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(2019)10ILR A 1

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE GOVIND MATHUR, C.J.
THE HON'BLE VIVEK VARMA, J.

Criminal Appeal No. 3022 of 1984

Mishri Lal & Ors ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri V.K. Shukla, Sri Bhuwan Raj, Sri Gaurav Singh, Sri Kamlesh Shukla, Sri Utkarsh Tripathi, Sri Vinay Saran, Sri Pradeep Kumar Mishra.

Counsel for the Opposite Party:
D.G.A.

A. Indian Penal Code, 1860 - Section 302 / 34 and 201 - Appeal against conviction - Accused cannot be convicted only on the basis of last seen evidence, in absence of corroborative evidence. (Para 15)

Extra judicial confession by itself is a very weak evidence and it should be relied on when it is independently corroborated by other evidence. (Para 18 & 19)

Criminal Appeal allowed (E-2)

List of cases cited: -

1. St. of Goa Vs Ganjay Thakran (2007) 3 SCC 755

2. Brahm Swaroop Vs St. of U.P. 6 SCC 288

3. Anjan kumar Sharma & ors. Vs Assam (2007) SCC online 622

4. St. of Panj. Vs Bhajan Singh AIR 1975 SC 258

5. Makhan Singh Vs St. of Panj. 1988 (Supp) SCC 526

6. Balwinder Singh Vs St. of Panj. 1996 SCC (Cri) 59

7. Devi Lal Vs St. of Raj. (Criminal Appeal No 148 of 2010 decided on 08.01.2019)

8. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 166

9. Shivaji Sahabaro Bobade and anr. Vs St. of Mah. (1973) 2 CC 793

10. Sujit Biswas Vs St. of Asam (2013) 12 SCC 406

11. Raja Alias Rajinder Vs St. of Har. (2015) 11 SCC 43

(Delivered by Hon'ble Vivek Varma, J.)

1. This appeal arises out of the judgment of conviction and order of sentence dated 30.10.1984 passed by the VII Additional Sessions Judge, Allahabad in S.T. No. 36 of 1982 convicting the appellants Chhabboo Lal, Modi and Mishrilal under Section 302/34 and 201 of IPC and sentencing them to undergo imprisonment for life and to undergo rigorous imprisonment for three years under Section 201 IPC.

2. The prosecution case states that Sri Chandrama Singh (P.W.-9) submitted a written report (Ex-Ka-6) at P.S. Ghoorpur on 5.9.1981 with assertion that his cousin brother Sheo Sagar Singh @ Matar Singh (deceased), resident of village Neebi, P.S. Ghoorpur, District Allahabad on 3.9.1981 left his home in the afternoon for Sewar, but did not return. It came to his knowledge that on the same day at about 3 p.m., deceased was seen with Mishrilal at his house along with accused Chhabbu Lal and Modi. He

suspected that Sheo Sagar Singh @ Matar Singh has been killed by the accused appellants and thereafter the dead body has been removed. As per the details given the deceased was wearing a white sando vest and a white *pyjama.*

3. The First Information Report (Ex-ka-9) was lodged on 5.9.1981 at about 21.45 P.M. at Police Station Ghoorpur, District Allahabad. After investigation, the police submitted a charge sheet (Ex-Ka 22) on 21.10.1981 against the accused/appellants under sections 302, 201,120 B IPC. The trial court framed the charges and charged the appellants Chhabboo Lal and Modi with the commission of offences under Section 302, 201 IPC while the appellant Mishrilal was charged under section 302 read with Section 34 IPC and 201 IPC. On denial of charges by the accused trial commenced.

4. In support of its case, the prosecution produced 15 witnesses and exhibited 22 documents. The accused-appellants were examined under Section 313 Cr.P.C. and they were confronted with the incriminating evidence adduced against them during the course of trial, which they denied and pleaded innocence and false implication.

5. The trial Court after examining the evidence available on record found that the circumstantial evidence available on record makes a chain of events that indicate definite involvement of the accused appellants in the crime in question and by the impugned judgment convicted and sentenced the appellants Chhabboo Lal, Mishrilal and Modi. Hence this appeal at the behest of convicted accused persons.

6. It is contended by learned counsel for the appellants that there is no eyewitness account of the incident and the conviction rests on circumstantial evidence but none of the circumstances from which inference of guilt can be drawn has been proved beyond reasonable doubt. The alleged confession made by the appellant Chhabboo before P.W.-4 Gajraj Singh is not corroborated by other cogent and reliable evidence and the recovery of dead body and seizure of various articles were not in accordance with law.

7. On the other hand, learned AGA opposing the submission of the appellants and supporting the impugned judgment submitted that chain of circumstances established on basis of adequate evidence clearly indicates involvement of the accused appellant in committing the crime in question. It is pointed out that the accused appellants committed the murder of Sheo Sagar Singh and threw his body. The dead body and several articles were discovered at the pointing out of the accused appellants. All these circumstances have adequately been established by the prosecution evidence which is sufficient to prove involvement of the accused appellants in the crime in question.

8. Heard learned counsels for the appellants, learned AGA and scanned the entire record and considered the arguments advanced.

9. The case of the prosecution consisted of following circumstances:-

(i) evidence of last seen of the deceased Shiv Sagar Singh in the company of the appellants,

(ii) extra judicial confession of the appellant Chhabboo Lal, and

(iii) discovery of incriminating articles relating to the offence at the instance of the appellants, while in police custody.

EVIDENCE OF LAST SEEN OF THE DECEASED IN THE COMPANY OF APPELLANTS

10. The original story as set up in the FIR is at variance with the story set up by the prosecution at the trial. In the FIR only this much had been stated by the informant that on 3.9.1981 at about 3 p.m. deceased was seen sitting at the door of appellant Mishrilal along with other two appellants. This part of the FIR is extracted below:-

ष्उसी दिन शिव सागर लगभग तीन बजे दिन मिश्री लाल पुत्र बिहारी केवट ग्राम नीबी के साथ उसी के दरवाजे पर छबबू लाल पुत्र राम लाल यादव व मोदी पुत्र राम केवल केवट ग्राम नीबी के **साथ बैठे देखे गये थे** मुझे संदेह है कि इन्हीं तीनों व्यक्तियों ने मिलकर शिव सागर की हत्या करके लाश को कहीं छिपा दिया है जिस समय घर से शिवसागर घर से निकले थे ष्

11. From the aforequoted version, it is clearly evident that the informant Chandrama Singh (P.W.-9) had himself not seen the deceased sitting alongwith the appellants at the house of appellant Mishrilal. Therefore from the said contents of the FIR, it is evident that the FIR version is based on some one else's information and the informant is not the witness of that fact. Before the trial court in his examination-in-chief, the informant (P.W-9) stated that he had seen the deceased at the house of appellant Mishrilal in the company of the appellants. However, under cross examination as to why did he not mention this fact in the FIR, what he is deposing in the court, he stated that what has been deposed by him in the Court had been written as such in the FIR. He infact admitted that he knew the said fact. When asked as to why did he not mention that fact in the FIR, he gave a strange answer that he did not write that fact because he did not want to raise a storm (rwQku) in the report. This was an absurd answer given by the said witness, therefore, on being further cross examined in that regard, he gave a different reason stating that in his understanding the said fact an important fact but he did not write that fact in the FIR as he could not recollect it when he wrote the FIR. He further stated that he did not tell this fact to the Investigating Officer during investigation, i.e. in his statement recorded under Section 161 Cr.P.C.

12. Smt Panchraje (P.W.-8), is the mother of the deceased, claims to have last seen the deceased before his murder. She deposed that the accused Modi came to her house. Sheo Sagar Singh and Modi both left for Sewar and thereafter Sheo Sagar Singh did not return. In the cross-examination this witness stated that she had told this fact to the informant (P.W.-9) in the evening at about 6-7 p.m. on that day itself, i.e. on 3.9.1981. The FIR was lodged after two days on 5.9.1981 at 9.45 p.m. If at all, it were a fact that P.W.-8 had told P.W.-9 that her deceased son had gone for Sewar alongwith the appellant Modi there is no reason why the informant P.W.-9 (who is none else than her own nephew) would neither have lodged the FIR nor mention that fact in the FIR nor stated that fact to the Investigating Officer during investigation. It is highly improbable that such an

important fact of the case (i.e. the deceased was taken by the accused from the latters' house) would not be revealed by the informant in the FIR as well as during the investigation of the case.

13. Since this story of the prosecution that the mother of the deceased, P.W.-8 had seen appellant Modi at her house and the deceased had gone alongwith him for Sewar that she had told this fact to the informant before lodging of the FIR was coming for the first time in the trial, therefore, when the informant (P.W.-9) appeared in the witness box he was questioned about this fact in the cross-examination. It was quite probable that the prosecution had introduced P.W.-8 in the case as no other person of the village was coming forward to state that he had seen the deceased in the company of the appellants before the death of the deceased. It is doubtful that the P.W.-8 had last seen the deceased Sheo Sagar Singh in the company of appellant-Modi.

14. The statement of P.W.-9 in the court contradicts the version of the FIR. This appears to be a case where the witness was trying to improve upon the story as had been set up originally in the FIR and as such the deposition of P.W-9 in the court, regarding his having seen the deceased the last in the company of appellants does not appears to be trustworthy and thus he is not a reliable witness. His credit as a witness thus stood impeached.

15. However, even if it is accepted that P.W.-8 had last seen the deceased in the company of appellant Modi, that fact, itself is not sufficient to prove the charge of murder against Modi. Further, that evidence is not against the other two accused. Even otherwise it is a settled position of law that accused cannot be convicted unless there is some other corroborative pieces of evidence. The Supreme Court in the matter of **State of Goa Vs Sanjay Thakran, 2007) 3 SCC 755, Brahm Swaroop Vs State of UP, 6 SCC 288 and Anjan Kumar Sharma and others Vs State of Assam, (2017) SCC online 622** has held as under:-

"In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction."

EXTRA JUDICIAL CONFESSION OF APPELLANT CHHABBOO LAL

16. The prosecution witness Gajraj Singh (P.W.-4) has been examined to prove extra-judicial confession alleged to have been made to him by the appellant Chhabboo Lal. This witness had deposed that in the night of 5.9.1981 at about 1/1.30 while he was sleeping, the appellant Chhabboo Lal came to him and woke him up and told him that he and other two appellants, on the asking of Satyawan, had murdered the deceased Sheo Sagar Singh in the house of appellant Mishrilal and requested him to save him from the police as the police was camping in the village and it had already arrested the other two appellants. He has further deposed in the examination in chief that after hearing the confessional statement of appellant Chhabboo Lal he was perturbed and he had asked the appellant to go away from him and he would not help him. Having said so he again slept. Later on in the morning the police arrested Chhabboo Lal at the door

of his house. In the cross-examination, this witness has categorically stated that he had no friendship with the police and he could not have helped the accused Chhabboo Lal. He has also stated that his house is nearly 1 km away from the house of Chhabboo Lal. There is no other corroborative evidence about this extra judicial confession.

17. The testimony of witness P.W.-4 does not inspire confidence. Firstly, because, there is no evidence that this witness is such a man, whom one would approach for help. The statement and the evidence do not suggest that any one would fall upon him in the hours of need or when placed in a difficult situation. Secondly, there is no evidence on record to even feebly suggest that he is a close associate of appellant Chhabboo Lal and that he used to help him or had even helped this appellant in the past. On the contrary, as already noted above, this witness had himself admitted in the cross-examination that he could not have helped the appellant Chhabboo Lal as he had no friendship with the police. In this set of facts it is highly improbable that the appellant Chhabboo Lal would make any confession whatsoever before such a person.

18. Law on extra judicial confession is well settled by the Apex Court. In **State of Punjab Vs Bhajan Singh, AIR 1975 SC 258,** it has been held that extra-judicial confession by itself is a very weak evidence which requires corroboration which would inspire utmost confidence. Thus, it would not at all safe to rely upon it. As regards extra-judicial confession, relevant paragraph of the Apex Court judgment in **Makhan Singh Vs State of Punjab, 1988 (Supp) SCC 526** is as under:-

" On 10 August, 1985 F.I.R. was lodged by Nihal Singh (PW-2)1 and on 13.8.85 the appellant went to Amrik Singh (PW-3) to make an extra judicial confession. Amrik Singh says that the appellant told him that as the Police was after him he had come and confessed the fact so that he might not be unnecessarily harassed. There is nothing to indicate that this Amrik Singh was a person having some influence with the Police or a person of some status to protect the appellant from harassment. In his cross-examination he admits that he is neither the Lumbardar or Sarpanch nor a person who is frequently visiting the Police Station. He further admits that when he produced the appellant there was a crowd of 10 to 12 persons. There is no other corroborative evidence about the extra judicial confession. As rightly conceded by the learned counsel for the State that extra judicial confession is a very weak piece of evidence and is hardly of any consequence."

19. In **Balwinder Singh Vs State of Punjab, 1996 SCC (Cri) 59**, while considering the evidentiary value of extra-judicial confession, the Supreme Court has held as under.

"10.An extrajudicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance. The courts generally look for independent reliable corroboration before

placing any reliance upon an extra judicial confession."

20. Thus, the extra-judicial confession made by appellant Chhabboo before P.W-4, is tested on the touchstone of aforesaid judicial pronouncements, it is rendered unworthy of credence, and being so does not inspire confidence of this court.

EVIDENCE OF DISCOVERY OF INCRIMINATING ARTICLES AT THE INSTANCE OF APPELLANTS.

21. Before appreciating the testimony of the prosecution witnesses of recovery we may record an important fact relating to recovery of the body of the deceased. The dead body was recovered from the paddy field of one Sumer of the village Neebi, i.e the village where deceased lived. From the site plan Ex-ka-20, it is evident that adjacent to the field of Sumer, on the three sides, there are fields of other persons, wherein paddy had been sown. These paddy fields lay at a distance of only one and half furlongs from the Abadi of village Neebi. It is thus clear that the field wherefrom dead body of deceased Sheo Sagar Singh was recovered was an open field accessible to all and sundry and visible from all sides and was quite close to the village Abadi. The Investigating Officer (P.W-12) had himself stated in the cross-examination that the field where the dead body was lying is open from three sides. He had further stated that when he went towards the paddy field where the dead body was lying it was visible from 10-12 steps from where he was standing. Thus, it cannot be said that the dead body of the deceased was discovered at the pointing out of the appellants Mishrilal and Modi.

22. The other incriminating articles which were alleged to have been recovered at the pointing of the appellants were gandasa, ashes of half burnt pieces of baniyan, pieces of pyjama of the deceased, *bamboo sticks, gamacha, dhoti* and rope by which the body was allegedly tied.

23. The offence of murder is alleged to have been committed in village Neebi and the incriminating articles are alleged to have been recovered from this village.

24. The prosecution has produced Manik Chand Singh, P.W.-5, Genda Singh P.W.-6 and Investigating officer P.W.-12 to prove discovery of dead body of deceased and other incriminating articles, mentioned above, at the instance of pointing out of the appellants.

25. So far as the prosecution witnesses P.W-5 and P.W.-6 are concerned they do not belong to Village Neebi. They belong to another village-Baramar. P.W.-6 has deposed that he and P.W.-5 belong to the same village. P.W.-5 has deposed in his examination in chief that his village is 4-5 furlongs away from village Neebi.

26. T he testimony of these two witnesses are to the effect that it was in their presence that the appellants Modi and Mishrilal, being in police custody, had allegedly confessed before the police that they had killed Sheo Sagar Singh and they may show the places where they had kept his dead body and other incriminating articles relating to the offence. These two witnesses have also

stated that appellant Chhabboo Lal was arrested on 6.9.1981 and being in police custody he had got the recoveries made of the *pyjama, gamacha, dhoti* and rope.

27. P.W-5 has deposed that he was sitting in his village at the tea shop of Mahangoo where 3-4 persons came from the side of village Neebi for taking *paan and biri* at the shop. They were talking that lot of police had come in the village Neebi. On hearing this he guessed that as Shiv Sagar Singh was missing the police might have come to the village in that connection. He then set out for village Neebi along with Rajendra and Lal Singh. When he reached village Neebi he saw that police personnel, appellants Modi and Mishrilal were sitting alongwith villagers. Investigating Officer was interrogating the appellants Modi and Mishrilal about the murder of the deceased Sheo Sagar Singh. The said two appellants had told the police before him that they had killed the deceased and that they can get dead body and other incriminating article recovered from the places where they are lying.

28. It is an admitted case of the prosecution that after lodging of the FIR on 5.9.1981 at about 9.45 p.m. the Investigating Officer (P.W.-12) reached village Neebi at about 11.15 p.m on the same date and he reached the house of appellants Modi and Mishrilal and any time after 12 in the mid night and started interrogating them. P.W-5 had stated in the cross-examination that he had reached village Neebi about 12 or 12.15 in the night.

29. We may at the very outset state that it is highly improbable that P.W.-5 in the mid night, would take the trouble to go from his village Baramar to another village Neebi, that too just to see why the police is camping there. This witness has stated in his cross-examination that when he was taking tea in his village shop, few person came there from the side of village Neebi and it was from their conversation that he learnt that in village Neebi lot of police has come and then he set out for village Neebi. It would be significant to mention here that this witness had admitted in the cross-examination that he had not told the Investigating Officer during the investigation about the fact that he was taking tea in his village and that few persons from the side of Village Neebi had come and from them he learnt that police had come to village Neebi. This would mean that it is an afterthought of the prosecution and surely a deliberate attempt to improve the prosecution case in the trial to explain and justify the presence of this witness in village Neebi for being a witness of the case. We may, therefore, hold that it is unbelievable that P.W.-5 was taking tea at the tea shop of his village at about 11 or 12 in the night. The reason is that it is common knowledge that even these days tea shops in the villages are not open at such a dead hours of night, what to say of the times of 38 years back in the year 1981, when the present incident had taken place. We, therefore, hold that P.W-5 is a got up witness of police and the prosecution has chosen him witness as no witness of village Neebi was coming forward to support the prosecution case. The suggestion given to this witness by the defence that he is a stooge of police and has made deposition under the influence of police appears to be correct. The incriminating articles were definitely not recovered in his presence. For all these reasons we hold that P.W-5 is not at all a reliable witness.

30. Another witness P.W-6 is also of the village of P.W.-5. His presence in village Neebi at the time of recovery is also unbelievable. This witness, for his presence in village Neebi, had given explanation in the trial that the millstone of his grist mill was not working so he had gone to village Neebi in the night at about 9 p.m. to call a mechanic named, Ganga Teli, who lived in village Neebi. He also stated that he went to the house of mechanic Ganga Teli who met him and thereafter he stayed whole night at the house of the said mechanic. He did so because the said mechanic asked him to stay at his home and in the morning he would accompany him to the place where the flour-mill of PW-6 was situated. He further stated that during his stay at the house of mechanic, the appellants had come to the village and at 12 to 12-30 in the night he reached at the house of the appellants. The appellant Modi was also present there and both the appellants told the SHO that they can show the place where they have hidden the dead body of the deceased. Thereafter PW-6 stated that he alongwith appellants and police went to the place where the dead body was lying. He had seen the dead body at the place where the appellants had indicated. This witness is also a witness of recovery of half burnt piece of *baniyan* of the deceased. He is also a witness of recovery of *Gandasa* and *bamboo sticks* from the house of the appellant Mishrilal. He is also a witness of recovery of pieces of p*yjama, Dhoti, Gamcha* etc. at the pointing out of appellant Chabbu Lal. These recoveries were made on 06.09.1981.

31. The statement of this witness does not inspire confidence particularly to the explanation that he had shown his presence in village Neebi. The deposition that this witness had gone to village Neebi to call mechanic Ganga Teli and he stayed at the house of the said mechanic is not believable. It is highly improbable that a person whose gristmill was not working, chose in the night by 9.00 P.M. to go to the village to call a mechanic of his choice for repairs. More so, when the repair could not have been undertaken in the night, there is no evidence of the fact that alleged repair work of the system was very urgent. To the contrary, the evidence is that there was no such urgency, otherwise this witness would not have stayed there whole night at the house of the said mechanic. It is also not comprehensible that a person who has gone to call the mechanic, has stayed in the night and would not return to his own village, which is only at a distance of a furlong from his village Neebi. The most significant fact that needs to be pointed out is that whatever explanation or reason that PW-6 has given about his presence is coming for the first time in the court and not during investigation. This is enough to suggest that said explanation of PW-6 about his presence in village Neebi is nothing but an after-thought of the prosecution. Therefore, we hold that PW-6 is a wholly unreliable witness. Therefore, the prosecution has failed to prove the discovery of incriminating articles at the instance of the appellant from the evidence of P.Ws.-5 and 6.

32. Now remains the evidence of PW-12, the Investigating Officer of the case.

33. The testimony of investigating officer PW-12 shows that he has not stated the actual words spoken by the appellants leading to the discovery of

dead body of the deceased and other incriminating articles of the case. It would be worthwhile to extract the examination in chief of this witness with regard to the discovery of incriminating articles at the instance of the appellants. He has deposed in his examination in chief as follows:-

"fदनांक 5.9.81 को मैं एस.ओ. धूरपुर तैयानात था यह मुकदमा मेरे मौजूदगी में कायम हुआ, तफतीश मैंने खुद ली उसी समय उसी दिन मैंने वादी मुकदमा चन्दरमा सिंह का बयान लिया उसके बाद मय फोर्स व सरकारी जीप के मौके पर ग्राम नीवी गया वहा मृतक की मां श्रीमती पंचराजा का बयान लिया दिनांक 6.9.81 को लगातार रात में ही 12 बजे के बाद संदिग्ध अभियुक्त मिश्री लाल व मोदी से पूछताछ करने के गरज से उनके निवास स्थान पर गया तो यह लोग पुलिस को देखकर भागे कि पुलिस ने घेर मारकर पकड लिया और उनसे पूछताछ की गई दोनों आदमियों ने अलग अलग पूछताछ पर जुर्म से एकवाल करके मितृक शिव सागर सिंह के लाश की बरामदगी कराने को कहा कि उनके निसान देही पर हमराह गवाहान जिनके सामने इकवाल किया था, गवाहान मानिक चन्द, गेंदा सिंह व मुकीम के साथ अन्तरगत धारा 27 मअपकमदबम ।बज बाजाफता लास की बरामदगी की गई ।ष

34. From the deposition of Investigating Officer (P.W.-12), it is clear that leave alone the material particulars of the place where the dead body was resting, even the substance of the whereabouts of the dead body and other recovered materials were not provided by the accused appellants. This deficiency in the evidence tendered by the Investigating Officer is itself fatal to the case of the prosecution. Moreover, the ingredients of a recovery which would incriminate the appellants under Section 27 of the Indian Evidence Act are not made out. The most essential ingredients of Section 27 of the Evidence Act is that accused had given the information to the police and it was upon that information something incriminating articles has been discovered. The prosecution has, thus, failed to prove that dead body and other incriminating articles were recovered at the pointing out of the appellants. From the aforesaid quotation, it is clear that this witness has not stated the actual words spoken by the appellants leading to discovery of dead body and other articles what he had stated is that he had made the alleged recovery according to Section 27 of Evidence Act.

35. In the case in hand, admittedly no motive has been established by the prosecution and further from the facts and circumstances of the case, it comes out that other circumstances are not constituting a chain of circumstance to record conviction of the appellants.

36. It may also be noted that the Apex Court recently in the case of **Devi Lal Vs State of Rajasthan (Criminal Appeal No. 148 of 2010 decided on 8.1.2019** while dealing with circumstantial evidence, observed as under:-

"14. The classic enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of the court in **Sharad Birdhichand Sarda Vs State of Maharashtra, 1984 (4) SCC 116.** The relevant excerpts from para 153 of the decision is assuredly apposite:-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in **Shivaji Sahabrao Bobade and Another Vs State of Maharashtra (1973) 2 CC 793** where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

15. It has further been considered by this Court in **Sujit Biswas Vs State of Assam, 2013(12) SCC 406 and Raja Alias Rajinder Vs State of Haryana, 2015 (11) SCC 43.** It has been propounded that while scrutinizing the circumstantial evidence, a court has to evaluate it to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. The underlying principle is whether the chain is complete or not, indeed it would depend on the facts of each case emanating from the evidence and there cannot be a straight jacket formula which can be laid down for the purpose. But the circumstances adduced when considered collectively, it must lead only to the conclusion that there cannot be a person other than the accused who alone is the perpetrator of the crime alleged and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

37. In view of the settled legal position as well from the facts as stated above, we are of the considered opinion that this appeal deserves acceptance. Hence, the same is allowed. The judgment of conviction and order of sentence dated 30.10.1984 passed by the VII Additional Sessions Judge, Allahabad in S.T. No. 36 of 1982 is set aside. The accused appellants be acquitted from the charges under which they were found guilty. As per record, appellants Chhabboo Lal and Mishrilal are on bail, therefore, their bail bonds and sureties stand discharged. Appellant Modi who had been taken into custody pursuant to Non Bailable Warrant dated 21.2.2018, is directed to be set at liberty forthwith, if not wanted in any other case.

The record of the court below be returned forthwith.

(2019)10ILR A 11

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.09.2019

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ANIL KUMAR -IX, J.

Criminal Appeal No. 1938 of 1993

Raju alias Rajendra ...Appellant (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri V.K. Chaturvedi, Sri Anita Singh, Sri Prem Babu Verma.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 302 and Code of criminal procedure 1973 - Section 313 - the statement of the accused - convicted for offence punishable under Section 302 IPC - sentenced to undergo imprisonment for life.- The motive for the crime disclosed in the FIR-some altercation had taken place between the accused and the deceased at the time of marriage in the house-statement of the appellant recorded under Section 313 CrPC, wherein he had disclosed his age as about 18 years, to raise a claim for the benefit of juvenility-conviction of the appellant under Section 302 IPC is upheld-the punishment awarded to the appellant by the court below is set aside. (Para 3, 11 ,32 & 51)

The postmortem report established that there were two incised wounds, cavity deep, on the body of the deceased - the witnesses have proved the place of occurrence; the time of occurrence; and the source of light at the time of incident - prosecution thus succeeded in not only proving the act of crime by the appellant but also the motive for the crime by disclosing that on 29.04.1990 there had been altercation between the deceased and the accused in connection with which threats were extended. (Para 19, 20 & 26)

B. Juvenile Justice (Care and Protection of Children) Act, 2015 - proviso to sub-section (2) of Section 9- claim of juvenility can be raised at any stage including the appellate stage -enables raising of a claim before any court even after final disposal of the case and such a claim is to be determined in accordance with the provisions contained in the Act and the Rules made there under even if the person has ceased to be a child on or before the date of commencement of the Act- held- appellant was 15 years 5 months and 25 days old at the time of the incident, as per the report of Juvenile Justice Board, Agra. (Para 44 ,45 & 49)

Criminal Appeal partly allowed (E-7)

List of Cases Cited: -

1. Sanjeev Kumar Gupta Vs St. of U.P. (2015) 11 SCC 69

2. Amit Vs St. of U.P. (2012) 4 SCC 107

3. Govindaraju alias Govinda Vs St. (2012) 4 SCC 722

4. Jitendra Singh alias Babbu Singh Vs St. of U.P. (2013) 11 SCC 193

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal has been filed against the judgment and order dated 03.11.1993 passed by the 5th Additional Sessions Judge, Agra in S.T. No.299 of 1990 (State Vs. Raju alias Rajendra) whereby the appellant Raju @ Rajendra has been convicted for offence punishable under Section 302 IPC and has been sentenced to undergo imprisonment for life.

2. The facts giving rise to the appeal are as under:

3. Lala Ram (PW-1) father of Mukesh (the deceased) lodged first information report (FIR) on 01.05.1990 at 11.30 pm (Case Crime No.48 of 1990) at P.S. Madan Mohan Gate, District Agra, alleging that, at about 10 pm, when the informant was inside his house and his son Mukesh (the deceased) and his younger brother Nand Kishor (PW-3) were sleeping at the door of the house, he heard cries; upon which, he rushed to the spot and saw Raju alias Rajendra son of Gauri Shanker (the appellant) running away in the lane, just in front of his house, with a blood stained knife in his hand and his son Mukesh (the deceased) lying injured and under the care of informant's brother Nand Kishor (PW-3) and neighbour Jaggo Lal (PW-2). The incident was allegedly witnessed in the light of a bulb lit just outside informant's house. The FIR further alleges that Nand Kishor (PW-3) and Jaggo Lal (PW-2) informed the informant that Raju (the appellant) had assaulted Mukesh (the deceased) with knife and ran away. FIR also alleges that upon hearing cries, informant's son Dilip (not examined) and other neighbours including Bangali son of Babu Ram (not examined) arrived at the spot. It is alleged that they all took the deceased to the emergency ward where the doctor declared him dead. The motive for the crime disclosed in the FIR was that on 29.04.1990 some altercation had taken place between the accused and the deceased at the time of marriage in the house of Taro Maharaj (not examined) in connection with which the accused had threatened the deceased. Thereafter, a day before the incident also, Raju (appellant) had come with boys of the locality and had extended threats to Mukesh (the deceased). In the first information report it was stated that the body of Mukesh (deceased) was lying at S.N. Hospital.

4. Upon lodging of the FIR, the police swung into action. After preparing the inquest report at the hospital, on 02.05.1990, blood soaked earth was taken from the spot; portion of the blood stained cot was collected; blood stained pillow and pillow cover was collected; and, on 04.05.1990, recovery of blood stained knife was made on the pointing out of the accused. The postmortem report revealed two incised wounds. One on the upper region of the chest and the other on the stomach region. As per report, death was caused due to shock and haemorrhage as a result of anti mortem injuries. The postmortem was conducted on 02.05.1990 at 2.30 pm and as per the doctor's opinion, the death could have occurred about half a day before. After conducting investigation charge sheet was submitted and the case was committed to the court of sessions. Charge of an offence of murder punishable under Section 302 IPC was framed against the accused-appellant who pleaded not guilty.

5. In the trial, three eye witnesses of the incident were examined, namely, Lala Ram (PW-1); Jaggo Lal (PW-2) and Nand Kishor (PW-3). PW-1 - Lala Ram reiterated what was stated in the first information report and disclosed about existence of light at the time of incident. He also stated that the first information report was scribed by his son-in-law Vijay (PW-4) on his dictation and, thereafter, lodged at the police station. He proved the first information report which was marked Exhibit 1. He disclosed that, on 29.04.1990, at the time of marriage in the locality, there had been altercation between Mukesh (the deceased) and Raju (the appellant) and, though, upon intervention, on that day, the situation was calmed down but, on the next day as well

as on the third day, Raju (the appellant) had extended threat of life to the deceased. In his cross examination, he disclosed that his house stood in the name of his father and that he has an electricity connection as well as an electricity meter. He stated that when he came out upon hearing the cries, he saw Raju (the appellant) running away in the lane. He also disclosed that, on that day, Mukesh (the deceased) had eaten his food between 4 pm & 5 pm. He stated that Mukesh used to sleep outside at the door of the house where there was a bulb and just below it, Mukesh's (deceased's) cot was there. He denied the suggestion that there was no light or that he had no valid electricity connection. He stated that in Taro's daughter's wedding, he was present. He stated that Raju (the appellant) had been demanding money from his younger son Raju (not examined) though he was not aware as to for what purpose money was being demanded. Upon suggestion that money was being demanded in connection with betel shop dues, he stated that the appellant - Raju does not have a betel shop though his father Gauri has one. He denied the suggestion that his son Raju (not examined) had betel shop dues payable. He stated that in the altercation that had taken place during marriage, he had intervened. He denied the suggestion that the incident had occurred under the influence of liquor. He denied the suggestion that somebody else had inflicted knife injury to his son. He also denied the suggestion that he had made false implication on account of enmity.

6. PW-2 - Jaggo Lal stated that in the night of the incident, he was sleeping at the Chabutra just outside his house and near him, the deceased (Mukesh) and Nand Kishor were sleeping. He stated that upon hearing cries, he and Nand Kishor woke up and saw Raju alias Rajendra (the appellant) inflicting knife blow on the stomach of the deceased (Mukesh). He stated that on hearing cries, Dilip (not examined) and Lala Ram (PW-1) had arrived. He stated that Mukesh raised alarm when he was inflicted knife blow on the neck and thereafter second knife blow was inflicted on the stomach. He stated that he saw Raju alias Rajendra (the appellant) inflicting knife blow in the light of a bulb, which was lit just outside the house of PW-1 (Lala Ram). He also stated that after inflicting knife blows, Raju ran away with the knife. In his cross examination, PW-2 stated that his house is situated just in front of the house of Lala Ram (PW-1) and, in between, there is a narrow lane about four hands wide. He stated that in front of his house, there is a Chabutra which is just 2 paces from his house and this Chabutra is about 3 paces wide and 3 paces long. He stated that he was lying on the Chabutra with no cot laid there. He stated that his feet were towards the house of Lala Ram. He stated that Mukesh (the deceased) was sleeping on the cot placed in the lane just in front of his house. He disclosed that the bulb was placed just above the door on the wall of the house though he was not aware about the wattage of the bulb. He stated that Lala Ram is his neighbour and not a relative. He denied the suggestion that he was sleeping at the time of the incident. He stated that, in fact, he was awake. He stated that at the Chabutara, he was alone and there was no one else. He denied the suggestion that at the Chabutara Nand Kishor was sleeping. He stated that Nand Kishor's cot was just adjacent to the cot of the deceased (Mukesh), which was just 2 paces away from the wall of the house of Lala Ram. He also stated that Raju's

house is just 10-11 paces away. He also disclosed that next to the house of Lala Ram, there are houses of Bangali and Ninnu. He stated that upon hearing the noise, members of the locality also arrived but before that, Raju had escaped. He disclosed that he had not gone to the hospital with Mukesh (the deceased). He denied the suggestion that he was cousin of Lala Ram. He denied the suggestion that he had not seen the incident.

7. PW-3 -Nand Kishor stated that on the night of the incident, he was sleeping in a cot just next to the cot of the deceased. Near them, his neighbour Jaggo Lal (PW2) was also sleeping. He stated that he woke up on hearing the cry of Mukesh. He saw Gauri's son Raju alias Rajendra (the appellant) inflicting knife blow on Mukesh. He saw Raju inflicting knife blow around the neck and, thereafter, second knife blow on the stomach region. He stated that upon hearing the noise, his brother Lala Ram (PW-1), Dilip, Jaggo Lal (PW-2) and Bangali had arrived. He stated that he saw the appellant Raju in the light of bulb which was lit at the door of Lala Ram's house. He stated that there was also a bulb in the lane. He stated that there was sufficient light. He stated that after inflicting knife blows, the accused-appellant had escaped. He stated that Mukesh was thereafter rushed to the emergency ward of the hospital where he was declared dead. He narrated the incident that occurred during the course of marriage of Taro Maharaj's daughter. He stated that in that incident, there was an altercation between the accused - Raju and the deceased-Mukesh. He stated that 2-3 days later, Raju (the appellant) had extended threat of life to the deceased. In his cross examination, he disclosed that his cot lay just next to the cot of Mukesh (the deceased) and that the Chabutra of Jaggo Lal is just 3-4 paces away from where the cots were. He stated that Jaggo Lal was sleeping on the floor of his Chabutra. He stated that Lala Ram is his real brother and he resides in the same house. He stated that in the lane, there is tiled house of Bangali, which is just about 8 paces away, where also there was a bulb lit on the night of the incident. He stated that there was another bulb at the door of Lala Ram. He stated that he was not aware about the wattage of those two bulbs. Upon being questioned as to who pays for the electricity bill, he stated that the electricity bill is paid by his brother. He denied the suggestion that there was no electricity connection in the house. He also denied the suggestion that there was no electricity bulb at the place. He stated that upon hearing the commotion and seeing people come, Raju escaped and could not be apprehended on the spot. He stated that he did not go to the hospital with Mukesh. He denied the suggestion that he had not witnessed the incident and was giving testimony only because he was brother of Lala Ram.

8. PW-4- Vijay Singh, son-in-law of the informant (Lala Ram), deposed that he was the person who scribed the FIR on the dictation of his father-in-law Lala Ram. He stated that he had arrived at the emergency ward of the hospital. He proved the written report, which was marked exhibit-1. He denied the suggestion that the report was prepared as per the suggestion of the Inspector.

9. PW-5- Sri O.P. Kalra, Sub Inspector. He stated that on the date when the first information report was lodged, he was S.O., P.S. Madan Mohan Gate, Agra;

that the case was registered at the police station in his presence; and he had investigated the matter. He stated that he had visited the spot and prepared site plan (Ex-3). He proved the inquest memo (Ex-2). He stated that he collected blood soiled earth as well as blood stained pillow and blood stained cot, which were marked exhibits 4 to 6. He stated that members of the public had arrested Raju on 04.05.1990 and on his pointing out, he had recovered blood stained knife of which Fard (Ex-7) was prepared. He proved preparation and submission of the charge sheet (Ex-9). In nutshell he proved the various steps taken during the course of investigation.

10. PW-6 -Dr. R.K. Yadav proved that the postmortem was conducted on 02.05.1990 at 2.30 pm. He proved the postmortem report (Ex-12) . He stated that there were two anti-mortem injuries. One was incised wound 2 cm x 0.5 cm x cavity deep on the left side chest and the other was incised wound 2 cm x 0.5 cm x cavity deep on the left side of stomach just 9 cm above from navel region at 11 O'clock position. He stated that upon internal examination, left lung membrane and lung were found ruptured. Likewise, membrane of stomach was also found ruptured with blood in the cavity. He stated that the death was on account of shock and haemorrhage. He stated that the injuries were sufficient to cause death in ordinary course. He stated that he could not tell with certainty as to when death could have occurred. He, however, stated that the deceased might have had his meals about 6-8 hours before his death. He stated that according to the medical college/police record, the deceased was brought to the hospital at 10.50 pm.

11. After closure of prosecution evidence, the statement of the accused-appellant under Section 313 Cr.P.C. was recorded in which he denied the prosecution case and claimed that he has been falsely implicated on account of enmity.

12. The trial court after assessing the evidence led before it came to the conclusion that the prosecution was successful in establishing the guilt of the accused beyond doubt; that the prosecution case was supported not only by the family members of the deceased, whose presence on the spot was natural, but also by the testimony of an independent witness, namely, Jaggo Lal, who was just few paces away from the place of the incident at the time of occurrence and who deposed that in the light of a bulb he saw the accused inflicting knife blows on the deceased. The trial court found that the spot where the incident occurred was duly proved by material exhibits such as blood soaked earth; blood drenched cot; and the site plan prepared by the Investigating Officer. The trial court found that the prosecution case was consistent with the medical evidence which disclosed that the deceased had sustained incised wound injuries on the upper region of the chest and stomach. Hence, it recorded conviction of the appellant for the offence punishable under section 302 IPC.

13. After convicting the accused, the trial court heard the accused on the question of sentence and upon finding that the accused had been convicted for an offence punishable under Section 302 IPC, awarded life sentence.

14. We have heard Ms. Anita Singh for the appellant; and Sri Deepak Mishra, learned A.G.A., for the State.

15. The learned counsel for the appellant urged that the prosecution was not successful in establishing the guilt of the appellant for the following reasons:- (a) that the incident occurred in the darkness of the night when, admittedly, the witnesses were sleeping and, according to their own claim, they woke up on hearing cries and, therefore, it cannot be said that they saw as to who inflicted the injuries that caused the death of the deceased; (b) that the source of light at the place of occurrence was not duly established as no document was produced to prove that informant's house had an electricity connection in respect of which electricity bills were paid; (c) that the alleged recovery of the assault weapon (knife) was not proved, inasmuch as, the knife was not produced in court as a material exhibit and, otherwise also, the witness of the recovery other than the Investigating Officer was not examined; (d) that several other persons, who are stated to have arrived at the spot upon hearing commotion, were not produced by the prosecution; (e) that the motive shown for the alleged crime was not strong enough to warrant an act of murder; and (f) that the Panch witnesses were not examined.

16. **Per contra,** Sri Deepak Mishra, learned A.G.A., submitted that the place of the incident was duly proved by the witnesses of fact as well as by the Investigating Officer who had visited the spot and had collected the blood soaked earth; pieces of blood drenched cot; blood drenched pillow; and blood drenched pillow cover and had also prepared a site plan showing that the incident had occurred just at the door of the informant's house where the deceased was sleeping in a cot next to the cot of his uncle (PW-3) and in front of the Chabutra of Jaggo Lal (PW-2) who had also witnessed the incident. He stated that the distance between the place where the deceased was sleeping and the place where Jaggo Lal (PW-2) was sleeping was hardly three paces and, therefore, as there were two knife blows inflicted, it was very much possible that upon victim's cry, on receipt of the first knife blow, the other two persons, who were sleeping in close proximity, would wake up and witness infliction of the second knife blow. He submitted that since PW-2 is an independent witness and he disclosed that he was at the spot when the incident occurred and had seen the accused inflicting knife blow, there is no reason to disbelieve his testimony and, otherwise also, the evidence led by the prosecution is consistent and unblemished. He submitted that merely because the material exhibit (knife) was not produced in court it would not render the prosecution case unbelievable as it was based on ocular evidence which was unblemished and consistent with the medical evidence. He, therefore, submitted that the appellant has rightly been convicted.

17. We have carefully perused the record and have considered the rival submissions.

18. Upon perusal of the record, we find that by producing material exhibits such as blood soaked earth; plain earth, blood stained pieces of cot; blood stained pillow cover; blood stained pillow; and oral evidence of the eyewitnesses as well as the investigation officer, who had also prepared the site plan, in absence of suggestion that the incident occurred at some other place, it was fully established

that the occurrence was at the door of the house of the informant which was situated just in front of the Chabutra of Jaggo Lal (PW-2) at a distance of just about three paces.

19. The postmortem report established that there were two incised wounds, cavity deep, on the body of the deceased. One was on the left side chest region and the other was on the left side of stomach region. Nothing abnormal was detected with respect to Larynx, Pharynx, Trachea and Oesophagus. Thus, it could be assumed that, upon receipt of first incised wound on the chest, the deceased was in a position to raise alarm. Under the circumstances, it was probable that upon infliction of the first wound, the deceased raised an alarm which woke up the other two persons, sleeping nearby, to witness the incident. The postmortem was duly proved by the doctor who appeared as PW-6. He stated that he conducted the postmortem on 02.05.1990, at 2.30 pm. He also proved that from the medical college /police record it appears that the deceased was brought to the hospital at 10.50 pm on 01.05.1990. He stated that the deceased could have had his food 6-8 hours before he was inflicted injuries which matches with the statement of PW-1, who, in his cross examination, had stated that the deceased must have had his food in between 4 pm and 5 pm. The lodging of the FIR was duly proved by PW-1 (Lala Ram); the investigation, preparation of the Panchnama; collection of blood soaked earth; plain earth; pillow; pieces of blood drenched cot were duly proved by PW-5 (Investigating Officer) who also proved the preparation of site plan. The inquest was conducted at the hospital at about 11.30 pm which was proved by the Investigating Officer (PW-5) and was marked exhibit Ka-2. He disclosed that the information on the basis of which inquest was conducted was received from Lala Ram. Although there is overwriting in the digits "11.30" but the digits are also written in the brackets as 23.30 over which there is no overwriting.

20. From the above evidence, the place; the time of occurrence; and the lodging of the first information report is duly established. As the first information report had come into existence at the time of inquest, which was conducted at about 11.30 pm (night), it is clear that the first information report was promptly lodged as is established from the chik FIR which has been proved by the Investigating Officer.

21. Once the place and time of the occurrence has been proved, we have to examine the reliability of the testimony of the eye witnesses to find out whether they have truthfully deposed about the incident.

22. From the statement of PW-1 it appears that he was inside the house and upon hearing cries he rushed outside to find out his son lying injured on the cot and the appellant-Raju running away with a blood stained knife in his hand. He proved the presence of his neighbour Jaggo Lal (PW-2); and his brother Nand Kishor (PW-3) at the place of occurrence. He proved the existence of the source of light by stating that at the door of his house, there was a bulb lit. He stated that in the light of that bulb as also other bulbs, he could see what he saw. He stated that he had rushed his son to the emergency ward of the hospital where the doctors declared him dead. He disclosed about the time of the incident as between

10 pm and 10.15 pm. He stated that the first information report was scribed at the hospital by his son-in-law Vijay (PW-4) upon his instruction. He also disclosed about the motive for the crime by stating that, on 29.04.1990, in a marriage procession, there had been an altercation between Mukesh (the deceased) and Raju (the appellant) and that in connection therewith, threats were extended to the deceased by the accused-appellant. In his cross examination, on a question put to him with regards to the existence of source of light, he stated that there existed a bulb and that he had a valid electricity connection. No question or suggestion was put to him that there was no supply of electricity in the locality where the incident took place. In his cross examination, PW-1 refuted the suggestion that he had not seen the incident. On the basis of his deposition, even if we hold that PW-1 did not see the actual infliction of injuries, he is reliable and trustworthy in so far as his statement relates to the motive for the crime; the time and place of occurrence; and as to the presence of the other two witnesses on the spot.

23. In so far as PW-2 - Jaggo Lal is concerned, he stated that on the date of the incident in between 10 pm to 10.15 pm he was lying at the Chabutra of his house, just in front of the place where the deceased (Mukesh) and Nand Kishor were sleeping. He stated that he heard a cry/shriek, upon which, he woke up and saw Raju (the appellant) inflicting a knife blow on the stomach of the deceased. He stated that upon hearing the commotion, Dilip; Lala Ram; and other neighbours also arrived. He stated that the deceased cried on being inflicted with wound on the neck region and thereafter wound was inflicted in the stomach region. He stated that he saw the accused-appellant inflicting knife injury in the light of the bulb. He stated that there was a bulb lit at the outer wall of the house of Lala Ram and Nand Kishor. He stated that after inflicting knife injury, Raju (appellant) ran away towards his house. In his cross examination, he stated that his house is just in front of the house of Lala Ram (informant) and, in between, there is a four hands wide lane (Gali). He stated that in front of his house, just two paces away, there is his Chabutara which is about three paces wide and three paces long. He stated that he was lying on this Chabutara at the time of the incident. He stated that when he was lying there, his feet were towards the house of Lala Ram; and Mukesh (the deceased) was sleeping on a cot in the lane which was in between the two houses. He stated that the bulb lit was fixed on a holder which was on the wall of Lala Ram. He denied the suggestion that he had any relations with Lala Ram. We find that he qualifies as an independent witness whose presence is disclosed in the FIR also. Further, no suggestion was made to him that he has enmity with the accused-appellant. His testimony has been consistent throughout and has not been shaken by the cross examination.

24. PW-3 - Nand Kishor stated that he was sleeping on a separate cot next to the deceased and that he saw the accused-appellant inflicting knife blows on the neck and stomach region of the deceased. He also disclosed about the existence of bulb and source of light. He disclosed that an incident of altercation between Raju (accused-appellant) and Mukesh (the deceased) had occurred during the course of marriage of the daughter of Taro Mahraj, which took place few days before

the incident. He also disclosed that threat was extended to the deceased by the accused-appellant. In his cross examination, nothing substantial came out. We are of the view that though he may be a relative of the informant and as such an interested witness but his presence is natural at the spot and is also proved by independent witness (PW-2).

25. PW-4 -Vijay had disclosed that he had written the first information report, which was marked exhibit 1, on the instruction of his father-in-law (Lala Ram) given at the hospital. PW-5 - O.P. Kalra proved conducting of investigation. He proved the site plan and established the place of occurrence by proving recovery of blood soaked earth and plain earth as also blood stained pillow and pieces of blood drenched cot which were exhibited. PW-6 - Dr. R.K. Yadav proved the postmortem of the deceased and confirmed existence of two anti mortem incised wound injuries which are consistent with the ocular evidence. He also proved that from the medical college /police record it appears that the deceased was brought there at about 10.50 pm.

26. When we proceed to analyze the evidence, we find that the witnesses have proved the place of occurrence; the time of occurrence; and the source of light at the time of incident. No suggestion was put to the witnesses that at the place where occurrence took place, there was no supply of electricity or that the electricity was not being supplied at the time of occurrence. The existence of bulb at the wall of the house of the informant is quite natural. It is also natural that the bulb remained lit as in summer months, to ward off heat, house inmates sleep outside. Moreover there is no suggestion that the parties were affluent, having the facility of cooler/ air conditioner etc, and, therefore would not sleep outside. The place of occurrence was established by collection of plain earth and blood soaked earth as also by collection of pieces of blood drenched cot and blood stained pillow. No suggestion was put to Jaggo Lal (PW-2) that he had any motive to falsely implicate the accused-appellant. The testimony of Jaggo Lal is clear and consistent and it demonstrates that he was there at the place and time of the occurrence and he heard cry of the deceased which invited his attention towards the deceased to enable him to witness infliction of knife blow by the appellant on the stomach of the deceased. As the injury was not such which severed vocal chord etc raising of alarm on receipt of first injury was quite natural thereby giving sufficient opportunity to the witnesses to witness infliction of the second blow even if they were sleeping when the first blow was inflicted. Further, the testimony of the witnesses is consistent with each other. The prosecution thus succeeded in not only proving the act of crime by the appellant but also the motive for the crime by disclosing that on 29.04.1990 there had been altercation between the deceased and the accused in connection with which threats were extended. The argument of the learned counsel for the appellant that the witnesses were sleeping at the time of incident and could not have witnessed the incident is not acceptable because there were two injuries inflicted on the body of the deceased and therefore it was highly probable that upon receipt of first blow the deceased would have raised an alarm thereby stirring up the persons sleeping near him to enable them to witness the second blow, as is the testimony of the

eye witnesses examined by the prosecution.

27. The submission of the learned counsel for the appellant that the source of light was not proved as the electricity connection papers were not proved is also not acceptable because it is not the case of the defence that there was no supply of electricity in the locality. Otherwise, the existence of the bulb has been established by oral testimony and is also shown in the site plan prepared during the course of investigation. Moreover, Lala Ram (PW-1) has also specifically stated that he had an electricity connection. Under the circumstances, non proving of electricity connection papers would not be fatal to the prosecution case. More so, when an independent witness has in his testimony disclosed that an electricity bulb was lit and nothing has come from his cross examination to suggest that he had any motive to falsely implicate the accused-appellant.

28. The contention of the learned counsel for the appellant that there had been no production of the recovered knife before the court and therefore there was a serious lacuna in the prosecution case rendering the conviction bad in law is not acceptable for the reason that it is well settled legal position that if the prosecution case is established by ocular evidence, which is reliable and consistent with the medical evidence, latches on the part of the investigating agency would not be sufficient to acquit the accused and discard the prosecution case which is otherwise proved by reliable oral testimony. In this context, regard be had to decision of the Apex Court in the case of ***Sanjeev Kumar Gupta Vs. State of U.P.: (2015) 11 SCC 69*** wherein it was held that even if the investigation suffers from certain flaws such as non-recovery of the weapon used by the accused appellants and other material, the entire prosecution case cannot be brushed aside when it is proved by ocular evidence and corroborated by medical evidence. Similar view has been taken earlier by the Apex Court in the case of ***Amit Vs. State of U.P. (2012) 4 SCC 107.***

29. The contention of the learned counsel for the appellant that the prosecution has failed to examine other witnesses that had arrived on the spot and, therefore, the benefit must go to the accused-appellant is also not worthy of acceptance because it is not the quantity of the evidence but the quality of the evidence that is to be considered. ***(Govindaraju alias Govinda Vs. State: (2012) 4 SCC 722)***. The prosecution had examined three eye witnesses. First was the informant, who was a resident of the same house where the incident occurred. He deposed about hearing the cry of the deceased upon receipt of knife blow and accused-appellant running away with blood stained knife. The second witness (PW-2) is a person who was lying on his Chabutra just few paces away in front of the place where the deceased was lying. He disclosed that upon hearing cry from the deceased, he woke up and saw the appellant inflicting knife blow on the stomach region of the deceased. The third witness (PW-3) is a person who was an inmate of the same house at the door of which the deceased slept and the said witness was sleeping just next to the deceased. These three witnesses were consistent in their stand and their presence at the spot could not be doubted by the questions put to them in the cross examination.

30. The submission of the learned counsel for the appellant that Panch witnesses were not examined and, therefore, prosecution failed to prove its case is also worthy of rejection because the preparation of the Fard etc. was proved by the Investigating Officer and no such question was put to him to suggest that he had not been a witness to its preparation.

31. In view of the above, we are of the considered view that the prosecution has been successful in establishing the guilt of the accused-appellant beyond the pale of doubt and that there exists a ring of truth in the prosecution story, therefore, we uphold the conviction of the appellant for the offence punishable under Section 302 IPC.

32. At this stage, the learned counsel for the appellant invited attention of the Court to the statement of the appellant recorded under Section 313 CrPC, wherein he had disclosed his age as about 18 years, to raise a claim for the benefit of juvenility. It was urged that the previous bench, upon noticing the said aspect, had allowed the appellant to set up the plea of juvenility. In that regard, attention of the Court was invited to order dated 07.03.2017, which is extracted below:-

"Heard Kumari Anita Singh, learned counsel for the appellant.

It has been submitted by the learned counsel for the appellant that since the age of the appellant- Raju @ Rajendra mentioned in his statement under Section 313 Cr.P.C. is about 18 years, he must have positively been juvenile on the date of the incident.

Learned counsel for the appellant prays for and is allowed two weeks' time to move an application under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000.

List this appeal on 30.3.2017."

33. The learned counsel for the appellant submitted that pursuant to the above order, an application was filed on 30.03.2017 to decide the appeal of the appellant as a juvenile in conflict with law. This application was supported by an affidavit in which Class-2 Transfer Certificate of the appellant issued by Headmistress of Mahatma Gandhi Junior High School, Agra, disclosing the date of birth of appellant as 06.11.1974, was enclosed along with an Election Voter ID Card disclosing the year of birth of the appellant as 1974. It was contended that from the above material it is ascertainable that on the date of commission of the crime, that is 01.05.1990, the appellant was below 16 years in age and therefore was entitled to the benefit of the provisions of Juvenile Justice Act, 1986 as well as the subsequent Juvenile Justice (Care and Protection of Children) Act, 2000.

34. On the aforesaid application, on 17.07.2017, the previous Bench of this Court had passed the following order:-

"This application u/s 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 has been filed on behalf of the appellant Raju @ Rajendra with the prayer to declare him juvenile in conflict with law.

The application is supported by an affidavit of one Pramod Kumar, S/O Sri Nem Singh, presently posted as Sub-Inspector of police at P.S.- Madan Mohan Gate, District- Agra.

It has been submitted by learned counsel for the appellant that age of the appellant Raju @ Rajendra mentioned in his statement recorded u/s 313 Cr.P.C. was about 18 years. Moreover, it is apparent from the perusal of the Scholar's Register & Transfer Certificate issued by the Principal of Mahatma Gandhi Junior High School Baah, District- Agra that the date of birth of the appellant Raju @ Rajendra is 06.11.1974 and hence the appellant on the date of incident i.e. 01.05.1990, was minor and as such it should be declared that he was juvenile in conflict with law on the date of occurrence.

Per contra Sri J.K. Upadhyay, learned AGA submitted that the Scholar's Register & Transfer Certificate of the appellant Raju @ Rajendra, brought on record as Annexure No.1 to the affidavit accompanying the application u/s 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000, upon enquiry was found to be true.

After having heard the submissions made by learned counsel for the parties, we are of the view that the said issue should be examined by the concerned Juvenile Justice Board after giving notice to the complainant.

In view of the above, we remit this matter to the District & Sessions Judge, Agra with the direction to him to refer the appellant's claim for being declared juvenile in conflict with law to the Juvenile Justice Board, Agra within a week from the date of receipt of this order and the application u/s 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000. He shall further ensure that the Juvenile Justice Board, Agra adjudicates upon the appellant's claim for being declared juvenile in conflict with law within two months from the date of such reference after hearing the informant.

The report/ order of the Juvenile Justice Board, Agra shall be placed before this Court on the next date fixed.

List this appeal after six weeks.

Office is directed to communicate this order and transmit the complete record of the application u/s 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000 moved by the appellant Raju @ Rajendra to the District & Sessions Judge, Agra within a week from today. "

35. Pursuant to the above order, the Juvenile Justice Board, Agra submitted its report dated 16.09.2017 stating that the appellant - Raju alias Rajendra was juvenile at the time of the incident and was aged 15 years 5 months and 25 days.

36. By order dated 04.10.2017, photostat copy of the report, dated 16.09.2017, was directed to be supplied to the learned A.G.A., to solicit an objection, if any.

37. Pursuant to the above order, a counter affidavit was filed on behalf of the State. Thereafter, by order dated 16.07.2018, office was directed to call for the records from the Juvenile Justice Board, Agra relating to the claim of juvenility set up by the appellant. Pursuant to which, the record of the Board has been placed before us.

38. From a perusal of the record it appears that the Juvenile Justice Board,

Agra while conducting inquiry on the claim of juvenility had issued notice to the informant (Lala Ram). Pursuant to which, his son Dilip had appeared as a witness and his statement was recorded on 16.09.2017. Dilip disclosed that his father Lala Ram is no more alive. In respect of the appellant's claim of juvenility, Dilip stated that he has no documentary evidence as regards the age of the appellant on the date of the incident but, according to his estimate, the appellant must have been 18-19 years old at the time of the incident. He further stated that, according to his estimate, the appellant must be 40 years old now. In his cross examination, he stated that he has done guesswork regarding the age of the appellant being 18-19 years old at the time of the incident though it may be one or two years less or more. The Board considered the statement of the appellant also. He had stated that he was born in the year 1974 and had studied up to Class-2. In his cross examination, he stated that except for Mahatma Gandhi Junior High School, he studied in no other school. He stated that he has one daughter and two sons. He stated that his elder daughter is aged about 19 years, born in 1996. He stated that he was married in the year 1995. He also stated that he remained in jail for a period of about 10 months.

39. In the inquiry, the statement of Nutan Mittal, Assistant Principal of Mahatma Gandhi Junior High School was also recorded. She had produced the scholar register of the institution. She stated that in the scholar register, the name of the appellant is entered at Sl. No.1463. The date of birth entered in the scholar register is 06.11.1974. She stated that as per the scholar register, the concerned student (appellant) took admission in Class-1 on 20.05.1982 and passed out Class-2 on 20.05.1984. She proved the Transfer Certificate which disclosed the date of birth of the appellant as 06.11.1974. She was crossed examined by the Assistant Prosecuting Officer.

40. After recording the statement of the witnesses, the Juvenile Justice Board, Agra came to a definite conclusion that the date of birth of the appellant was 06.11.1974 and that on the date of the incident, that is 01.05.1990, the appellant was aged 15 years 5 months and 25 days and, as such, a juvenile under the provisions of Section 2(h) of Juvenile Justice Act, 1986.

41. Upon being called upon by the Court to submit an objection to the report submitted by the Juvenile Justice Board, a counter affidavit has been filed by Sri Krishna Upadhyay, Sub-Inspector, Police Station Madan Mohan Gate, District Agra. In paragraph 3 of the counter affidavit, dated 04th December, 2017, it has been stated as follows:-

"That in compliance of the order passed by this Court the deponent verified the aforesaid Scholar's register & Transfer Certificate Form from the office of Basic Shiksha Adhikari Agra in which the name of the appellant is mentioned at serial no. 1436 in which the date of birth of the appellant is recorded as 06.11.1974, the deponent has also verified the aforesaid date of birth from the institution namely Mahatma Gandhi Junior High School B.M. Khan Agra, in which the aforesaid date of birth is mentioned. A copy of the Scholar's Register & Transfer Certificate Form verified by the Basic Shiksha Adhikari Agra along with certificate issued by the

Principal of institution are collectively being filed and marked herewith as Annexure no.CA-1 to this affidavit."

42. A perusal of Annexure 1 to the counter affidavit would reveal that in the Scholar's Register & Transfer Certificate Form of Mahatma Gandhi Junior High School, Agra the name of Rajendra alias Raju son of Gauri Shanker is entered at Sl. No.1463 disclosing his date of birth as 06.11.1974. The date of admission is 03.07.1981 and date of passing out is 30.06.1983.

43. During the course of arguments, the learned A.G.A. could not demonstrate before us that victim's family had questioned the report of the Juvenile Justice Board, Agra declaring the appellant juvenile, that is aged 15 years 5 months and 25 days, on the date of the incident. Even before us, in this appeal, no objection has been taken to the above report by any member of the victim's family.

44. As the Juvenile Justice Board, Agra had conducted an inquiry to determine the age of the appellant at the time of the incident and, after giving opportunity of hearing to the members of the victim's family, on the basis of date of birth recorded in educational certificate, had come to a definite conclusion that the appellant was 15 years 5 months and 25 days old at the time of the incident, we accept the report and hold that the appellant was a juvenile, as defined by Section 2(h) of the Juvenile Justice Act, 1986; Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000; and Section 2(35) of the Juvenile Justice (Care and Protection of Children) Act, 2015, on the date of the incident.

45. It is well settled legal principle that the claim of juvenility can be raised at any stage including the appellate stage. In the case of ***Jitendra Singh alias Babbu Singh Vs. State of U.P. (2013) 11 SCC 193*** the incident had occurred on the midnight of 23.05.1988/24.05.1988. The allegation was that the accused-appellant had set his wife on fire for dowry. The appellant was convicted under Section 304-B IPC as also under Section 498-A IPC. The conviction and sentence was challenged in criminal appeal before the High Court, which was dismissed. Against the judgment and order passed by the High Court, the appellant went in appeal before the Supreme Court. During the pendency of the proceedings, the appellant filed a petition raising additional grounds including that on the date of commission of the offence, he was a juvenile or child within the meaning of that expression as defined in Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000. According to the appellant, his date of birth was 31.08.1974 and, therefore, when the offence took place, he was aged about 14 years. On the application claiming juvenility, a report was called. After receiving objections, the court came to a definite conclusion that the appellant was about 17 years old when the incident had occurred. The question that arose for consideration before the Apex Court was whether the conviction of the appellant could be sustained on merits and, if so, what was the sentence that could be awarded to the appellant. The Apex Court upheld the conviction and, on the question of sentence, by taking into account the provisions of Juvenile Justice Act, 1986, held as follows:-

"31. In the present case, the offence was committed by the appellant when the Juvenile Justice Act, 1986 was

in force. Therefore, only the "punishments' not greater than those postulated by the Juvenile Justice Act, 1986 ought to be awarded to him. This is the requirement of Article 20(1) of the Constitution. The "punishments' provided under the Juvenile Justice Act, 1986 are given in Section 21 thereof and they read as follows:

*"**21. Orders that may be passed regarding delinquent juveniles**.--(1) Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks fit,--*

(a) allow the juvenile to go home after advice or admonition;

(b) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(c) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(d) make an order directing the juvenile to be sent to a special home,--

(i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(ii) in the case of any other juvenile, for the period until he ceases to be a juvenile:

Provided that .....
Provided further that .....

(e) order the juvenile to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under clause (b), clause (c) or clause (e) of sub-section (1) is made, the Juvenile Court may, if it is of opinion that in the interests of the juvenile and of the public it is expedient so to do, in addition make an order that the delinquent juvenile shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the delinquent juvenile:

Provided that .....

(3) -(4)"

32. A perusal of the "punishments' provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a "punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under

the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986.

33. While dealing with the case of the appellant under IPC, the fine imposed upon him is only Rs.100/-. This is ex facie inadequate punishment considering the fact that Asha Devi suffered a dowry death.

34. Recently, one of us (T.S. Thakur, J.) had occasion to deal with the issue of compensation to the victim of a crime. An illuminating and detailed discussion in this regard is to be found in Ankush Shivaji Gaikwad v. State of Maharashtra (2013) 6 SCC 770. Following the view taken therein read with the provisions of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 the appropriate course of action in the present case would be to remand the matter to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of Asha Devi."

46. After holding as above, in paragraphs 57 to 60 of the report, the Apex Court concluded as follows:-

"57. The appellant was a juvenile on the date of the occurrence of the incident. His case has been examined on merits and his conviction is upheld. The only possible and realistic sentence that can be awarded to him is the imposition of a fine. The existing fine of Rs.100/- is grossly inadequate. To this extent, the punishment awarded to the appellant is set aside. The issue of the quantum of fine to be imposed on the appellant is remitted to the jurisdictional Juvenile Justice Board. The jurisdictional Juvenile Justice Board is also enjoined to examine the compensation to be awarded, if any, to the family of Asha Devi in terms of the decision of this Court in Ankush Shivaji Gaikwad.

58. Keeping in mind our domestic law and our international obligations, it is directed that the provisions of the Criminal Procedure Code relating to arrest and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 being the law of the land, should be scrupulously followed by the concerned authorities in respect of juveniles in conflict with law.

59. It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a prima facie opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident.

60. Accordingly, the matter is remanded to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of Asha Devi. Of course, in arriving at its conclusions, the said Board will take into consideration the facts of the case as also the fact that the appellant has undergone some period of incarceration."

47. While agreeing with the above conclusion, Hon'ble T.S. Thakur, J., while supplementing the judgment, in paragraphs 85 and 86 of the judgment, as per report, concluded as follows:-

"85. In the totality of the above circumstances, there is no reason why the conviction of the appellant should be interfered with, simply because he is under the 2000 Act a juvenile entitled to the benefit of being referred to the Board for an order under Section 15 of the said Act. There is no gainsaying that even if the appellant had been less than sixteen years of age, on the date of the occurrence, he would have been referred for trial to the Juvenile Court in terms of Section 8 of the 1986 Act. The Juvenile Court would then hold a trial and record a conviction or acquittal depending upon the evidence adduced before it. In an ideal situation a case filed before an ordinary Criminal Court when referred to the Board or Juvenile Court may culminate in a conviction at the hands of the Board also. But law does not countenance a situation where a full-fledged trial and even an appeal ends in a conviction of the accused but the same is set aside without providing for a trial by the Board.

86. With the above observations, I agree with the Order proposed by brother Lokur, J."

48. The aforesaid decision of the Apex Court was rendered at the time when the Juvenile Justice (Care and Protection of Children) Act, 2000 was in force. In the instant case, the claim of juvenility was raised after the Juvenile Justice (Care and Protection of Children) Act, 2015 had come into force with effect from 15.01.2016.

49. The proviso to sub-section (2) of Section 9 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short Act, 2015) enables raising of a claim before any court even after final disposal of the case and such a claim is to be determined in accordance with the provisions contained in the Act and the Rules made thereunder even if the person has ceased to be a child on or before the date of commencement of the Act.

50. By order of this Court, an inquiry was held by the Juvenile Justice Board, Agra and the appellant has been found to be aged below 16 years and, therefore, is a child in conflict with law even as per the provisions of the Act, 2015. Therefore, even if we deal with the appellant as per the provisions of the Act, 2015, the orders that could be passed regarding child found to be in conflict with law are those which have been provided in Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 18 is extracted below:-

*"**18. Orders regarding child found to be in conflict with law.**- 1. Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,--*

a. allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

b. direct the child to participate in group counselling and similar activities;

c. order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

d. order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

f. direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

g. direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

2. If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to--

i. attend school; or

ii. attend a vocational training centre; or

iii. attend a therapeutic centre; or

iv. prohibit the child from visiting, frequenting or appearing at a specified place; or

v. undergo a de-addiction programme.

3. Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

51. When we compare the provisions of Section 21 of Juvenile Justice Act, 1986 with the provisions of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015, we find that there exist similar provisions for orders that could be passed in respect of a juvenile in conflict with law including direction to pay fine. Hence, by applying the law laid down by the Apex Court in **Jitendra Singh's case (Supra)** and by keeping in mind the provisions of Section 18(1) (d) of the Act, 2015, we are of the view that the appropriate punishment that ought to be awarded to the appellant, who was a juvenile on the date of the incident, would be 'fine'. We find that the court below while convicting the appellant has not awarded any fine. As to what quantum of fine is to be awarded can appropriately be determined by the Juvenile Justice Board after giving opportunity of hearing to the appellant in the light of the observations contained in the judgment of the Apex Court in **Jitendra Singh's case (Supra)**. Accordingly, the appeal is **partly allowed.** The conviction of the appellant under Section 302 IPC is upheld. However, the punishment awarded to the appellant by the court below is set aside. The appellant who is on bail need not surrender. The sureties are discharged. The matter is remanded to the Juvenile Justice Board, Agra constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of the victim, as per the law. The appellant shall cooperate in the proceedings in that regard and shall put in appearance before the Juvenile Justice Board, Agra by or before 15th October, 2019.

52. Let the record of the court below as well as the record of Juvenile Justice Board, Agra be sent back.

(2019)10ILR A 29

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 288 of 1991

Mahesh ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri D. Dahma, Sri Divya Ojha, Sri Prem Chandra, Sri Sangam Lal Keshwani.

Counsel for the Opposite Party:
D.G.A.

A. Indian Penal Code, 1860 - Section 302 read with Section 34 I.P.C- criminal appeal - section 313 Cr.P.C - injuries sustained by the deceased were very serious - so much of chaff has been mixed with the grain that it becomes almost impossible to sift the grain from the chaff. The benefit of which would have to be extended to the accused - prosecution has failed to establish the

guilt of the accused beyond the pale of doubt- The appellant's conviction is therefore unsustainable-appellant is entitled to the benefit of doubt.

(Para,32,41 & 43)

Held:- Under the circumstances, the prosecution evidence has to be tested before its acceptance and conviction is to be recorded only when it is found reliable. Where doubts arise about the truthfulness of the prosecution evidence, the benefit of doubt would always go to the accused (Para-42)

B. Code of criminal procedure 1973 - Section 157 - Procedure for investigation- no time-limit for a report under section 157 Cr.P.C could be specified as a rule - mere absence to mention crime number in inquest report or medical papers by itself is not significant to discard the FIR as ante-timed or to disbelieve the prosecution case. (Para 31)

Held:- It is equally well settled that each case would have to be tested on its own facts and circumstances derived from the evidence led. In cases where the substantive evidence led throws questions that are left unanswered or leaves out gaps in the prosecution story, such latches, as noticed in **Meharaj Singh's case,** may assume importance as to whether benefit of doubt is to be provided to the accused.

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Meharaj Singh (L/Nk.) Vs St. of U.P. (1994) 5 SCC 188

2. Mahmood Vs St. of U.P. (2007) 14 SCC 16

3. Jaishree Yadav Vs St. of U.P. (2005) 9 SCC 788)

4. Dinesh & anr. Vs St. of Har. (Criminal Appeal No. 1076 of 2000, decided on Oct. 10 2001) reported in (2015) 17 SCC 804

5. Shankarlal Gyarasilal Dixit Vs St. of Mah. (1981) 2 SCC 35 (paragraph 35)

(Delivered by Hon'ble Manoj Misra, J.)

1. This appeal has been filed by Mahesh son of Dibbu Mehtar against the judgment and order dated 13.02.1991 passed by the Ist Additional Sessions Judge, Aligarh in Sessions Trial No. 662 of 1987 by which the appellant, along with Gajendra Singh @ Gajpal son of Girraj Singh Jat; and Jagdish son of Ram Swarupa Mehtar, has been convicted for offence punishable under Section 302 read with Section 34 I.P.C. and awarded life imprisonment as well as fine of Rs. 2,000/- and, in case of default in payment of fine, to undergo one year additional rigorous imprisonment. The other two convicted accused, namely, Jagdish and Gajendra Singh, had jointly filed a separate Criminal Appeal No. 232 of 1991 which stood abated as they expired during the pendency of appeal. Thus, this judgment deals with the appeal filed by Mahesh only.

2. Briefly put the prosecution case is as under. The deceased - Mahendra Singh was working as a Homeguard attached to Police Station (for short P.S.) Pisawa, Aligarh. Like every day, on 11.07.1987, at about 6.45 p.m., he, along with his father Todar Singh (informant-P.W.1) who had to sleep over night at the shop of his other son (Mehtab Singh) at Pisawa, was going on a bicycle to P.S. Pisawa to attend his duty. As they reached near Kumargarha Nala, four persons, namely, Jagdish son of Swarupa Mehtrar; Mahesh son of Dibbu Mehtar (appellant); Gajendra Singh @ Gajpal son of Girraj Jat; and an unknown person (later disclosed as Biri Singh), who were all hiding behind Patel bushes, came out and surrounded them. Gajendra shouted at Mahendra (the deceased) as to why he did

not allow the pigs of Jagdish and Mahesh to graze in his field. Upon which, the deceased - Mahendra responded by saying that they would have destroyed his maize crop. On hearing the reply, Gajendra exhorted the other accused persons to finish off Mahendra (deceased) whereafter all four accused took out their knives and after putting the deceased on ground started assaulting him with knives, as a result, the deceased received injury on his neck. Witnessing attack on his son, the informant (P.W.1) cried for help, upon which, villagers, namely, Gulzar (P.W.2); Girraj (not examined); Tara Singh (not examined); and Harveer Singh (not examined) arrived. On seeing them coming, and sensing that the deceased had died, the accused escaped. Thereafter, Mahendra was brought in an injured condition to P.S. Pisawa where the report (Ex. Ka 1) was scribed by Kishan Singh (not examined) on dictation of the informant (P.W.1). After signing the same, PW1 got the first information report (FIR) (Ex Ka 2) registered at P.S. Pisawa at 20:15 hours (8:15 p.m.) which was entered by Head Moharir Ramvir Singh (P.W.3) in the register on 11.7.1987 as case crime no.32 of 1987 for offences punishable under sections 307/324 IPC. Thereafter, P.W.5 - Rajendra Singh Tomar, Investigation Officer (I.O.), proceeded to record the statement (Ex Ka 10) of Mahendra Singh (the injured), under section 161 CrPC, at about 9.00 p.m. However, as the condition of the injured was very serious he was taken to Pisawa hospital. There no doctor could be found. Hence, he was taken to J.N. Medical College Hospital, Aligarh and was admitted there at about 10.50 p.m. However, he succumbed to his injuries at the hospital at about 11.20 p.m. on 11.07.1987 itself. As the said hospital was under P.S. Civil Lines, Aligarh, information of Mahendra Singh's death was given by the hospital to P.S. Civil Lines, Aligarh, which prepared the inquest report (Ex Ka 12). Thereafter, upon receipt of death report, on 12.7.1987, the offences were altered and Sections 302 read with 34 IPC were added.

3. The lodging of the FIR was proved by P.W. 1 and P.W.-3. Dr. Mohd. Arshad (P.W.4), who had examined the deceased - Mahendra at the hospital, proved the injury record (Ex Ka 5) and confidential memo (Ex Ka 6) to demonstrate that Mahendra (the deceased) was brought by his brother Mehtab (not examined) to the hospital at 10:50 p.m. on 11.07.1987 as a case of cut-throat (stab injury neck), where he expired at 11:20 p.m.

4. The post mortem report (exhibit Ka-13) was proved by Dr. R.P. Gupta (P.W.6) of Malkhan Singh Hospital, Aligarh. The post mortem examination disclosed a solitary ante mortem injury as follows:-

"An incised wound measuring 4 cm x 2 cm (in middle) muscle deep on left side neck, 5 cm above the medial end of left clavicle, oblique in direction. Spindle shaped in figure. Margins are well defined. On exposure, the wound runs towards right side downwards, cutting through and through trachea and oesophagus, reached right side in muscles. Great vessels of right side are also cut."

5. The prosecution examined six witnesses. Only two were witnesses of fact, namely, P.W.1- informant -Todar Singh (father of the deceased) and P.W.2

- Gulzar. P.W.-3- Ramveer Singh was head moharir at the police station who made GD entry of the first information report; P.W.5 - Rajendra Singh Tomar conducted the investigation; P.W.4-Dr. Mohd Arshad is the doctor who examined the deceased when he was brought to the hospital in the night of 11.07.1987; and P.W.6 - Dr. R.P. Gupta is the doctor who conducted the post-mortem examination.

6. P.W.4 in his testimony stated that the injured Mahendra Singh was brought to the hospital by his brother Mehtab Singh, where he died at 11:20 p.m. in the night of 11.07.1987 and information of his death was given to P.S. Civil Lines.

7. P.W.6-Dr. R.P. Gupta proved the post-mortem report which disclosed that post mortem examination was conducted on 12.7.1987 at about 3.30 p.m. and a solitary incised wound was found on the neck region. He stated that, according to his opinion, the deceased died due to excessive bleeding caused by the injury. He stated that it was possible that the deceased died on 11.07.1987 at 11:20 p.m.; that the injury was caused by a knife; and that the injury might have been inflicted at about 6:45 p.m. on 11.07.1987. On cross-examination, he stated that after receipt of such injury though it was possible that the injured might have been able to speak but the probability that he might not have been able to speak is higher. He also stated that if he could have managed to speak then such speech would not have lasted for more than 5-10 minutes after such injury. He stated that the possibility that the injury was caused between 8:30 and 9 p.m. of 11.07.1987 is there.

8. P.W.1-Todar Singh, who is the informant, reiterated the story narrated in the first information report except that in his testimony he also named the fourth accused, who was left unnamed in the FIR, as Biri Singh. He stated that all four had assaulted the deceased with knives though the knife blow of Gajendra caused the injury. He stated that he had raised alarm, upon which, Gulzar, Tara, Harveer and Girraj arrived. Seeing them, the accused ran away. As his son was injured and bleeding, he tied a Tahmat (head-cloth) on the neck of his son. Thereafter they arranged for a cot and carried the injured Mahendra to P.S. Pisawa where the FIR was written by Kishan Singh on dictation of informant and thereafter informant got it lodged after putting his signature. He disclosed that the deceased had been working as a homeguard and, on the fateful day, he was going to attend his duty at P.S. Pisawa. As regards the motive for the crime, he disclosed that 5-7 days before the incident, pigs of Jagdish and Mahesh had entered the field of the deceased and the deceased had scolded them therefore they had a grudge against the deceased. The fourth accused, namely, Biri Singh, was disclosed as brother-in-law (Behnoi) of Mahesh. P.W.1 stated that he had taken his injured son Mahendra to M.S. Hospital and there he expired at about midnight. He stated that at the time of the incident, there was sunlight.

9. In his cross-examination, he stated that before inflicting knife blows, the accused persons had exhorted each other and all four had caught hold the deceased and, after putting him down, had inflicted knife blows. He stated that while they were inflicting knife blows, Mahendra Singh was trying to get up and was twisting and moving sideways. He stated that he did not make any attempt to catch hold any of the accused persons

while they were inflicting knife blows because he was standing 2-3 paces away and the entire incident just lasted two minutes. He stated that only a single blow was received by the deceased although all four were trying to inflict blows. He stated that he is not in a position to disclose about the length of the knife. P.W.1 also stated that as soon as Mahendra received knife blow, he had raised alarm. Immediately, thereafter, he stated that he raised alarm the moment Mahendra was pinned down. He stated that Tara Singh and Harveer Singh had arrived before infliction of knife blow whereas rest arrived later. He stated that the field of Gulzar - P.W.2 is at a distance of 60-70 paces from the spot. He stated that the injured was taken on a cot. The cot was brought from Pisawa. He stated that Mahendra got unconscious on receiving knife blow but later regained consciousness and was conscious at the police station. He stated that in the FIR he had specifically disclosed about receipt of solitary knife blow by Mahendra but he does not know as to how it has been written that all four had inflicted knife injuries on the neck. He further stated that he had told the scribe to write that knife blow of Gajendra had caused the injury to his son but the scribe told him that it would result in death penalty. He also stated that the accused Gajendra is a Jat whereas the other accused are *Bhangi.*

10. In his cross-examination, at the instance of Mahesh and Biri Singh, he stated that he had seen Biri Singh earlier but he was not aware of his name and relationship with Mahesh, though, later, after two days, he became aware of his name and relationship on being told by the investigation Officer. In his cross-examination, he stated that the witnesses took 3-4 minutes to arrive after he had raised the alarm. Upon suggestion that Mahesh was falsely implicated because he had refused to lift night soil, he stated that Mahesh and his father never used to clean his toilets. He denied the suggestion that he had not seen the incident or that he had falsely implicated the accused only because they had stopped cleaning his toilets. He stated that after the incident, about 10 minutes were taken to arrange a cot as from the spot Pisawa was about a kilometer away. He also stated that Harveer, Tara had accompanied him to the Hospital.

11. P.W.2 - Gulzar Singh stated that he arrived at the spot upon hearing shouts of Gajendra Singh. When he reached there, he found that Gajendra Singh; Jagdish; Mahesh; and Biri Singh were inflicting knife blows on Mahendra Singh (deceased). He stated that he was just 5-7 paces away from the spot but he could not notice as to whose blow caused the injury to the deceased. He stated that at that time Tara, Harveer and Girraj Singh all had arrived and Todar Singh (informant) was shouting. He stated that upon seeing them, the accused escaped. In his cross-examination, he stated that his field is 50-60 yards away; that before his arrival, Todar Singh had arrived; that he, Harveer and Tara arrived simultaneously from different directions; that Girraj arrived later from the village. Harveer and Tara arrived on a Buggy (cart). He stated that when he had arrived there all four accused had put the deceased on the ground and were inflicting knife blows. He stated that he had seen all the accused inflicting knife blows but he is not sure as to who caused the injury. He stated that Mahendra was brought on a cot to P.S. Pisawa. The cot was called from Pisawa.

He stated that the distance between Pisawa and the place of occurrence is about four furlongs and that Pisawa is about six furlongs from his village. He stated that about 15-20 minutes were spent in arranging for the cot. He stated that he had been with the deceased till 10 p.m. He denied the suggestion that he has falsely implicated the accused on account of party bandi.

12. In his cross-examination, he stated that he knew Biri Singh from before as Biri Singh happens to be the Behnoi (brother in law) of Mahesh. However, his name was not known, which came to be known on the next day. He also stated that Todar Singh had dictated the first information report in his presence and he had informed Todar Singh at that time that Mahesh's brother in law is also one of the persons involved. In his cross-examination, he admitted that Mahesh had been cleaning toilets though he claimed that he never used to clean his toilets. He denied the suggestion that Mahesh was implicated because he refused to lift his toilet's night soil.

13. P.W.3- Ramveer Singh, Head Moharir (clerk), who made the GD entry of the FIR at P.S. Pisawa, though proved the lodging of the FIR but, during cross-examination, upon suggestion that FIR was ante-timed and was lodged after death of Mahendra, after denying the said suggestion, admitted that on that day other than the concerned FIR only a non-cognizable report was registered at 6:40 am in the morning. He also stated that information / special report of the concerned FIR was sent on 13.7.1987 at about 8.00 am in the morning as in the night no vehicle was available.

14. P.W.5- Rajendra Singh Tomar, who conducted the investigation, stated that he first recorded the statement of the injured Mahendra Singh; thereafter of the informant Todar Singh and of the scribe Ramveer Singh and, thereafter, he proceeded to the spot, collected samples of blood stained and plain earth and prepared site plan. On his return, on receipt of information regarding death of the injured, the case was converted into one under section 302 / 34 IPC on 12.07.1987. He stated that inquest was carried out by P.S. Civil Lines. He stated that after completing the investigation the charge-sheet was filed under his signature.

15. In his cross examination, he stated that along with informant and the injured several others had come to the police station. He stated that although the condition of the deceased was serious when he was brought to the police station but he could speak therefore, after lodging of the first information report, his statement was recorded and thereafter he was sent to the hospital. He stated that Mahendra was sent to Pisawa hospital but there the doctor was not available and therefore he was taken to Malkhan Singh Hospital. He stated that the informant had stayed back at the police station whereas the rest had gone to the hospital with the injured. He stated that the injured had a cloth tied around his neck of which possession was not taken by him. He stated that the informant had gone with him to the spot and had remained with him till about 6.30 am (next day morning). He stated that he had reached the spot at about 10.30 p.m. on the night of the incident. The site plan was prepared next day morning, at about 5:45 am. He stated that blood stained earth was found at that spot where, as per the site plan, knife blow is stated to have been inflicted,

and at no other place. He stated that the deceased Mahendra was Home Guard posted at P.S. Pisawa and his duty hours were from 6 pm to 4 am. He admitted that he had not noted the location of the fields of Gulzar and Girraj in the site plan.

16. Upon recall, he stated that the statement of Mahendra (deceased) had been recorded by him. The statement was thereafter exhibited as Ex Ka 10.

17. In his cross-examination, upon recall, he stated that he had recorded the statement of the injured at about 9 pm and that he took about 20 minutes to record the statement. He stated that he had not taken adequate precaution while recording statement and that he did not take the signature of the injured on his statement. He stated that when he recorded his statement no other person was present. He stated that the injured was in a fit condition to give his statement. He denied the suggestion that the injured was not in a position to give his statement and that the recorded statement is bogus.

18. The accused were confronted with the prosecution evidence. They denied the prosecution case in their statement recorded under section 313 CrPC and claimed that they have been falsely implicated.

19. The trial court on the basis of the evidence produced by the prosecution convicted Jagdish; Mahesh (Appellant) and Gajendra Singh but acquitted Biri Singh by giving him benefit of doubt on the ground of non disclosure of his name or identity in the first information report even though his identity as Behnoi of Mahesh was known. The trial court also discarded the alleged dying declaration recorded by the Investigating Officer by observing that from the medical evidence it becomes clear that the deceased was not at all in a condition to get his statement recorded.

20. We have heard Sri Sangam Lal Kesarwani and Sri Prem Chandra Yadav for the appellant; the learned A.G.A. for the State; and have perused the record.

21. Sri Sangam Lal Kesarwani, learned counsel for the appellant, has submitted that according to the prosecution case all four accused were armed with knives and they had put down the deceased on the ground and had inflicted several knife blows and that the incident lasted for about two minutes but the post mortem report of the deceased reveals a solitary incised wound. This would suggest that the incident was not witnessed by the witnesses and the story was subsequently developed.

22. He submitted that the presence of P.W.1 on the spot becomes doubtful for the following reasons: (a) his son was being assaulted in front of his eyes yet he makes no attempt to save him; (b) no bloodstained clothes of PW1 have been collected to demonstrate that he had been with the deceased at the time of the incident and had carried the deceased to the hospital; (c) that the medical papers suggests that the deceased was brought to the hospital by his brother - Mehtab Singh and not by PW1, whereas Mehtab Singh has not been examined as a witness. Moreover, it has not been disclosed as to how Mehtab Singh was with the deceased at the time of his medical examination.

23. He submitted that FIR appears to be ante-timed for the following reasons: (a) no chitthi majroobi (letter for medical

examination of injured) was prepared and produced by the police and the medical papers also do not disclose that the injured was taken to the hospital with a letter from the police station concerned, which suggests that at the time when the deceased was taken to hospital, no report was in existence and registered at the police station and that after receipt of information about the death, first information report was lodged and the story was developed; (b) the inquest was conducted by a different police station; (c) the inquest papers do not disclose about prior registration of case, rather, it discloses that information was received from the hospital; and (d) that report under section 157 CrPC was given not on 12.07.1987 but on 13.07.1987, that is, after the post mortem examination of the deceased.

24. He also submitted that from the statement of P.W.1 it appears that Tara and Harveer, who were not examined as witness, had arrived earlier whereas the remaining witnesses arrived later, which suggests that Gulzar had not witnessed the incident and had arrived later upon getting information about the incident.

25. It has been submitted that the nature of the incident suggests that some unknown assailant had inflicted injury upon the deceased and had escaped and the story was set up on the basis of suspicion and guess work.

26. It has been submitted that neither the weapon of assault nor bloodstained clothes, if any, of the accused have been recovered. The prosecution has therefore not been able to establish its case beyond the pale of doubt. He further submitted that the very fact that the police had shown that a dying declaration was recorded when, in fact, the deceased was not at all in a condition to even speak, would go to show that there was an effort to falsely implicate persons to solve out the case as a Home Guard had been the victim.

27. It was also argued that if the deceased, who was Home Guard deputed at P.S. Pisawa, been brought injured at the police station, it is but natural that a police constable would have accompanied him for medical examination/treatment. But, from medical papers, it appears, he was brought to the hospital by his brother who has not been produced as a witness. He thus submitted that the prosecution has left many questions unanswered, which leaves a lot of doubt about the truthfulness of the prosecution case, hence, the appellant is entitled to the benefit of doubt.

28. **Per contra**, learned A.G.A. has supported the judgment of the court below by submitting that the first information report was lodged promptly; the doctor in his cross-examination has admitted that the incident could have occurred on or about the time at which it is purported to have occurred; that the presence of eye-witnesses cannot be doubted as they have appeared from adjoining fields; and that there is no cogent reason brought on record as to why the witnesses would be lying. It has also been submitted that there is no such serious conflict between ocular and medical evidence as very often blows may miss the body of the victim and, therefore, under the circumstances, merely because a solitary injury has been found, the involvement of four persons in the incident cannot be ruled out. Moreover, they have been convicted with the aid of section 34 IPC.

29. We have given thoughtful consideration to the rival submissions and have perused the record carefully.

30. Upon consideration of the rival submissions, one of the issues that falls for our consideration is whether the FIR was ante-timed. To find out whether the FIR has been ante-timed certain external checks are there. Some of these checks have been noticed by the apex court in ***Meharaj Singh (L/Nk.) v. State of U.P., (1994) 5 SCC 188,*** where, in paragraphs 12 and 13 of the judgment, as reported, it was observed:

12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.

13. It appears that it was a blind murder and none of the eyewitnesses were actually present at the scene. The ante-timing of the FIR was obviously made to introduce eyewitnesses to support the prosecution case....."

(Emphasis Supplied)

31. Though in several subsequent decisions the apex court has held that no time-limit for a report under section 157 CrPC could be specified as a rule and that mere absence of mention of crime number

in inquest report or medical papers by itself is not significant to discard the FIR as ante-timed or to disbelieve the prosecution case, if otherwise the substantive evidence brings home the charge without reasonable doubt (vide ***Mahmood v. State of U.P., (2007) 14 SCC 16; Jaishree Yadav v. State of UP, (2005)*** 9 SCC 788), but, it is equally well settled that each case would have to be tested on its own facts and circumstances derived from the evidence led. In cases where the substantive evidence led throws questions that are left unanswered or leaves out gaps in the prosecution story, such latches, as noticed in **Meharaj Singh's case (supra)**, may assume importance as to whether benefit of doubt is to be provided to the accused.

32. In the instant case, we find that the injuries sustained by the deceased were very serious inasmuch as his Trachea as well as Oesophagus, including the main vessels, were cut which, in ordinary course, would result in heavy bleeding and severe pain as well as shock. The doctor (P.W.6) who carried out the post mortem examination was of the view that with such an injury ordinarily the victim would not be in a position to speak and, if he could, that capacity would not last beyond 5 to 10 minutes from the time of infliction of the injury. The doctor (P.W.6) accepted the possibility that the injury sustained by the deceased might have been caused between 8.30 p.m. and 9.00 p.m. of 11.7.1987, though he did not rule out the possibility of the injury being caused at the time stated by the prosecution. What assumes importance is that the nature of the injury suffered by the deceased was such that the normal course of human conduct, particularly, of father or close relative of the injured, would be to rush the injured to the hospital straight away for immediate medical attention rather than to take him to the police station and wait there for over an hour. The medical papers disclose that the injured was brought to the hospital by Mehtab Singh and not by the police, without any *chitthi majroobi*, which is suggestive of the possibility that the injured was rushed to the hospital straight away. This possibility gets credence from other circumstances noticed herein after. The deceased was a home guard posted at P.S. Pisawa. If he had been brought in an injured condition at that police station, the least that was expected is that a constable would have been deputed to accompany him to the hospital. As per medical papers/ evidence, deceased's brother, Mehtab Singh, brought him to the hospital. Though the I.O. (P.W.5) stated that a constable had gone to the Pisawa hospital and he returned because doctor could not be found there, but neither the name of that constable is disclosed nor Mehtab, whose name finds mention in medical papers, has been examined. Interestingly, the inquest proceeding was conducted at the hospital by the police of P.S. Civil Lines on information given by the hospital. Had there been information to the hospital that FIR has already been lodged at P.S. Pisawa there was a possibility of information being provided to that police station. Neither any one from police station Civil Lines nor any of the witnesses of inquest proceeding has been examined. Importantly, PW1 and PW2 are not Panch witnesses.

33. From the testimony of the doctor (P.W.6) the possibility of recording the statement of the injured by P.W.5 is ruled out, if the incident had occurred at 6.45

p.m. because the deceased could not have had sustained his speaking capacity beyond 5 to 10 minutes post the incident so as to enable the I.O. (P.W.5) to record his statement at about 9.00 pm. and, that too, for about 20 minutes, as is the claim of P.W.5. This circumstance is suggestive of two possibilities. One that the incident did not occur at 6.45 p.m., as alleged, and the other is that the dying declaration is bogus. What was the reason to show that the statement of the injured was recorded. Perhaps, the answer of that can be found in the alleged statement of the injured (Ex. Ka 10), which has been discarded by the court below.

34. On perusal of Ex Ka 10, the alleged statement of the injured made before his death, we find that it makes an effort to explain the absence of more than one injury on the injured as also to bring out the name of the fourth unnamed person, namely, Biri Singh. This clearly signifies that the I.O. had tried to fill in the gaps in the prosecution case, after getting information, by setting up the statement of the deceased.

35. Further, we may observe that if the I.O. had recorded the statement of the deceased and had come to know about the identity of the fourth person there was no reason for him not to disclose this fact to the informant then and there at the police station itself on 11.07.1987. The informant (P.W.1), on the other hand, in his cross-examination, at the instance of Mahesh, stated that he came to know about the involvement of Biri Singh through the I.O. about 2 days later. This discrepancy not only throws doubt about recording of the dying declaration but is also suggestive of the probability that the I.O. filled up the police papers some time later to suit the prosecution case.

36. Another feature which is worthy of notice is that the I.O. (PW5) stated that the informant stayed with him till next day morning and in the night of 11.7.1987 itself he went to the spot and took blood stained earth and plain earth samples. The fard (Ex-Ka-7) of that recovery discloses Chhido Nath and Vijendra Singh as witnesses of recovery. Both of them have not been examined. Interestingly, PW1 states that from P.S. Pisawa he had brought the injured Mahendra to M.S. Hospital. If that was so, then how could he have stayed back at the police station as claimed by the I.O. so as to enable him to visit the spot and collect blood stained earth, etc in the night of 11.07.1987.

37. When we see the prosecution evidence in its entirety and the aspects discussed above, ante-timing of the FIR or the incident cannot be ruled out. The statement of P.W.3 that prior to the registration of the concerned FIR only one non cognizable report had been entered in the morning of that day (11.07.1987) at the police station concerned shows that there was sufficient scope in the General Diary to make entries without the necessity of overwriting or interpolation.

38. Now, we shall proceed to examine the reliability of the ocular evidence. P.W.1 is the father of the deceased. He claims himself to be an eye witness. He, in his FIR as well as statement in court, states that four accused surrounded the deceased, pinned him down, took out knives and inflicted him blows. As against multiple knife injuries a solitary incised wound has been found. Even assuming that few blows may have missed but when some one is pinned down and his entire body is available for attack it is quite unbelievable that all the

blows would miss. This discrepancy, PW1 sought to explain by stating that he tried to tell the scribe of the FIR that only the blow of Gajendra had caused the injury but the scribe retorted that it would result in death penalty. If P.W.1 had seen the incident and was convinced about what he saw why would he agree to dilute the case against Gajendra. Further, P.W.1 stated that after infliction of injury the deceased stood up, ran few paces and then fell down unconscious and, thereafter, regained consciousness and was also able to speak. Interestingly, I.O. (PW 5) stated that he could find blood at only one spot. When we appreciate the statement of P.W.1 in the light of the statement of the doctor that the deceased could not have sustained his speech faculty for more than 5 to 10 minutes after the injury, the statement of P.W.1 does not at all inspire confidence. Doubts as regards the presence of P.W.1 at the place of occurrence also surface from the medical papers which indicate that Mehtab Singh, son of P.W.1, who has not been examined, brought the deceased to the hospital. P.W.1 did not make any effort to save his son and has suffered no injury. Link evidence such as blood stained clothes of the informant to show that he has been with the deceased have not been collected and produced. No doubt, every person may react differently to a given situation and therefore absence of effort on the part of informant to save his son may not be a clinching circumstance to discredit him but when all the circumstances are put together, including attribution of role of inflicting knife blows on the deceased to four persons as against solitary injury found on his body, they throw a serious doubt about the presence of P.W.1 on the spot at the time of occurrence. Further, it may be noticed that though P.W.1 states that he had been to the hospital with his son (injured) but the Investigating Officer states that P.W.1 had stayed at the police station. Under the circumstances, the statement of P.W.1 does not inspire confidence to enable us to uphold conviction of the accused persons.

39. The statement of P.W. 2 falls in the same category. More over, he appears to be a chance witness who came to the spot on hearing cries. He has neither accompanied the deceased to the hospital nor has been an inquest witness. He also states that all four accused pinned down the deceased and inflicted knife blows, which is in conflict with medical evidence as noticed above. That apart, from his testimony, it appears that he had informed the informant before lodging of the FIR that fourth accused was Behnoi of Mahesh but, interestingly, there is no such mention in the FIR, which is suggestive of the fact that he may not have been there with the informant till the time of lodging of the first information report. Thus, his testimony also does not inspire confidence to enable us to sustain the conviction.

40. Apart from above, there is another unexplained gap in the prosecution story which is as to why Gajendra would espouse the cause of the other three co-accused more so when Gajendra was Jat by caste and the others were members of lower caste (Bhangi).

41. When we test the prosecution case on all the aspects discussed above and keep in mind that four persons have been nominated with identical role of pinning down the deceased and inflicting blows on him with knives as against

solitary injury found on the deceased, we get the feeling that the prosecution case is not only embellished but also highly exaggerated. In this context, it would be useful to refer to the observations made by the apex court in ***Dinesh and Another V. State of Haryana (Criminal Appeal No. 1076 of 2000, decided on October 10, 2001) reported in (2015) 17 SCC 804.*** *In paragraph 17 of the judgment, as reported, it was observed: "If the prosecution has tried to implicate three persons-- the father and the two sons, while only one or two of them might have assaulted the injured Santra Devi and positive role is assigned to the three accused persons, which is not corroborated by medical evidence, the court is left guessing about the exact number of assailants and the manner in which they may have assaulted the injured. The present one is the case where a little grain has been mixed up with so much of chaff that it is almost not possible to separate the grain. Though a court of facts is obliged to make an effort at finding out the truth by separating it from the falsehood, but, on finding it not possible to do so, it is not permissible for the court to spin out altogether a new case, different from the one alleged by the prosecution, and to convict the accused."* In the light of the decision noticed above, when we take a conspectus of the prosecution evidence it appears to us that so much of chaff has been mixed with the grain that it becomes almost impossible to sift the grain from the chaff. The benefit of which would have to be extended to the accused. We are therefore of the considered view that the prosecution has failed to establish the guilt of the accused beyond the pale of doubt. The appellant's conviction is therefore unsustainable.

42. The contention of the learned AGA that the defense was not successful in establishing motive for false implication therefore the prosecution case was worthy of acceptance is unacceptable simply for the reason that the ultimate burden to prove the guilt beyond the pale of doubt is on the prosecution. The prosecution evidence is not to be accepted as gospel truth merely because no sufficient motive is shown for false implication. It may be observed that the apex court in ***Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCC 35 (paragraph 35)*** had observed that *"different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions."* Under the circumstances, the prosecution evidence has to be tested before its acceptance and conviction is to be recorded only when it is found reliable. Where doubts arise about the truthfulness of the prosecution evidence, the benefit of doubt would always go to the accused.

43. Thus, for all the reasons recorded above, the appellant is entitled to the benefit of doubt. The appeal is allowed. The judgment and order dated 13.02.1991 passed by the Ist Additional Sessions Judge, Aligarh in Session Trial No. 662 of 1987 convicting and sentencing the appellant is hereby set aside. The appellant is acquitted of the charge. If the appellant is on bail, he need not surrender.

44. Let a copy of the order as well lower court record be sent to the court concerned for compliance.

(2019)10ILR A 42

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 2833 of 2000

Dhruv Raj Rai & Ors. ...Appellants (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Rajendra Rai, Sri Shashi Bhushan Rai.

Counsel for the Opposite Party:
A.G.A., Sri Sharad Kumar Srivastava, Sri Rajesh Yadav, Sri S. N. Tripathi.

A. Indian Penal Code, 1860 - criminal appeal - Sections 147 (punishment for rioting), Section 148 (rioting armed with deadly weapons), Section 149 (every member of unlawful assembly guilty of offence committed in prosecution of common object), Section304 (punishment for culpable homicide not amounting to murder),Section 326(voluntary causing grievous hurt by dangerous weapon or means),Section323(voluntarily causing grievous hurt), Section504 IPC (Intentional insult with intent to provoke breach of peace) - accused persons were examined under Section 313 Cr.P.C, 1973- Prosecution proved motive of the alleged incident. - the involvement of all the accused appellants in the alleged incident is established - injured witness has made clear and cogent statement - version is consistent with medical evidence- conviction. (Para 9, 27 & 28)

B. Indian Evidence Act, 1872 - Natural witness may not be labelled as interested witness -Interested witnesses are those who want to derive some benefit out of the litigation/case- A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. It is well settled that if a case is based on direct testimony of eye witnesses, proof of motive is not required. (Para 23 & 24)

C. Indian Evidence Act, 1872 - **Consistency of oral evidence with medical evidence - though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, but when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence**. (Para 25)

Held:- Whether the members of the unlawful assembly really had the common object to cause the murder of the deceased has to be decided in the facts and circumstances of each case, nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the circumstances under which the occurrence took place. It is an inference to be deduced from the facts and circumstances of each case (Para 28)

Criminal Appeal partly allowed (E-7)

List of Cases Cited: -

1. Ravinder Kumar & anr. Vs St. of Punj. (2001) 7SCC 690

2. Amar Singh Vs Balwinder Singh & ors. (2003) 2 SCC 518

3. Tara Singh Vs St. of Punj. AIR (1991) SC 63

4. Sahebrao & anr. Vs St. of Mah. (2006) 9 SCC 794

5. Palani Vs St. of T.N. Criminal Appeal No. 1100 of 2009

6. St. of Punj. Vs Hardam Singh 2005 SCC (Cr.) 834

7. Dilip Singh Vs St. of Punj. A.I.R. 1983 S.C. 364

8. Harbans Kaur Vs St. of Har. 2005 S.C.C. (Crl.) 1

9. St. of U.P. Vs Kishan Chandra & ors. 2004 (7), S.C.C. 629

10. Dalbir Kaur Vs St. of Punj. AIR 1977 SC 472.

11. Gujrat Vs Naginbhai Dhulabhai Patel AIR 1983 SC 839.

12. Solanki Chimanbhai Ukabhai Vs St. of Guj. AIR 1983 SC 484

13. Mani Ram & ors. Vs St. of U.P. 1994 Supp (2) SCC 289

14. Khambam Raja Reddy & anr. Vs Public Prosecutor H.C. of A.P. (2006) 11 SCC 239

15. St. of U.P. Vs Dinesh (2009) 11 SCC 566

16. St. of U.P. Vs Hari Chand (2009) 13 SCC 542

17. Jarnail Singh Vs. St. of Punj. (2009) 9SCC 719

18. Krishan Vs St. of Har. (2006) 12 SCC 459

19. Abdul Sayeed Vs St. of M.P. (2010) 10 SCC 259

20. Rajendra Shantaram Todankar Vs St. of Mah. & ors. JT (2003) 2 SC 95

21. St. of Punj. Vs Sanjiv Kumar alias Sanju & ors. JT (2007) 9 SC 274

22. Allauddin Mian & ors. Sharif Mian & anr. Vs St. of Bihar JT (1989) 2 SC 171

23. Daya Kishan Vs St. of Har. JT (2010) 4 SC 325

24. Kuldip Yadav & ors. Vs St. of Bihar JT (2011) 4 SC 436

25. Lalji & ors. Vs St. of U.P. JT (1989) 1 SC 109

26. Ranbir Yadav Vs St. of Bihar JT (1995) 3 SC 228

27. Rachamreddy Chenna Reddy & ors. Vs St. of A.P. JT (1999) 1 SC 412

(Delivered by Hon'ble Raj Beer Singh, J.)

1. This appeal arises out of impugned judgment and order dated 02.11.2000 passed by learned Additional District & Sessions Judge, Court No. 7, Azamgarh in Session Trial No. 203 of 1988 (State vs. Sankatha and Others), whereby accused-appellant Dhruv Raj Rai has been convicted under Section 304 Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to seven years rigorous imprisonment along with fine of Rs. 1,000/- and accused-appellants, namely Ramesh Rai, Radhey Shyam, Ghan Shyam alias Dhannu, Man Shyam alias Munnu, Rajeshwar Rai, Singhasan, Jagdish and Mahendra have been convicted under Section 304/149 IPC and sentenced to seven years rigorous imprisonment and fine of Rs. 1,000/- each. All the appellants-accused were further convicted under Section 326/149 IPC and sentenced to five years rigorous imprisonment with fine of Rs. 500/- each. Accused-appellants Ramesh Rai and Radhey Shyam were further convicted under Section 147 IPC and sentenced to one year rigorous imprisonment. Accused-appellants, namely, Ghan Shyam alias Dhannu, Man Shyam alias Mannu, Rajeshwar Rai, Singhasan, Jagdish, Mahendra and Dhruv Raj Rai were further convicted under Section 148 Cr.P.C. and sentenced to two years rigorous imprisonment. In default of payment of fine under Sections 304 and 326 IPC, accused-appellants have to undergo six and three months additional imprisonment. The substantial sentences awarded to each of the accused persons were directed to run concurrently.

2. At the very outset it may be mentioned that co-accused Sankatha, Ghan Shyam and Surya Bali have died during trial, while accused-appellant no. 2 Rajeshwar Rai and accused-appellant no. 5 Ghan Shyam alias Dhannu have expired during pendency of this appeal and thus, appeal in respect of appellant no. 2 Rajeshwar Rai and accused-appellant no. 5 Ghan Shyam alias Dhannu stand abated.

3. The prosecution version is that before the incident of the present case, on 09.01.1987 Ghan Shyam Rai and others have given beatings to complainant Rajender Rai (PW 1) and others and in that regard a case was lodged. The incident of the present case took place on 06.03.1989. It was alleged that on 06.03.1987 at around 11:30 AM when Bajrangi Rai was going to irrigate his field, the accused-appellants came there and hurling abuses, they asked him to stop irrigation. Hearing noise, one Phool Chand, Gorakh Rai, Harikesh Rai and some other persons also reached there but the accused-appellant no. 1 Dhruv Raj Rai gave a spear (ballam) blow at Bajrangi while remaining accused persons started beating with lathis. When PW-2 Phool Chand, Rajendra Rai and Harikesh tried to intervene, they were also beaten by the accused persons.

4. The complainant reported matter to police by submitting a written tehrir Ex. Ka-1 and on that basis, case was registered against all the accused persons under Sections 147, 148, 149, 326, 323, 504 IPC on 06.03.1989 at about 12:45 PM vide FIR Ex. Ka-10.

5. Injured Phool Chand was medically examined by PW-4 Dr. Abdul Moin vide MLC Ex. Ka-2 and following injuries were found on his person:

(i) 3.5 cm x 1 cm x muscle deep lacerated wound on the right side of forehead 1 cm above the right eyebrow. Clotted blood present.

(ii) 2.5 cm x 0.5 cm x muscle deep vertical lacerated wound on the forehead including inner part of right eyebrow. Clotted blood present.

(iii) 10 cm x 1 cm x scalp deep lacerated wound on the middle part of head 15 cm above the left ear. Clotted blood present.

(iv) 4.5 cm x 1.0 cm x through and through incised wound on the letf ear. Blood clotted present. Margins clear cut.

(v) 13.5 cm x 0.5 cm x muscle deep oblique incised wound on the left side of neck including the pinna of left ear. Margins clear cut blood present.

(vi) 2 cm x 0.5 x muscle deep incised wound on the left side of face 3 cm below the outer contusion of left eye. Blood present.

(vii) 4 cm linear abrasion on the inner part of right thigh 25 cm above the knee joint.

(viii) 19 cm linear abrasion on the back of left thigh 21 cm above the knee joint.

(ix) 22 cm x 14 cm contusion on the left forearm including elbow joint deformity just Adv. x-ray.

(x) 2 cm x 1.5 cm abrasion on the back of left elbow just. Clotted blood present.

(xi) 3.5 cm x 0.5 cm x muscle deep irain severe incised wound on the outer and back of left upper arm 7 cm above the left elbow joint.

(xii) 10 cm linear abrasion on the left side of abdomen including lower part of chest.

(xiii) 15 cm x 2.5 cm contusion on the left side of outer part of chest 9 cm outer and below the left nipple. Colour reddish.

(xiv) 10 cm x 4 cm contusion on the dorsum of left hand. Adv. x-ray. Kept U.O.

On the same day, injured Harikesh Rai was also medically examined by PW-4 Dr. Abdul Moin vide MLC Ex. Ka-3 and following injuries were found on his person:

(i) 2 cm x 1.5 cm scalp deep triangular lacerated wound on the front of head 8 cm above the base of nose.

(ii) 8 cm x 1 cm abrasion on the right side of head 11 cm above the right ear. Blood present.

(iii) 17 cm x 2.5 cm oblique contusion on the right upper back 8 cm below the shoulder joint colour reddish.

(iv) 9 cm linear irain severe abrasion with 2 cm x 0.5 cm muscle deep incised wound on the midline of back 23 cm below the 7th cervical spin. Blood present.

(v) 8 cm x 2 cm oblique contusion on the right upper back 15 cm below the right shoulder joint. Colour reddish.

(vi) 23 cm x 2.5 cm oblique contusion on the left side of chest and abdomen adjacent to left nipple. Colour reddish.

(vii) 2 cm x 0.5 cm x muscle deep incised wound on the left side of chest 7 cm inner and below the left nipple. Blood present.

(viii) 2 cm x 0.5 cm x muscle deep incised irain severe wound on the abdomen 3 cm below the umbilicus. Blood present.

(ix) 4 cm x 2.5 cm abrasion on the outer and back of left upper arm 6 cm above the elbow joint. Blood present.

(x) 15 cm x 2 cm contusion on the outer and back of left forearm including elbow joint colour reddish.

(xi) 13 cm x 11 cm contusion on the dorsum of left hand including wrist joint. Adv. X-ray.

(xii) 2 cm x 0.3 cm abrasion on the dorsum of right hand 4 cm below the wrist joint blood present.

Injured Rajendra Rai was medically examined by PW-4 Dr. Abdul Moin vide MLC Ex.Ka-4 and following injuries were found on his person:

(i) 3 cm x 0.5 cm x scalp deep irain severe incised wound on the front of head 7 cm above the base of nose. Blood present. Margins clean cut.

(ii) 4 cm x 0.5 cm x scalp deep vertical lacerated wound on the left side of head 10cm above the left ear. Blood present.

(iii) 5 cm x 0.5 cm x upto bone deep lacerated wound on the middle part of head 2 cm above the injury no. II.

(iv) 3 cm x 0.5 cm x scalp deep lacerated wound on the right side of head 11 cm above the right ear.

(v) 2 cm x 2.5 cm x scalp deep lacerated circular wound on the right side of head 2 cm below the injury no. IV.

(vi) 8 cm x 2.5 cm x 2 cm deep incised wound on the right shoulder region. Clotted blood present. Adv. x-ray kept U.O.

(vii) 7 cm x 2.5 cm abraded contusion on the outer part of right upper arm 14 cm below the injury no. VI. Blood present colour reddish.

(viii) 7 cm x 0.5 cm abrasion on the outer and lower part of right upper arm 4 cm above the elbow joint. Blood present.

(ix) 8 cm x 2 cm abraded contusion on the outer and back of right forearm 11 cm below the elbow joint. Blood present scalp not formed colour reddish.

(x) 8 cm x 5 cm contusion with 0.5 cm x 0.2 cm x muscle deep lacerated wound on the dorsum of right hand 6 cm distal to wrist joint colour reddish. Blood present.

(xi) 5 cm x 1 cm x muscle deep incised wound on the ventral aspect of right palm including wrist joint margin clear cut blood present.

(xii) 3 cm x 0.5 cm x muscle deep incised wound on the right palm including base of ring finger margins clear cut. Blood present.

(xiii) 2.5 cm x 0.5 cm x muscle deep incised wound on the ventral aspect of right middle finger 1 cm x proximal to its tip.

(xiv) 4 cm x 0.5 cm x muscle deep incised wound on the ventral aspect of right ring finger 1.5 cm proximal to its tip.

(xv) 2 cm x 0.5 cm x muscle deep incised wound on the ventral aspect of right little finger 1 cm proximal to its tip.

(xvi) 0.5 cm x 0.3 cm x muscle deep lacerated wound on the outer part of right leg 18 cm below the knee joint. Blood present

(xvii) 5 cm x 0.5 cm x muscle deep incised wound on the front of right leg. 1.5 cm below the injury no. XVI.

(xviii) 2 multiple abrasion in the areas of 29 cm x 13 cm on the front and outer part of right leg 10 cm below the knee joint.

(xix) 12 cm x 2.5 cm contusion on the inner and front of left upper arm 26 cm below the left shoulder joint.

(xx) 7 cm x 1 cm x muscle deep incised wound irain severe on the ventral aspect of left palm adjacent to writ joint.

(xxi) 12 cm x 2 cm x upto bone deep incised wound on the outer part of

left palm adjacent to injury no. XX. Adv. x-ray kept U.O.

(xxii) 6 cm x 1 cm x muscle deep incised wound on the ventral aspect of left thump upto its base.

(xxiii) 11 cm x 1 cm x skin deep incised wound on the left upper back 14 cm below the left shoulder joint blood present.

(xxiv) 14 cm x 2.5 cm oblique contusion on the left middle back 13 cm below the injury no. XXIII. Colour reddish.

6. During treatment, injured Bajrangi Rai succumbed to injuries and thus, sec 304 IPC was added. Inquest proceedings on the dead body of Bajrangi Rai were conducted by S.I. Ambika Pandey and thereafter his dead body was sent for postmortem.

7. PW-5 Dr. N.K. Jaiswal conducted post-mortem on the dead body of deceased vide post-mortem report Ex. Ka-8 and following injuries were found on his person:

(i) penetrating wound 2.25 cm x 1 cm x abdominal cavity deep left side abdomen oblique in direction 6 cm below and out from umbilicus 4 o'clock position.

(ii) 16 cm stitched wound (surgical) paramedian vescial rt side abdomen lower part 1 cm away from umbilicus one drainage tube present left side abdomen lower part.

According to autopsy surgeon, the cause of death o*f the deceased is due to shock and haemorrhage as a result of ante-mortem injury.*

8. After completion of investigation, all the accused-appellants were charge sheeted. Learned trial court framed charge against accused Dhruv Raj Rai under Section 304 IPC, 148, 304/149, 326/149 IPC, while accused-appellants Ramesh Rai and Radhey Shyam were charged under section 147, 326/149 and 304/149 IPC and accused-appellants Ghan Shyam alias Dhannu, Man Shyam alias Mannu, Rajeshwar Rai, Singhasan, Jagdish and Mahendra were charged under Section 148, 326/149 and 304/149 IPC. The accused persons pleaded not guilty and claimed trial.

9. So as to hold the accused persons guilty, prosecution has examined seven witnesses. After prosecution evidence, accused persons were examined under Section 313 Cr.P.C, wherein they have denied the evidence and claimed false implication. However, no oral evidence was adduced in defence. In documentary evidence, accused persons have filed copies of certain documents viz Ex. Kha-1 to kha-5 in their defence.

10. After hearing and analyzing the evidence on record, learned Trial court convicted the accused-appellants under the aforesaid sections vide impugned judgment and order dated 02.11.2000 and sentenced them as mentioned in paragraph no. 1 of this judgment.

11. Being aggrieved by the impugned judgment and order of trial court, the accused-appellants have preferred present criminal appeal.

12. Heard Sri Rajendra Rai, learned counsel for the accused-appellants, Sri Sharad Kumar Srivastava, learned counsel for the complainant and Sri Nagendra

Kumar Srivastava, learned A.G.A. for the State-respondent.

13. Learned counsel for the accused-appellants has argued:

(i) that there is undue delay in lodging the FIR. As per prosecution version, the alleged incident took place on 06.03.1987 at 11:30 AM but the FIR was lodged on 06.03.1987 at 12:45 hours, which shows that FIR was lodged after making consultation and the same makes prosecution case doubtful.

(ii) that PW-1 Rajender Rai, PW-2 Phoolchand, PW-3 Surendra Kumar Rai are interested witnesses and thus, their testimony cannot be believed. Further, in his cross-examination, PW 1 has not supported prosecution version regarding involvement of accused-appellants, which makes prosecution version doubtful.

(iii) that the appellants have been falsely implicated in this case on account of enmity. In that regard certain documents of previous litigation were also referred. It was argued that accused-appellants have been falsely implicated on account of land dispute.

(iv) that medical evidence is not consistent with the ocular testimony of the witnesses and thus, the evidence of PW-1, PW-2 and PW-3 cannot be relied upon.

(v) that for the sake of argument, even if the prosecution version is taken as such, no offence under Section 304/149, 326/149 IPC is made out. It was pointed out that the alleged incident has taken place in the year 1987 and thus, the period of about 32 years has already elapsed.

(vi) that there are serious contradictions and inconsistencies in the statements of the witnesses, which rendered their evidence unreliable.

14. On the other hand, supporting the impugned judgement, it has been argued by State counsel that the conviction of the appellants is in accordance with law and there is no infirmity in the same. In the alleged incident several persons have sustained serious injuries and thus, the delay in lodging the FIR is quite natural as the first priority of injured persons would be to get medical treatment and not to rush to the police station for lodging FIR. In the alleged incident PW-2 Phoolchand and two more persons have sustained severe injuries and thus, their presence at the spot can not be doubted at the spot. The injured witness has made clear and cogent statement against the accused-appellants and no major contradiction or inconsistency could be pointed out. It was further submitted that testimony of a witness can not be disbelieved on the ground that he is related to deceased or is an interested witness. An injured witness would be the last person to spare the actual assailants and to falsely implicate any innocent person. It was further submitted that evidence of PW-1, PW-2 and PW-3 has been amply corroborated by medical evidence and the nature of injuries sustained by injured persons as well as by deceased and the manner of assault and the weapon used, clearly brings out a case against the accused-appellants under Section 304 and 326 of IPC besides Section 147/148 of IPC, under which they have been held guilty by the learned trial court. It was argued that conviction of all the accused-appellants is based on evidence and there

is no error or illegality in the impugned judgment and order.

15. I have considered the rival contentions of learned counsel for both the parties and perused record.

16. In evidence, PW-1 Rajender Rai stated that before the incident, on 09.01.1987 Dhruv Raj Rai, Mahender, Ramesh, Ghanshyam alias Dhannu and Singhasan have assaulted him and regarding that incident a case was registered at police station Phoolpur, district Azamgarh. The incident of present case took place on 06.03.1987 at 11:30 AM. When Bajrangi Rai was going to irrigate his land by pumping set, accused Dhannu, Munnu, Rajeshwar having gandasa, accused Radhey Shyam, Sankatha, Ramesh having lathi, accused Singhashan, Ghan Shyam having sword, accused Dhruv Raj and Mahender having ballam and accused Jagdish having country made pistol, came there and making exhortation, accused Dhruv Raj assaulted Bajrangi by ballam and thereafter all the accused persons assaulted the injured as well as the deceased.

17. PW-2 Phool Chand Rai stated that on the day of incident at about 11:15-11:30 AM, he was present at his agricultural land. Near his land, deceased Bajrangi was irrigating his wheat crop. Accused Sankatha Rai, Dhruv Raj Rai, Ramesh Rai, Ghan Shyam Rai son of Surya Bali Rai, Jagdish Rai, Mahendra Rai, Rajendra Rai, Ghan Shyam alias Dhannu son of Rajeshwar Rai, Manshyam alias Munnu, Singhasan Rai, Radhey Shyam Rai came there. Accused Sankatha, Ramesh and Radhey Shyam were having lathi, accused Ghan Shyam, Man Shyam and Rajeshwar were having spear (ballam), accused Dhruv Raj and Mahendra were also having spear, accused Ghan Shyam, Man Shyam and Rajeshwar were having gadasi, accused Ghan Shyam son of Suryabali and Singhashan were having sword and Jagdish was having country made pistol. They asked Bajrangi to stop water of irrigation and when Bajrangi refused to do so, they hurled abuses and starting beating Bajrangi. Hearing noise, PW-2 Rajendra, Harikesh and one Rajendra reached there but they were also assaulted by the accused persons. Dhruv Raj has given a spear blow at Bajrangi. PW-2 Phool Chand further stated that in this incident, he as well as one Rajendra and Harikesh also sustained injuries. Bajrangi died of injuries sustained in the alleged incident as he has suffered a spear blow at his stomach. Bajrangi was taken to police station and thereafter to hospital. PW-2 and other injured were also taken to hospital and were medically examined. Rajendra Rai has lodged report at police station and has taken deceased Bajrangi to hospital. PW 2 further stated that about 1-1 ½ months prior to this incident, Ghan Shyam, Rajeshwar and Raju etc. have assaulted Rajendra and regarding that incident, Mahendra, Dhruv Raj, Ramesh, Singhasan and Ghan Shyam alias Dhannu have faced the trial and they were convicted in that case. In the alleged first incident, Bajrangi and his brother Surendra have helped Rajender and due to this reason, accused persons have developed an animosity towards Rajrangi and Surender.

18. PW-3 Surendra Kumar Rai stated that on 08.01.1987 Ghan Shyam alias Dhannu, Singhasan, Mahendra, Dhruv Raj and Ramesh have assaulted

Rajender. He (PW-3) has taken Rajendra to Varanasi and provided treatment to him and in that incident, PW-3 was an witness. In that case, above stated accused persons were convicted. Due to this, accused persons have developed animosity towards him. The incident of this case took place on 06.03.1979 at 11:30 AM. He (PW-3) and his brother Bajrangi were irrigating their land by pumping set and while his brother was at his land, hearing noise, PW-3 also reached there and saw that Sankatha Rai, Radhey Shyam and Ramesh were having lathi, Dhruv Raj Rai and Mahendra were having spear, Singhasan Rai and Ghan Shyam son of Suryabali were having sword, Jagdish was having country made pistol, Rajeshwar Rai, Ghan Shyam alias Dhannu, Ghan Shyam alias Munnu were having gadasi and they all were making exhortation to kill Bajrangi. Jagdish has fired a shot with country made pistol. Hearing noise, Harikesh Rai, Phool Chand Rai, Rajendra Rai also reached there. On the exhortation of Jagdish Rai, Dhruv Raj Rai gave a spear blow at Bajrangi, which hit at his stomach while rest of the accused persons assaulted Harikesh Rai, Phool Chand Rai and Rajendra. PW-3 further stated that he was irrigating his land but accused persons wanted to irrigate their land and have asked them to stop water of irrigation. In this incident, Bajrangi, Harikesh Rai, Phool Chand and Rajendra have sustained injuries. Bajrangi has sustained serious injuries. Rajender Rai has lodged the FIR and Bajrangi was taken to the hospital. Harikesh, Phool Chand and Rajendra were also medically examined and were provided treatment. On 06.03.1987, Bajrangi Rai succumbed to injuries in district hospital.

19. PW-4 Dr. Abdul Moin has medically examined injured Phool Chand Rai, Harikesh Rai, Rajendra Rai and has proved their MLC as Ex.Ka-2, Ex. Ka-3 and Ex. Ka-4.

20. PW-5 Dr. N.K. Jaiswal has conducted postmortem on the dead body of the deceased Bajrangi while PW-6 Dr. P.K. Sinha has medically examined deceased Bajrangi on 06.03.1987, while he was in injured condition.

21. PW-7 S.I. Shakuntala Pandey has proved FIR Ex. Ka-10 and GD entry Ex.Ka-11 by way of secondary evidence. She has also proved other relevant documents of inquest Ex.Ka-13 to Ex.Ka-16 including panchayatnama by way of secondary evidence. She has also proved site plan of the spot prepared by S.I. Vijay Singh as Ex.Ka-18 and chargesheet as Ex.Ka-19 by way of secondary evidence.

22. So far as the question of delay in lodging FIR is concerned, it is well settled that if delay in lodging FIR has been explained from evidence on record, no adverse inference can be drawn against prosecution merely on the ground that the FIR was lodged with delay. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. In **"Ravinder Kumar & Anr. Vs. State of Punjab", (2001) 7SCC 690**, Hon'ble Apex Court held that:

"The attack on prosecution cases on the ground of delay in lodging FIR has almost bogged down as a stereotyped redundancy in criminal cases. It is a recurring feature in most of the criminal cases that there would be some delay in furnishing the first information to the police. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin

advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly FIR is not an unreserved guarantee for the genuineness of the version incorporated therein. When there is criticism on the ground that FIR in a case was delayed the court has to look at the reason why there was such a delay. There can be a variety of genuine causes for FIR lodgment to get delayed. Rural people might be ignorant of the need for informing the police of a crime without any lapse of time. This kind of unconversantness is not too uncommon among urban people also. They might not immediately think of going to the police station. Another possibility is due to lack of adequate transport facilities for the informers to reach the police station. The third, which is a quite common bearing, is that the kith and kin of the deceased might take some appreciable time to regain a certain level of tranquility of mind or sedativeness of temper for moving to the police station for the purpose of furnishing the requisite information. Yet another cause is the persons who are supposed to give such information themselves could be so physically impaired that the police had to reach them on getting some nebulous information about the incident."

In **Amar Singh Vs. Balwinder Singh & Ors. (2003) 2 SCC 518,** the Hon'ble Apex Court held that :

"In our opinion, the period which elapsed in lodging the FIR of the incident has been fully explained from the evidence on record and no adverse inference can be drawn against the prosecution merely on the ground that the FIR was lodged at 9.20 p.m. on the next day. There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."

In this connection it will also be useful to take note of the following observation made in **Tara Singh V. State of Punjab AIR (1991) SC 63.**

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station

for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts should be cautious to scrutinize the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstance of each case."

In **Sahebrao & Anr. Vs. State of Maharashtra (2006) 9 SCC 794,** Court has held:

"The settled principle of law of this Court is that delay in filing FIR by itself cannot be a ground to doubt the prosecution case and discard it. The delay in lodging the FIR would put the Court on its guard to search if any plausible explanation has been offered and if offered whether it is satisfactory."..

From the above discussed exposition of law, it is manifest that prosecution version can not be rejected solely on the ground of delay in lodging FIR. Court has to examine the explanation furnished by prosecution for explaining delay. There may be various circumstances particularly number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If prosecution explains the delay, Court should not reject prosecution story solely on this ground. Therefore, the entire incident as narrated by witnesses has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of the prosecution and even if there is some unexplained delay, court has to take into consideration whether it can be termed as abnormal. Recently in **Palani V State of Tamilnadu, Criminal Appeal No. 1100 of 2009, decided on 27.11.2018,** it was observed by the Hon'ble Supreme Court that in some cases delay in registration of FIR is inevitable. Even a long delay can be condoned if witness has no motive for falsely implicating the accused. In the instant case, the alleged incident took place on on 06.03.1987 at 11.30 AM and the FIR was registered on the same day at 12.45 hours. In this case evidence shows that one person namely Bajrangi has sustained serious injuries and after the incident he was taken to hospital by the complainant. Three other injured have also sustained multiple injuries. The distance of police station from the spot was shown four miles. The FIR was registered within one hour 15 minutes of the incident. In view of all these facts, it can not be said that there is undue delay in lodging the FIR and thus, the contention of learned counsel for the appellant has no force.

23. So far as the contention, that PW-1, PW-2 and PW-3 are interested witnesses, is concerned, it is well settled position that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a

witness was present on the scene of occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of **State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834**, it has been held by the Apex Court that ordinarily the mere relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In the case of **Dilip Singh Vs State of Punjab, A.I.R. 1983, S.C. 364,** it was held by the Supreme Court that the grounds that the witnesses being the close relatives and consequently being the partition witness would not be relied upon has no substance. Similar view has been taken by the Supreme Court in **Harbans Kaur V State of Haryana, 2005, S.C.C. (Crl.) 1213;** and in **State of U.P. vs. Kishan Chandra and others, 2004 (7), S.C.C. 629.** The contention about branding the witnesses as 'interested witness' and credibility of close relationship of witnesses has been examined by Apex Court in number of cases. A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness', as held by the Supreme Court in **Dalbir Kaur v. State of Punjab, AIR 1977 SC 472**. The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence straight way unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. Similar view was taken in case of State of **Gujrat v. Naginbhai Dhulabhai Patel, AIR 1983 SC 839.**

In the present case, it is correct that PW 3 Surender Kumar Rai is brother of deceased Bajrangi but it can not be a sole ground to doubt his testimony. PW 3 has been subjected to cross-examination, but no such adverse effect could emerge, so as to make his presence at the scene of offence doubtful. Regarding PW-2 Phoolchand it was submitted that there was litigation between him and some of the accused persons and thus, he is an enmical witness. In support of this contention some documents were also filed in defence. It may be seen that PW 2 has made a clear and cogent statement regarding the alleged incident. His presence at the spot is established by the fact that he himself has sustained injuries in the incident. Medical examination report of PW 2 Phoolchand shows that he has sustained as many as 14 injuries, thus, his presence at the spot is established. He has been subjected to lengthy cross-examination, but no such adverse effect could emerge, so as to affect his credibility. Version of PW-1 has been amply corroborated by PW-2 and PW-3. Thus, the contention of learned counsel for the accused-appellants has no force.

24. So far as this contention is concerned that there was enmity between the parties on account of the land dispute and that the appellants have been falsely implicated on account of that enmity, it is well repeated legal saying that enmity is a double edged weapon and it cuts both

ways. On the one hand, it may be a reason for false implication while on the other hand, it may also provide a motive for commission of offence. In the instant case, one person (Bajrangi) has died and three persons sustained injuries in the alleged incident. PW-2 Phool Chand has sustained 14 injuries, Harikesh Rai has sustained 12 injuries and Rajendra Rai has sustained 24 injuries. In view of the injuries, it is apparent that deceased and injured persons were assaulted in a serious manner by using various types of weapons. The accused-appellants have not come up with any such case that if they were not involved in the incident, how deceased Bajrangi and injured persons have sustained alleged injuries. FIR of the alleged incident was lodged without any undue delay naming all the accused persons. In view of all attending facts and circumstances of the case and particularly keeping in view the nature of injuries sustained by deceased and injured persons, it cannot be imagined that the injured persons would falsely implicate the accused persons leaving their actual assailants. It is well settled that if a case is based on direct testimony of eye witnesses, proof of motive is not required. However, in the instant case it may also be seen that as per prosecution version before the incident in question, on 08.01.1987 accused Ghan Shyam alias Dhannu, Singhasan, Mahendra, Dhruv Raj Rai and Ramesh have assaulted complainant of the present case namely Rajendra Rai and regarding that incident a case was registered against them, in which the above stated accused persons were convicted. PW-3 Surendra Kumar Rai was a prosecution witness in that case. Though the present case is based on direct testimony of eye witnesses but in view of the above-stated evidence, prosecution has been able to prove motive to commit the alleged incident. In view of the aforesaid, contention of learned counsel for the accused-appellants has no force.

25. It was next argued that oral evidence is not consistent with medical evidence. It is trite law that oral evidence has to get primacy as medical evidence is basically opinionative. It is only when the medical evidence especially rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case, the Court has to draw the adverse inference. It is well settled by a series of decisions of the Apex Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eyewitnesses has to get primacy as medical evidence is basically opinionative. But when the court finds inconsistency in the evidence given by the eyewitnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in a different perspective by the courts. In ***Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484,*** the Hon'ble Supreme Court observed as under:

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-

witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

A similar view has been taken in **Mani Ram & Ors. v. State of U.P., 1994 Supp (2) SCC 289; Khambam Raja Reddy & Anr. v. Public Prosecutor, High Court of A.P., (2006) 11 SCC 239; and State of U.P. v. Dinesh, (2009) 11 SCC 566. In State of U.P. v. Hari Chand, (2009) 13 SCC 542,** the Hon'ble Apex Court re-iterated the aforementioned position of law and stated that in any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy over the medical evidence.

From the above stated authorities, it is clear that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, but when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. Where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. In the present case as per the prosecution version, deceased Bajrangi was attacked by accused Dhruraj with spear and the injury sustained by Bajragi were penetrating wound 2.25 cm x 1 cm x abdominal cavity deep on left side of abdomen and a 16 cm stitched wound at right side of abdomen. Similarly injured were attacked with clubs, sticks, 'gadasi, spear and sword. Considering the nature of injuries sustained by the deceased as well as by the injured persons, it is apparent that these injuries were possible by the alleged weapons. In view of these facts, it can not be said that oral evidence is not consistent with medical evidence. At any rate, it can not be said that the oral evidence is totally irreconcilable with the medical evidence. Further oral evidence has primacy over the medical evidence. The medical evidence does not make the ocular testimony improbable nor the alleged inconsistency is of such nature that it completely rules out all possibility of the ocular evidence being true. Thus, the contention of learned counsel for the accused-appellants has no force.

26. Learned counsel for the accused-appellants has pointed out certain contradiction and stated that in his cross-examination, PW-1 has stated that after hearing noise when he was coming out from "abadi" area, Bajrangi has met him in injured condition and PW-1 took him to the police station and that neither Surendra nor any other persons was with him. PW-1 has also stated that in the earlier incident of 08.01.1987 Surendra Rai was a witness but he has not deposed from the side of complainant. It was further pointed out that in his cross-examination PW-1 stated that the FIR was lodged on the version of injured Bajrangi Rai. From the cross-examination of PW-1, it appears that in later part of his cross-examination, he has back tracked from his earlier version and on certain important points he did not support the prosecution case. However, the alleged contradictions and inconsistencies emerged in his cross-examination, are not supported by his statement recorded under Section 161 Cr.P.C. In his examination in-chief, PW 1 has made clear categorical statement against all the accused persons but in later part of his cross-examination, he made a volta facie on some substantial points. Considering the entire facts, it appears

that in his cross-examination, PW-1 has deliberately not supported the prosecution case and turned hostile and after some cross-examination, PW-1 was declared as hostile by the prosecution. However as his examination-in-chief is fully consistent with his earlier version and FIR and also corroborated by PW-2 and PW-3 and thus, the hostility of PW-1 in his cross-examination would not affect the testimony of PW-2 and PW-3. Even the relevant part of examination of PW-1, which appears truthful and support prosecution may be taken in to consideration against the appellants-accused. Thus, the argument of learned counsel for the accused-appellants has no force.

For the sake of arguments even if it is assumed that PW 1 Rajender Rai has not witnessed the incident, as claimed by him in later part of his cross-examination, the testimony of injured witness PW 2 Phool Chand Rai is quite clear and cogent. In his statement, PW 2 has stated vivid description of the incident. No major contradiction or inconsistency could be pointed out in his statement. His statement is consistent with medical evidence. Though in the FIR, no specific weapon was attributed to the accused persons except that of accused-appellant Dhruv Raj Rai but it is well settled that FIR is not a encyclopaedia of case. Further, FIR was not lodged by PW-2 Phool Chand Rai and as stated earlier, FIR was lodged by PW-1, who has admitted in his cross-examination that he has not witnessed the incident. It was pointed out that PW-2 has admitted in his cross-examination that there was enmity between him and accused persons, however, as discussed above, it can not be a factor to doubt his testimony, which otherwise is cogent and inspires confidence. The testimony of PW-2 has been corroborated by PW-3 Surendra Kumar Rai. The testimony of PW-3 was mainly assailed on the ground that PW-2 has not spoken about his presence, however, it cannot be a reason to doubt the presence of PW-3 at the spot. The statement of PW-3 is clear and cogent and no important contradiction or infirmity could be shown in his statement. PW-2 and PW-3 have been subjected to cross-examination but no such important fact could emerge, which may create any dent on the prosecution version. As stated earlier, PW-2 is an injured witness. In **Jarnail Singh Vs. State of Punjab (2009) 9SCC 719**, the Supreme Court reiterated the special evidentiary status accorded to the testimony of an injured accused. It was held that the fact that witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case, the injured witness is subjected to lengthy cross- examination and nothing can be elicited to discard his testimony, it should be relied upon. Similar view was expressed in the case of **Krishan v State of Haryana, (2006) 12 SCC 459.** With respect to the evidence of victim, the Supreme Court in Criminal Appeal Nos. 513-514 of 2014 decided on 09.01.2017 in case of **Baleshwar Mahto & Anr. v. State of Bihar & Anr.**, has reiterated the law laid down in case of **Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259**, which reads as under :

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness

to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.

"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881:1973 SCC (Cri) 563:AIR 1972 SC 2593], Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], Mohar v. State of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] 29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. .....In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

27. When the aforesaid principles are applied in the facts of this case, it would show that the injured witness PW-2 Phool Chand has named all the accused-appellants. As stated earlier, the testimony of the injured witness is accorded a special status in law and the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. In the instant case, injured witness PW 2 Phoolchand has made clear and cogent statement. He has been subjected to lengthy cross-examination, but nothing adverse could come out. His version is consistent with medical evidence. No such reasons could be shown as to why he would depose falsely against appellants-accused sparing his actual assailants. The prosecution has also proved motive of the alleged incident. Considering entire evidence on record, the involvement of all the accused appellants in the alleged incident is established.

28. However, examining the entire evidence carefully, it appears that all the accused appellants are not liable for conviction under all the charges as held by learned trial court. So far death of deceased Bajrangi is concerned, appellant-accused Dhruraj has been convicted under section 304 IPC while rest of the appellants-accused have been convicted under section 304 IPC with the aid of section 149 IPC. The evidence shows that deceased Bajrangi Rai has sustained merely two injuries, which have been attributed to appellant-accused Dhruraj. Provisions of Section 149 of IPC provide that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The first part of Section 149 IPC states about the commission of an offence in prosecution of the common object of the assembly whereas the second part takes within its fold knowledge of likelihood of the commission of that offence in prosecution of the common object. Scope of two parts of Section 149 IPC has been explained in **Rajendra Shantaram Todankar v. State of Maharashtra and Ors. [JT 2003 (2) SC 95],** the Apex Court has explained Section 149 and held as under:

"14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood

of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 -- either clause -- is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act....."

The same principles have been reiterated in **State of Punjab v. Sanjiv Kumar alias Sanju and Ors.** [JT 2007 (9) SC 274].11. Creation of vicarious liability under Section 149 IPC is well elucidated in **Allauddin Mian and Others, Sharif Mian and Anr. v. State of Bihar [JT 1989 (2) SC 171],** this Court held:

"8. .....Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly....." [underlining added].

The same principles were reiterated in paras (26) and (27) in **Daya Kishan v. State of Haryana [JT 2010 (4) SC 325]** and also in **Kuldip Yadav and**

Ors. v. State of Bihar [JT 2011 (4) SC 436]. Whether the members of the unlawful assembly really had the common object to cause the murder of the deceased has to be decided in the facts and circumstances of each case, nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the circumstances under which the occurrence took place. It is an inference to be deduced from the facts and circumstances of each case (vide **Lalji and Ors. v. State of U.P. [JT 1989 (1) SC 109]; Ranbir Yadav v. State of Bihar** [JT 1995 (3) SC 228]; **Rachamreddy Chenna Reddy and Ors. v. State of A.P.** [JT 1999 (1) SC 412]).

In prosecution of "common object' means "in order to attain the common object'. Effect of section 149 may be different on different members of the same assembly. Common object is determined keeping in view nature of the assembly, arms carried by members and behaviour of members at or near the scene of incident. It is not necessary in all cases that the same must be translated into action or be successful. It is well settled that the expression "in prosecution of common object" has to be strictly construed as equivalent to "in order to attain the common object.' The word "knew' used in the second part of section 149 IPC implies something more than possibility and it cannot bear the sense of might have known'. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. Members of an unlawful assembly may have community of object upto a certain point. The "common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances.

29. Coming to the facts of present case, it may be seen that as per injury report Ex. Ka-9, deceased Bajrangi Rai has sustained one lacerated wound of 2 cm x 1.5 cm x 0.5 cm at left side of his stomach and another injury was swelling in the area of 4 cm x 3 cm at left arm. As per post-mortem report of deceased Bajrangi Rai, he has sustained one penetrating wound 2.25 cm x 1 cm x abdominal cavity deep left side of abdomen and one stitched wound of 16 cm size at right side of stomach. According to prosecution, accused appellant Dhruv Raj Rai has attacked Bajrangi with spear and other accused persons have attacked with gandasi and sticks, however, in view of post-mortem report of the deceased, it is apparent that deceased has sustained merely two injuries and the fatal injury i.e. penetrated wound, is quite probable by spear. The post-mortem report of deceased does not indicate that he was assaulted by all the accused persons, who were eleven in numbers. PW-2 and PW-3 have also not attributed any specific role to the accused persons except that of Dhruv Raj Rai, in causing injuries to deceased Bajrangi. These witnesses have stated deceased was given spear blow by Dhruv Raj Rai and thereafter rest of the accused persons assaulted injured persons. All these facts indicate that unlawful assembly of accused persons might not have common object to cause death or culpable homicide of deceased. It was the individual act of accused appellant Dhruv Raj Rai, which is responsible for causing

fatal injury to the deceased. Here it would be pertinent to mention that even learned trial court has charged accused-appellant Dhruv Raj Rai under Section 304 IPC simpliciter while rest of the accused persons were charged under Section 304/149 IPC. In the facts and circumstances of the case, this court is of the view that so far the death of deceased Bajrangi is concerned, the prosecution has not proved the existence of the common object of causing death of deceased amongst the accused persons and that all of them acted in furtherance of the common object to invoke the first part of Section 149 IPC and thus, it would not be safe to convict the accused persons under Section 304 IPC with the aid of Section 149 IPC. Thus, conviction of accused appellants Ramesh Rai, Radhey Shyam, Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra under Section 304/149 IPC is not sustainable. However, so far as accused appellant Dhruv Raj Rai is concerned, his conviction under Section 304 IPC is based on evidence and thus, liable to be upheld. So far as the conviction of all the accused-appellants under Section 326/149 IPC is concerned, it may be seen that learned trial court has found that accused-appellant Radhey Shyam, Sankatha and Ramesh were having lathi, while rest of the accused persons were armed with gandasi, spear, sword and country made pistol. Perusal of medical evidence shows that injured Phool Chand Rai has sustained 14 injuries, which included lacerated, incised, abrasion and contusion wounds and as per x-ray report Ex.Ka-6, he has suffered fracture in radius ulna bone and parietal bone. Injured Harikesh Rai has sustained 12 injuries and as per ex-ray report Ex.Ka-5, he has suffered fracture in radius bone. Out of the injuries sustained by injured Harikesh Rai, there were three incised wounds and other were contusions. Injured Rajendra Rai has sustained as many as 24 injuries, which included incised, lacerated and contusion wounds etc. As per x-ray report Ex.Ka-7, injured Rajendra Rai has sustained fracture in spine and scapula. In view of the evidence on record conviction of all the appellants-accused 326/149 IPC is based on evidence. The conviction of appellant-accused Ramesh Rai and Radheysyam u/s 147 IPC and of appellant-accused Manshyam @ Mannu, Singhasan, Jagdish, Mahender and Dhruraj u/s 148 IPC is also based on evidence.

30. In view of aforesaid, conviction of accused appellant Dhruv Raj Rai under Section 148, 304, 326/149 IPC is upheld. Similarly conviction of accused appellants Man Shyam alias Mannu, Singhasan, Jagdish, Mahendra, Ramesh Rai and Radhey Shyam under Section 326/149 IPC is upheld, however, their conviction and sentence under Section 304/149 IPC is set aside. Conviction of appellant Ramesh Rai and Radhey Shyam under Section 147 IPC and of appellants-accused Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra under Section 148 IPC is also based on evidence and has to be upheld.

31. So far as the question of sentence is concerned, it may be observed that alleged incident took place on 06.03.1987 and since then the period of 32 years has elapsed. Accused Sankatha, Ghan Shyam and Surya Bali have died during trial, while accused-appellant no. 2 Rajeshwar Rai and accused-appellant no. 5 Ghan Shyam alias Dhannu have expired during pendency of this appeal. No doubt,

a period of more than three decades has passed since the incident, however, it can not be ignored that in the alleged incident one person has lost his life and he was attacked with spear at his stomach and that three injured persons have sustained multiple injuries. Out of injured persons, injured Rajendra Rai has sustained as many as 24 injuries. So far as accused appellant Dhruv Raj Rai is concerned, considering the evidence and his specific act of attacking deceased with spear, his sentence of seven years along with fine of Rs. 1,000/- under Section 304 IPC is justified and the same is upheld accordingly.

So far as other appellants are concerned, they have not caused any injury to the deceased Bajrangi. Among the injured persons, injured Phoolchand has sustained fracture in lower V3 and in V3 shaft radius and injured Rajender Rai sustained in spine of scapula at lateral end of right scapula. Except these, all other injuries sustained by injured persons were simple in nature. Five co-accused persons have already died. At the time of recording statements under section 313 CrPC in the year 2000, accused-appellant Jagdish Rai was aged 55 years and Radheyshyam was aged 46 years. Other accused were in late thirties or early forties. It was submitted that appellants Ghanshyam Rai and Manshyam have remained in jail for about three months, while rest of the appellants remained in jail for about one month. Considering all relevant facts at this stage it would not be appropriate to send them to jail. This court is of the view that ends of justice would met if appellants-accused Ramesh Rai, Radhey Shyam, Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra are sentenced to the period alraedy undergone by them along with some substantial amount of fine.

32. Resultantly conviction of appellants-accused Ramesh Rai, Radhey Shyam, Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra u/s 326/149 IPC is upheld but the sentence awarded by the trial court is set aside and they are sentenced to the period alraedy undergone by them along with fine of Rs 25,000/ each under section 326/149 IPC. In default of payment of fine, they shall undergo one year imprisonment. Conviction of Appellant-accused Ramesh Rai and Radhey Shyam u/s 147 IPC is affirmed but sentence is modified and they are sentenced to the period already undergone with fine of Rs 2000/ each under Section 147 IPC. In default of payment of fine, they shall undergo two months imprisonment. Conviction of Appellants-accused Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra u/s 148 IPC is affirmed but sentence is modified and they are sentenced to the period already undergone along with fine of 3000/ each under Section 148 IPC. In default of payment of fine, they shall undergo three months imprisonment. Conviction and sentence of appellants Man Shyam alias Mannu, Singhasan, Jagdish, Mahendra, Ramesh Rai and Radhey Shyam u/s 304/149 IPC is set aside. Appellants are on bail. Appellant Dhruv Raj Rai be taken into custody to serve out the sentence in accordance with law. Remaining appellants Ramesh Rai, Radhey Shyam, Man Shyam alias Mannu, Singhasan, Jagdish and Mahendra are granted three months time to deposit the fine. In case the fine is not deposited within the prescribed period, the trial court shall proceed in accordance with law.

33. It is directed that out of the total fine realized, Rs 50,000/ shall be paid to the legal heirs of deceased Bajrangi and Rs 20,000/ each shall be paid to each of the three injured of the incident.

34. The appeal is **partly allowed** in above terms.

(2019)10ILR A 63

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 2582 of 2005

Jagdish & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Pankaj Shukla, Sri Arvind Pandey, Sri B.R. Mishra, Sri Lav Srivastava, Sri Manoj Kumar, Sri Noor Mohammad.

Counsel for the Opposite Party:
A.G.A., Sri N.K. Sharma.

A. Indian Penal Code, 1860 - Section 307/34, 302/34 I.P.C, Section 25 and 4/25 Arms Act,1959 - criminal appeal – accused were examined under Section 313 Cr.P.C. - F.I.R. is anti-timed- motive for committing a crime is something which is hidden in the mind of the accused - held - it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person- the incident is of the day hours and it happened in the presence of witnesses, as such it is a case of direct evidence - "motive" in a criminal case in face of ocular testimony of witnesses is not at all relevant - eye witnesses of the incident who have supported the case which is also corroborated by the medical and formal evidence - acquitted the appellants under Section 307/34 I.P.C., u/s 4/25 and 25 Arms Act,1959 and has convicted them under Section 302/34 I.P.C. and sentenced them to imprisonment for life.
(Para 9, 22, 24, 26, 27, 28 & 42)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. St. of U.P. Vs Ramesh Prasad Misra & ors. (1996) 10 SCC 360

2. K. Anbazhagan Vs S.P. (2004) 3 SCC 767

3. Ramesh & ors. Vs St. of Har. (2017) 1 SCC 529

4. Praful Sudhakar Parab Vs St. of Mah. (2016) 12 SCC 783

5. St. of H.P. Vs Jeet Singh (1999) 4 SCC 370

6. Rajagopal Vs Muthupandi @ Thavakkalai & ors. (2017) 11 SCC 120

7. Rajesh Govind Jagesha Vs St. of Mah. (1999) 8 SCC 428

8. Krishna Mochi Vs St. of Bihar (2002) 6 SCC 81

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard learned counsel for the appellants, learned A.G.A. for the State and perused the material on record.

2. This appeal has been filed by the appellants against the judgement and order dated 21.06.2005 passed in Sessions Trial No.193 of 2001 (State v/s Jagdish and others) under Section 307/34, 302/34 I.P.C. and Sessions Trial No.194 of 2000, under Section 25 and 4/25 Arms Act,

Police Station Sureer, District Mathura whereby the learned Additional Sessions Judge-IV, Mathura has acquitted the appellants Jagdish, Rajendra Singh and Vijay Kumar under Section 307/34 I.P.C., u/s 4/25 and 25 Arms Act and has convicted them under Section 302/34 I.P.C. and sentenced them to imprisonment for life with fine of Rs.10,000/- and in default of payment of fine further to undergo imprisonment for one year.

3. Briefly stated the facts of the case are that on 21.12.2000 at about 4:30 p.m., Mukesh, the informant, Rohitash Kumar (deceased), his wife Mamta, sister of the first informant, niece Kavita, Sanjay son of Sumer Singh, Naresh son of Shri Indrapal Singh, Rajkumar son of Sri Kishori Lal and others were sitting on a *chabutra* (elevated floor) outside the house of Rohitash and talking among themselves when the three accused, namely, Jagdish, Rajendra and Vijay Kumar came there armed with weapon in their hand and stating that they would teach him a lesson with regard to Pradhan elections all the three accused persons fired at Rohitash with intention to kill. Rohitash after receiving fire arm injury in order to save himself entered into the house of Sumer Singh running through Gully, assailants also entered into the house of Sumer Singh firing behind him and they killed him there. When they reached the house of Sumer Singh, they found Rohitash lying dead and the assailants, the appellants herein, fled away firing at them with intention to kill them.

4. Informant Mukesh Kumar got scribed the report Ext.Ka-1 by Satya Deo (P.W.5) and handed it over to the police station Sureer, District Mathura, on the basis of the written report (Ext.Ka-1), chik F.I.R. Ext.Ka-19, Case Crime No.149/2000, under Sections 302, 307/34 I.P.C. was registered on 22.12.2000 at 19:00 P.M. Investigation of the case was entrusted to S.H.O. Sri Shiv Kumar Singh. On the instruction of the Investigating Officer Shiv Kumar Singh, P.W.8 S.I. S.N. Singh prepared inquest report (Ext.Ka-5) of the deceased Rohitash Kumar. He also prepared relevant documents for post-mortem and dispatched the dead body for post-mortem along with Constable Shiv Kumar and Jayanti Prasad.

5. Dr. V.S. Agnihotri (P.W.7) conducted autopsy on the dead body of the deceased Rohitash on 23.12.2000 at 3:20 P.M. and prepared report (Ext.Ka-4), according to which following injuries were found on the person of the deceased:

1. Incised wound 1 c.m. X .3 c.m. X .4 c.m. left side middle of neck.

2. Incised wound 1.5 c.m. X .3 c.m. X .3 c.m. right side of the neck on the lower part.

3. Incised wound 1.5 c.m. X .3 c.m. X .3 c.m. on the upper part of the right shoulder.

4. Incised wound 3 c.m. X 1 c.m. X cavity deep on the right side of intestine mid wall 3 c.m. below the sub- costa margin.

5. Incised wound 2 c.m. X .8 c.m. muscle deep towards right of the chest above the 10th and 11th rib.

6. Incised wound 2.5 c.m. X 1 c.m. muscle deep in front of chest above the 8th and 9th rib.

7. Incised wound 2.5 c.m. X 1 c.m. X chest cavity deep over 6th and 7th rib.

8. Incised wound 1.5 c.m. X .5 c.m. X .4 c.m. in front of left middle finger.

9. Fire arm wound of entry .5 c.m. X .2 c.m. X .3 c.m. on left side back, 8 c.m. from L-1 spine.

In internal examination 6th, 9th and 10th right side ribs were found fractured and right side lung was ruptured. In the opinion of P.W.7 Dr. V.S. Agnihotri injury no.1 to 8 are possible by knife. Injury no.9 is possible by fire arm like country-made pistol and injuries were sufficient to cause death. Death was one day old from the time of examination and it was possible at 4:30 P.M. in the evening of 22.12.2000.

6. The Investigating Officer took into his possession four live cartridges 315 bore, one empty cartridge 315 bore, two bullets in which one like 303 bore and one 315 bore from the place of incident and house of Sumer Singh and prepared memo (Ext.Ka-3). He took into his possession blood stained and plain earth from the place of dead body and prepared memo (Ext.Ka-2). He also took all the accused in police custody remand on 19.01.2001 and recovered one country-made pistol and a knife on the pointing out of accused Jagdish from the clump of bulrushes situated at the south of the hydrent about 75 steps north of the culvert towards north of side walk of both canals in village Mehmoodgadhi. He also recovered a country-made pistol and a knife on the pointing out of accused Rajendra from the clump of bulrushes situated at the north of the hydrent and from nearby a knife was also recovered on the pointing out of accused Vijay Kumar. He prepared recovery memo (Ext.Ka-16), thereafter, he took into custody the accused persons under Section 25 and 4/25 Arms Act and prepared custody memo (Ext.Ka-18). On the basis of the recovery memo chik F.I.R. (Ext.Ka-21), Case Crime No.3/2001 and 4/2001 u/s 25 and 4/25 Arms Act against the accused Jagdish, Case Crime No.5/2001 and 6/2001 u/s 25 and 4/25 Arms Act against accused Rajendra and Case Crime No.7/2001 and 4/25 Arms Act against accused Vijay Kumar, was registered.

7. The Investigating Officer after completing the investigation in Case Crime No.149/2000 submitted charge sheet (Ext.Ka-16 under Section 302/307/34 I.P.C. against the accused Jagdish, Rajendra and Vijay Kumar before the court of C.J.M. The Investigating Officer of Case Crime No.3, 4, 5, 6 and 7 of the year 2001, after completing the investigation in Case Crime No.7/2001 submitted charge sheet (Ext.Ka-26) u/s 4/25 Arms Act against accused Vijay Kumar. Charge sheet (Ext.Ka-27) in Case Crime No.6/2001 under Section 4/25 Arms Act and charge sheet (Ext.Ka-28) in Case Crime No.5/2001 under Section 25 Arms Act against accused Rajendra, charge sheet (Ext.Ka-29) in Case Crime No.3/2001 under Section 25 Arms Act and charge sheet (Ext.Ka-30) in Case Crime No.4/2001 under Section 4/25 Arms Act against Jagdish before C.J.M., who committed the accused for trial to the court of Session where Case Crime No.149/2001 was registered as a Session Trial No.193/2001 (State vs. Jagdish and

others) and Case Crime Nos. 3/2001, 4/2001, 5/2001, 6/2001, 7/2001 were registered as Session Trial No.194/2001 wherefrom the above mentioned both trials were transferred to the court of Additional Session Judge-IV, Mathura for trial who framed charge under u/s 307/34 and 302/34 I.P.C. against the accused Jagdish, Rajendra and Vijai Kumar. He also framed charge u/s 4/25 and 25 Arms Act against accused Jagdish and Rajendra and u/s 4/25 Arms Act against accused Vijai Kumar. Accused denied the charge and claimed trial.

8. To prove its case prosecution has examined 12 witnesses. P.W.1 Mukesh Kumar, informant, P.W.2 Narendra Kumar @ Naresh, P.W.3 Km. Kavita, P.W.4 Ram Chander and P.W.5 Satya Deo are witnesses of fact while P.W.6 Constable Jayanti Prasad brought the dead body for post-mortem, P.W.7 Dr. V.S. Agnihotri conducted autopsy, P.W.8 S.I. S.N. Singh conducted inquest, P.W.9 H.C.P. Narendra Singh witness of recovery of arms, P.W.10 S.I. Hakim Singh scribe of chik F.I.R. and G.D., P.W.11 Netra Pal scribe of chik F.I.R. and G.D. under Section 25 Arms Act and 4/25 Arms Act, P.W.12 H.C.P. Ram Vir Singh I.O. of the Case Crime No.3, 4, 5, 6, 7 of 2001 under Section 25 and 4/25 Arms Act are formal witnesses.

9. After adducing prosecution evidence, the accused were examined under Section 313 Cr.P.C. in which they have stated that due to enmity of election of Pradhan they have been falsely implicated in the present case. Accused have produced D.W.1 Sahab Singh as defence witness.

10. After hearing the parties and scrutinising the evidence on record learned Additional Session Judge-IV, Mathura has passed the impugned judgement and order as disclosed in para 1 of the judgement. Hence this appeal.

11. Learned counsel for the appellants submits that P.W.5 Satya Deo and accused Vijay Kumar had contested the election of Pradhan, deceased Rohitash had not contested the election and he was only supporter of P.W.5 Satya Deo the winner of election. Satya Deo has stated that Rohitash did not do any special work for him. He was not his polling agent. Neither he blazed flags of Vijay Kumar nor he did quarrel with any supporter of Vijay Kumar, nor he stopped his voters going to poll. So, there is no motive for the appellants to commit the offence. He also submits that according to prosecution in the house of Sumer Singh deceased Rohtash was killed but as per inquest memo dead body has been found on chabutra of Sumer Singh. P.W.5 Satya Deo has stated that on 22.12.2000 at 7:00 P.M., he came seeing the dead body of Rohitash at that time dead body was at chabutra till then police had not come in the village, thus, from the evidence led by prosecution, place of incident is not established. He further submits that as per statement of Mukesh (P.W.1) deceased Rohtash died due to fire arm injury while P.W.-7 Dr. V.S. Agnihotri has found that there are eight incised wound and one injury of fire arm and no pellet or bullet was found from the injury, cause of death has been found shock and haemorrhage due to the injuries. Thus, from the prosecution evidence the alleged manner and mode of the incident is also not proved. He also submits that according to prosecution incident has been caused in the house of Sumer Singh and at that time his wife Savitri was present but she has

not been produced by the prosecution which is fatal to the prosecution case. Lastly he submits that time of incident is alleged 4:30 P.M. on 22.12.2000 and as per F.I.R. information has been given to the police at 19:00 P.M. while P.W.1 Mukesh Kumar, informant has stated that report was scribed on the dictation of the villagers at 10:00 P.M. in presence of the police. He has also stated that daroga called him to the police station when it was less than one or two days to a month from the incident, where he got his signature on papers and he went to the police station for the first time when his signatures were obtained on papers which creates doubt regarding time of incident and giving information at the police station. There is also overwriting in the inquest memo in the column of distance of police station from the place of incident. In the column 18 has been made 16 while in chik F.I.R. distance of police station from the place of incident has been mentioned 15 kilometers, if F.I.R. was in existence and available at the time of preparing inquest memo of dead body, then such overwriting could not have been made. These anomalies make the F.I.R. anti-timed also. In fact Rohitash was killed somewhere outside the village by some unknown persons. Accused Vijay Kumar had contested the Pradhan election against P.W.5 Satya Deo, who barely won the election. Neither deceased Rohitash contested the election nor he was agent. Due to election enmity Vijay Kumar and his supporter Jagdish and Rajendra have been implicated falsely in the case. He prays that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellants-accused. Learned Additional Session Judge-IV, Mathura without proper appreciation of evidence has passed the impugned judgement and order which is not sustainable and liable to be set aside. Appellants are liable to be acquitted.

12. On the contrary learned A.G.A. for the respondent-State, submitted that P.W.1 Mukesh, P.W.2 Narendra, P.W.3 Km. Kavita (niece of the deceased) have supported the prosecution version. P.W.4 Ram Chander, who is an independent witness has stated that on 23.12.2000 blood stained and plain earth were taken into possession by the Investigating Officer in his presence from the place where the dead body was lying in the room, inside the house of Sumer Singh. He has proved the two containers in which blood stained and plain earth were kept and sealed in his presence as material (Ext-4 and 5). He has also stated that when darogaji came, he kept the dead body on the door of Sumer Singh, but before the police came the dead body was in the house of Sumer Singh. From the testimony P.W.4 Ram Chander place of occurrence is established. The learned A.G.A. further submits that statement of P.W.1 Mukesh Kumar started on 10.07.2001 and was completed in five different dates on 12.09.2002. Informant Mukesh Kumar supported the prosecution story with regard to time of incident and lodging report at police station but when he settled the marriage of his sister (wife of the deceased) then he retracted from his previous statement and stated that the report was scribed on the dictation of villagers in the presence of police after 2 to 3 hours of the incident and again stated the time as 10:00 P.M., which is liable to be discarded. He prays that from the evidence produced by the prosecution charge under Section 302/34 I.P.C. against the appellants-accused is fully proved and the learned Additional

Sessions Judge-IV, Mathura has rightly convicted and sentenced the appellants-accused in which no interference is required by this Court and the appeal is liable to be dismissed.

13. The incident is alleged to have occurred on 22.12.2000 at 4:30 P.M. and as per Ext.Ka-19 its information has been given at 19:00 P.M. on the same day. P.W.1 Mukesh has stated that after he got report scribed by Satya Deo Singh, reported the incident to the police station and proved it as Ext.Ka-1. In cross-examination on 11.01.2002 he has stated that he himself scribed the report. He did not scribe the report by asking anyone but in cross-examination on 12.06.2002, he has retracted from his previous statement and has stated that the report was scribed by the villagers in presence of police. He does not know the name of anyone who scribed the report. He has further stated that after 2 to 3 hours of the incident and again stated that at 10:00 P.M. the report was scribed. He has also stated that after one or two days short of a month from incident darogaji called him and obtained his signatures on papers in the police station. On the recovery papers of country-made pistol and knife his signatures were obtained. First time he went to police station when his signatures were obtained on the papers.

14. In ***State of U.P. v/s Ramesh Prasad Misra and others, (1996) 10 SCC 360***, it has been held that it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

15. In ***K. Anbazhagan v/s Superintendent of Police (2004) 3 SCC 767***, Hon'ble Supreme Court has held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. The finding of K. Anbazhagan vs. Superintendent of Police (supra) has been relied on by the Hon'ble Supreme Court in Ramesh and others vs. State of Haryana, (2017) 1 SCC 529 .

16. P.W.5 Satya Deo scribe of the report has stated that on the dictation of P.W.1 Mukesh, he has scribed the report on 22.12.2000 at about 5:00 P.M. at Khaira while returning from Delhi to his village and he had also proved it as Ext.Ka-1. He has denied the suggestion by defence that report was not scribed on dictation. From the cross-examination by defence nothing has been extracted, so that any adverse inference can be drawn that on dictation of P.W.1 Mukesh Kumar report was not scribed by him at about 5:00 P.M. on 22.12.2000 at Khaira. Thus, previous statement of P.W.1 Mukesh scribing report Ext.Ka-1 from P.W.5 Staya Deo is consistent with the prosecution case.

17. P.W.10 Hakim Singh has stated that he was posted on 22.12.2000 at P.S. Sureer and he had registered chik F.I.R., Case Crime No.149/2000, under Section 302, 307/34 I.P.C. on the basis of the written report of the informant Mukesh Kumar and proved it as Ext.Ka-19. He has also stated that he entered the case in G.D. No.32 on 22.12.2000 at 19:00 P.M.

and proved it as Ext.Ka-20. He has further stated that he copied the same as was scribed in the written report and denied the suggestion that chik and G.D. have been scribed anti-time. He has also stated that two persons had come along with the informant. In G.D. Ext.Ka-20, it is mentioned that Sri Mukesh son of Bhudev Singh, resident of Jait, P.S. Vrindavan, District Mathura and other companion Rakesh son of Sukhveer Singh, Raju son of Kishori, resident of Mehmoodgadhi, P.S. Sureer, District Mathura came and handed over an application written and signed by Satya Deo. Defence has also cross-examined this witness, nothing has been elicited from his cross-examination, so that adverse inference can be drawn that P.W.1 Mukesh (informant of the case) had not gone to the police station on 22.12.2000 along with his companion Rakesh son of Sukhveer Singh and Raju son of Kishori, resident of Mehmoodgarhi, District Mathura and he did not hand over the written report to the witness. As such the testimony of P.W.1 Mukesh giving information of the incident to police station is also consistent with the prosecution case.

18. According to P.W.9 H.C.P. Narendra Singh, he recognizes the writing of Sri Shiv Kumar and has seen him writing and reading. He has died.

19. P.W.8 S.I. S.N. Singh has stated that he was posted at police station Sureer as S.I. on 23.12.2000 and on the instruction of Inspector Shiv Kumar he conducted the inquest of deceased Rohitash Kumar @ Pappu. He was posted with him and recognizes his hand writing. He has proved the spot map Ext.Ka-6 and other papers. In cross-examination he has stated that he cannot tell where the statement of the informant was taken. He can however tell seeing the case diary. He cannot tell whether the informant went from the police station by his own vehicle or how he went. Since, the Investigating Officer has died and this witness has not disclosed where statement of informant was recorded, in such a situation for this purpose case diary has to be seen and according to it informant and scribe of F.I.R. H.M. 65 Hakim Singh were present in the police station on 22.12.2000 and their statements were recorded at the police station from which also presence of the informant Mukesh at the police station is supported and prosecution evidence regarding presence of informant at the police station is consistent.

20. In view of the finding of Hon'ble Supreme Court in ***State of U.P. v/s Ramesh Prasad Misra and others, K. Anbazhagan vs. Superintendent of Police and Ramesh and others v/s State of Haryana*** (supra) and considering the statement of P.W.5 Satya Deo, P.W.10 Hakim Singh and close scrutiny of the statement of P.W.1 Mukesh, the statement of P.W.1 Mukesh given in the cross-examination before 12.06.2002 being consistent with the prosecution case is convincing and reliable that he got scribed the report Ext.Ka-1 from P.W.5 Satya Deo and reported the incident on 22.12.2000 at 19:00 P.M. to police station Sureer, District Mathura going along with aforesaid Rakesh and Raju and the statement given on 12.06.2002 that after one or two days short of month the daroga called him and obtained his signatures on papers and first time he went to the police station when his signatures were obtained on the papers and written report Ext.Ka-1 was scribed on dictation of villagers in presence of police are neither consistent

nor convincing nor acceptable. Bestowing our consideration on the whole statement of P.W.1 Mukesh Kumar as well as P.W.5 Satya Deo, P.W.10 Hakim Singh and documents available on record, as discussed above, in our opinion, from prosecution evidences, it is established that the written report Ext.Ka-1 was scribed by P.W.5 Satya Deo on the dictation of P.W.1 Mukesh which was given by him at the police station going along with Rakesh and Raju and as such we find no force in the contention of learned counsel for the appellants that the time of incident and giving information at the police station is in any manner doubtful.

21. As per F.I.R. Ext.Ka-19 the distance of the police station from the place of incidence is 15 kilometers. In cross-examination P.W.8 S.I. S.N. Singh has stated that in the body of the inquest memo initially 18 kilometers was written but subsequently 16 kilometers is written correctly. He has also stated that while preparing inquest memo chik F.I.R. was with him and he had read it and he has denied the suggestion of defence that in inquest memo and other papers blank space were left for crime number and sections. On going through the inquest memo, we find that it has been prepared in the same hand writing and ink. Although, he has stated that he read the chik F.I.R. but from his statement it is not clear that while reading the chik F.I.R. he entertained the distance of police station from the place of incident mentioned in it. It appears that by mistake in the inquest memo Ext.Ka-5 regarding the distance of police station from the place of incident previously 18 kilometers and subsequently 16 kilometers has been recorded. Contention of the learned counsel for the appellants also does not appeal to us for the reason that if the F.I.R. was not with the witness P.W.8 S.I. S.N. Singh and blank spaces were left in the inquest memo and other papers for crime number and sections, in that condition distance 15 kilometers as recorded in the F.I.R. Ext.Ka-19 should have been recorded in the inquest memo Ext.Ka-5 in place of subsequent recording it as16.

22. Thus, upon considering the evidences led by the prosecution as discussed above, we also find no substance in the contention of the learned counsel for the appellants that as per F.I.R. distance of police station from the place of incident is 15 kilometers and there is overwriting in the column of distance of police station from the place of incident in the inquest memo, so the F.I.R. is anti-timed.

23. P.W.5 Satya Deo has stated that he is the present by elected Pradhan of village Amanallapur (Mahmoodgadhi) and accused Vijay Kumar was defeated in the last election. He has admitted that Rohitash was his supporter who was not his polling agent. He did not do any special work for him. Rohitash did not set blazed any flag of Vijay Kumar nor quarrelled with his supporters. He also did not stop his voters going to poll. In view of the statement of P.W.5 Satya Deo apparently it appears that the act and conduct of the deceased was not such as to impel the accused Vijay Kumar, defeated candidate of Pradhan election, to bear enmity towards him.

24. In the case of ***Praful Sudhakar Parab v/s State of Maharashtra, (2016) 12 SCC 783,*** the Hon'ble Supreme Court

has held that motive for committing a crime is something which is hidden in the mind of the accused and it has been held by this Court that it is an impossible task for the prosecution to prove what precisely have impelled the murderer to kill a particular person.

25. In ***State of H.P. v/s Jeet Singh, (1999) 4 SCC 370***, the Hon'ble Supreme Court in para 33 has held as under:

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

26. In ***Rajagopal vs. Muthupandi @ Thavakkalai and others, (2017) 11 SCC 120,*** the Hon'ble Supreme Court has held that motive need not be established where direct evidence is available and in the case of ***Rajesh Govind Jagesha vs. State of Maharashtra, (1999) 8 SCC 428,*** the Hon'ble Supreme Court has held that "motive" in a criminal case based on ocular testimony of witnesses is not at all relevant.

27. In the instant case prosecution version is that on 22.12.2000 at 4:30 P.M. informant Mukesh, deceased Rohitash Kumar his sister Mamta, niece Kavita, Savita, Sanjay, Naresh, Rajkumar and others were talking among themselves sitting on the chabutra outside the house of Rohitash. At that time the accused persons came and stating that they would teach lesson of Pradhan election fired at him. From which it is clear that the incident is of the day hours and it happened in the presence of witnesses, as such it is a case of direct evidence. In view of the opinion of the Hon'ble Supreme Court in the case of ***Rajagopal v/s Muthupandi @ Thavakkalai and others and Rajesh Govind Jagesha v/s State of Maharashtra*** (supra) in the instant case motive need not be established and motive is not at all relevant.

28. Apart from it as per F.I.R. Ext.Ka-1 accused persons stating that they would teach the deceased a lesson with regard to Pradhan election fired at him which has been supported by P.W.2 Narendra Kumar also through his testimony. According to P.W.5 Satya Deo deceased Rohitash was his supporter and as per statement of accused Vijay Kumar under Section 313 Cr.P.C. P.W.5 Satya Deo barely won the election. All accused have stated that due to Pradhan election they have been implicated falsely. Deceased Rohitash is said to be supporter of elected Pradhan P.W.5 Satya Deo, accused Vijay Kumar is the defeated candidate of Pradhan and accused Jagdish and Rajendra are his supporters, thus, deceased Rohitash being supporter of P.W.5 Satya Deo winner of Pradhan election there appears an ire of Pradhan election for the accused towards the deceased. As such, in view of the opinion of Hon'ble the Supreme Court in State of

H.P. v/s Jeet Singh (supra) we find that prosecution succeeded in proving an ire of Pradhan election for the accused towards the deceased to impel them to commit the offence. Accordingly, we do not find substance in the contention of learned counsel for the appellants also that there is no motive against the appellants to commit the offence.

29. P.W.5 Satya Deo in his cross-examination has stated that he came seeing the dead body of Rohitash on 22.12.2000 at 7:00 P.M., at that time the dead body was kept on the chabutra till then police had not come in the village while P.W.4 Ram Chander has stated in the cross-examination that he met the daroga at 8:00 P.M. on the day of incident and next day morning at 8:00 A.M. When the daroga came, he kept the dead body of Rohitash at the door of Sumer Singh. Thus, according to P.W.5 Satya Deo, dead body of the deceased Rohitash was lying at the chabutra before coming of the police while as per statement of P.W.4 Ram Chander police came and kept the dead body on the chabutra. Hence, there is contradiction in the statement of both witnesses regarding keeping the dead body of deceased Rohitash on the chabutra. So, we have to look for other evidences in this regard.

30. P.W.4 Ram Chander has stated that Rohitash was murdered and Investigating Officer on 23.12.2000 collected blood stained and plain earth from the place of incidence, in the room inside the house of Sumer Singh sealed and stamped in his and Pradhan Satya Deo's presence; prepared memo and obtained their signatures on the memo, and has proved it as Ext.Ka-2. P.W.5 Satya Deo has also stated that Investigating Officer taking into his possession the blood stained and plain earth from the place of incidence in his and Ram Chander's, presence, prepared the memo and after reading out to him obtained his signature and thumb impression of Ram Chander. He has also proved the recovery memo as Ext.Ka-2. From the cross-examination by defence of both witnesses i.e. P.W.4 Ram Chander and P.W.5 Satya Deo, nothing has been extracted by which any adverse inference can be drawn that on 23.12.2000 the blood stained and plain earth was not taken in the presence of the witnesses from the place of incidence, in the room inside the house of Sumer Singh and it's recovery memo Ext.Ka-2 was not prepared.

31. P.W.8 S.I. S.N. Singh has stated that he prepared the inquest memo of deceased Rohitash on the instruction of Inspector Shiv Kumar. In cross-examination he has stated that he had gone to the place of incidence, when police party reached the spot the dead body was kept outside of the house on the chabutra. He has specifically stated that murder of deceased was committed in the house of Sumer Singh; before inquest of the dead body he did not ask from the informant or any other person as to who brought the dead body on chabutra from the place of occurrence. He has also stated that he had taken the blood stained and plain earth from the place of occurrence. From the cross-examination of this witness too nothing has been extracted by defence, so that his statement regarding taking of blood stained and plain earth from the place of occurrence in the room inside the house of Sumer Singh as stated by P.W.4 Ram Chander and P.W.5 Satya Deo also can be doubted. In Ext.Ka-2

recovery memo of blood stained and plain earth, it is mentioned that in the presence of witnesses Satya Deo and Ram Chander in Case Crime No.149/2000, under Section 302/207 I.P.C. blood stained and plain earth were taken into police custody from the room inside the house of Sumer Singh (uncle of the deceased), kept in containers; were sealed and stamped, recovery memo was prepared, and signatures of witnesses were obtained. In the spot map Ext.Ka-6 proved by P.W.8 S.I. S.N. Singh, place-A has been shown where the murder of the deceased was committed, which is shown in the room inside the house of Sumer Singh. Prosecution evidence of P.W.4 Ram Chander, P.W.5 Satya Deo and P.W.8 S.I. S.N. Singh is consistent regarding taking of blood stained and plain earth from the room inside the house of Sumer Singh. P.W.1 Mukesh and P.W.2 Narendra Kumar have stated very categorically that after receiving fire arm injury, Rohitash entered the house of Sumer Singh and after following the accused they found Rohitash dead in the house of Sumer Singh. From their cross-examination nothing has been extracted.

32. In defence D.W.1 Sahab Singh has been produced to prove that Rohitash was murdered somewhere else and due to enmity of Pradhan election the accused have been implicated falsely in the case. Sahab Singh has stated that he and his brother were in their field, at about 7:00 P.M. in the evening when they heard sound of firing from the side of canal. They undertook it to be miscreants and came towards the village. When they reached close to the village they saw that people of the village are coming bringing Rohitash in a fire arm injured condition and they kept the dead body of Rohitash on the chabutra of pahalwan Sumer Singh. When the *daroga* came in the morning he told about it to him but in cross-examination by prosecution he has stated that he had not told the *daroga* but he had told about it to the police only. He has also stated that he is stating for the first time in court about telling the police. Thus, his statement being contradictory at the same stage and made first time in court is neither convincing nor believable. Contrary to it, the prosecution evidence regarding place of incidence in the house of Sumer Singh as discussed above is consistent, cogent, convincing and reliable. Although the statement of P.W.4 Ram Chander appears trustworthy that the daroga came and kept the dead body on the chabutra as the dead body was not in the house of deceased but it was in the house of some other person yet, if it is ignored, even then, the place of incident of deceased Rohitash is established in the room inside the house of Sumer Singh. Therefore, once the place of incidence is established in the room inside the house of Sumer Singh then who kept the dead body on chabutra outside the house of Sumer Singh will not carry much importance and it will not affect the prosecution case. Accordingly, we also find no substance in the contention of learned counsel for the appellants that place of incidence is not established.

33. In cross-examination P.W.1 Mukesh has stated that he knew that death occurred due to fire arm shooting injury. According to medical report Ext.Ka-4 proved by P.W.7 Dr. V.S. Agnihotri, a fire arm wound of entry .5 c.m. x .2 c.m. x .3 c.m. on left side back, 8 c.m. from L-1 spine and two on neck, one on upper part of shoulder, one on intestine mid, three on chest and one on left middle finger,

incised wounds have been found. In internal examination 6th, 9th and 10th right side ribs were found fractured and right side lung was ruptured. Injuries were sufficient to cause death. P.W.7 Dr. V. S. Agnihotri has stated that injury no.9 can be possible by fire arm and in injury no.9 no pellet or bullet was found. Since, depth of the injury was less, so it was not thought proper to have x-ray for search of pellets. In view of nature of injury no.9 as opined by doctor, it may not be the cause of death of the deceased Rohitash.

34. As per written report Ext.Ka-1 deceased Rohitash after receiving fire shot injury entered into the house of Sumer Singh in order to save his life; the assailants also entered into the house of Sumer Singh and killed him there and fled away firing at the informant and others. After the accused persons left, the informant P.W.1 Mukesh and others on going inside the house found the dead body of Rohitash. P.W.1 Mukesh has deposed in support of Ext.Ka-1, the written report and has stated that when Rohitash stepping down from the chabutra started running, the accused persons started firing. Rohitash received fire arm injury and entered into the house of Sumer Singh. The accused also entered into the house of Sumer Singh behind Rohitash. The accused fled away after coming out from the house of Sumer Singh firing upon them. When the informant and his sister went inside the house of Sumer Singh after 10-15 minutes, they found the dead body of Rohitash. In cross-examination by defence nothing has been extracted so that the statement of P.W.1 Mukesh can be doubted.

35. P.W.2 Narendra Kumar @ Naresh has also stated that on 22.12.2000 at 4:30 P.M. he was sitting on the chabutra of Rohitash. Rohitash, his brother in law Mukesh, wife Mamta, niece Kavita, Savita, Sanjay and Raj Kumar were also sitting there. Rohitash was talking with Mukesh when at that time accused Jagdish, Rajendra and Vijay Kumar of the village came carrying country made pistols in their hand and addressed Rohitash to teach him lesson of Pradhan election. On exhortation of the accused Rohitash fled away towards the gully; the accused chased and fired at him, shot of Jagdish hit in the waist of Rohitash. In order to save his life Rohitash entered into the house of Sumer Singh. The three accused also entered into the house of Sumer Singh behind him, going there the accused persons inflicted knife injuries. The incident was witnessed by him, Kavita, Mukesh and Savitri wife of Sumer Singh. On their alarm the accused persons fled away and on going near Rohitash found him dead. Although, the witness has exaggerated in respect of witnessing the incident while causing knife injuries by the accused but from cross-examination by defence on material point like while sitting on chabutra coming of accused having country-made pistols in their hand; stating that they would teach lesson of Pradhan election; fleeing of deceased towards gully; while fleeing Rohitash being fired upon by accused persons and on receiving fire injury, entering into house of Sumer Singh; entering of accused also into the house of Sumer Singh behind Rohitash and after fleeing away the accused persons finding dead body of Rohitash in the house of Sumer Singh, his testimony is intact.

36. P.W.3 Km. Kavita has also supported the prosecution version through her testimony and from her cross-examination by defence too nothing has

been extracted, so that her testimony regarding her presence on 22.12.2000 at 4:30 P.M. on the chabutra along with deceased Rohitash, Mukesh, Narendra, Mamta at that time coming of accused persons having country-made pistols in their hand; accused stating to teach lesson of Pradhan election to Rohitash; while fleeing Rohitash being fired upon by accused and on receiving fire injury his fleeing towards house of Sumer Singh can be doubted.

37. Thus the evidence of P.W.1 Mukesh, P.W.2 Narendra Kumar and P.W.3 Km. Kavita is consistent, corroborated by each other, convincing and reliable that on 22.12.2000 at 4:30 P.M. when deceased Rohitash was sitting on the chabutra along with Mukesh, wife Mamta, Kavita, Savita, Sanjay and Raj Kumar and talking among themselves, accused persons came having pistols in their hand and stated to teach him lesson of Pradhan election when Rohitash fled in the gully they fired at him and on receiving fire arm injury on his waist, he entered into the house of Sumer Singh, the accused persons also entered into the house of Sumer Singh and when they fled away dead body of Rohitash was found in the house of Sumer Singh.

38. P.W.4 Ram Chander, P.W.5 Satya Deo and P.W.8 S.I. S.N. Singh have supported the fact that dead body of Rohitash was lying in the room inside the house of Sumer Singh. Since, the incident has occurred in a room and the place in room will not be visible from outside as depicted in spot map Ext.Ka-7 but before entering into the house of Sumer Singh, it is the consistent case of the prosecution that the accused persons had fired at Rohitash and receiving fire arm injury is supported by medical report Ext.Ka-4 proved by P.W.7 Dr. V.S. Agnihotri also, in such circumstances, not mentioning knife injury in Ext.Ka-1 will not be fatal to the prosecution case which has been explained by P.W.1 Mukesh Kumar also through his statement, in his cross-examination as he has stated that he has not mentioned knife in his report no one told him about knives. He has also stated that he had seen the accused persons firing shot and he had also seen the shot hitting Rohitash @ Pappu that is why he had written in the report about shot fired by accused persons at Rohitash @ Pappu. Since the accused persons fired at the deceased Rohitash before his entering into the house of Sumer Singh and Rohitash received fire shot injury, accused persons also entered into the house of Sumer Singh behind him and soon after the accused persons fled away, deceased Rohitash was found dead by informant P.W.1 Mukesh and P.W.2 Narendra Kumar. In such a situation the inescapable inference will be that it is the accused persons who have caused death of deceased Rohitash. The place of incidence being not visible from outside the house and injury by knife being possible non mentioning of knife injury as explained by P.W.1 Mukesh Kumar also as discussed above, in the facts and circumstances of this case as well as aforesaid discussion and injury no.9 being fire arm injury in Ext.Ka-4, it cannot be said that the manner and mode of the incident has not proved.

39. P.W.2 Narendra Kumar @ Naresh has stated that the incident was witnessed by him, Mukesh (brother-in-law of Rohitash), Savitri (wife of Sumer

Singh) and Kavita (daughter of Dinesh). Prosecution has not produced Savitri as a witness.

40. In ***Krishna Mochi vs. State of Bihar, (2002) 6 SCC 81,*** the Honble Supreme Court has held as under:

"It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

41. Prosecution has produced informant P.W.1 Mukesh Kumar, P.W.2 Narendra Kumar @ Naresh and P.W.3 Km. Kavita who were present at the time the incident occurred. In view of the opinion of the Hon'ble Supreme Court in Krishna Mochi v/s State of Bihar (supra) and witnesses of fact produced by prosecution as discussed above non production of witness Savitri Devi will not affect the prosecution case, as such non-production of Savitri Devi will not be fatal to the prosecution case. Accordingly, there is no force in the contention of learned counsel for the appellants.

42. In view of the above discussion, it is established that on account of Pradhan election, there was an ire of Pradhan election for the accused persons against the deceased to commit the murder. It is a day light case of direct evidence. P.W.1 Mukesh, P.W.2 Narendra @ Naresh and P.W.3 Km. Kavita are the eye witnesses of the incident who have supported the case which is also corroborated by the medical and formal evidence.

43. Therefore, on a conspectus of facts and analysis of the evidence on record, we do not find any illegality or infirmity in the judgement and order of the trial court dated 21.06.2005 passed by the Additional District Judge-IV, Mathura in Sessions Trila No.193 of 2001 (State v/s Jagdish and others) under Section 307/34, 302/34 I.P.C. and Sessions Trial No.194 of 2000 under Section 25 and 4/25 Arms Act, Police Station Sureer, District Mathura.

44. The appeal fails and is accordingly dismissed. The conviction and sentences awarded by the trial court are upheld.

45. The appellants no.2 and 3, Rajender Singh and Vijay Kumar respectively are on bail. The C.J.M., Mathura is directed to take the appellants no.2 and 3 in the above case into custody forthwith and send them to jail to serve out the sentence, as awarded by the trial court and affirmed by us.

46. So far as the appellant no.1 Jagdish is concerned, he is already in jail. He shall be kept there to serve out the sentence as awarded by the trial court and affirmed by us in the above case.

Office is directed to send a copy of this order to the court concerned within a weekfor compliance.

(2019)10ILR A 77

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 1388 of 1988

Matadin @ Chapole & Anr. ...Appellants (In Jail)

Versus

The State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri K.D. Tripathi, Ms. Ruchita Jain, Sri R.S. Pandey.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 -Section 302/34 I.P.C- criminal appeal - convicted and sentenced to imprisonment for life - statements recorded u/s 313 Cr.P.C - Contradictions and discrepancies in statements with regard to the manner of assault- Credibility of a witness - relationship cannot be a factor to affect the credibility of a witness - The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence- The prosecution has miserably failed to adduce any evidence linking the 'pharsa' allegedly recovered from the river bed with the commission of the murder of the deceased - the prosecution has not been able to prove its case against the surviving appellant beyond all reasonable doubts - entitled to benefit of doubt.

(Para 13, 34, 38, 39, 40, 41 & 43)

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Mano Dutt & anr. Vs St. of U.P. (2012) 77 ACC 209

2. Namdeo Vs St. of Mah. (2007) 58 ACC 414 (52) - 2007 (54) AIC 162

3. Chand Khan Vs St. of U.P. 1995 ACC 685 (SC)

4. Wama & ors. Vs St. of Mah. 2011 Crl. L.J. 4827

5. Balraje @ Trimbak Vs St. of Mah. (2010) 70 ACC 12 (SC) = 2010 (90) AIC 32

6. St. of U.P. Vs Naresh & ors. (2011) 75 ACC 215 (SC) = 2011 (106) AIC 76 (SC)

(Delivered by Hon'ble Bala Krishna. Narayana, J.)

1. Heard Sri R. S. Pandey, assisted by Ms. Ruchita Jain, learned counsel for the appellants and Sri J. K. Upadhyay, learned A.G.A. for the State.

2. This criminal appeal has been preferred by Matadin @ Chapole (A1) and Kripa Ram (A2) against the judgement and order dated 31.05.1988 passed by Vth Additional Sessions Judge, Jhansi in S.T. No. 68 of 1985, State Versus Matadin and another, whereby both the appellants were convicted and sentenced to imprisonment for life u/s 302/34 I.P.C.

3. Record shows that Kripa Ram (A2) died during the pendency of this appeal and this appeal stood dismissed as abated qua Kripa Ram (A2) by the order of this Court dated 16.07.2018.

4. Thus, the challenge to the impugned judgement and order is now confined on behalf of Matadin @ Chapole (A1) alone.

5. The prosecution story in short is that deceased Lakhan was a highly

arrogant, hard core, anti-social element who was involved in several criminal cases including cases of burglary, dacoity etc. and several anti-social elements of village- Atarsua bore grudge against him. It is alleged that on 08.03.1985 at about 1.30-2.00 p.m., few residents of village- Atarsua had gathered in front of the house of Rati Ram to celebrate Holi. Deceased Lakhan was singing Holi (phag) songs while his son P.W.3 Hari Om, his cousin P.W.2 Ram Narayana and others were standing nearby and enjoying the Holi songs. While they were singing Holi songs, Matadin @ Chapole (A1) and Mehngu armed with country-made pistols and Kripa Ram (A2) armed with 'pharsa' came to the spot suddenly and Matadin @ Chapole (A1) and Mehngu fired with their country-made pistols at Lakhan, causing firearm injuries on his head, when Lakhan tried to get up, the accused caught hold of him and Kripa Ram (A2) dealt 'pharsa' blows to him causing injuries on vital parts of his person. Lakhan died on the spot instantaneously and P.W.1 informant Motilal who described himself in the written report of the incident as deceased's "khaandani bhai" although before the trial court, he had not deposed that he was "khaandani bhai" of the deceased, also arrived on the spot upon hearing the noise and found his brother Lakhan dead with injuries on various parts of his body. P.W.3 Hari Om, deceased's son who was present near the dead body apprised him with the details of the incident and P.W.1 informant Motilal got the written report of the incident (Ext.Ka.1) scribed by one P.W.4 Manohar and proceeded straight to P.S.- Gursarain, which was at a distance of about 9 kms. from the place of the incident along with the written report.

6. On the basis of the written report (Ext.Ka.1) given by P.W.1 informant Motilal at P.S.- Gursarain, District- Jhansi, Case Crime No. 12 of 1985 u/s 302 I.P.C. was registered against the appellants and one Mehngu. Check F.I.R. (Ext.Ka.11) and the relevant G.D. Entry (Ext.Ka.12) were prepared by Head Constable Jagdish Awasthi.

7. P.W.7 S.O. Subedar Singh took over the investigation of the case and proceeded to the place of the occurrence immediately and reached there at 5 p.m. After holding the inquest on the dead body of Lakhan, he got prepared the inquest report (Ext.Ka.4) and other related documents whereafter he handed over the dead body of Lakhan to Constable Subedar Singh and Constable Shiv Gulam Pandey along with postmortem requisition memo (Paper no. 17-A). He seized samples of blood-stained and plain earth from the crime scene vide seizure memo (Exts.Ka.5 and Ka.6). He also seized two empty cartridges (material Ext.12) and missed cartridge (material Ext.14) vide recovery memo (Ext.Ka.5). After inspecting the place of occurrence, he prepared its site plan (Ext.Ka.7).

8. Postmortem on the dead body of Lakhan was conducted by P.W.5 Dr. B.D. Mangal, Medical Officer, Primary Health Centre, Mauranipur on 09.03.1985 at 2.45 p.m. He prepared and proved the postmortem report of the deceased as (Ext.Ka.2) and noted following ante-mortem injuries on the person of Lakhan :-

(a) Firearm wound of entry ¾ inch x wound of exit on the back of head. Left side in occipital region 2" above and backward from left ear. Skin surrounding the wound is black and scorched and tattooed wound is oval in shape. Singeing

of hairs is also seen. Direction of wound is left to right and slightly mediary. Fracture of right occipital bone seen.

(b) Firearm wound of exit 2½" x 2" x wound of entry on right temporal region, just above right ear. Multiple chips fracture or right temporal occipital and partial bone are seen.

(c) Firearm wound of exit 1" x 1" x wound of entry on right occipital region 1" lateral to injury no. 2 fracture of occipital bone of right side seen.

(d) Incised wound oblique 2½" x 1" x skin muscle with cutting of third cervical vertibra from front to back on left side of neck 2½" below and lateral to left ear lobule.

(e) Incised wound horizontal 3" x 1" x skin muscle with cutting of Ist cervical vertibra upto the middle on back of the neck.

(f) Incised wound 2½" x ½" x bone deep on the left upper scapula region.

(g) Incised wound superficial x ½" x 1/8" on back of right leg in calf region.

(h) Incised wound 2½" x ½" x muscle deep on back of right leg x calf region 2" below from injury no. (h).

(i) Incised wound 2" x ½" x bone deep on back and lateral side of left leg 3" above from left ankle joint.

9. According to P.W.5 Dr. B. D. Mangal, the cause of death of Lakhan was shock and haemorrhage as a result of firearm injuries received by him in the occurrence.

10. The prosecution further claims that the accused surrendered before the Judicial Magistrate on 12.03.1985 and the Investigating Officer thereafter obtained the police custody of the accused from the said court for three days from 19.03.1985 to 21.03.1985. It is also alleged that the accused expressed their willingness to get the crime weapons namely country-made pistols and 'pharsa' which they had concealed in the bed of Betwa River near KHIRIA GHAT and Kripa Ram (A2) got the 'pharsa' (material Ext.9) recovered from the bed of the river which was seized and sealed by the Investigating Officer vide recovery memo (Ext.Ka.8) while no country-made pistols could be recovered on the pointing out of the other two accused including the appellants.

11. After completing the investigation, charge-sheet was filed by the Investigating Officer in the Court of Judicial Magistrate- IInd, Jhansi on 06.04.1985 against all the three accused who vide his committal order dated 19.04.1985 committed the case for trial to the Court of Sessions Judge, Jhansi where Case Crime No. 12 of 1985 was registered as S.T. No. 68 of 1985, State Versus Matadin and another, and made over for trial from there to the Court of Vth Additional Sessions Judge, Jhansi who on the basis of the evidence on record, framed charge against all the three accused u/s 302/34 I.P.C. in furtherance of their common intention. The accused abjured the charges framed against them and claimed trial.

12. The prosecution in order to prove the charge framed against the accused examined as many as seven witnesses of whom P.W.1 informant Motilal, P.W.2 Ram Narayan, P.W.3 Hari Om and P.W.4 Manohar were produced as witnesses of fact while P.W.5 Dr. B.D. Mangal, P.W.6 Raj Bahadur Singh and P.W.7 Subedar Singh were examined as formal witnesses.

13. The accused-appellants in their statements recorded u/s 313 Cr.P.C. denied the prosecution case and alleged false implication. They did not lead any evidence in defence.

14. Learned Vth Additional Sessions Judge, Jhansi by the impugned judgement and order, convicted both the appellants and sentenced them to imprisonment for life u/s 302/34 I.P.C. while co-accused Mehngu was acquitted.

15. Hence, this appeal.

16. It is contended by the learned counsel for the appellants that the so-called eye witnesses of the occurrence, P.W.2 Ram Narayan and P.W.3 Hari Om, cousin brother and son of the deceased and hence, highly interested in securing the conviction of surviving appellant Matadin @ Chapole (A1) for the murder of Lakhan but there are irreconcilable contradictions and inconsistencies in their statements which totally belie their claim of being the eye witnesses of the occurrence. The number of injuries found on the dead body of Lakhan by P.W.5 Dr. B.D. Mangal who had conducted the postmortem on the body of deceased Lakhan, do not in any manner corroborate the manner of assault as spelt out in the F.I.R. and later deposed by the two so-called eye witnesses of the occurrence. The very fact that the F.I.R. of the incident was lodged by the village Chaukidar P.W.1 informant Motilal and not either by P.W.2 Ram Narayan or P.W.3 Hari Om falsifies the prosecution case that the occurrence had taken place in their presence at the place mentioned in the F.I.R. Had the deceased been attacked by the accused in their presence, then there is no reason why the F.I.R. of the incident would not have been lodged either by P.W.2 Ram Narayan or P.W.3 Hari Om, son and cousin brother of the deceased. Moreover, from the perusal of the F.I.R. recitals itself it is apparent that P.W.1 informant Motilal had reached at the crime scene after the incident. The aforesaid circumstance supports the defence version that after some unknown persons had shot dead Lakhan who was an acknowledged anti-social element of the village after being brutally attacked by them and his dead body was discovered by P.W.1 informant Motilal, Chaukidar of the village, a false F.I.R. falsely implicating the surviving appellant Matadin @ Chapole (A1) and the other accused, was got prepared and lodged by P.W.1 who admittedly was not an eye witness of the incident at the behest of P.W.2 Ram Narayan and P.W.3 Hari Om. No explanation is forthcoming from the side of the prosecution that if the incident had taken place in the presence of several villagers, why no independent witness of the occurrence was examined and only P.W.2 Ram Narayan and P.W.3 Hari Om, cousin brother and son of the deceased whose presence at the place of incident at the time of the occurrence is extremely doubtful, were produced as witnesses of fact. Such being the state of evidence, neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and is liable to be set-aside.

17. Per contra Sri J. K. Upadhyay, learned A.G.A. appearing for the State submitted that it is proved to the hilt from the evidence of P.W.2 Ram Narayan and P.W.3 Hari Om, cousin brother and son of the deceased, that the deceased Lakhan died as a result of injuries inflicted on him by accused-appellants with country-made

pistols and 'pharsa'. The medical evidence on record fully corroborates the ocular version. The failure of the P.W.2 Ram Narayan and P.W.3 Hari Om to lodge the F.I.R. of the incident which was anyway lodged promptly within 2½ hours of the occurrence by the P.W.1 informant Motilal, village chaukidar, leave no room for any deliberation or consultation, does not in any manner indicate that they had not witnessed the occurrence as they had given a correct and cogent description of the occurrence, assigning specific roles to all the three accused including the surviving appellant Matadin @ Chapole (A1). This appeal lacks merit and is liable to be dismissed.

18. We have heard learned counsel for the parties present and perused the entire lower court record very carefully.

19. The only question which arises for our consideration is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not ?

20. Before proceeding to evaluate the evidence of the four witnesses of fact produced by the prosecution during the trial, we first propose to have a look at the evidence of the formal witnesses.

21. Dr. B.D. Mangal, Medical Officer who had conducted the postmortem on the dead body of Lakhan on 09.03.1985 in Primary Health Centre, Mauranipur was examined as P.W.5. He deposed that he had found various ante-mortem internal and external injuries of which we have already taken note hereinabove and opined that Lakhan had died within 24 hours of the postmortem examination on account of shock and haemorrhage as a result of firearm and other injuries sustained by him. He proved the postmortem report of the deceased as (Ext.Ka.2). From the evidence of P.W.5 Dr. B.D. Mangal, it is proved that Lakhan died a homicidal death. However, he in his cross-examination on page 68 of the paper book deposed that if the "pharsa' used was crescentric, the injury may be crescentric in shape. He further deposed that none of the injuries found were crescentric in shape.

22. P.W.6 Raj Bahadur Singh, deposed before the trial court that about two years and nine months before at about 9 a.m. while he was going from Modi crossing with one Alam towards the market in Gursarain, he had met one Daroga who was sitting in a jeep which was parked before the police station with 2-3 accused sitting on it. He had stopped them and asked them to listen to what the accused were saying. Accused Kripa Ram (A2) who was present in the Court had told that he had thrown the 'pharsa' in the river. The remaining two accused who were also present in the Court had stated before them that they had also thrown their country-made pistols in the river. Then the Daroga Ji asked him and Alam to sit in the jeep and took them to the place on the bank of the river where the accused had concealed their weapons. He further deposed that Kripa Ram (A2) walked into the river bed and came out with a 'pharsa'. The other two accused tried to search their country-made pistols in the river bed but the same could not be recovered. He proved his signature on the recovery memo of the 'pharsa' (Ext.Ka.3).

23. S.O. Subedar Singh, the Investigating Officer of the case, was

examined as P.W.7. He in his statement made before the trial court narrated the various steps taken by him during the course of investigation. He proved the inquest report (Ext.Ka.4) of the deceased, recovery memo of empty and live cartridges (Ext.Ka.5), recovery memo of blood-stained and simple earth (Ext.Ka.6), site plan of the place of occurrence (Ext.Ka.7), recovery memo of 'pharsa' on the pointing out of surviving appellant Matadin @ Chapole (A1) and the site plan of the place of recovery of 'pharsa' (Ext.Ka.9) and the charge-sheet (Ext.Ka.10). He proved the plain and blood-stained earth produced during the trial as material (Ext.10 and 11), check F.I.R. which was in the handwriting and signature of Head Constable Jagdish Awasthi (Ext.Ka.11), original copy of the relevant G.D. Entry which was prepared vide rapat no. 14 time 4 p.m. dated 08.03.1985 was prepared by Head Constable Jagdish Awasthi as (Ext.Ka.12), P.W.7 S.O. Subedar Singh also proved the criminal history of the appellant Lakhan and deposed that he was currently involved in Case Crime No. 89/87 u/s 396 I.P.C., P.S.- Gursarain, Case Crime No. 79/78 u/s 395, 397 I.P.C., P.S.- Uldan, Case Crime No. 3/79 u/s 395, 397 I.P.C., P.S.- Uldan, Case Crime No. 95/80 u/s 399, 402 I.P.C., P.S.- Uldan and Case Crime No. 42/81 u/s 325, 323 I.P.C., P.S.- Uldan while he had been acquitted in the rest of the cases. He also deposed that he did not find any blood on the platform in the north of the house of Rati Ram where the deceased was allegedly sitting and singing Holi songs.

24. From the evidence of P.W.7 S.O. Subedar Singh, the Investigating Officer of the case, it is proved that no blood was found on the platform in the northern part of the house where as per the prosecution case, he had been shot by Mehngu and Kripa Ram (A2) from their country-made pistols.

25. Having scrutinized the evidence of formal witnesses, we now proceed to evaluate the evidence of three witnesses of fact produced by the prosecution during the trial.

26. P.W.1 informant Motilal who was the village chaukidar had deposed that at the time of the incident, he was in his house. On hearing the noise, he went to the place of incident which had taken place at about 1.30 p.m. When he had reached there, the persons who were singing Holi songs, had fled. P.W.3 Hari Om had told him about the incident. The written report of the incident was scribed by P.W.4 Manohar on his dictation. He proved the written report of the incident as (Ext.Ka.1). He further deposed that when he had reached the place of occurrence, he had found P.W.2 Ram Narayan and P.W.3 Hari Om present there. He admitted in his cross-examination that the deceased was a history sheeter.

27. P.W.4 Manohar, scribe of the F.I.R., stated before the the trial court that he had scribed the written report of the incident (Ext.Ka.1) on the dictation of P.W.1 informant Motilal. He further has not deposed about the presence of P.W.2 Ram Narayan and P.W.3 Hari Om at the place of the incident when he was scribing the F.I.R. on the dictation of P.W.1 informant Motilal.

28. It is very strange that although P.W.2 Ram Narayan and P.W.3 Hari Om claim themselves to be the eye witnesses

of the occurrence but no explanation is coming forth why the written report of the incident was written by P.W.4 Manohar on the dictation of P.W.1 informant Motilal. In the natural course, if the deceased had been killed in the presence of P.W.2 Ram Narayan and P.W.3 Hari Om, who were the cousin brother and son of the deceased, the written report of the incident would have been scribed either on the dictation of P.W.2 Ram Narayan and P.W.3 Hari Om who had seen the incident and not on the dictation of P.W.1 informant Motilal who deposed that whatever he had stated in the written report was narrated to him by P.W.2 Ram Narayan or P.W.3 Hari Om. The prosecution has failed to pin-point any reason for the written report of the incident having not been scribed on the dictation of either P.W.1 informant Motilal or P.W.3 Hari Om. The very fact that the written report of the incident was written by P.W.4 Manohar on the dictation of P.W.1 informant Motilal is in itself a very material circumstance which belies their claim of being the eye witness of the occurrence.

29. Moreover, after going through the statements of P.W.2 Ram Narayan and P.W.3 Hari Om, we have found that there is a material contradiction in their statements with regard to which of the two accused, Mehngu or deceased Kripa Ram (A2) had fired at the deceased first, who had stated on oath that on the date of the incident at the relevant time, some of the residents of village- Atarsua had gathered in front of the house of the Rati Ram of the same village to celebrate Holi festival and was singing Holi (phag) songs while P.W.2 Ram Narayan, P.W.3 Hari Om, Nand Ram, Damodar etc. were enjoying the songs. Both the above so-called eye witnesses had also deposed that Matadin @ Chapole (A1) and Mehngu armed with country-made pistols and Kripa Ram (A2) armed with 'pharsa' suddenly arrived at the scene of the incident. P.W.2 Ram Narayan stated in his examination-in-chief as well as in paragraph 18 of his cross-examination that Mehngu had fired the first shot at the deceased which had hit him and thereafter, Matadin @ Chapole (A1) had shot Lakhan which had also hit him. After being shot by the country-made pistols, Lakhan tried to run away but Mehngu caught hold of him while deceased Kripa Ram (A2) inflicted injuries on his person by 'pharsa' on his head, neck and other parts of the body while P.W.3 Hari Om stated before the Court that when on 08.03.1985 at about 1.30-2.00 p.m., he was standing in front of the door of Rati Ram's house and listening to the Holi songs, Matadin @ Chapole (A1), deceased Kripa Ram (A2) and accused Mehngu had committed the murder of his father Lakhan. The incident had taken place in front of the house of Rati Ram on the platform in front of the door of the house of Rati Ram. Matadin @ Chapole (A1) had fired the first shot at the deceased with his country-made pistol which had hit the deceased on his head. The second shot fired by accused Mehngu had missed the target. Deceased Kripa Ram (A2) and Mehngu had then caught hold of the deceased Lakhan by his waist when he had got up after being shot after the second shot which was fired by Matadin @ Chapole (A1) had hit his father Lakhan on his head. Then Kripa Ram (A2) inflicted injuries on his father by 'pharsa'. His father died on the spot.

30. P.W.2 Ram Narayan however in paragraph 19 of his cross-examination

resiled from his statement given by him in his examination-in-chief as well as in paragraph 18 of his cross-examination by deposing in paragraph 19 of his cross-examination that the first shot fired by Mehngu had failed to hit Lakhan and thereupon Mehngu fired a second shot which hit the deceased on his head.

31. Similarly, although the initial version of the incident as narrated by P.W.3 Hari Om in his examination-in-chief was the first shot fired by Mehngu had not hit Lakhan's head (paragraph 1 of his examination-in-chief). However, he tried to bring his testimony in consonance with the version of the incident given by P.W.2 Ram Narayan by stating in paragraph 18 of his cross-examination that Mehngu's shot had also hit Lakhan's head, the fact which was conspicuous by its absence in his statement recorded u/s 161 Cr.P.C.

32. The aforesaid discrepancies in the statements of P.W.2 Ram Narayan and P.W.3 Hari Om, in our opinion, are sufficient to discard the evidence of P.W.2 Ram Narayan and P.W.3 Hari Om. There is only one firearm wound of entry with two corresponding exit wounds of firearm on deceased's body. The question which arises for our consideration is that how the above noted discrepancies could have crept into the statements of P.W.2 Ram Narayan and P.W.3 Hari Om when admittedly the incident had taken place in broad daylight and both the witnesses claim themselves to be the eye witnesses of the occurrence.

33. The presence of P.W.2 Ram Narayan and P.W.3 Hari Om at the place of the incident at the time of the occurrence further stands belied from the fact that none of them were made inquest witnesses.

34. Thus, considering the fact that the written report of the incident was neither scribed on the dictation of P.W.2 Ram Narayan nor by P.W.3 Hari Om or given at the police station by them for which no explanation is forthcoming from the side of the prosecution and the irreconcilable discrepancy in the statements of P.W.2 Ram Narayan and P.W.3 Hari Om, the two so-called eye witnesses of the occurrence with regard to the manner of assault to which we have already referred and dealt with in detail hereinabove, we cannot believe their claim of being present at the scene of the occurrence. Apart from the aforesaid, both P.W.2 Ram Narayan and P.W.3 Hari Om are cousin brother and son of the deceased and as such, highly interested witnesses. There is no doubt that it now stands well-settled that evidence of eye witnesses who are closely related to the deceased can neither be discarded nor disbelieved on account of close relationship of such witnesses with the deceased but it is equally true that the evidence of a witness who is related to the deceased, is to be scrutinized with utmost caution and if the Court, after a careful appraisal of his evidence, finds that he has given a correct and cogent description of the incident, in that case, his evidence cannot be discarded merely on the ground of his being a relative of the deceased. In this regard, it would be useful to refer to the following authorities laid down by the Apex Court :-

35. Regarding evidentiary value of testimony of the interested or relatives witnesses, Hon'ble Supreme Court in ***Mano Dutt and another Vs. State of U.P.***

reported in ***2012 (77) ACC 209,*** has observed in paragraph no. 19 referring to the case of ***Namdeo Vs. State of Maharashtra r***eported in ***2007 (58) ACC 414 (52) = 2007 (54) AIC 162***, that this Court drew a clear distinction between a chance witness and a natural witness. Both these witnesses have to be relied upon subject to their evidence being trustworthy and admissible in accordance with law.

36. In ***Chand Khan Vs. State of U.P***., reported in ***1995 ACC 685 (SC)***, it was observed that minor discrepancies in evidence of eye-witnesses who have given convincing and reliable evidence with regard to details and manner of assault will not affect their evidentiary value. Absence or insufficiency of motive is immaterial if the incident is proved by evidence of eye witnesses.

37. Hon'ble Supreme Court in ***Waman and others Vs. State of Maharashtra reported in 2011 Crl. L.J. 4827*** has observed in paragraph no. 9 which reads as follows:

"In ***Balraje @ Trimbak Vs. State of Maharashtra, reported in 2010 (70) ACC 12 (SC) = 2010 (90) AIC 32,*** *this Court held that mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed toward the accused. After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same."*

38. It has been further observed in ***Waman (supra)*** that relationship cannot be a factor to affect the credibility of a witness. The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the court has to analyse evidence of related witnesses carefully to find out whether it is cogent and credible. The same view has been reiterated in ***State of U.P. Vs. Naresh and others reported in 2011 (75) ACC 215 (SC) = 2011 (106) AIC 76 (SC).***

39. In the present case, since after a threadbare scrutiny and a thorough evaluation of the evidence of P.W.2 Ram Narayan and P.W.3 Hari Om, we have found that there are contradictions and discrepancies in their statements with regard to the manner of assault which cannot be ignored as being trivial or attributed to errors in perception driving from the senses or lapse of memory and hence, we do not find it safe at all to maintain the recorded conviction of Matadin @ Chapole (A1) on the basis of their evidence. It has come on the record that apart from P.W.2 Ram Narayan and P.W.3 Hari Om, the incident was witnessed by a large number of independent witnesses but none of them including one Rati Ram, in front of whose house, the murder of Lakhan was committed, was examined during the trial.

40. The prosecution has miserably failed to adduce any evidence linking the 'pharsa' allegedly recovered on the pointing out of Kripa Ram (A2) from the river bed with the commission of the murder of the deceased. The 'pharsa' admittedly was not sent to the forensic lab for chemical examination. Similarly, blood allegedly recovered from the place where the deceased had fallen after being shot while he was sitting on the platform and the empty cartridges allegedly recovered from the place of incident were not sent for chemical examination.

41. The different dimensions of the incised wounds noted by P.W.5 Dr. B. D. Mangal on the deceased's body clearly suggest use of not one but several sharp-edged weapons in inflicting incised wounds on the deceased's body, thus totally nullifying the prosecution theory that the injuries sustained by the deceased were caused by the "pharsa' allegedly recovered on the pointing out of Kripa Ram (A2).

42. There is another very strange aspect of the matter. Along with appellants before us, one Mehngu was also charge-sheeted and tried for the charge u/s 302/34 I.P.C. The role assigned to him by P.W.2 Ram Narayan was that he had fired the first shot at the deceased which had hit him and thereafter he had caught hold of the deceased along with Matadin @ Chapole (A1) while Kripa Ram (A2) had inflicted injuries on him with 'pharsa'. According to P.W.3 Hari Om, the shot fired by him at the deceased had missed him. The trial court however strangely proceeded to acquit Mehngu and convicted Kripa Ram (A2) on the same set of evidence. The learned trial Judge has failed to assign any reason for disbelieving the evidence of two eye witnesses qua Matadin @ Chapole (A1) while relying upon the same for the purpose of convicting Kripa Ram (A2).

43. Thus, upon a wholesome consideration of the facts of the case, attending circumstances and the evidence on record, we do not find that the prosecution has been able to prove its case against the surviving appellant Matadin @ Chapole (A1) beyond all reasonable doubts and he is entitled to benefit of doubt.

44. The appeal succeeds and is accordingly **allowed.**

45. Matadin @ Chapole (A1) is on bail. He need not surrender. His bail bonds are cancelled and his sureties discharged. However, he shall comply with the provisions of Section 437-A of Cr.P.C.

46. There shall however, be no order as to costs.

(2019)10ILR A 86

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2019

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR IX, J.

Criminal Appeal No. 2813 of 2014
connected with
Criminal Appeal No. 2770 of 2014

Sheela @ Sushila ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri M.J. Akhtar, Sri Nazrul Islam Jafri, Sri Ravi Prakash Srivastava, Sri V.M. Zaidi, Sri Khalid Mahmood.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Sections 302 read with section 34 IPC, 120B IPC -criminal appeal - Code of criminal procedure, 1973 - Section 313 - Examination of accused persons - offered no explanation to negative the chain of circumstances pointing towards the guilt of the accused persons- Statement under section 161 Cr.P.C -The first information report is not an encyclopaedia to give each and every details-Minor contradictions cannot be taken to be a ground to reject the testimony of the prosecutions witnesses of facts- consideration of circumstantial evidence - circumstances forms a complete chain that in all human probability the crimes were committed by the accused appellants and none else - Law does not require to the prosecution to prove the existence of motive and probability of the accused having committed the crime -appellants sentenced for life imprisonment under section 302 of IPC. (Para 36,46 & 55)

B. Indian Evidence Act, 1872 - Section 27, 134 & 106 - When an offence like murder is committed in the secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution - burden on the inmates of the house to give cogent explanation as to how the crime was committed -The testimony of the prosecution witnesses fully supports the prosecution case and they have no motive to make false statement against the accused-appellants - evidence must be weighed and not counted - Medical evidence (postmortem report) fully corroborates the prosecution version as well as the testimony of the prosecution witnesses. The blood-stained weapon of offence and recovery of articles at the time of arrest of the accused persons on their disclosure statement made by them is admissible under section 27 of the Evidence Act. Merely because the other accused who was named by the prosecution has been acquitted by giving benefit of doubt would not make the evidence of the witnesses totally untrustworthy. (Para 42 & 46)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Reena Hazarika Vs St. of Assam AIR 2018 Sc.5361

2. Vikram Jit Singh Vs St. of Punj. (2006) 9 SC Page 338

3. Dr. (Smt.) Nupur Talwar Vs St. of U.P. (2018) 102 ACC Page 524

4. Joydeb Patra & ors. Vs St. of W.B. AIR 2013 S.C.2878

5. Shanker Lal & anr. Vs St. of CG. (Criminal Appeal No. 497 of 2008) decided on 6.10.2017

6. Sukhjeet Vs St. of Punj. (2015) 3 S.C. 670

7.Ranvir Yadav Vs St. of Bihar (2009) 4 SC 205

8. Sukhjeet Vs St. of Mah. (2009) 4 S.C. 429

9. Navaneetha Krishan Vs St. through Insp. of Police (Criminal Appeal No. 1134 of 2013)

10. Dashrath Singh Vs St. of U.P. (2004) 7 SCC 408

11. Suresh Chandra Bahri Vs St. of Bihar JT (1994) 4 SC 309

(Delivered by Hon'ble Naheed Ara Moonis J.)

1. Since both the accused appellants have been convicted and sentenced vide order dated 8.7.2014 passed by the Additional Sessions Judge Court No.10 Muzaffar Nagar,hence these appeals have been heard together and are being decided by a common order.

2. These criminal appeals have been preferred on behalf of the accused-

appellants against the impugned judgment and order dated 8/9-7-2014 passed by the Additional Sessions Judge, Court No. 10 Muzaffar Nagar whereby the accused-appellants have been convicted and sentenced to serve out life imprisonment with fine of Rs. 25,000/- in Sessions Trial No. 382 of 1982 (State vs. Sheela @ Sushila and others) under Sections 302 read with section 34 IPC, Police Station Hastinapur District Meerut .In default of payment of fine, they have to undergo imprisonment for a period of three months.

3. The emanation of facts giving rise to the prosecution in a short conspectus is that a first information report was lodged on 22.6.1982 at about 6.20 a.m. with respect to the incident occurred at night on 21/22-6-1982 with the allegation that the complainant heard shrill and shriek of his brother's wife in the morning on 22nd June 1982 at about 5.00 a.m. Being thunder-struck and panicky the complainant, his elder brother Mahesh and other family members rushed towards the room of Ramesh where they saw the dead body of his brother Ramesh lying on the cot. The blood was oozing from his mouth.There were marks of a number of injuries on the person of Ramesh. Ramesh was done to death at any time in the night. On the basis of tip off of the complainant (Ashok Kumar Singhal), an FIR was registered against unknown persons at police station Medical District Meerut vide Case Crime No. 170 of 1982 under section 302 IPC.

4. After lodging of the FIR, the investigating officer S.I. Sudarashan Chandra Katoch (P.W.12) swung into action and recorded the statement of the complainant and the witnesses. He got the copy of the FIR entered in the case diary. He reached at the place of incident i.e. residence of deceased Ramesh, Mohalla Madho Nagar, Meerut. He prepared the site plan which is marked as Ext. Ka.14. After conducting the requisite formalities, Panchayatnama of corpse was prepared on the same day in accordance with the procedure prescribed which was marked as Ext.Ka.15. Thereafter, the copy of chik, copy of report, photo lash, challan lash, report R.I., report C.M.O. and sample seal along with sealed dead body was sent to the mortuary for the autopsy. The aforesaid papers were marked as Ext.Ka.16 to 19. The investigating officer prepared the questions to be asked from the Medical Officer which was marked as Ext.Ka.20. At the instance of accused Haroon he prepared the recovery memo of blood stained Pant and towel from the shop which was marked as Ext.Ka.4. On 23.6.1982, arrested accused Sheela from her house and was interrogated. At her instance a screw driver was recovered in the presence of witnesses exhibited as Ext.12. Site plan with regard to recovery of Screw Driver was marked as Ext.Ka. 21. One piece of blood stained rod recovered at the instance of accused Rahimuddin exhibited as Ka.4 of which memo was prepared as Ext.Ka.5. The site plan of recovery of iron rod was prepared which was marked as Ext.Ka.22 . Constable CP 710 Rameshwar Singh associated with S.I.Suresh Chandra were present at the place of occurrence. After Panchayatnama ,the corpse of Ramesh Chand was handed over to them with relevant papers for autopsy. Autopsy of deceased Ramesh was conducted on 23.6.1982 by P.W.10 Dr.S.K.Tyagi, Medical Officer, P.S.Sharma Hospital Meerut. The investigating officer after completing all the necessary formalities

and collecting the credible and clinching evidence against the accused appellants Sheela and Irfran, and co-accused Rahimuddin and Haroon submitted the charge sheet under sections 302/120B IPC.

5. The case was initially committed by the learned Chief Judicial Magistrate Meerut but was later on transferred to the VIth Additional Sessions Judge Meerut for trial.

6. The learned trial judge after hearing the prosecution as well as the defence and also after providing the necessary documents to the accused appellant and the co-accused persons framed charges against them under Section 302/34/120B IPC. The charges framed against the appellants and the co-accused persons were read over and explained to them. All the accused persons adjured the charges and claimed to be tried hence the prosecution was called upon to lead the evidence.

7. In order to prove guilt of the accused persons, the prosecution had examined the complainant Ashok Kumar (PW-1), Mahendra Giri (PW-2), Suresh Chandra Singhal (PW-3), Babu Lal Sharma (PW-4), Mahesh Chandra (PW-5), Pradeep Kumar (PW-6), Ram Karan (PW-7) Constable Kanhaiya Lal (P.W.8), Prakash Chand (P.W.9), Dr.S.K.Tyagi (P.W.10), Constable Subhash Chand (P.W.11), S.I. Sudarshan Chandra (P.W.12) and Constable Rameshwar Singh (PW-13) All the prosecution witnesses had supported the prosecution case.

8. After examining the prosecution evidence, the accused appellants namely Sheela and Irfan and the co-accused Rahimuddin and Haroon were examined under section 313 Cr.P.C. and in their statement, they denied all the charges levelled against them and pleaded for innocence. The accused persons pleaded that they have been falsely implicated in the present case on account of suspicion and personal vengeance. The accused appellant Sheela in her statement divulged that she was on duty in the nursing home on the fateful night of 21/22.6.1982. Kaushal Kumar an employee of Nandan Cinema Meerut was examined as D.W.1.

9. Since the accused Haroon was declared juvenile by the Principal Judge, Juvenile Justice Board , Muzaffar Nagar hence his trial was separated vide order dated 5.4.2014. The learned trial Judge, Muzaffar Nagar upon appreciation and appraisal of material evidence on record held that the prosecution has failed to prove evidence against Rahim Uddin under section 302 read with section 34 and section 120B IPC. The learned Addl. Additional Sessions Judge, (Court No.10) held the appellants Sheela and Irfan guilty for the murder of Ramesh whereby they were convicted and sentenced under Section 302/34 IPC to serve out life imprisonment along with fine of Rs. 25,000/-. In case of default, they were directed to serve out additional sentence of three months. Both the accused appellants were acquitted of the charge of section 120B IPC. Since the prosecution had not provided any evidence against accused Rahimuddin, he was acquitted from the charge under section 302/34/120B IPC. His bonds and sureties were discharged.

10. In support of prosecution case, the prosecution has examined Ashok

Kumar Sanghal son of Kailash Narain as PW 1. In his testimony, Ashok Kumar deposed that he is well aware about the miscreants present in Court namely Mohd. Irfan, Rahimuddin ,Haroon and Sheela. Accused Sheela is the wife of his brother Ramesh (deceased).Accused Haroon and Rahimuddin were doing the work of mechanic with accused Irfan. Irfan has developed illicit carnal relation with accused Sheela. Accused Irfan was running a shop in contiguous to his house. Accused Irfan had taken on rent on rent a shop in the house of the complainant (P.W.1). He had also taken a room on rent in the house of Ramesh. Ramesh is the elder brother of the complainant. The house of the complainant (P.W.1) and Mahesh are adjoining . The main gate of the house of Ramesh was opening towards road in the western side. A door of that house was opening in the back side towards lane. He had seen his Bhabhi Sheela reading and writing. He can easily identify her writings. It was crucial day of 22.6.1982 at about 5.00 a.m. in the morning, he was sleeping in the Verandah of his house . He heard panic-stricken voice of lamentation & bemonaning of Sheela (appellant).The complainant,his brother Mahesh and other family members reached there at the place of occurrence. The complainant (P.W.1) saw the corpse of his brother lying on the cot. The deceased Ramesh had sustained fatal injuries. The fan was moving. The deceased Ramesh had worn blue linear underwear which was soaked with blood. Rigor mortis was present on the corpse and there was blue mark around the neck. A number of persons of the locality namely Natthoo Lal, Mahinder Giri , Baboo Ram , Satya Prakash and other arrived there. The accused Sheela had strained and acrimonious relation with her husband (Ramesh deceased). The brother of the compainant namely Ramesh used to thrash his wife (Sheela) occasionally on account of illicit corporal relation with Irfan. There had been scuffling between Ramesh and his wife (Sheela) in the morning on 19.6.1982. Just after half or quarter to half hour Irfan appeared and uttered that he would not spare any person who would try to put spokes on their relations whosoever may be inclusive of her husband. The paper written by Sheela which was marked as Ext.Ka.1 and the paper which was written by accused Irfan were proved by the complainant (P.W.1). The report of the murder was given by the complainant (P.W.1) which was in his writing and signature. The paper written by the complainant marked as Ex.Ka.3 was duly proved. The accused Sheela used to sleep with his brother (Ramesh) in the room. The cot on which dead body was lying had a blank sheet, two pillows. Both the pillows were saturated with blood.

11. During cross examination condition of the deceased was neither disclosed in the FIR nor was communicated to the Station Officer. There was no mention in the first information report with regard to clothes and cot.He did neither disclose the factum of sleeping in room with Sheela (accused) in the FIR nor to the station officer concerned. The marriage of Irfan (co-accused) was solemnized prior to 8 to 10 days. The complainant (P.W.1) had relation with Irfan (co-accused) as tenant. The complainant (P.W.1) and his brother Mahesh had attended his marriage. The marriage of Irfan (co-accused) was performed at Unchauli. The complainant was doing the work of Munshi prior to 1 & 1'1/2 years but he denied that he was

doing the work of Munshi with Gajendra Singh Dhama. Mahesh (P.W.5) was doing the work at Kutcheri (civil court).His father and uncle were also doing the work at Kutcheri (civil court). On 19.6.1982, Ramesh had thrashed Sheela (accused) for attending the marriage of Irfan. On the persuation of his mother, the complainant had gone at the residence of Irfan but looking the presence of Sheela ,he came back. The place where dead body was lying was in the tenancy of Irfan (co-accused). Since Ramesh was the owner of that room hence it was mentioned in the first information report. When the complainant came back after lodging the first information report, Babu Lal Sharma (P.W.4) met him outside the room. The name of father of Mahendra Giri (P.W.2) is Lakhpat. His house is adjoining to the shop of Irfan (accused appellant). The father of the complainant (P.W.1) had got published in the news paper prior to murder of Ramesh that the demeanour and conduct of Ramesh was not fair. This fact was disclosed by his mother. His father had written will deed in favour of his mother. It was incorporated in the will deed by his father that after his death, the property left by his will be inherited by the complainant and his brother Mahesh (P.W.5). It was not remembered to the complainant as to whether the portion in which Ramesh and Sheela used to live was constructed prior to executing will deed or thereafter. The father of the complainant had expired prior to six years of the incident. The portion in which Ramesh (deceased) and Sheela (accused) used to live was taken into possession by the complainant's mother. The accused appellant Sheela used to work in Manjula Nursing Home adjoining to the home during the course of that period. The complainant (P.W.1) showed his ignorance as to whether Sheela (accused) used to work in that nursing home at night. The complainant used to meet Ramesh (deceased) frequently. The complainant went to lodge the report with his brother Mahesh (P.W.5) and Raj Kumar. He reached at the police station ast 6.15 a.m. and the police personnel came at the spot at about 7.00 a.m.Satya Prakash Tyagi and Mahendra were tenant in the house of the complainant. The portion of the house where the complainant was sleeping,its door was opening towards west. The door of the house of complainant was not opening towards the house of Ramesh. There was a window in between the house of the complainant and Ramesh but that window was not being used for ventilation. The tenant had also reached there. The police personnel remained present near the dead body of Ramesh upto 11.15 a.m. It was asserted by the complainant that there was illicit carnal relation between Sheela and Irfan. The complainant deposed that Ext.Ka.1 was not written before him. He had not seen that letter earlier. Nobody had come to collect money from Sheela borrowed by Ramesh. There was cordial and congenial relation between Ramesh and the complainant. Irfan used to repair light of the motor and charge battery. Shop is in the name of Jalaluddin on rent of Rs.50/- who is tenant since childhood.There was no dispute between Irfan and Jalal Uddin for getting the shop vacated. Rahim Uddin was doing the repairing of the tractor. He also used to work as electrician at the shop of Irfan. When threat was extended by Irfan to eliminate Ramesh, his mother ,Mahendra ,Natthoo and other persons of the locality were present. At that moment about 10-15 persons were there. The complainant showed his ignorance with respect to

Ext.Ka.2. portraying second of wife of Irfan. He did not certify the photo taken at the marriage of Irfan. The complainant (P.W.1) had come back prior to reciting the Nikah at about 11/12 "O"clock. He did not have any information as to whether the girl with whom marriage of Irfan was performed was within the access of Sheela. He proved similarity between Ext.Kha2 and Ka.2. In Ext.Ka.3 Irfan and Sheela were shown side by side. Irfan was wearing the cloths of groom. In Ext.Kha.4, the picture of Irfan has been delineated. Probably, the lady was the same which was delineated in Ex.Ka.2. The invitation card which was printed for the marriage of his sister was proved as Ext.Ka.5. In that invitation card, the name of Ramesh (deceased) was elucidated. There is no member of his family in Ext.Ka.6. He disowned that he had falsely implicated them on account of litigation. It was also divulged that the room of the house was rented to Irfan in the intervening period of one & half to two years earlier. The possession of the room rented to Irfan was taken by the mother of the complainant after 8-9 months of the incident of murder. At the crucial period of murder of Ramesh, some glasses and clothes were lying inside the room of which photo was taken by the station officer concerned. The complainant asserted with respect to presence of Irfan in that room. The complainant was associated with his brother Mahesh (P.W.5) upto coming back from the police station concerned. The dead body was sent at about 10.15 a.m. on rickshaw. Mahesh (P.W.5) went on motor cycle. Irfan was tenant in the room of Ramesh. Sheela had illicit corporal relation with Ramesh. There is no intention of implicating Irfan with an oblique design of getting the room vacated.

12. Mahendra Giri was examined as P.W.2. In his statement on 24.9,86 averred that his house is in the adjoining of Ashok (P.W.1) and Mahesh (P.W.5). He was well aware about the identity of accused persons namely Haroon, Rahimuddin, Irfan and Sheela. Sheela is the widow of Ramesh (deceased). Haroon and Rahimuddin used to work with Irfan. His shop was situated in the vicinity of his house. Haroon and Rahimuddin did not stay at the shop in night. It was the incident prior to four to four and half years, he came to know in the morning about murder. The miscreants Irfan and Haroon were coming back from the house of Sheela at about 12.15 in the night. The accused persons were not present at the shop on the fateful day of occurrence. He had seen the dead body of Ramesh to whom a number of injuries were inflicted.

13. In his cross examination he deposed that he was sleeping outside the house. He had seen from the distance of 5 to 7 paces that the miscreants were going. The distance from the shop of Irfan was about 8 to 10 paces. His shop was adjacent to the shop of Irfan . Irfan had small shop. The door of the shop of Mahendra Giri (P.W.2) and Irfan was opening towards east. He (P.W.2) was taking rest after urination. He had shown the place of his sleeping and the place of departing of miscreants. He could not put forth any reason as to why it has not been demonstrated in the map. He was well aware about the miscreants. Their names were disclosed to the station officer concerned. He could not advance any reason why it was omitted. When he reached near the dead body of Ramesh at about 5.30 a.m., Ashok (P.W.1) Mahesh (P.W.5) and Banwari were present. He had gone at the house of Ramesh at about

4.30 p.m. at the call of Station Officer concerned. At that moment, police personnel were present there. The station officer concerned was present in front of room of Sheela (accused appellant). The dead body of Ramesh arrived after 2/3 days at about 2 to 2.30 p.m. He remained at his shop on the fateful day of murder from 7.30 to 8.00 a.m. and 7.30 to 8. p.m. It was disclosed by him that Dhama Advocate, had been looking after his cases for the last 5 to 7 years. Ashok (P.W.1) had been clerk of Mr. Dhama Advocate. It was also divulged by him that Rahimuddin is servant at the shop of Irfan (accused).

14. The prosecution had examined Suresh Chandra Singhal as P.W.3. He stated on oath that on 23.6.82 at about 1.30 p.m. he was sitting at the outer portion of house of his Tau. Yogesh, Ashok (P.W.1) ,Bhagat, Banwari Lal and Babu Ram were also sitting there. Haroon and Rahimuddin were brought there in the custody of police personnel. It was unfolded by the police that both the miscreants namely Haroon and Raimuddin would make recovery of the weapons inclusive of clothes used in the murder of Ramesh. Both the miscreants were interrogated by him (P.W.3), they answered in affirmative. The miscreant Haroon went ahead, P.W.3 Suresh Chandra and others proceeded behind the police personnel. The lock of the shop of Irfan (accused) was opened by Haroon. He took out a dirty Khaki pant from the plywood makeshift roof which was saturated with blood. A torn towel was taken out from the cannister filled with black oil. Both the articles were sealed by the station officer concerned in different bundle. He (Suresh Chandra Singhal-P.W.3) and Yogesh had put their signatures on the Fard which was marked as Ext.Ka.4. The accused Rahimuddin went ahead and entered in the shop. He took out an iron axle from the rack of table. The fard of the recovered article was prepared and was duly signed by him and Yogesh which was marked as Ext.Ka.4. The recovered rod was put under seal cover and was also signed by him. Haroon was the servant of Irfan. Both were present in the court. On 21.6.1982, the P.W.3 Suresh Chandra Singhal and the son of his Tau,Mahesh were coming back after looking picture. They saw Irfan and Haroon coming from their shop. When they were at the distance of 5 to 7 paces, Mahesh said to Irfan to have a cup of tea. Irfan did not show his willingness on the pretext of going to village. Iran and Haroon were highly disturbed. They proceeded towards the Hapur stand. After some time Haroon came back and proceeded towards the shop of Irfan. He (P.W.3) and Mahesh returned to their house. Next day at about 5.30 a.m. He (P.W.3) was sleeping inside his house. His father shouted that someone had done to death to Ramesh in the night . He (P.W.3) immediately rushed towards the house of Kailash Narain. Sheela (accused appellant) was lamenting and bemoaning outside of the house. The corpse of Ramesh was lying on the cot in the room. There were multiple injuries on his person. There was blue mark on the neck. On that crucial date, Irfan, Rahimuddin and Haroon did not come at the shop. The shop was closed. He (P.W.3) remained present there upto 6'1/2 'O' clock till then neither they (accused persons) came nor the shop was opened. He reached near to the deceased Ramesh at about 5.00 a.m. and remained there till 6.30 a.m. When he (Suresh Chandra Singhal-P.W.3) reached at the

place of occurrence, Mahesh ,Ashok, Natthoo were present there. Mahesh s/o Lakhpat was also present there. The shop of Mahesh s/o Lakhpat was opened on the fateful day. The miscreants were arrested by the police personnel on 23.6.1982. The key of lock which was opened by Haroon was closed by police personnel and was given to Haroon. They remained present at the shop of Irfan about one hour. The panchayatnama of Ramesh was done before him. The house of Ramesh is at a distance of 400 yards from the tea shop of Bhure and 100 yards from his house. He proved the presence of Irfan and Haroon.

15. The prosecution has examined Baboo Lal Sharma as P.W.4. He stated on oath with regard to murder of Ramesh in June 1982. He had gone at the place of occurrence. The dead body of Ramesh was lying on the cot. The police personnel had come and had taken into custody the pillow etc. The articles taken by the police were marked as Ext.Ka.8 to 11. He had proved his signature on Ext.Ka.6. Next day, Sheela (accused) had supplied screw driver which was marked as Ext.Ka.12. The screw driver recovered by the police personnel was saturated with blood. It was affirmed that the said screw driver was used in the commission of murder. Sheela went ahead. She opened the lock and door. The screw driver was wrapped in the cloth and the fard of which was prepared and marked as Ext.Ka.7.He had proved his signature on Fard Ext.Ka.7. Next day, the children of Sheela had left the house.

16. In his cross examination he deposed that he had reached at the place of occurrence at about 5.30 a.m.The police personnel were not present there. Mahesh, Ashok, Banwari and Suresh were present there. He could not mind as to whether Mahendra was present there or not.Sheela (accused appellant) was present there.,He came back after 2 to 4 minutes. He again went at about 8.30 a.m.The dead body of Ramesh was lying on the cot. The dead body was not sealed. He had again gone at 10.30 a.m.The dead body of Ramesh was sent at that time. He came back at about 6 to 6.30 p.m.Next day, police was not present there. Recovery was made at about 11.30 a.m. There was gathering on 23.6.1982 then he was also present there. One police constable called him by indication. The Station officer concerned, P.W.4 Babu Lal Sharma and Sheela entered inside the room. The station officer concerned came back taking the screw driver. The screw driver used in the said crime was marked as Ext. Ka.11. The entire process was completed at the place of occurrence. The house of P.W.4 Babu Lal Sharma and Mahesh was in front of each other. The house of the deceased Ramesh is situated at Hapur road.

17. The prosecution has examined Mahesh Chandra as P.W.5. He stated on oath that he is well aware about the identity of the accused persons. Haroon and Rahimuddin used to come to Irfan. Sheela is the wife of his brother, Ramesh. In one portion Ramesh used to live, one portion of that house was given on rent to Irfan. Sheela and Irfan had illicit physical relation. He heard shriek and scream of wife of Ramesh (Sheela) on 22.6.82 at about 5.00 a.m. He in the company of his wife, Ashok Kumar (P.W.1) and mother went inside the room of Ramesh (deceased). Sheela was lamenting on the door step of the room of Irfan. The dead body of Ramesh who was wearing linear half pant was lying on the cot in the room.

Blood was clotted on the face. There were multiple injuries. One pillow was placed below the head and one beneath the leg. Both the pillows were saturated with blood. The children of Ramesh were not present there. They came out seeing the deceased Ramesh. The condition of his mother deteriorated. She was consoled. At about 5.30 a.m. he (P.W.5), Ashok and Rajkumar went at the police station concerned for lodging the first information report. Ashok (P.W.1) handed over the report of the incident to the Moharrir. On 21.6.82, he (P.W.5) and Suresh went to see picture, while returning they were taking tea and saw Haroon and Irfan were coming back from their shop. When they came near to them, they offered to have a cup of tea. Irfan was confounded and perplexed. He showed his hurriness. After sometime Haroon came there and moved towards his shop. There was illicit corporal relation between Irfan and Sheela. Irfan had thrashed to Ramesh many times on this pretext. Irfan had given overt challenge to eliminate to anyone who would dare to intervene in their relation. Ramesh had beaten to his wife Sheela. Sheela had attended the marriage of Irfan against the wish of Ramesh. Ext.Ka.1 was written by Sheela. On thrashing of Sheela by Ramesh, Irfan came and warned that whosoever would muster courage to interdict in his matter, would be eliminated for ever. Ext.Ka. 2 was recovered from the room of Ramesh in the newspaper. He (P.W.5) had seen to Sheela reading and writting the letter. Ext.Ka.1 is signed by her. He had seen her reading and writing .He was well aware about her hand writing. The same was signed by her.

18. The fateful date when Ramesh was liquidated, the shop of Irfan was closed. On 23.6.1982, the wife of Ramesh had come at about 3'1/2 'O' clock. When the wife of Irfan opted to open the door, in the meantime police arrived and took her into custody. He (P.W.5) and Babu Lal were called outside by the police personnel. It was disclosed by the Police personnel that the accused Sheela wanted to get the screw driver recovered. On being interrogated, Sheela evinced her willingness to get the recovery of screw driver used in the murder of Ramesh. It was about 11.30 a.m. Two sub-inspectors, P.W.5 Mahesh Chand and Babu Lal went forward behind Sheela. Sheela opened the door after unfastening the lock and entered inside the house. Both the sub-inspectors in association with P.W.5 Mahesh Chand and Babu Lal entered inside the house. The cannister was placed towards north window. The screw driver used in the commission of said crime was taken out from that cannister. The said screw driver was saturated with blood at a number of places. The said screw driver was put under seal and the fard was prepared exhibiting as Ka.7. The said Fard was signed by P.W.5 Mahesh Chand ,Babu Lal and Sheela and was marked as exhibit-12.

19. In cross examination Mahesh Chandra (P.W.5) divulged that he had been working on the post of clerk in the civil court since 3.7.75. He was posted in the court of Munsif Magistrate. The report was written at about 5.30 a.m. in the frontal portion of room of Ramesh. At that moment, Suresh, Banwari Lal, Babu Lal, Nattho etc. came. He did not mention with regard to envision of Haroon and Irfan in the night. There has been no disclosure with regard to illicit relation between Irfan and Sheela. He has also not discussed any inkling for thrashing to Sheela and any threats extended by Irfan. This fact was also not unravelled that the condition of mother was deteriorated. He (P.W.5) stayed at the police station

concerned about 10 minutes. The police had come after 5 to 7 minutes after his departure. It was intimated by him to the Station Officer concerned that Rahimuddin was doing work at Irfan but this was not reduced in writing. It was not divulged by him that Sheela was weeping at the threshold of room of Irfan. It was also not unfolded that the children of Ramesh were not there. This matter was brought in the notice of Irfan which caused him infuriation and extended threats. This fact was intimated to the Station officer concerned. He could not expose any reason as to why it was not reduced in writing. Irfan had taken on rent the said room prior to one & half or two years. He could not inform the amount of rent. This fact was not mentioned while lodging the report. The relationship with Irfan was merely of a tenant. Irfan had thrashed to Ramesh about month back to the incident. He (Irfan) used to beat to Ramesh earlier also. On account of relationship with Bhabhi (Sheela) he had gone on 12.6.82. Ashok Kumar (P.W.1) was also associated to him. They remained at the house of Irfan about one and half hour. It was not remembered to him that photo was clicked or not. He could not identify to Ext.Ka.2 (photo) which was clicked in red Sari whether she was the wife of Irfan as he (P.W.5) had never seen the wife of Irfan. In Ext.Ka.2 green dhoti of Sheela has been depicted. Second lady is the same who has been portrayed in Ext.Ka.2. That lady was seen in the marital function. In Ext.Ka.4, Irfan has been evinced. He (P.W.5) was not aware as to that photo was pertaining to marriage and the said lady was not manifested. In Ext.Kha 3 groom Irfan was evinced. He showed his ignorance as to whether it was pertaining to the marriage. In Ext.Kha.1. the photo of Mahesh Chand (P.W.5) and Sheela was displayed. He could not ascertain as to whether this photo was clicked at the time of marriage of Irfan. The name of son of Sheela is Manoj. Ext.Ka.2 and negative were made available to him in December 1982 which were handed over to Government Counsel. The letter was also given to him. He could not disclose the name of government counsel. The government advocate was hailing to Meerut District. He was engaged when the case was transferred. No letter or application was presented to the Superintendent of Police. He did not disclose the distance of Uchauli from Meerut but divulged that this path can be covered within half hour. He (P.W.5) was annoyed hearing about the extra marital relation of Sheela with Irfan anterior to one year. He (P.W.5) had tried to convince Irfan but he did not agree. He admitted that Irfan was tenant of Ramesh. He also ratified with regard to illicit relation of Irfan with Sheela. He also authenticated with regard to beating of Sheela by Ramesh. On 19.6.1982, Ramesh had thrashed to Sheela . After half an hour Irfan appeared then he vented his ire & irate that Ramesh will be decimated. He (P.W.5) did not move any application with regard to that episode. Jalaluddin who is the brother of Irfan, is owner of the shop in question. He could not disclose the whereabouts of Jalaluddin. He (P.W.5) did not make any complain of illicit relation of Irfan with Sheela to any person of the locality or to Jalaluddin. His father had died in 1980. He (P.W.5) did not make complain to Banwari Lal. Nobody had disclosed to him with relation to her relation with Irfan. The shop was rented at Rs. 50/-. The rent of the shop was taken by mother. The mother was living with him. His mother is in possesion of the room rented

to Irfan. Irfan did not live in Uchauli at the time of marriage as well as on the crucial day of murder of Ramesh. Irfan used to live in the room of Ramesh. He (P.W.5) was not aware as to whether bus was running to Uchauli or not. The bus was plying from Mawana station. The Mawana station was at a distance of three kilometres from the place of occurrence. He did not interrogate from Irfan as to why he was going at his room at 12'1/2"O' clock at night. He (P.W.5) was sipping tea prior to 3-4 minutes. Thereafter 4 to 5 minutes were passed away. Haroon had come back after one and one & half minutes. Bhoora and his servant were present there. He had been looking to Bhoora running the shop for the last 8 to10 years. He was not aware as to Bhoora was conversant to Irfan. He (P.W.5) did not have any conversation with Bhoora after liquidation of Ramesh. After murder of Irfan, the shop of Natthoo was rented at Rs. 250/- per month. Mahendra did not have any shop. The room adjoining to the road was not in the tenancy of Mahendra. He (P.W.5) did not recollect as to whether this fact was narrated to the Station Officer concerned that the shop of Irfan was closed. He (P.W.5) rebutted this fact that this story was fabricated so as to get the shop vacated. He confronted this fact that the photo was taken from the album of Irfan and was got prepared deceitfully. The roon was rented to Irfan. He could not recollect the exact period of departure of Sheela to attend the marriage of Irfan. On paying a glance on the wife of Ramesh, he declined to have meal. Ramesh did not interrogate from him as to why he had attended the marriage of Irfan. His father had executed a will in favour of his mother in which the place which was in possession of Ramesh and Sheela was not portrayed. He was not aware when this share was demarcated. There was no partition from Ramesh. Since Ramesh was divested from the property of his father thus the question of partition did not crop up. His mother had staked her right over that property. His mother had produced the copy of Prabhat in the suit. He could not confirm as to whether Ext.Ka.7 is the same document. This fact was divulged by Sheela to the station officer concerned and thereafter she opened the door removing the lock. The cannister was not taken into possession. After recovery of screw driver at the pointing of Sheela from the room, she put lock in the room. The Station officer concerned visited the room where the corpse of Ramesh was lying. He could not recollect as to whether the second room was opened or not. The lock which was put in the door by Sheela was not in his presence. The fard was prepared by the same Station Officer who had recorded his statement. The process of recovery was completed at about 11.45 a.m. Sheela used to read and write and was teaching to the children. He refuted that this story has been cooked up so as to take possession over the house in question.

20. The prosecution had examined Pradeep Kumar as P.W.6. He stated on oath that he has a shop of photography at Meerut. He proved to have taken some photos of dead body. He proved Ext.Ka.3,9/1,9/2,9/3 and 9/4. The photo was clicked at about 2.30 to 3.00 p.m. but he had neither put his signature nor had kept the negative.

21. Prosecution has examined Babu as P.W.7. He stated on oath that he was running tea shop in June 1982 in Madhavnagar near Hapur stand. The

house of deceased Ramesh was situated in front of his tea shop. Sheela is the wife of Ramesh (deceased). The accused persons namely Irfan, Haroo and Rahimuddin are well to known to him. He divulged for closing his tea shop at about 7.30 to 8.00 p.m.He disowned closing of his shop at about 1.30 a.m. at night. He disowned his meeting with those miscreants on that night. He also stated that he had not seen those accused persons entering and departing from the house of Ramesh. The station officer concerned had not recorded his statement. He turned hostile. He was cross examined by the prosecution to have given any statement under section 161 Cr.P.C. to the investigating officer.He had proved Ext.Ka.8. He admitted that affidavit paper no.35 Kha was given by him.

22. Constable Kanhaiya Lal was examined as P.W.8. He stated on oath that he was posted as constable at the police station Medical College on 22.6.82. On the production of report Ext.Ka.3 at about 6.20 a.m. by Ashok Kumar (P.W.1) ,he prepared Chik Report Ext.Ka.9. He proved Ext.Ka.3,written FIR, Ext.Ka.9, Report No.6. He also proved the Report No.31 dated 22.6.82 written by H.C. Dharmpal and Report No.17 dated 23.6.82 written by H.C.Dharmpal. He also proved Ext.Ka.11 and Ext.Ka.12. He (P.W.8) was not cross examined by the defence.

23. The prosecution has examined Prakash Chand as P.W.9 who was posted as C.C.Malkhana Sadar Meerut. He stated on oath that he recognized the hand writing & signature of Malkhana incharge Sheesh Ram. He has brought with him the Malkhana register. On 27.7.1982 he sent the case property for chemical examination to Agra. Pursuant to the order of the Chief Judicial Magistrate dated 9.7.1982, those incriminating articles were sent through Constable Subhash Chand. The articles remained intact till it was preserved in the Malkhana. These articles were kept in Sadar Malkhana from the police station concerned on 26.7.1982. The order of Chief Judicial Magistrate dated 9.7.82 was received in Malkhana Sadar on 27.7.1982 and on that date it was sent to Agra for chemical examination but no report was received with regard to its return.

24. Dr. S.K.Tyagi (P.W.10) who was posted as Medical Officer at Public Health Centre Bhagwanpur District Saharanpur stated on oath that he was posted at mortuary in P.L.Sharma Hospital Meerut on 23.6.1982. On that day at about 12.00 (noon), he conducted the post mortem of Ramesh Chandra Gupta son of Kailash Chandra r/o 62, Madho Nagar Meerut. The dead body of Ramesh was brought by constable Rameshwar Singh and Constable Harendra Singh under seal cover. The deceased Ramesh was about 32 years old with average body built. Rigor mortis was present on lower extremities only and had passed from upper extremities. Decomposition had started. The nails were deeply cyanosed. Eyes were open and bulging. There was bleeding from mouth and stool was coming out of anus. His genital on examination were found with smegma behind corona glandis.

25. Following ante-mortem injuries were found on the person of deceased Ramesh.

1. Incised wound 2 cm x 1 cm x bone deep on the lateral aspect of right eye brow.

2. Incised wound 2.5 cm x 1 cm x muscle deep on the left angle of lower jaw.

3 3. Bruise 21 cm x 8 cm on the front of neck more on left sid side.

4. Multiple abrasion in area of 12 cm x 4 cm on top of left shoulder.

5. Linear abrasion of 1 cm long, 2 cm below the left elbow.

6. Bruise 18 cm x 9 cm on front, chest and lower part of neck.

7. Bruise 18 cm x 10 cm x 12 cm below the left nipple.

8. Multiple abrasion 8 cm x 5 cm on the dorsom of right hand.

9. Traumatic swelling around both the scrotum sachs.

Internal Examination

26. On internal examination, the doctor found that membrances were congested . The brain was also congested. Ribs from 2 to 8 were found fractured on oath side. Pleura was lacerated and congested . There was fracture of hyoid bone and cartilages. Trachea rings were lacerated and contained blood. Both the lungs were lacerated and congested. Big vessels were contused. In the soft tissues and chest cavity there was large collection of blood about 250 ml. Penitorium was congested. Spleen & kidneys were congested. Teeth were 16 x 16,pharynx and larynx were congested.

27. Death could have occurred in the night 21-22/6.82.

28. According to the opinion of the doctor, the deceased Ramesh died about a day and half back because of asphyxia, syncope and ante-mortem injuries. The doctor has proved the post mortem report exhibit Ka.13.opining that injuries were sufficient in ordinary course of nature to cause death. Death could have occurred in the night of 22/22.6.1982.

29. The prosecution had examined constable Subhash Chand as P.W.11. He stated on oath that he was posted as constable at Police Station Medical College District Meerut. He had taken the case property from Malakhana Sadar to Agra for chemical examination. The seal of the case property was intact. There was seal of Chief Judicial Magistrate Meerut on the said case property.

30. The prosecution had examined constable Subhash Chand as P.W.11. He stated on oath that he was posted as constable at Police Station Medical College District Meerut. He had taken the case property from Malakhana Sadar to Agra for chemical examination. The seal of the case property was intact. There was seal of Chief Judicial Magistrate Meerut on the said property.

31. The prosecution has examined S.I. Sudarshan Chandra Katoch as P.W. 12 . He stated on oath that he was posted as S.I. in June 1982. He was entrusted the investigation of this case. He started the investigation of this case on 22.6.1982 after visiting the place of occurrence at Mohalla Madhonagar Meerut. The corpse of Ramesh was lying at the place of occurrence. The corpse of Ramesh was taken into custody and made inspection of the place of occurrence. The photographer took the photo of the place of occurrence. The investigating officer also prepared the site plan of the place of occurrence. The site plan prepared by the investigating officer was marked as Ext.Ka.14 and the same was duly proved. He got the Panchnama prepared which was marked as Ext.Ka.15. The photo lash, letter to Chief Medical Officer and the Challan Lash were prepared and marked as Ext.Ka.16,17 and 18 respectively. The

investigating officer further sent a letter to Chief Medical Officer raising some questions which was marked as Ext.Ka.20. The dead body of Ramesh was wrapped in a cloth and was sealed. After completing requisite formalities, the dead body was sent to the mortuary under the supervision of constable Harendra Singh and Rameshwar. He collected one pillow,one bed sheet and one bed cover saturated with blood which were collectively marked as Ex.Ka.6. The investigating officer recorded the statement of Ashok Kumar (complainant P.W.1) Mahesh Chandra (P.W.5), Banwari Lal, Suresh Chandra Sanghal (P.W.3), Karmvari, Babu s/o Ram Karan and Yakub s/o Pyare Mian and other witnesses. On the same night, the accused Irfan was arrested from his shop. On his pointing some incriminating articles were recovered which were deposited in the Malkhana under seal cover. On 23.6.1982, the investigating officer arrested the accused Sheela from her house. On the pointing of Sheela, a screw driver used in the said crime was recovered in the presence of witnesses namely Mahesh Chandra Sanghal and Babu Lal Sharma. The said screw driver was marked as Ext.Ka.12. The site plan of recovery of screw driver was prepared and marked as Ext.Ka.21. The statement of Mahesh Chandra Saghal and Babu Lal Sharma was recorded. Thereafter the accused Haroon and Rahimuddin were arrested. On the pointing of Haroon, blood saturated pant and towel were recovered which was marked as Ext.Ka.4. The recovered articles were duly sealed in the presence of Suresh Chandra Sanghal and Yogesh Bansal. On the pointing of accused Rahimuddin a blood saturated iron rod (Ext.Ka.4) was recovered which was marked as Ext.Ka.5. The recovered rod was put under seal in the presence of Yogesh Chandra Sanghal and Suresh Chandra Sanghal. He had proved the Ext.Ka.22 relating to site plan of recovery of piece of iron and recovery of pant and Ext.Ka 23 charge sheet dated 2.8.82 submitted by Mahavir Singh posted at Police Station Medical College as Station Officer. He confirmed the arrest of Sheela on 23.6.1982 at about 11.30 a.m. Accused Sheela was detained at the police station up 3.35 p.m.The articles which were recovered on personal search were entered in G.D. Mahendra had neither disclosed the place where he had slept in the night nor unfolded the place where he had seen the accused Irfan in the night. Mahendra had only disclosed the name of Irfan. It was also not disclosed by Mahesh Chandra that Rahim is the servant of Irfan. The children of Ramesh were not present at the place of occurrence. The accused Irfan was arrested at 7.30 p.m. at Sun Battery Charging Works. There is distance of about 14-15 yards from the place of occurrence and the said shop. The door of shop of Irfan and place of occurrence was towards Hapur road. The accused Irfan was interrogated at his shop. There was electric light at the shop and Irfan was all alone. The statement of accused Irfan was recorded in the electric light inside the shop. After putting lock in the shop, the accused Irfan proceeded with him. The accused Irfan was put in lock up after search. The key of the shop was not taken from the accused Irfan as it was not related with case property. On 23.6.1982 at about 11.30 a.m.He (P.W.12) had gone at the house of accused Sheela. After taking into custody to accused Sheela, the screw driver used in the crime was recovered at her pointing. It was entered in the case diary. The accused Haroon and Rahimuddin were arrested

from the bridge of foul smelling culvert. After taking into custody to Haroon and Rahimuddin, the investigating officer came at the shop of accused Irfan from where Irfan was arrested. The shop was closed and the key of which was with Haroon. At the time of search whatever articles recovered from the accused persons were deposited at the police station and entered in the G.D. The accused Irfan was sent to Jail on 23.6.1982. The almirah from which iron rod was recovered was kept at the open place. Suresh and Yogesh were the witness of fard recovery.

32. Sudarshan Chandra (P.W.12) stood lengthy cross examination.

33. The prosecution had examined constable Rameshwar Singh as P.W. 13. He stated on oath that he was posted at police station medical college Meerut on 22.6.1982. He had gone at the place of occurrence with S.I. Katoch (P.W.12) and Harendra constable. After completing all the necessary formalties, the corpse of Ramesh was handed over to him and constable Harendra. The dead body of Ramesh was taken at the mortuary by them with requisite papers. After completing the formalities of post mortem, Rameshwar Singh (P.W.13) and Harendra reported at the police station concerned and submitted the post mortem report.

34. The prosecution had examined constable Subhash Chand as P.W.11. He stated on oath that he was posted as constable at Police Station Medical College District Meerut. He had taken the case property from Malakhana Sadar to Agra for chemical examination. The seal of the case property was intact. There was seal of Chief Judicial Magistrate Meerut on the said case property.

35. After conclusion of the prosecution evidence, the accused-appellants namely Sheela, Irfan, Rahim Uddin and Haroon were examined under Section 313 Cr.P.C. and in their statement they denied all the charges levelled against them and pleaded for innocence. They stated that they have falsely been implicated in the present case at the inkling and connivance of interested and partisan persons. The investigating officer has submitted false and frivolous charge sheet against them. In her statement under section 313 Cr.P.C. accused Smt. Sheela herself divulged that her father in law had executed a will deed prior to this incident. The room in which the accused Sheela and her husband (Ramesh) used to live was got constructed by her after execution of the will deed. The complainant (P.W.1) and her mother in law wanted to grab the room on account of which they were annoyed and exasperated from her. In connection to this a civil suit was also instituted. She used to work in the nursing home at the night. In the morning when she came, she began to bemoan and lament looking to the pitiable and pathetic condition of her husband. Subsequently in connivance with police, the complainant (P.W.1) and the witnesses got her challaned fraudulently . The witnesses and the complainant (P.W.1) had been working in civil court Meerut. They are hands in glove with the police personnel.

36. In the statement recorded under section 313 Cr.P.C of Haroon (who has been later on declared juvenile vide order dated 5.4.2014 and his trial was separated), it has come out that all the witnesses are hailing to the same

genealogy and have come forward to implicate them on account of personal animosity taking the comauflage of getting the shop vacated.

37. Further in the statement under section 313 Cr.P.C. it has been unravelled by Irfan that he used to go to his village per day at evening after closing the shop and after coming back at morning he was opening his shop. He also proved Ex.Kha.1 the photo of his marriage in which the son of Sheela (accused) ,Mahesh (P.W.5) and other persons are dancing .He also proved Ext.Kha.2 the photo of his marriage in which his wife and Sheela are present. He proved Ext.Kha.3 photo with his wreath in which a number of persons are clicked. It was also unfolded by accused Irfan that after the sad demise of Kailash Narain, on the issue of enhancing the rent, some dispute had taken place with Mahesh, Ashok (P.W.1) and Mahendra but the persons present in the market got it pacified. They wanted to get the shop vacated from him. They had also filed suit in civil court Meerut for the purpose of getting the shop vacated. He has been falsely implicated on account of putting undue pressure upon him.

38. Accused Rahimuddin in his statement under section 313 Cr.P.C. deposed that he has been implicated as he had taken the side of Haroon ,when quarrel of Haroon with Mahesh took place. He has been implicated due to animosity.

39. The accused appellants in their defence examined Kaushal Kumar (D.W.1) who divulged that he was in service at Nandan Cinema in 1980. In 1982, Naresh Chand Jain was holding the post of Manager in the said Cinema Hall and Khalil Ahmad Khan used to prepare the B.Form. On 21.6.1982, he (D.W.1), Naresh Chandra Jain and Khalil Ahmad were in service at Nandan Cinema. Naresh Chandra Jain & Khalil Ahmad Khan had died. On 21.6.1982, there were three classes in Nandan Cinema i.e. Balcony, Special and First Class.The defence witness after looking the attested copy of B.Form submitted that on the said photo sets signatures were made by Naresh Chandra Jain. That B.Form was pertaining to night show of 21.6.1982 in respect to Nandan Cinema. B.Form is distinct for different show. B.Form is sent to Amusement Tax Department after filling cost of ticket, rent, tax etc. The cost of the ticket for Balcony was Rs. 6.00, Special Class Rs. 5.00, First Class Rs. 3.00 According to B.Form there was no ticket for Rs. 4.00 in Nandan Cinema. Naresh Chand Jain had joined in service at Nandan Cinema after 5-6 years. In the absence of Jain, other person of the staffs were doing the work. Kaushal Kumar Sharma (D.W.1) could not confirm as to whether he was on duty on 21.6.1982 or not. Who had filled the form was not confirmed by him. He had proved the signature of Naresh Chandra Jain. He confirmed that there was no ticket of Rs. 4/- in Nandan Cinema. He denied that the ticket was sold at Rs. 4/- in the case of mass gathering.

40. The learned trial judge upon appreciation and appraisal of evidence on record convicted and sentenced the accused appellants Irfan & Sheela to undergo life imprisonment under section 302/34 IPC with fine of Rs. 25,000/- and in default of payment of fine to undergo further three months imprisonment and acquitted accused Rahimuddin under

section 302 read with section 34 IPC and 120B IPC .

41. We have heard Sri N.I.Jafri Senior Advocate assisted by Sri Khalid Mohmood learned counsel for the appellants and Sri Ashwani Prakash Tripathi, learned AGA appearing on behalf of State and perused the entire material on record.

42. Learned counsel for the accused-appellants contended that the judgment and order passed by the learned trial judge is per se illegal and erroneous whereby the appellants have been awarded life imprisonment merely on suspicion while there are serious irregularities and lapses on the part of the prosecution. The prosecution case is based entirely on circumstantial evidence. All the witnesses produced by the prosecution are highly interested and inimical who succeeded in accomplishing their evil design. All the witnesses had developed the story of illicit relationship between accused Sheela and accused Irfan being the strong motive behind the murder of Ramesh. The prosecution witnesses namely Ashok Kumar (P.W.1), Mahesh (P.W.5) have concoted a false story who in their examination unfolded that there was illicit corporal relation between Sheela and Irfan . Ramesh (deceased) was highly irritated and disturbed on account of easy virtue of his wife Sheela hence the relations between Ramesh and Sheela (accused) were highly ruptured and frayed. Ramesh used to thrash Sheela because of her illicit relations with Irfan. It has also come into light that in the morning of 19.6.1982, some verbal duel took place between Sheela and Ramesh (decease). After one and half hour accused Irfan came and unleashed reign of terror threatening to the husband of Sheela to be liquidated in case he caused hindrance or obstacle in their courtship. It has also come in the evidence that Ramesh had thrashed Sheela for attending the marriage of Irfan but this entire story does not stand on sound footing. There are material inconsistency in the prosecution version and the statement of the witnesses which itself creates suspicion about the incriminating circumstances framed against them. The first information report had been lodged without disclosing the name of any accused persons.'\No strong motive has been attributed for committing the said incident. The motive assigned to the appellants for committing the gruesome and barbarous murder of Ramesh does not inspire any confidence corroborating its truthfulness and probity. The accused-appellants are absolutely innocent and had been made scape goat on account of conspiracy of the complainant and other witnesses. There was property dispute among the brothers of deceased Ramesh. There is no evidence that Sheela was staying along with her husband on the fateful night. There is no evidence to show that applicant Sheela and Irfan were last seen together inside the room with deceased Ramesh. There is no evidence to show that Irfan was seen going inside the room asnd coming out of the house of Ramesh. The P.W.1 Ashok kumar, P.W.5 Mahesh Chanda are the brother of the deceased Ramesh. There was congenial and genteel family term between Irfan,Ashok Kumar (P.W.1) Mahesh (P.W.5) even the son of Ramesh (deceased) attended the marital celebration of Irfan which was solemnized on 12th June 1982. There is vivid demonstration of photograph (Ext.Kha.1) showing dance and revel by

the son of Sheela (accused) and Mahesh Kumar (P.W.5). There is material (Ext.Ka.2) showing Sheela sitting with Irfan and his wife of which photo clicked by Ramesh himself negative of which has been produced from the room of Ramesh. In the first information report the complainant after hearing the shriek and shrill of Sheela, he in association with his brother Mahesh (P.W.5) and other family members reached at the room of Ramesh and saw the dead body of Ramesh lying on the cot. So far as the corporal relation between Irfan and Sheela is concerned, it was natural on the part of the family members of Ramesh (deceased) not to allow Sheela to attend the marriage of Irfan and make rejoincing there. Mahesh (P.W.5) and Ashok Kumar (P.W.1) were jubilant and exhilirated and were dancing in the marriage of Irfan has vital impact. The sitting of Sheela with accused Irfan and his newly wedded wife itself demonstrates their cordial and affable relations. There was nothing to show that the appellants were party to any conspiracy.There is no evidence to show that appellants Sheela and Irfan were last seen together inside the room with deceased Ramesh. There is no evidence to show that Irfan was seen going inside the room and for coming out of the house of Ramesh. The alleged confessional statement of Sheela regarding recovery of screw driver cannot be used against her which is inadmissible under section 27 of Evidence Act. Moreover, the screw driver cannot be a weapon of crime to commit murder . There are significant contradictions with regard to the recovery of articles recovered by investigating officer. It was not established from the prosecution evidence on record that accused-appellants had committed the murder of Ramesh thus the conviction and sentence awarded under 302/34 IPC is highly cryptic and cannot sustain. The prosecution has failed to establish any criminal conspiracy between Sheela and Irfan thus it could not prove its case beyond reasonable doubt against them therefore, the appeal against the impugned judgment and order stands on justifiable grounds and may be allowed.

43. The main thrust of the learned counsel appearing on behalf of the appellants is that all the witnesses produced by the prosecution were highly partisan and interested who wanted to satiate their lust of grudge . The investigation has also been done in a very perfunctory and casual manner. There are material inconsistency in the prosecution version and the statement of the witnesses which itself creates great suspicion about the manner of assault at the alleged time of occurrence. The first information report has been lodged against unknown persons while the accused appellant are well known to the complainant. The medical evidence also does not corroborate the prosecution version. The witnesses had come at the place of occurrence after hearing the shriek and shrill of accused Sheela as such it cannot be said that they had witnessed the killing and have roped the appellants on account of suspicion so as to wreak their personal vengeance. No strong motive has been attributed for committing the said incident. The motive assigned to the appellants for committing the gruesome and hellish murder of Ramesh does not inspire any confidence corroborating its verity and truthfulness. The name of the accused appellant came during investigation at the statement of complainant Ashok Kumar (PW.1) and Mahesh Chand (P.W.5) It is conspicuously explicit from the site plan

prepared by the investigating officer that nobody had seen the manner of assault inflicted upon Ramesh . The statement of the investigating officer, who had prepared the site plan, recovery memo and sent the corpse to mortuary is a bundle of contradictions. The falsehood and contradictions are so evident that it would obliterate the verity and probity of the entire prosecution version. It is trite fact that Ramesh had met to unnatural death which is corroborated from the medical report but who were the real assailants cannot be deduced by implicating the innocent persons merely in the guise of suspicion. The learned trial judge has erroneously passed the impugned judgment and order attaching pivotal significance to the statement of Ashok Kumar (P.W.1) and prosecution witnesses without vetting and weighing the material inconsistency in the prosecution version, medical evidence and the statement of the witnesses. The prosecution has failed to corroborate that the accused appellants were the actual perpetrator of the crime. The conviction of the appellants placing reliance on the feeble eye witness account Ashok Kumar (P.W.1) and Mahesh Chand (P.W.5) is not proper for want of independent corroboration as the presence of the prosecution witnesses on the spot at the time occurrence has not been proved. The accused appellants have been subjected to scapegoat on account of evil design and revengeful sentiments of the Ashok Kumar (P.W.1) and Mahesh Chand (P.W.5). The investigating officer had submitted charge sheet against the accused appellants relying upon the statement of partisan and interested witneses . The fair and impartial investigation has not been done rather the investigation has been done in a tainted and prejudicial manner so as to circumvent the accused appellants in the present case. The accused appellants were not arrested at the place of occurrence. The prosecution has failed to prove its case beyond reasonable doubt as the evidence adduced in support thereof were not found to constitute a firm basis upon which life imprisonment has been awarded to the accused appellants. The learned trial court has framed the charges against them merely on suspicion putting at shelf all the material evidence which itself stumbles the prosecution version. The entire prosecution story is rested on uncorroborated facts and evidence and the guilt of the accused-appellants not having been proved to the hilt by the prosecution, the appellants are entitled to the benefit of doubt. The absence of apparent motive on the part of the accused-appellants who did not have any criminal history has a material bearing on the question of sentence hence the judgment and order passed by the trial court may be reversed by exercising extraordinary power of appellate jurisdiction.

44. To buttress his argument, learned counsel for the appellants have placed reliance on the verdict of the Hon'ble Supreme Court as well as Hon'ble High Court enunciated in the following judgments :

1. Reena Hazarika versus State of Assam AIR 2018 Sc.5361

2. Vikram Jit Singh versus State of Punjab 2006 (9) Supreme Court Page 338

3. Dr.(Smt.)Nupur Talwar versus State of U.P. 2018 (102) ACC Page 524

4. Joydeb Patra & others versus State of West Bengal AIR 2013 S.C.2878

5. Shanker Lal & another Versus State of Chhattisgarh (Criminal Appeal No. 497 of 2008) decided on 6.10.2017

6. Sukhjeet versus State of Punjab , 2015 (3) S.C. 670

7. Ranvir Yadav versus State of Bihar 2009 (4) SC 205,

8. Shaikh Maqsood versus State of Maharastra 2009 (4) S.C. 429,

9. Navaneetha Krishan versus State through Inspector of Police (Criminal Appeal No. 1134 of 2013).

45. Per contra learned AGA appearing on behalf of the State contended that from the prosecution evidence, available on record, the case of prosecution is proved beyond reasonable doubt against the accused-appellants The impugned judgment and order passed by the trial court is based upon proper appreciation of evidence available on record. The finding recorded by the trial court does not suffer from any legal, procedural or factual infirmity or vulnerability. It has further been contended by learned AGA that the prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others if the motive is proved by the prosecution,the court has to consider it and see whether it is adequate.It is also corroborated from the record that prosecution had examined the complainant Ashok Kumar as PW-1 who in his statement on oath proved Ext.Ka.1,Photo Ext.Ka.2 and written information Ext.Ka3. The occurrence took place in the night of 21/22nd June 1982 at about 12.15 a.m. In the morning the wife of deceased Ramesh namely Sheela was bemoaning and lamenting. On hearing the shriek and shrill of Sheela ,the complainant (P.W.1) and his elder brother Mahesh (P.W.5) and other family members rushed towards the room of Ramesh where he saw dead body of Ramesh lying on the cot. The blood was coming out from the mouth of deceased Ramesh. There was numerous marks of injuries on the body of Ramesh which demonstrates that Ramesh was liquidated at falling hours of night. The prosecution has fully proved the presence of accused Sheela in the night of 21/22.6.1982 with deceased Ramesh. The argument of learned counsel for the appellants that Sheela was working as Nurse and was on her duty in the nursing home.When she came in the morning on 22.6.1982, she found her husband (Ramesh) laying on the cot. The accused Sheela cannot get away by simply keeping quiet and silent on the premise that the prosecution has to prove its case . There is nothing on record to substantiate that accused Sheela was not present in the night on 21/22.6.1982 with her husband deceased Ramesh in the house and she was at Nursing Home. The recovery of screw driver has been made at the pointing of Sheela. The recovery of iron rod was madfe on the pointing of Rahimudddin. The recovered screw driver was duly marked as Ext.Ka.12. The recovered screw driver was saturated with blood stains. The person who is supposed to give such information could be so physically impaired that he could hardly narrate the factum of incident, knowing the conditions of the informant's mother

who was highly saddened person to rush to the police station immediately after the occurrence. At times being grief-stricken because of the calamity it may not immediately occur to the informant that he may give a report in detail. It is not in dispute that place of occurrence is inside the house of Ramesh . The prosecution witnesses are natural witnesses and they have no motive to make false statements against the accused-appellant. Even if, there is absence of motive, it would not benefit the accused when there is reliable and acceptable version of the eye witnesses, In a case where near and dear one is killed, his family members would not spare the real culprits and falsely implicate others. The relationship is not a factor to affect the credibility of the prosecution witnesses. The testimony of the aforesaid prosecution witnesses cannot be discarded merely on the ground of being closely related to the deceased. Each case must be judged on its own facts. The presence of the witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the Court to discard the statement of such witnesses. There is no bar in law on examining family members or any other person as witnesses. In cases involving family members of both sides, it is the family members who come forward to disclose correct facts. If the statement of witnesses, who are known to the parties affected is credible, reliable and trustworthy there would not be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party . The P.W.1 Ashok Kumar and P.W.5 Mahesh Chandra were put to lengthy cross-examination, but nothing could be elicited by way of cross-examination so as to create doubt about their stand. Their testimonies have been well supported by the medical evidence. There is complete consistency and coherence in the examination-in-chief and cross-examination of the prosecution witnesses, There is nothing on record to show if the prosecution witnesses had any animus against the accused appellants so as to implicate falsely in the present case. The testimony of prosecution witnesses are cogent, credible and trustworthy and have a ring of truth. There is nothing on record to disbelieve the statements of the prosecution witnesses.On appreciation of entire evidence on record, the learned trial court has rightly found them guilty.

46. Considering the entire facts and circumstances of the case, we are of the considered opinion that the registration of the first information report is mandatory with respect to the incident occurred. It is not necessary that the first information report should contain minutest detail. The first information report is not an encyclopaedia to give each and every details. Minor contradictions cannot be taken to be a ground to reject the testimony of the prosecutions witnesses of facts. In the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. It is only the serious contradictions and omissions which materially affect prosecution case but not every contradiction or omission. In order to appreciate the evidence, the Court is required to bear in mind the set-up and the

environment in the which the crime is committed. The appellant Sheela wife of deceased Ramesh is duty bound to explain as to how her husband died. When an offence like murder is committed in the secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of section 106 of Evidence Act, there will be a corresponding burden on the inmates of the house like in the present case wife to give cogent explanation as to how the crime was committed. Bearing in mind these broad principles the evidence is required to be appreciated to find out what part out of the evidence represents the true and correct states of affairs. It is for the Court to sequester the grain from the chaff. The appellants Sheela, the wife of Ramesh and Irfan being the tenant of the room where the dead body of Ramesh was found, have to give an explanation as to why he sustained injuries when they could not offer any explanation as to the homicidal death of Ramesh, it is a strong circumstance against both the accused that they are responsible for the commission of the offence. The Court cannot draw adverse inference only because of any contradiction in the statement of the witnesses. The Court can rely on the quantity and not quality of evidence which is material. The testimony of the prosecution witnesses fully supports the prosecution case and they have no motive to make false statement against the accused-appellants. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section-134 of the Evidence Act. The learned counsel for the accused appellants had cited a catena of decisions to prop up his submissions which do not have any applicability with the present set of facts. Medical evidence (postmortem report) fully corroborates the prosecution version as well as the testimony of the prosecution witnesses. The blood stained weapon of offence and recovery of articles at the time of arrest of the accused persons on their disclosure statement made by them is admissible under section 27 of the Evidence Act. Merely because the other accused Rahimuddin who was named by the prosecution has been acquitted by giving benefit of doubt would not make the evidence of the witnesses totally untrustworthy .

47. "Falsus in uno falsus in omnibus " has never been accepted as an argument to discard the evidence of a witness .The trial court has appreciated the evidence carefully .The statement of prosecution witnesses of fact despite being lengthy and searching cross examination nothing of any consequence has been elicited to discredit them.

48. It has been argued on behalf of the appellants that the injuries caused to deceased are incised wound and the recovery is of screw driver and iron piece from which it is not possible to cause incised wound. It has also been argued that if screw driver will be used then punctured wound would be caused. He also argued that from iron piece also incised wound cannot be caused. So the weaspon shown as causing murder are not connected with the injuries on the body of deceased Ramesh Chand. It has been clearly stated in the post mortem report that the death of the deceased Ramesh was due to asphyxia and syncope because of ante-mortem injuries. Medical evidence is only an opinion.

49. The Hon'ble Apex Court has also dealt this issue in extenso in Dashrath Singh versus State of U.P.20-04 (7) SCC 408 quoting the renowned author of the

Medical Jurisprudence & Toxicology.It has been clarified that incised wound on occipital region is possible with lathi or stick. Occasionally, on wounds produced by a blunt weapon or by a fall, the skin splits and may look like incised wounds when inflicted on tense structures covering the bones, such as the scalp,eyebrow, iliac crest, skin, perincum etc. A scalp wound by a blunt weapon may resemble an incised wound. The injury of incised wound of deceased Ramesh is on eye brow which can be caused by iron piece or screw driver. It all depends on how the screw driver is being used. Ext.Ka.24 and Ext.Ka.25 are the chemical report and seriologist report respectively from which it is clear that blood marks have been found on screw driver and iron piece as well. So ,the argument advanced by the learned counsel for the applicant will not have any effect that the incised wound cannot be caused by use of iron piece or screw driver. The prosecution has been successful to prove the recovery of screw driver and iron piece from the possession of accused persons and use of it in the murder of Ramesh (deceased).

50. The next submission that the death of Ramesh was caused in the morning on 22.6.1982 and his stomach was empty. It must have taken at least seven hours to digest the food and in no condition it could be said that the death of Ramesh took place before 12 p.m. Dr.S.K.Tyagi (P.W.10) who had conducted the post mortem had stated in his cross examination that time of death could be 3 to 4 a.m. in the night of 21/22.6.1982 because the stomach was empty and faecal matter was present and he must have eaten food seven hours before death.

51. This aspect has also been dealt with by Hon'ble Supreme Court in re Suresh Chandra Bahri versus State of Bihar, JT 1994 (4) SC 309, the Hon'ble Apex Court referred "Modis Medical Jurisprudence and Toxicology, 22nd Edition, Pages 246 ,247 which delineats as under :

52. "Digestive conditions vary in individuals up 2.5-6 hours depending upon healthy state of body, consistency of food motility of the stomach, osmotic presssure of stomach contents, quantity of food in the duodenum, surroundings in which food is taken emotional factos and residual variations and only very approximate time of death can be given. The deceased Ramesh was 32 years old hence the submission advanced by the learned counsel for the appellants will not have any force as it depends on the health and body of the person.

53. The evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence as has been provided under Section-134 of the Evidence Act. The learned counsel for the accused appellants had cited a catena of decisions to prop up his submissions which do not have any applicability with the present set of facts.

54. After considering the entire facts and circumstances of the case, we are of the considered view that the testimony of all the prosecution witnesses and cumulative result of all circumstances supports the prosecution case. There is nothing on record to show that the prosecution witnesses had any animus against the accused appellants so as to implicate them falsely in the present case hence there appears no justification to

disbelieve the testimony of the prosecution witnesses.

55. From the above facts and circumstances of the case, it is fully established that Ramesh succumbed to unnatural death with on account of multiple injuries inflicted upon him. The statement of the witnesses cannot be doubted or suspected merely they are related to the deceased or on account of minor variation or aberration in their statement. The utterances have consistently and umpteen times been repeated by the witnesses who had narrated and unfolded the incident in a very natural and articulatory manner that Sheela & accused Irfan have committed murder of Ramesh The overt act of the accused appellants at the relevant moment is fully established and is unimpeachable beyond a shadow of doubt consistent with the hypothesis of the guilt of the accused appellants within all human probability. The manner in which Ramesh has been done to death portrays very inhuman and gruesome state of mind of the accused appellants. The occurrence is fully supported by the testimony of witnesses and the medical evidence which cannot be overclouded by any stretch of imagination or suspicion. In the course of cross examination, the defence side has tried to evolve a story of false implication in order to overshadow the testimony of the posecution witnesses.From the appraisal of the ocular testimony of the prosecution witnesses , the chain of circumstances explicitly proves to the hilt about the illicit relation between the accused appellants Sheela and Irfan which was going on between them. It may not be known to others about their illicit corporal relation. It is highly difficult for the prosecution to skim from the mind of the accused persons. The circumstances are of such a conclusive nature which prove that the said crime must have been committed by the accused appellants. Another circumstance which is consistent with the hypothesis of the guilt of the accused appellants that accused Irfan and Haroon were seen coming out from the house of Ramesh (deceased) on the fateful and crucial night of 21/22.6.1982 in the presence of the accused appellant Sheela on whose pointing blood stained screw driver has been recovered. Another circumstance which has clinching effect that at the pointing of co-accused Rahimuddin (acquitted by the trial),recovery of piece of iron rod has been made. If these circumstances be clubbed together, it forms a complete chain that in all human probability the crimes were committed by the accused appellants and none else. While examining the accused persons under section 313 Cr.P.C. they had offered no explanation to negative the chain of circumstances pointing towards the guilt of the accused persons. There is no room to doubt that the incident had not taken place inside the house where the Ramesh (deceased) and the accused appellants were residing. If the wife of Ramesh (deceased) could not put forth any convincing and trustworthy explanation to show how her husband (Ramesh) had sustained fatal injuries that she was not having guilty mind, there is no hesitation to come to the conclusion that it was the accused appellants who were the perpetrator of the crime. Law does not require to the prosecution to prove the existence of motive and probability of the accused having committed the crime. The victim Ramesh had been done to death in a very ghastly and fiendish manner and no plausible explanation has been put forth

by the accused appellants making the prosecution version unbelievable and incredible on any other hypothesis except that the accused appellants are guilty for the commission of said crime. The motive being a state of mind of the accused persons may not be known to others as to what was the motive for a particular offence.The mere fact that the prosecution failed to translate mental disposition of the accused appellants into evidence does not mean that no such mental condition existed in their mind. The accused appellants had perpetuated the crime in a very relentless and devilish manner as the prosecution has successfully proved the recovery of screw driver and iron piece from the possession of the accused persons which were used in the murder of Ramesh.

56. On the basis of verbose and prolix discussions made here in above and also considering the material evidence on record, we are of the considered opinion that findings of conviction for the offence punishable under Sections 302/34 of the Indian Penal Code recorded by the Trial Court are well substantiated by the evidence on record. The Trial Court has appreciated the evidence in the right perspective. We don't find any justification to interfere with the findings of conviction recorded for the offence punishable under Sections 302/34 of the Indian Penal Code, therefore, the conviction recorded against the accused-appellants under section 302/34 IPC is hereby maintained and affirmed. The appeal is accordingly dismissed.

57. The order dated 8/9-7-2014 passed by the Additional District & Sessions Judge Court No.10, Muzaffar Nagar in Sessions Trial No. 382 of 1982 (State vs. Sheela @ Sushila and others) under Sections 302/34 IPC is hereby affirmed. The accused appellant Sheela is in jail. The co-accused Irfan is on bail. His bail bond is hereby cancelled. He be taken into custody forthwith . They shall serve out the sentence as awarded by the learned trial court and affirmed by this Bench.

58. Let a copy of the judgment be certified and sent along with the lower court record to the court below immediately for compliance and necessary entries be made in the relevant register.

(2019)10ILR A 111

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2019

BEFORE

THE HON'BLE R.S.R. (MAURYA), J.
THE HON'BLE UMESH KUMAR, J.

Criminal Appeal No. 3609 of 2015
connected with
Criminal Appeal No. 1807 of 2015

Prakash ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Mangala Prasad Rai, Sri Rajiv Lochan Shukla, Sri Sharangpani Vikramdhar Dw, Sri Brijesh Sahai, Sri Bhavya Sahai.

Counsel for the Opposite Party:
A.G.A., Sri Avanish Kumar Singh, Sri Krishna Kumar Singh

A. Indian Penal Code, 1860 - Sections 302 read with Section 34, Section 307

read with Section 34 IPC - statements of witnesses under Section 161 Cr.P.C - charge sheet under Section 302, 307, 504 IPC- Statements of accused-appellants under Section 313 Cr.P.C - confessions and statements - recorded under Section 164 - Section 238 of Cr.P.C. – compliance with section 207 Cr.P.C. - contradict the witnesses under Section 145 of Evidence Act -convicted and sentenced for life imprisonment - Section 437-A, Cr.P.C.- Bail to require accused to appear before next appellate court. (Para 4,8,28,31 & 33)

B. Indian Evidence Act, 1872 - mode of assessing reliability of a witness - material discrepancies - Court to scrutinise the testimony more particularly keeping in consideration the deficiencies, drawbacks and infirmities pointed out in the evidence.

The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable, nor wholly unreliable. In the case of first two categories, there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of the cases where the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness or as the case may be. (Para 19 &20)

C. Code of Criminal Procedure, 1973 - Section 238 – compliance with section 207 Cr.P.C. - Non supply of copies of documents such as statement under section 161 Cr.P.C, Section 154 Cr.P.C , the confessions and statements, if any, recorded under Section 164, panchayatnama and other relevant record to the accused, in the case in hand has caused serious prejudice during trial to contradict the witnesses under Section 145 of Evidence Act. (Para 28 & 31)

Criminal Appeal allowed (E-7)

(Delivered by Hon'ble Umesh Kumar, J.)

1. These two criminal appeals have been filed challenging the judgment and order dated 30.04.2015 passed by Additional Sessions Judge, Court No.3, Fatehpur in S.T. No. 1185 of 2001 (State Vs. Ravi Karan and others) by which the appellants have been convicted and sentenced for life imprisonment and a fine of Rs. 20,000/- each under Sections 302 read with Section 34 IPC and in default to undergo 2 years R.I., and under Section 307 read with Section 34 IPC, to undergo 7 years R.I. and fine of Rs. 10,000/- each; and in default to further undergo one year R.I. All the sentences are directed to run concurrently. The accused-Bhola died during trial.

2. P.W.1 Shiv Prasad-informant has given a written report at Police Station Kishanpur district, Fatehpur alleging that in the evening on 16.2.1992 at about 6.00 P.M. some altercation took place between Moti Lal with Pitai Kumhar of his village; his son Hira Lal and Awadesh intervened and brought Moti Lal to the house. Soon thereafter, Ravi Karan son of Ram Naresh having Rifle, Prakash armed with DBBL gun and Bhola having lathi in his hand came abusing in front of the door of Moti Lal; Moti Lal asked them not to abuse, upon hearing the noise, the informant, his son Suresh Chandra, sister-in-law (wife of Babu Lal), wife of Moti Lal, and Chiya daughter of Moti Lal and Awadhesh arrived and forbade them not to abuse, on which, accused Bhola exhorted saying kill them as their bullying has increased and now they have started teasing their own persons; in the meantime, accused Prakash and Ravi Karan having Rifle and

gun in their hands fired on Moti Lal which hit on his stomach; the wife of Moti Lal-Sarla, his daughter Chiya and informant's son Suresh Chandra and his sister-in-law received injuries. The accused appellants ran away from the spot abusing and they could not be caught hold due to fear. The injured were sent to hospital for treatment along with villagers and he has come to lodge first information report.

3. On the basis of the said information, chick FIR (Ex.Ka-2) was prepared and a case under Sections 307/504 IPC at Case Crime No. 30 of 1992 was registered against the accused namely Ravi Karan, Prakash and Bhola and relevant entry was made in the G.D., but the GD and the said FIR is not available on record. Subsequently, after death of injured-Moti Lal on 17.2.1992, the offence under Section 307/504 IPC was converted into Section 302 IPC and relevant entry in the GD regarding conversion of the case was entered at GD No. 21 at 5.30 P.M. Dated 17.2.1992.

4. Investigation of case was made by P.W.6 S.I. Ravi Chandra Mishra. He recorded the statements of witnesses under Section 161 Cr.P.C., inspected the spot, prepared site plan, sent dead body for post mortem to the District Hospital, Fatehpur and after completing investigation submitted charge sheet under Section 302, 307, 504 IPC.

5. Learned Trial Court framed charges against the accused-appellants. Accused-Bhola was charged under Section 302/34 and section 307/34 IPC. The accused Ravi Karan and Prakash were charged under Sections 302/307 IPC. The accused-appellants denied their guilt and claimed to be tried.

6. The prosecution in support of its case has examined 8 witnesses. P.W.1 Shiv Prasad is the informant, P.W.2 Sarla Devi-injured witness, P.W.3 Jhallu Prasad Misra-Head Constable, P.W.4 Dr. Bharat Namdeo who conducted post mortem, P.W.5 Dr. Devendra Kumar who examined and prepared injuries reports of Chiya, Suresh and Phulmati w/o Babu Lal, P.W.6 Ravindra Mishra, I.O., P.W.7 Subhash Chandra Singh-Pharmacist and P.W.8 Chiya.

7. Here, it is note worthy that entire prosecution documents were lost before committal of the case and was re-constructed under the orders of the then District Judge, Fatehpur. After re-construction of the documents such as nakal tahrir (Ex.Ka.2), G.D (Ex.Ka.3), post mortem report (Ex.Ka.4), injury reports of Phulmati (Ex.Ka.5), injury report of Chiya (Ex.Ka.6) and Suresh (Ex.Ka.7), the case was committed to the Court of Sessions on 20.12.2001 by Judicial Magistrate, Khaga, Fatehpur which was registered as S.T. No. 1185 of 2001(State Vs. Ravi Karan and others)

8. Statements of accused-appellants under Section 313 Cr.P.C. was recorded thrice; Firstly on 4.11.2009, after the examination of prosecution witnesses 1 to 6. They denied the prosecution allegation and stated that evidence against them have been led on the basis of forged document; they have been falsely implicated. The accused Ravi Karan has further stated that under the influence of enemies, entire prosecution story has been concocted and false evidence has been led in the case. He has also taken plea of alibi. The prosecution on 20.7.2013 again produced P.W.7 and P.W.8. The accused Prakash denied the evidence against him

and claimed to be innocent; he asserted that unknown dacoits during course of commission of dacoity have caused death of Moti Lal and he has been falsely implicated in the case in collusion with local police. Simultaneously, accused Ravi Karan has also made similar statement. Thirdly, statement of accused-Prakash and Ravi Karan under Section 313 Cr.P.C. was recorded on 19.10.2013 after filing of FSL report (Ex.Ka.8). The accused said that they do not know about the report. The extract of medico legal report Register page No. 47 injury report of Sarla Devi dated 17.2.1992 has been filed by P.W.7 who stated that this report has not been prepared before him. Moreover, he stated that he cannot tell by whom this report was prepared.

9. In the autopsy report, following injuries were found on the body of deceased;

1. Fire arm wound of entry 8 cm x 5 cm x cavity deep over left iliac fossae of abdomen 5 cm. to A.S. aliac spinal. Blackening present. Direction from right to left and little upward. Blackening present. Liver and intestine loops coming out of wound and wadding piece recovered from muscle.

2. Fire arm wound of entry 8 cm. x 4 cm. bone deep over right leg middle part anterior surface. Tibia and fibula bones fractured into multiple pieces. No blackening and tattooing. Three small pellets recovered. Seven small pellets recovered from abdominal cavity.

3. Multiple fire arm wound of entry in an area of 15 cm. x 6 cm. x 0.1 cm. over left thigh postero-lateral surface upper part. No blacking and tattooing. Two small pellets recovered from wound cavity.

4. Multiple fire arm wounds of entry in an area of 7 cm. x 3 cm. over left leg lower part lateral surface. No blackening or tattooing. One small pellet recovered from wound.

10. Photo copies of the injury reports of injured Phulmati, Chiya and Suresh are not much visible and therefore, relevant extract from the statement of the doctor is quoted here in below;

श्रीमती फूलमती

चोट नं0–1 फटा हुआ घाव 05 सेमी ग स्किन डीप जो कि अग्रबाहु पर सामने की ओर रिस्ट जोड़ से 3.5 सेमी उपर था। लालिमा युक्त खून का थक्का लगा था। ? चोट नं0–2 फटा हुआ घाव 0.5 सेमी ग 0.5 सेमी ग त्वचा की गहराई तक जो कि दाहिनी निचले अग्रबाहु पर सामने की ओर 6.5 सेमी दाहिनी रिस्ट लाइन से उपर था। तथा लालिमा युक्त खून का थक्का लगा था।

चिया

चोट – फटा हुआ घाव 1 सेमी ग 1 सेमी ग मांस तक गहरा जो कि दाहिनी जांघ के सामने की ओर तथा घुटने के जोड़ से 8 सेमी उपर अन्दर की तरफ। घाव के अन्दर कोई वस्तु घुंसी हुयी प्रतीत हो रही थी। घाव अनियमित था तथा वह वस्तु जो घाव में धंसी हुयी वह घाव से 1 सेमी आगे थी। घाव में कालिमा मौजूद थी। घाव से लालिमा युक्त पदार्थ रिस रहा था। चोट को एक्स रे की सलाह दी गयी थी।

मेरी राय में यह चोट साधारण थी और अग्नेयास्त्र द्वारा पहुंचाई गयी थी। चोट 3/4 दिन पुरानी थी। यह चोट भी दिनांक 16.02.92 को 6. 00 बजे सांय को आना सम्भव है।

सुरेश

चोट – फटा हुआ घाव 4 सेमी ग 1 सेमी ग मांस तक गहरा जो कि दाहिनी छाती में सामने की ओर 5.5 सेमी दाहिनी निप्पल से दूर था। इस चोट से खून रिस रहा था तथा घाव के किनारे अनियंत्रित थे।घाव के किनारे कालिमा युक्त थे। चोट के एक्स रे की सलाह दी गयी थी। चोट को निगरानी मे रखा गया था।

11. We have heard Sri Brijesh Sahai, learned Senior Counsel assisted by Sri Bhavya Sahai for appellant-Prakash and Sri Mangala Prasad Rai, learned Senior Counsel assisted by Sri Ashok Kumar for appellant- Ravi Karan, Sri Anil Kumar Kushwaha for informant and the learned AGA on behalf of State and have perused the record.

12. Learned Counsel for the appellants argued that entire proceeding of trial is based on illegal evidence adduced by the prosecution; allegations of prosecution even if assumed to be true, in committing the said offence, no role has been assigned to the appellant. Learned Counsel appearing for appellant- Ravi Karan has raised argument that no role has been assigned; the appellant has been said to be armed with Rifle, where as no rifle injury was found either on the body of deceased-Moti Lal or any of the injured, and this indicates that in the commission of offence, appellant was not involved; only on the statement in chief of the witnesses, conviction has been based and not on the totality of the evidence adduced by prosecution; it was the categorical averment of the witnesses that they are not in a position to say by whom exhibited documents were prepared but even then the exhibited papers were relied upon by the Trial Court; merely saying that when these papers were being reconstructed, no objection was made by the defence, whereas the fact remains that while documents/papers were being exhibited, serious objection was raised by defence counsel which is apparent by perusal of oral evidence of the witnesses. These facts have also been asserted in their statements under Section 313 Cr.P.C. It was further argued by learned Counsel for the appellant that prior to committal, copies of relevant documents viz statement under Section 161 and other relevant documents were never provided to the accused and therefore, they failed to controvert the witnesses during trial and this major defect of the prosecution, affects the principle of just and fair trial rendering the entire prosecution case under shadow of doubt, besides causing prejudice and thus, the appellants are entitled for acquittal giving benefit of doubt.

13. Per contra, learned AGA and Sri Anil Kumar Kushwaha, learned Counsel for informant opposed the submissions made by learned Counsel for the appellants; supported the impugned judgment and order by saying that the learned Trial Judge has passed a detail and reasoned order believing the testimony of prosecution witnesses, there is no illegality or infirmity and thus, the appeal is liable to be dismissed.

14. P.W.1 Shiv Prasad scribe of the first information report has stated that on 16.2.1992, an altercation took place between Moti Lal and Pitai Kumhar; his son Hira Lal and Awadhesh brought Moti Lal home. Then about 20 minutes later, Bhola having Lathi, Prakash armed with DBBL gun and Ravi Karan armed with Rifle were seen going towards the house of Moti Lal; they were exhorting "इसकी गुन्डई बढ गई है, यह अपने आदमियो को भी सताने लगा है इसे जान से मार देगे।" He followed

them; the above accused reached at the door of Moti Lal, upon which Moti Lal told that why they were abusing and exhorting; hearing noise, the wife of Moti Lal Sarla, his daughter Chiya, wife of Babu Lal-Phulmati and his son Suresh and Awadhesh arrived there. Bhola exhorted to kill Moti Lal on which, accused Ravi Karan and Prakash started firing; his son Suresh received injuries on his chest, his sister-in-law Sarla received injuries in her thigh, Chiya and wife of Babu Lal namely Phulmati received pellet injuries and Moti Lal received injuries in the stomach and leg. The accused fled away from the spot after committing the offence. In examination-in-chief, this witness stated that Moti Lal fell down and when he was rescuing/lifting Moti Lal, the S.P. Guru Darshan Singh and police personal came and took Moti Lal to Dariyapur police outpost; his sister-in-law Sarla was also with them. From Dariyapur, they went to Vijaipur police outpost where he wrote the first information report. His brother Babu Lal took Moti Lal and Sarla both injured to the District Hospital, Fatehpur. Other injured were examined on the next day at Vijaipur hospital. He further stated that Moti Lal expired on 16.2.1992 while he was in the way to Dariyapur and he has given written report on the same day at 9.00 P.M. in the night at police outpost Vijaipur; from Vijaipur he never went to police station, Kishunpur. Re-constructed first information report (Ex. Ka-1) was read over to him which he accepted to have given at the police outpost. This exhibit was objected by the defence Counsel, but the objection was rejected by the Trial Judge. In the statement in Court, he explained that Moti Lal received injuries in his stomach and leg. In chief, this witness has stated that police never interrogated him at any point of time during investigation, though in his statement he stated that he reached on the spot just from behind the accused persons, but this fact has not been described in the first information report. In his cross examination, he stated that he was just behind 10 steps from the accused and when he was watching the incident, he was not stand still but was moving 2-3 steps here and there. This statement of the witness that he saw the entire incident from behind the accused is not corroborated by the site plan available on record where place "A' has been shown as the place from where Suresh, Shiv Prasad, Phulmati came out and saw the occurrence and they sustained injuries. It is admitted that in the incident, Shiv Prasad has ever received any injury. His presence on the spot becomes doubtful according to the site plan and the version of first information report, he has shown himself to be present on the spot behind the accused. He stated that he cannot tell how many shots were fired and which shot was fired by which of the accused as the firing was being made at some intervals; when firing was being made, he was behind 2-3 steps, his daughter was at distance of 4 steps south to him, wife was towards west at a distance of 2-3 steps. Phulmati was at a distance of about 10 steps towards western side of deceased-Moti Lal and Suresh was 5 steps towards south west from deceased. They received injuries. The mode and manner of assault, as has been stated by P.W.1, is not only contrary to the statement of P.W.2 an injured witness, but is also not supported by the site plan available on record. Even the presence of other person as stated by this witness is contrary to the statements of other witnesses, whereas this witness stated that on shouting of Bhola, wife of

Moti Lal, his daughter Chiya, Phulmati(wife of Babu Lal) and Suresh reached on the spot.

15. P.W.2 stated that she and her husband were sitting on a bench outside the house, whereas P.W.8-Chiya injured stated that she was playing in front of house; her father was sitting with Suresh and was discussing something when the accused came and exhorted. How all injured and P.W.1 reached on the spot, in the statements of P.W. 1, P.W.2, P.W.8 are not corroborating each other so as to place reliance on their statements. Though, it has been asserted by P.W.1 and P.W.2 that pellets hits wall and window of Babu Lal, but during investigation, neither any pellet has been recovered by the Investigating Officer nor any such recovery memo was prepared during investigation. P.W.1 in his cross examination, has stated that accused Prakash and Ravi Karan were firing from one place. He did not remember that in which leg and where Moti Lal-deceased received injuries; he cannot say that whose fire hit the leg of Moti Lal, though he admitted that after this injury in the leg, Moti Lal fell down. He cannot say that whether it was first or the second fire, but it might be third or fourth fire, but which shot hit, he did not count. He stated that daughter Chiya and sister]-in-law started running towards the house of Moti Lal. He stated that although he is a license holder of 12 gun, but he is not in a position to explain the difference of shots between rifle and 12 bore gun. The injury of stomach sustained by the deceased, has not been explained by any of the witnesses in their statements.

16. P.W.2- Sarla in her chief stated same version in support of the first information report and stated that in the said occurrence of firing made by Ravi Karan and Prakash, her husband, she herself, daughter Chiya and Phulmati received injuries, whereas P.W.1 stated that first information report was written by him at Vijaipur police outpost, but this witness in her chief states that his brother-in-law Shiv Prasad wrote this paper at home and went to Police Station Kishunpur, which is totally contrary to the statement of P.W.1. She stated that her husband Moti Lal died before reaching Fatehpur, Hospital. She stated that at the time of occurrence, she along with her husband were sitting on a Bench facing south; when the accused were firing, she saw Shiv Prasad, Chiya and Phulmati were also there. She did not count number of shots, but 7-8 shots were fired. She had seen gun and rifle from before the incident. She stated that without watching, only on sound, she can identify whether shots were fired from gun or by rifle. She categorically stated that first fire was made by gun which missed the target and she and her husband did not run towards house but moved 10 steps towards field and she was 2-3 steps behind her husband. Second shot was fired by rifle which also did not hit any one; none tried to escape even after said firing; Chiya, Phulmati and Suresh also did not run away; the first and second shot did not hit any one and pellets entered in the wall and window of Babu Lal, but third fire of rifle hit the leg of her husband,she was 4 steps towards north from the place where her husband was standing. This fact is not corroborated by the evidence available on record and also by the site plan. The third fire was made by rifle which hit right leg of her husband and that time, she was one step away from her husband. Even after receiving injury,

neither her husband fell down nor he sat, but was still in standing position. She stated that fourth fire by gun hit her but what injury was sustained by her, has not been explained in the entire testimony and not the husband and at that time, daughter Chiya was towards west, Phulmati was towards north and Suresh was towards southern side. She stated that the shot which hit her was made from four furlongs from south eastern side. On query made by the Court, she stated that one furlong is equal to one hand and if it is so, injuries shown in the injury report (Ex.Ka-7) is not corroborated. She stated that fifth shot was fired by Prakash from gun which hit Suresh and Phulmati and firing was made from same place from where 4th shot was made; she further stated that sixth shot was fired by Prakash from gun which hit Chiya. P.W.2 stated that P.W.1-informant accompanied her from village to Fatehpur all time, whereas P.W.1 has stated that he sent Moti Lal and her sister-in-law(Sarla) along with his brother Babu Lal to District Hospital, Fatehpur and he went to police out post to lodge report. The mode and manner stated by this witness and the injuries received during commission of offence, is not corroborated by medical evidence available on record. This witness also stated that she and other injured witnesses went to the police station, which creates doubt and her statement badly damages the prosecution version.

17. It is significant to note that there is no inquest report available on record. P.W.2 has stated that inquest was prepared at 7.00 P.M. on the day of occurrence where police Inspector was present and her jeth Shiv Prasad was also present there. It is also strengthen by the statement of P.W.1 Shiv Prasad that Moti Lal expired on 16.2.1992 while in the way to police outpost, Dariyapur.

18. P.W.8-Chiya in chief has stated that at the time of occurrence, she, her father, mother Sarla Devi, Suresh and Phulmati were present on the spot and Ravi Karan armed with rifle, Prakash armed with DBBL gun and Bhola armed with Lathi came and they assaulted her father, mother,Phulmati, Suresh and Chiya by firing from their weapons and her father after receiving injuries fell down They went to Vijaipur hospital, but doctor was not available there, so her father Shiv Prasad and Sarla went to Sadar Hospital. They were examined on the next day at Vijaipur Hospital. Her father expired on the next day in Sadar Hospital, Fatehpur due to injuries caused by the accused. The Investigating Officer of the case recorded her statement during investigation. The statement of this witness that her father expired next day in Sadar Hospital, Fatehpur is contrary to the statement of P.W.2 (Sarla Devi), where she stated that they reached Sadar Hospital, Fatehpur at about 12.00 in the night and when reached to the hospital, her husband expired, the fact remains that at one place she stated that her husband expired at 7.00 PM on the same day and inquest was prepared by the Investigating Officer. Exactly when Moti Lal-deceased expired is not clearly stated by any of the witnesses, hence the time of death of deceased is not ascertainable from the statement of so called eye witnesses, more so in the absence of inquest report on record. In her examination in chief, she stated that she, her mother,father, Suresh and Phulmati were present in front of house just prior to the occurrence, whereas in cross examination, she has stated that when assailants came in front

of her house, her mother-Sarla was in the house and she was playing outside the door; her father and Suresh were there. She has stated that she cannot say that how many fires were made on her father; she cannot say how many shots were fired. However, this witness has admitted the fact that the Investigating Officer has recorded her statement and the statements of Phulmati and Suresh also, but she has not answered any question properly and deposed that she has forgotten every thing regarding incident. On careful scrutiny of the testimony of this witness, we are of the opinion that she is not wholly reliable and trustworthy. The statements of these witnesses comes within the purview of partly reliable and partly not reliable, hence in totality, it would not be safe to record conviction on the testimonies of these witnesses.

19. The mode of assessing reliability of a witness has been explained time and again by the Apex Court that certain factors are to be kept in mind while assessing the testimony of a witness. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable, nor wholly unreliable. In the case of first two categories, there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of the cases where the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness or as the case may be.

20. The material discrepancies are those which are not normal, and not expected of a normal person. While appreciating the testimony of a witness, approach of the Court must be as to whether the evidence of witness after perusal appears to have line of credibility and once that impression is formed, it will be necessary for the Court to scrutinise the testimony more particularly keeping in consideration the deficiencies, drawbacks and infirmities pointed out in the evidence and to evaluate the same to arrive at a conclusion whether it is against general tenor or it is shaken so as to render it unworthy of belief. It is relevant to mention that other injured witnesses Suresh and Phulmati have not been examined by the prosecution.

21. P.W.3 Head Moharrir is formal witness who has executed chick FIR of the case., Though original chick has been lost, but he proved this document, which has been objected by the defence counsel. This witness has admitted the fact that original (Ex.Ka.3) is not before him nor available in the S.P. office, and he did not know who prepared (Ex.Ka.3); GD in respect to institution of case is not on record, hence he is not in a position to explain whether any *chitthi majroobi* was prepared or not. He stated that the case was investigated by SHO, R.C. Mishra. This witness has stated that he has taken blood stained clothes of injured in his possession at the time of preparation of chick FIR, fard was prepared and after getting it sealed was kept in Malkhana, but no such memo of recovery is available on record, nor has been exhibited. Hence, reliability of this assertion is meaning less, specially when P.W.2 in her statement has stated that she wore blood stained sari having wholes of pellets for

about 7-8 days and none had taken the same from her. Therefore, this witness also is not reliable and trustworthy.

22. P.W.4 Dr. Bharat Namdeo conducted autopsy of the body of deceased Moti Lal on 18.2.1992 at 3.30 P.M. From perusal of post mortem report it transpires that injuries caused to the deceased was of gun fire and not by rifle as pellets and wadding were found and thus, it is clear that his injuries would not have been caused by rifle. In his statement, the doctor has given vague reply by saying that the all four injuries on the body of deceased might have been caused minimum by two shots or maximum by four shots.

23. P.W.5 Dr. Devendra Kumar examined injured Phulmati, Chiya and Suresh brought by constable Brijraj Chaubey on 17.2.1992 at 4.25 PM and he has opined the injuries to be simple caused by fire arm. He has stated that he cannot tell about the distance from which the injuries were caused. He also stated that he cannot ascertain as to from which of the fire arm, these injuries were caused.

24. P.W.6 Ravi Chandra Mishra, Investigated the case and submitted charge sheet. He stated that as there is no prosecution documents, he is unable to described about the steps taken during investigation. He disown his signature on the photo copy of site plan available on record and also stated that he did not remember who has put signature on it. In cross examination, he stated that what the witnesses had stated, he cannot tell in absence of case diary. This witness was recalled and this time, he stated to have investigated case crime no. 30 of 1992 under Section 302,307,504 IPC, P.S. Kishunpur and submitted charge sheet against accused Ravi Karan, Prakash and Bhola, but today, neither original nor photo copy of the charge sheet is available before him. Although, this witness has admitted to have recorded statements of witnesses during investigation, but no statement recorded under Section 161 Cr.P.C is available on record. In this reference, argument of learned Counsel for the appellants that prior to committal, copies of the relevant documents such as statements under Section 161 Cr.P.C. were not provided to the accused, hence, they failed to controvert the witnesses during trial under Section 145 of Indian Evidence Act, has substance.

25. P.W.7 Subhash Chandra Singh-Phamacist stated in his statement that medico legal register dated 1.1.92 to 31.3.1992 is with me in which injuries received by Sarla Devi is noted who was examined on 17.2.1992 at 1.10 A.M. This witness has stated that at the time of examination, he was not present and thus, he cannot tell who had prepared it.

26. In the present case, although the accused were charged under Sections 302/307, but both the accused are convicted with the aid of Section 34 IPC without assigning any reason and no stress has been laid down by learned AGA on the point.

27. On the aforesaid facts and circumstances of the case, we gave our thoughtful consideration to remand the case back for fresh trial but remanding back case to the Trial Judge at this stage, will never be proper and justified after lapse of 27 years for the reason that reconstruction of those documents/records

is impossible now and thus, initiation of fresh trial today will never meet the ends of justice.

28. Non supply of copies of documents such as statement under section 161 Cr.P.C, panchayatnama and other relevant record to the accused, in the case in hand has caused serious prejudice during trial to contradict the witnesses under Section 145 of Evidence Act. It will not be out of reference to note that an omission to comply with section 207 Cr. P.C. read with section 238 Cr. P.C. is bound to cause a serious prejudice to the accused. It is obligatory for the Trial Magistrate to ensure supply of copies of the relevant documents upon which the prosecution intends to rely upon during trial. The Hon'ble Apex Court held that it was incumbent upon the trial court to supply the copies of these documents to the accused as that entitlement was a facet of just, fair and transparent investigation/trial and constituted an inalienable attribute of the process of a fair trial which Article 21 of the Constitution guarantees to every accused. We would like to reproduce the following portion of the said judgment discussing this aspect: "21.The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced. (This was observed in Manjeet Singh Khera Versus State of Maharashtra,SPECIAL LEAVE PETITION (CRIMINAL) NO.5897 OF 2013. Also see V.K. Sasikala v. State Represented by Superintendent of Police (2012) 9 SCC 771).

29. In para-33 of the impugned judgment, although injuries sustained by Sarla Devi is mentioned, but the facts remain that wrongly, injuries sustained by Phulmati has been mentioned in the name of Sarla Devi.

30. The accused is entitled to get copy of police report and other documents and in this respect, provisions of Section 207 are necessary to be quoted here in below;

Section 207 in The Code Of Criminal Procedure, 1973

207. Supply to the accused of copy of police report and other

documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i)the police report;

(ii)the first information report recorded under section 154;

(iii)the statements record.ed under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;

(iv)the confessions and statements, if any, recorded under section 164;

*(v)any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173: Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be all*owed to inspect it either personally or through pleader in Court.

Section 208 in The Code Of Criminal Procedure, 1973

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session. Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii)the statements and confessions, if any, recorded under section 161 or section 164;

(iii)any documents produced before the Magistrate on which the prosecution proposes to rely: Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

31. Section 238 of Cr.P.C. unequivocally provided that a solemn duty is cast on the Magistrate to satisfy himself that he has strictly complied with the provisions of Section 207 Cr.P.C. viz. furnishing the accused, free of cost, copies of documents as prayed for by him and referred to in that section itself without delay and such satisfaction has to be invariably judicial satisfaction. An omission to comply with the mandatory provision of law as enshrined in Section 207 Cr.P.C. read with Section 238 Cr.P.C is bound to cause serious prejudice to the accused and such a situation may even vitiate the criminal trial. The supply of documents and statements prepared at the investigating stage as mandated under Section 207 Cr.P.C. cannot be treated a mere superfluity or empty formality. It is highly improper and irregular on the part

of the Court to shirk its responsibility in this regard and put the accused at the mercy of prosecution by merely observing inter alia that it is the duty of prosecution "to follow the rules of natural justice'. Thus, it can safely be held that accused could not be refused to supply copies of documents even at the stage of trial, if relied upon by the prosecution per statutory provisions of Section 207 Cr.P.C. and also as per the provisions of Section 238 Cr.P.C. If we go carefully through the ratio laid down in V.K. Sasikala Vs. State (2012) 9 SCC 771, we get clear idea about the solemn duty of the Court to supply copies of documents to the accused. It is the duty of the Court to supply to the accused, copies of the police report, the first information report recorded under Section 154 Cr.P.C., the statements recorded under Section 161(3), the confessions and statements, if any, recorded under Section 164 and any other documents or relevant extract thereof, which is forwarded to the Magistrate along with police report.

32. To sum up the matter, after careful scrutiny of the oral testimony of the witnesses and the records available, we find following discrepancies;

i) No motive of the occurrence has been placed by any of the witness to inspire confidence.

ii) No x-ray report or supplementary report, inquest report is available on record.

iii) P.W.1-informant in his statement deposed that deceased-Moti Lal died in the way while going to Dariyapur and he reported the matter at Police outpost Vijaipur, while the FIR was lodged at Police Station, Kishunpur district, Fatehpur.

iv) P.W.1 disown his statement under Section 161 Cr.P.C. and stated that the police did not inquire anything from him.

v) P.W.2-injured Sarla Devi, although tried to describe the mode and manner of the incident together the injuries sustained during course of commission of offence, but her statement is not corroborated. Moreover, she stated that the FIR was written at home.

vi) In the site plan, house of Babu Lal is shown towards north. How this site plan was prepared and later constructed, itself is doubtful as no mode of reconstruction has been explained by any of the prosecution witnesses.

vii) P.W.1 stated to have seen the occurrence from behind the accused, whereas, in the map/site plan Suresh, Shiv Prasad and Phulmati all have been shown at place "A', which is towards north from the place of said firing and witnessing the occurrence from behind the accused is not corroborated from the perusal of available map as P.W.1 states.

xiii) According to FIR version, the informant stated that he sent the injured to hospital along with village people and then he came to the police station, and in chief, he stated that injured deceased-Moti Lal and injured-Sarla were with him while injured-Chiya was at home.....

ix) The injuries found on the body of injured as asserted by P.W.2 are not corroborated from medical evidence.

x) P.W.2 has not properly explained the mode and manner of assault/ occurrence which creates serious doubt about the prosecution version.

xi) P.W.1 is not reliable and trustworthy. P.W.8 is also totally unreliable, as at the time of occurrence, she was aged about 9 years.

xii) Non providing copies of documents to the accused, has caused serious prejudice to them and violates the principle of fair trial.

33. In view of discussion made above, taking cumulative effect of the evidence, as discussed above, we allow this appeal and set aside the impugned judgment and order dated 15.4.2015 passed by learned Trial Judge in S.T. No. 1185 of 2001 (State Vs. Ravi Karan and others). The appellants Prakash is in jail. He be set at liberty forthwith. The appellant Ravi Karan is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged. However, the appellants are directed to make compliance of the provisions of Section 437-A, Cr.P.C. in the concerned Court below.

34. Registry is directed to transmit the original record to the concerned Trial Court forthwith for compliance of this judgment. Trial Court is obliged to intimate compliance to this Court within a month.

35. Before parting with the case, we feel it necessary, in the ends of justice to obtain a report from the District Judge, Fatehpur informing this Court that whether or not a non judicial enquiry as has time and again been circulated by the High Court in relation to loss of judicial records, conducted and if so, its result. It is also directed that after receipt of report from the District Judge, Fatehpur, the Registrar General of this Court shall place the matter before Hon'ble the Administrative Judge concerned for appropriate orders, in case of non compliance of the various Circulars of this Court regarding loss of record.

(2019)10ILR A

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 5146 of 2018
with
Criminal Appeal No. 5666 of 2018

Abdul Khaliq & Ors. ...Appellants (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Kamal Krishna, Sri Ajay Kumar Upadhyay.

Counsel for the Opposite Party:
G.A., Sri Dhanbeer Mishra, Sr Satendra Prakash Srivastava.

A. Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 504, 506, 307 I.P.C. and Section 7 of the Criminal Law Amendment Act - Statements of accused under section 313 Code of criminal procedure,1973-two appeals challenging judgements – illegal ,arbitrary , perverse and contrary - conviction and sentence of accused-appellants, for the offence under section 307/323 read with 149 and section 147, 148 I.P.C. and the conviction and sentence of accused-appellants for the offence under section 147,148 I.P.C. is perverse, illegal and not sustainable under law - conviction of accused-appellants for the offence under section 307 I.P.C. is liable to be converted for the offence under section 325/34 I.P.C. and the sentence is liable to be reduced and modified for both offences under section 325/323 read with section 34 I.P.C.

Two F.I.R. has been lodged in respect of same incident - The injury was caused by blunt object like lathi and not by any deadly weapon, and therefore, intention to cause death cannot be imputed and instead of offence under section 307 I.P.C., only an offence under section 325 and 323 I.P.C. for voluntarily causing grievous hurt and simple hurt is proved.. It also shows their common intention in causing injuries and section 34 I.P.C. is very much applicable. (Para 8,10,21,51 & 53)

B. Indian Evidence Act, 1872- Contradictions/inconsistencies/embellishments or improvements of minor nature on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. (Para 43)

Criminal Appeal partly allowed (E-7)

List of Cases Cited: -

1. St. of Har. Vs Krishan AIR 2017 SC 3125

2. Mukesh Vs St. for NCT of Delhi & ors. AIR 2017 SC 2161 (Three-Judge Bench)

3. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 537 and

4. Jarnail Singh Vs St. of Punj. (2009) 6 Supreme 526

5. St. of U.P. Vs Chhoteylal AIR 2011 SC 697

6. Dimple Gupta (minor) Vs Rajiv Gupta AIR 2008 SC 239

7. St. of U.P. Vs Naresh 2011 (75) ACC 215 (SC)

8. Gosu Jayarami Reddy & anr. Vs St. of A.N. (2011) 3 SCC (Cri) 630

9. Parsu Ram Pandey Vs St. of Bihar AIR 2004 SC 5068

10. Shivappa Vs St. of Kar. AIR 2682

11. Ramchandaran Vs St. of Kerala AIR 2011 SC 3581

12. Mukesh Vs St. for NCT of Delhi & ors. AIR 2017 SC 2161 (Three-Judge Bench)

13. Bhagwan Jagannath Markad Vs St. of Mah. (2016) 10 SCC 53

14. Nasir Ali Vs St. of U.P. AIR 1957 SC 366

15. Ugar Ahir Vs St. of Bihar AIR 1965 SC 277

16. Sucha Singh Vs St. of Punj. (2003) 7 SCC 643 to

17. Babu Vs St. of T.N. (2013) 8 SCC 60 and

18. St. of Kar. Vs Suvarnamma (2015) 1 SCC 323

19. Ram Gulam Chowdhary Vs St. of Bihar (2001) 2 JIC 986 (SC)

20. Rupinder Singh Sandhu Vs St. of Punj. (2018) 16 SCC 475

21. Khem Ram Vs St. of H.P. (2018) 1 SCC 202

22. St. of Punj. Vs Hakam Singh (2005) 7 SCC 408 and

23. Leela Ram Vs St. of Har. (1999) 9 SCC 52510,

(Delivered by Hon'ble Pradeep Kumar Srivasatva, J.)

1. These two appeals have been preferred against the impugned judgment dated 31.08.2018, passed by Additional Sessions Judge/Fast Track Court-II, Basti, in two connected Sessions Trial No. 110 of 2011 (State vs. Abdul Khaliq and 6 others), arising out of Case Crime No. 2B of 2009, under Sections 147, 148, 149, 323, 504, 506, 307 I.P.C. and Section 7 of the Criminal Law Amendment Act, Police Station Rudhauli, District Basti and in Sessions Trial No. 168 of 2011 (State vs. Islahur Rahman @ Islam and 14 others), arising out of Case Crime No. 2 of 2009, under Sections 147, 148, 323/149, 504,

506 I.P.C. and Section 7 of the Criminal Law Amendment Act, Police Station Rudhauli, District Basti.

2. In Sessions Trial No. 110 of 2011, the accused-appellants Abdul Khaliq, Razi Ahmad @ Raju, Tufel Ahmad, Nurul Huda, Jamil Ahmad, Ujer Ahmad and Abdul Mutaliq have been convicted and sentenced for the offence under Section 307/149 I.P.C. for seven years simple imprisonment and fine of Rs. 5000/- each and in default six months additional imprisonment, under Section 323/149 I.P.C. for six months simple imprisonment and fine of Rs. 500/- each and in default one month additional imprisonment, under Section 147 I.P.C. for six months simple imprisonment and fine of Rs. 500/- each and in default one month additional imprisonment, under Section 148 I.P.C. for two years imprisonment along with fine of Rs. 2000/- each and in default three months additional imprisonment. The appellants have been acquitted for the offence under Sections 504, 506 I.P.C. and Section 7 Criminal Law Amendment Act.

3. In Sessions Trial No. 168 of 2011, the accused-appellants Islahur Rahman @ Islam, Miswahur Rahman, Abdul Mutaliq, Abdul Khaliq, Jamil Ahmad, Tufel Ahmad, Wasiullah, Ujer Ahmad, Nurulhuda, Ainuullah, Iflahur Rahman, Gulam Husen, Israhul Haq, Taufiq Ahmad and Razi Ahmad have been convicted and sentenced for the offence under Section 147 I.P.C. for six months imprisonment each, under Section 323/149 I.P.C. for six month imprisonment and fine of Rs. 500/- each and in default one month additional imprisonment. The appellants have been acquitted for the offence under Section 148, 504, 506 I.P.C. and Section 7 Criminal Law Amendment Act.

4. Brief facts of Sessions Trial No. 110 of 2011 arising out of Case Crime No. 2B of 2009 are that the complainant Abdul Samad lodged a first information report on the basis of written report filed by him on 05.01.2009 stating that Abdul Wafa was returning from Dankuiya on 03.01.2009. At about 11 AM when he passed near the house of Abdul Khaliq, Razi Ahmad @ Raju exhorted to kill him and on his exhortation, Tufail Ahmad, Nurul Huda, with country made pistol in their hands, fired on the son of complainant, but he escaped. Then Abdul Khaliq exhorted and on his exhortation Jamil Ahmad hit his son on his head by lathi in order to kill him and Abdul Mutaliq and Ujer Ahmad also hit him on his head and back due to which, he fell down. People gathered there including Ahmad Ali, Mohd. Yaseen, Abdul Kuddus and Iqbal Ahmad. His son sustained serious injuries and was taken to Rudauli Hospital. He was medically examined and his condition was found serious as he was regularly vomiting and his injury was bleeding. He was sent to District Hospital and some treatment was provided to him but he became unconscious. He was referred to Lucknow Medical College where he is under treatment. The accused persons are of the same village and they have old enmity with the complainant. On the basis of report, offence was registered as Case Crime No. 2B of 2009, under Sections 147, 148, 149, 307, 323, 504, 506 I.P.C. and Section 7 Criminal Law Amendment Act on 05.01.2009 at about 06:50 P.M. The Investigating Officer investigated into the offence and finding sufficient evidence against the accused persons,

filed charge sheet under the aforesaid sections.

5. Brief facts of Sessions Trial No. 168 of 2011 arising out of Case Crime No. 2 of 2009 are that at about 01:30 P.M., a written report in Police Station Rudhauli was given stating that on 03.01.2009, at about 11 AM in the north side of Raunahia Village in a pit of Gram Samaj, Abdul Khaliq was taking water for irrigating his field. When the water was likely to over in the pit, he stopped taking water from it. Thereafter the whole village went there for fishing in the pit. Abdul Khaliq said that he has cleared the pit and, therefore, he will alone have the right of fishing. Some people of the village, however, started fishing whereupon the accused persons Islahur Rahman @ Islam, Miswahur Rahman, Abdul Mutaliq, Abdul Khaliq, Jamil Ahmad, Tufel Ahmad, Wasiullah, Ujer Ahmad, Nurulhuda, Ainuullah, Iflahur Rahman, Gulam Husen, Israhul Haq, Taufiq Ahmad and Razi Ahmad, with lathi and danda in their hands, with intention to kill Abdul Wafa and Rafiuddin, attacked on them, who after sustaining injuries fell on the ground. The first information report was registered as Case Crime No. 2 of 2009, under Sections 147, 148, 323 I.P.C. and Section 7 Criminal Law Amendment Act and after investigation, the Investigating Officer submitted charge sheet against the accused persons.

6. Charges were framed against all the accused persons under aforesaid sections who denied the charges and claimed trial. By order dated 20.12.2014, passed by Additional Sessions Judge, Court No. 5, both the aforesaid mentioned cases were consolidated and Sessions Trial No. 110 of 2011 was made the leading file, in which the evidence was recorded.

7. The prosecution examined PW-1 Abdul Wafa, PW-2 Dr. A.K. Chaudhari, PW-3 Abdul Hamid, PW-4 Ram Kawal Yadav, PW-5 Arvind Nath Tiwari, PW-6 Ahmad Ali, PW-7 Yashwant Krinvendra Chaudhari and PW-8 Gaurav Bhushan, who proved the written report Ext. Ka-1, medical report of Abdul Wafa Ext. Ka-2, written report of Sessions Trial No. 168 of 2011 Ext. Ka-3, site map as Ext. Ka-4, charge sheets Ext. Ka-5 to Ka-13, chik F.I.R. in Case Crime No. 2B of 2009 Ext. Ka-14, G.D. Ext. Ka-15, chik F.I.R. of Case Crime No. 2 of 2009 Ext. Ka-16, GD Ext. Ka-17, reference slip Ext. Ka-18 and CT Scan report as Material Ext.-1.

8. Statements of accused-appellants were recorded under section 313 of the Criminal Procedure Code in which they have stated that they have been falsely implicated out of enmity. Accused Mutaliq has stated himself to be handicapped. Accused Tufail has pleaded innocence as he was irrigating and complainant side came carrying lathi danda and became aggressive on the issue of fishing and instituted false case crime no. 2A/09 to create evidence of innocence. Accused Jameel Ahamad has pleaded innocence and has stated that except Israhulhaq, none was present on spot. In defence, the accused persons have filed statement of Harimohan in ST No. 153/11, charge-sheet and statement, photo-state admit card of Razi and certificate about Ujer Ahamad.

9. The learned trial court after hearing both sides and perusing evidence on record, convicted and sentenced the

accused-appellants by impugned judgment in both the session trials by a common judgment.

10. Aggrieved by the impugned judgment, these two appeals have been preferred challenging the impugned judgment on the ground that the same is illegal, arbitrary, perverse and contrary to evidence on record. The appellants have been assigned no specific role and prosecution case is based on general allegations. Two incidents have been alleged and in both Abdul Wafa has been alleged to have sustained injuries. The offence under section 307 I.P.C. was not proved in view of injuries. Defence evidence has been completely ignored. The sentence is too severe. The impugned judgment is not sustainable under law and is liable to be set aside. Therefore, the appellants are entitled for acquittal.

11. PW-1 Abdul Wafa, the injured has stated that on 03.01.02009 at about 11 AM, when he was coming to his house from Danokuiya and passing nearby the house of Abdul Khaliq, Abdul Khaliq and Razi Ahmad @ Raju exhorted to kill him at which Tufail Ahmad and Nurul Huda having country made pistol in their hands fired on him but he escaped by sitting down. Again Abdul Khaliq exhorted to kill him, whereupon, Jamil Ahmad and Abdul Mutaliq hit him on his head by lathi in order to kill him. Accused Ujer Ahmad also hit him by lathi below his neck on his back. He sustained injuries on his head and fell down. Witnesses and others reached there. He was vomiting and became unconscious. When be became conscious, he found himself in Mayo Medical Centre, Lucknow, where he was admitted and kept under treatment for 10 to 12 days. The accused persons have enmity with his family. The complainant in the case is his father who has died and who had given a written report by his signature. The witness has identified the signature on the written report Ext. Ka-1. The witness also filed original medical report, CT Scan report and discharge slip, the photostat thereof were already on record. He has further stated that because of the injuries, he is still under treatment and he is not comfortable in speaking.

12. PW-2 Dr. A.K. Chaudhary has stated that on 03.01.2009, he was posted as Medical Officer in PHC, Rudhauli and injured Abdul Wafa aged about 55 years was brought by police of PS Rudhauli. He found following injuries on his body :-

(1) lacerated would 9 x 5 cm. x scalp deep on the left perital region, above 8 cm. on the back side. Bleeding was present, X-ray was advised.

(2) lacerated wound 3 x 0.4 cm. x scalp deep close to injury no. 1. Bleeding was present.

(3) contusion 3 x 2 cm. (red colour) on the left side on chest 5 cm. below the scapular.

13. According to doctor, all the injuries were caused by blunt object and were simple in nature, except injury no. 1 for which X-ray and expert opinion was advised. During treatment, the injured vomited once and complained that he is feeling tendency of vomiting and he has vomited 7 times. The patient was advised to be kept under observation in District Hospital, Basti. Injuries were fresh. The doctor has proved the injury report as Ext. Ka-2 and said that the injuries must have

been caused at about 11 AM on 03.01.2009.

14. PW-3 Abdul Hamid has stated that eight and half years ago, the said incident took place when he was present in his house. Abdul Khaliq was irrigating his field by water collected in a pit of Gram Samaj. When the water in the pit was getting over, many persons of the village became excited for fishing which was opposed by Abdul Khaliq saying that he has cleared water from the pit and he has alone right of fishing in the said pit. The pit was of Gram Samaj and, therefore, some persons stepped down in the pit for fishing. Abdul Khaliq became angry and started speaking otherwise. All the 16 accused persons namely Islahur Rahman @ Islam, Miswahur Rahman, Abdul Mutaliq, Abdul Khaliq, Jamil Ahmad, Tufel Ahmad, Wasiullah, Ujer Ahmad, Nurulhuda, Ainuullah, Iflahur Rahman, Gulam Husen, Israhul Haq, Taufiq Ahmad, Razi Ahmad and Karam Husen along with lathi, danda, country made pistol and spade. Accused Ujer Ahmad and Razi Ahmad were having country made pistol, Nurul Huda was having spade in his hand and the remaining accused persons were having lathi and danda in their hands and they started beating Abdul Wafa and Rafiuddin. He and others saw the whole incident. He got the report inscribed by a person about this incident and gave the same in police station on the basis of which, first information report was registered. The witness proved the written report as Ext. Ka-3.

15. PW-4 SI Ram Kewal is the Investigating Officer who proved the site map as Ext. Ka-4 and Ka-6 and has recorded the statements of the witnesses. After finding sufficient evidence, he submitted charge sheet Ext. Ka-5 and Ka-7.

16. PW-5 SI Arvind Nath Tiwari is subsequent IO who has proved charge-sheet Ext. Ka-8, Ka-9, Ka-10, Ka-11, Ka-12 and Ka-13.

17. PW-6 Ahmad Ali has stated that on the date of incident at about 11 AM Abdul Wafa was returning to his house and when he came near the house of Abdul Khaliq, on the exhortation of Abdul Khaliq and Razi Ahmad, accused Tufail Ahmad and Nurulhuda fired on him but he escaped, whereupon on the exhortation of Abdul Khaliq, Jamil Ahmad hit Abdul Wafa by lathi on his head but he missed and lathi hit on his back, below the neck. He fell on the ground. Abdul Wafa was also hit by Abdul Mutaliq and Ujer Ahmad and he sustained injuries on his head. He was taken to Rudhauli for treatment and in view of the seriousness of the injuries, he was referred to the District Hospital.

18. PW-7 Yashwant Krinvendra Chaudhary is Constable Moharir, who has proved the chik F.I.R. Ext. Ka-14, GD Report Ext. Ka-15, Chik F.I.R. Ext. Ka-16, GD report Ext. Ka-17.

19. PW-8 Dr. Gaurav, Radiologist has stated that on 16.01.2019, he was deputed on Raj Scanning Limited, Jiyamau, Lucknow. Abdul Wafa aged about 54 years was sent by Dr. Sumil Agarwal for CT Scan. In the CT Scan depressed fracture of frontal bone was found and clotting was present on frontal labes. He has proved the CT Scan report as Ext. Ka-18. CT Scan film has been proved as Material Ext.-1.

20. The learned counsel to the accused-appellants, Sri Kamal Krishna, Senior Advocate, has argued that in respect of same occurrence, two fires were lodged and two charge-sheets were submitted and in both the cases, the accused-appellants have been convicted, whereas, the place of occurrence for both the cases are different and the evidence of the prosecution has become self-contradictory and the whole prosecution case is doubtful. The learned A.G.A. and counsel for the complainant side have submitted that the prosecution by cogent evidence has established the case beyond shadow of doubt and the learned trial court has rightly convicted and sentenced the accused-appellants.

21. Certain pertinent facts need to be mentioned in order to understand the overall factual matrix in this case. Two F.I.R. has been lodged in respect of an incident taking place on 3.1.2009 at 11 AM, one got registered on the written report of Abdul Hameed on the same day at 13.30 PM naming 16 accused persons. The second F.I.R. was lodged by Abdul Samad, the father of the injured, on 5.1.2019 at 6.50 PM naming only 7 accused persons from the group of those 16 persons who were earlier named in the F.I.R. lodged on 3.1.2009. It is not understandable how another F.I.R. was registered by police in respect of same incident and why not the subsequent F.I.R. was included with the first F.I.R. which was earlier in time and date. Both were in respect of same incident bearing Crime No. 2/09 and Crime No. 2B/09 and were investigated altogether by the I.O. Two separate charge-sheets were filed and cognizance was taken on both and both were committed to sessions for trial. Naturally, it could be so done if they are connected and in respect of same criminal incident or if they are cross cases.

22. The committing court has mentioned in the committal order about the case pertaining to S.T. No. 168/11 to be cross case of other S.T. No. 110/11, though the same is not correct as it was not a cross case at all. The learned trial court by order dated 21.8.2014 refused to undertake joint trial and still retained S.T. No. 168/11 which was for the offence u/s 148,147,323,504,506 I.P.C. and 7 Criminal Law Amendment Act which was triable by Magistrate. Two trials of at least those 7 accused persons who were common in both the cases was not possible. The matter went to the High Court on this point in Criminal Misc. No. 42513/14 and vide order dated 27.10.2014, the order of the trial court dated 21.8.2014 was quashed directing the trial court to take a fresh decision on this point. Thereafter, by order dated 20.12.2014, both the trials were consolidated and a joint trial was directed making S.T. No. 110/11 to be leading file. Against this order, the prosecution did not seek any judicial remedy. It means that the prosecution accepted both the cases to be connected, arising out of one incident and adduced evidence accordingly.

23. In S.T. No. 110/11 charges were framed for the offence u/s 147, 148, 323/149, 504, 506, 307/149 I.P.C. and Section 7 of the Criminal Law Amendment Act and in ST No. 168/11 for the offence u/s 147, 148, 323/149, 504, 506 I.P.C. and Section 7 of the Criminal Law Amendment Act. Clearly, in both the trials, all the sections were common except section 307 I.P.C. which is additional in ST No. 110/11. Both the session trials have been decided by the

impugned judgment and all the accused persons have been convicted in both the session trial. Therefore, I find that at both level, investigation and trial, procedural lapse and omission has occurred, may be because of inexperience or ignorance. I will come to the legal effect of such lapse and omission later on. Now the question is what should have been done in such situation and what was the legal course open during investigation and trial. Just for guidance, it is observed as follows:

1. The second F.I.R. should not have been registered, and if registered, as it has happened in this case, it should have been merged with the earlier F.I.R. and the offence should have been investigated taking into consideration the subsequent report. By doing so, the mistake could have been avoided which has occurred in respect of those 7 accused persons whose names are common in both the cases because a double trial is not legally possible for the same offence.

2. Now, if the investigating agency committed that error, the learned trial court should not let the error to continue and the same could have been corrected during trial. The learned trial court should and must have struck down the names of the seven accused persons whose names are common in both the cases from the case which related to smaller and less serious offence, to avoid double trial resulting in double jeopardy of those accused persons which is in violation of the constitutionally protected fundamental right of the accused persons as guaranteed by Article 20 of the Constitution of India.

24. Instead of doing so, the learned trial court convicted all those seven accused persons in both the cases. Therefore, the trial of 7 accused persons charge-sheeted in ST No. 168/11 who are also accused in ST No. 110/11 is absolutely vitiated being infringement of the protection provided against double jeopardy under Art. 20 of the Constitution of India as no body can be tried or convicted twice for the same criminal incident and offence. Hence, the trial, conviction and sentence of the accused-appellants Abdul Khaliq, Razi Ahmad @ Raju, Tufel Ahmad, Nurul Huda, Jamil Ahmad, Ujer Ahmad and Abdul Mutaliq in ST No. 168/11, arising out of Crime No. 2/09, under Sections 147, 148, 323/149, 504, 506 I.P.C. and Section 7 of the Criminal Law Amendment Act, Police Station Rudhauli, District Basti is liable to be set aside and quashed and consequently they are entitled to be acquitted.

25. Prosecution admits that both the criminal incident took place on same date and same time. But, it appears that there remained confusion in the prosecution during investigation and till the end of trial whether both the cases relate to one offence or both are distinct offences taking place at the same time and because of this, discrepancy has occurred, both in investigation and also in the statement of the fact witnesses. first F.I.R. was lodged on the same day by Abdul Hameed and he named 15 persons as accused. The second F.I.R. was lodged by Abdul Samad after two days and the reason put forward for delay was his son was injured and was under treatment in Medical College, Lucknow and when he came back from there, he lodged F.I.R. against 7 persons. In the first report the reason for the incident was alleged to be the dispute which arose because of fishing. No such

reason has been alleged in the subsequent F.I.R. lodged by the father of injured. Three fact witnesses have been examined- PW-1 Abdul Wafa (injured), PW-3 Abdul Hameed (informant of first F.I.R.) and PW-6 Ahamad Ali as eyewitness. Abdul Samad, the informant of second F.I.R. died and could not be examined and the written report has been proved by PW-1 injured as secondary witness. Both PW-1 and PW-6 have confined their statement to the facts of second F.I.R.. As such, in respect of facts in ST No. 168/11, only informant appears to have supported his F.I.R. version as eyewitness. In the F.I.R., it has been stated that in addition to Abdul Wafa, Rafiuddin also sustained injury, but, Rafiuddin has not been examined in the court nor any medical report has been produced to show that he sustained injury in the incident.

26. PW-3 Abdul Hameed has stated that accused Ujer Ahamad was carrying country made pistol and accused Nurulhuda was carrying spade, while all other accused persons were carrying lathi danda at the time of incident and all committed marpeet and caused injuries to Abdul Wafa and Rafiuddin. Rafiuddin has not been examined who could be the best witness to say that he sustained injury in the incident. His statement has not been even recorded by IO nor he is a witness of charge-sheet. Abdul Wafa is not a witness in respect of case based on the F.I.R. lodged by Abdul Hameed and while giving statement in court, he has disowned the F.I.R. version and he has denied his presence on pond/pit at the time of incident. PW-6 Ahmad has also disowned that F.I.R. and has stated that he was not present there at pond/pit at the time of incident. Both these witnesses have expressed their ignorance about the incident taking place there as the same did not happen in their presence and any thing, though very little, came in their statement regarding that incident is totally hearsay which cannot be taken in support of prosecution case so far as ST No. 168/11 is concerned. The evidence of PW-3 Abdul Hameed also does not stand during cross-examination as he has stated in his chief that Abdul Wafa and Rafiuddin sustained injuries, but in cross-examination he states that in addition to both he and one Tamudin also sustained injuries. There is no such medical report nor Tamudin has been examined. He has never said in his F.I.R. that he also sustained injury. In corresponding GD also there is no mention about his injury or injury of Tamudin or Rafiuddin. The two fact witnesses of the charge-sheet, Abdul Quddus and Nurulhaq have also not been examined in support.

27. In view of the above discussion, I find that the finding of conviction in the impugned judgment in S.T. No. 168/11 is perverse, suffers from illegality and is not sustainable under law and the same is liable to be set aside. Consequently, the accused-appellants are entitled to be acquitted.

28. So far as the other session trial S.T. No. 110/11 is concerned, in the F.I.R., 7 accused persons are named and against them charge-sheet has been filed. It needs to be pertinently mentioned that it has been the prosecution case that only Abdul Wafa sustained injuries and in the medical examination 3 injuries have been found on his body- two lacerated wound on head and one contusion on back below the neck.

29. Ext Ka-4 is the site-map for this case in which the place of occurrence has

been shown as 'X' which is situated on Hanumanganj-Padi road in front of house of Khaliq. The F.I.R. also contains that the incident took place on the road in front of the house of Khaliq while the injured was coming from Dankuia. This has been proved by PW-1 and PW-6 in their statements The submission of the learned counsel to the accused-appellants is that in the first F.I.R., the place of incident is different. Since both the witnesses, PW-1 and PW-6 have disowned that F.I.R., and that case has been disbelieved earlier in this judgment, therefore, that difference is not material and need not to be considered for the purpose of this case. Moreover, if the site-map of both the cases are compared, it is clear that there is not much distance between the two places of occurrence. In the north house of accused Khaliq has been shown and in the south the agricultural land of Nurulhaq has been shown and in between the two, there is pond/pit to which the agricultural land of Nurulhaq is very close. In the north of the pond/pit and in the south of the house of Khaliq, there is road on which by 'X' the place of occurrence has been shown in the site-map. Therefore, the difference in place of occurrence has no legal impact. Thus, the place of occurrence stands established.

30. The date and time of incident has been also proved by the witnesses PW-1 who is injured and by virtue of injury, his presence at the time of occurrence can hardly be disputed and his statement finds further support from the testimony of the eyewitness PW-6. PW-2 Doctor has stated while proving the injury report that the injuries could have been possibly caused by blunt object such as lathi and it was possible to have been caused on 3.1.2009 at 11 A.M. In C.T. Scan, a depressed fracture on head has been found on his head along with blood clotting. Therefore, it is also established that on the said date, time and place, Abdul Wafa sustained injuries with a depressed fracture on head.

31. Now, the only thing which is required to be determined whether the seven accused persons caused the injury and committed offence as alleged by prosecution. PW-1 Abdul Wafa has stated that on the exhortation of Khaliq and Razi Ahamad alias Raju to kill him, accused Tufail and Nurulhuda fired on him by country made pistol whereupon, he sat down and escaped. When it is alleged that the injured was shot fire and no such firearm was incurred by him, the use of firearm by two accused persons becomes suspicious. It just remains an oral saying in absence of any firearm injury and also in absence of any recovery of pistol from both the accused or any object from spot in terms of pellets etc. showing use of firearms in commission of offence. In the factual matrix of the case also, it appears that the attack was direct and from close distance, and therefore, the fact that the injured escaped because he dropped himself down, seems to be improbable and unbelievable. Therefore, the presence and involvement of accused Tufail and Nurulhuda has become extremely doubtful.

32. PW-1 Abdul wafa has further stated that again on exhortation of Khalik, Jameel Ahamad, Mutaliq and Ujer hit him by lathi by which he sustained injuries. This time the witness has not stated that accused Razi Ahamad alias Raju also exhorted both on which they acted upon. His role of exhortation has been confined to exhortation of accused Tufail and

Nurulhuda who were allegedly shot fire and in respect of them when the case of prosecution has been found to be doubtful. Therefore, the exhortation by accused Razi Ahamad alias Raju, consequently becomes doubtful.

33. Thereafter, on exhortation of Khaliq, Jameel Ahamad, Mutaliq and Ujer hit Abdul Wafa by lathi by which he sustained injuries. He was taken to hospital and was medically examined at P.H.C. and from there he was sent to District Hospital and then referred to Medical College Lucknow. In his statement, PW-1 has also stated that Abdul Mutaliq also hit him by lathi. The learned counsel of appellant has submitted that inclusion of Abdul Mutaliq appears to be an improvement and the statement of PW-6 is also an exaggeration on the point as he mentions the name of Mutaliq subsequently, though says that he and Ujer Ahamand hit first by lathi on exhortation. But, I find no force in this submission as both injured witness and eye-witness have stated that he also hit the injured by lathi causing injury to him. In the F.I.R. also he has been alleged to have caused injury by lathi. It should be remembered that PW-1 is an injured witness and there is no reason to discredit the testimony of an injured witness and law gives a very higher value to a witness who has sustained injury in the incident.

34. As held in ***State of Haryana Vs. Krishan, AIR 2017 SC 3125, Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench), Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537 and Jarnail Singh Vs. State of Punjab, 2009 (6) Supreme 526***, deposition of an injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies for the reason that his presence on the scene stands established in the case and it is proved that he suffered the injuries during the said incident.

35. Other witness PW-6 is of the same locality and is neighbor of the injured and he has also supported that on the exhortation of Khaliq, the other three accused persons hit the injured by lathi and caused injury to the injured. The injured has sustained three injuries which also supports the participation of accused persons. Moreover, both the witnesses are illiterate villager and keeping in view the law laid down in ***State of U.P. Vs. Chhoteylal, AIR 2011 SC 697, Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239*** the court should keep in mind the rural background and the scenario in which the incident had happened and should not appreciate the evidence from rational angle and discredit the otherwise truthful version on technical grounds.

36. In view of above discussion, participation and involvement of four accused persons in commission of offence is established- Khaliq who exhorted and Jameel Ahamad, Abdul Mutaliq and Ujer who hit the injured on his exhortation.

37. Now, the nature of injuries needs to be examined. As per F.I.R., Abdul Wafa was seriously injured and he was taken to Rudhouli Hospital where he was examined. But he was regularly vomiting and his injury was bleeding, and therefore, he was taken to District Hospital where some treatment was provided to him. But he started vomiting,

getting unconscious and fits also started and then, he was referred to Medical College, Lucknow where he is under treatment and condition is serious.

38. Medical report which is on record is of P.H.C., Rudhouli which has been referred above. PW-8 is Dr. Gourav (Radiologist) of Raj Scanning Ltd., Jiyamau, Lucknow has stated that in C.T. scan, a depressed fracture was found on left frontal bone on head of Abdul Wafa. In his cross-examination, he has admitted that he did not see the patient and he prepared the report on the basis of C.T. Scan film which is Mat. Ext.-1 and C.T. Scan was conducted on 16.1.2009 in his supervision by the technician on the reference of Dr. Sunil Agrwal. He has also admitted that Raj Scanning Ltd. is a private institution. In the Report, he has written 'co-relate clinically' which means that the doctor doing treatment should verify the report with the real condition of the patient. There is no such supplementary report after co-relating clinically as advised in the report. A discharge slip of Mayo Hospital, Lucknow is on record as paper no. 92 kha showing date of admission in the hospital on 8.1.2009 and discharged on 21.1.2009, but the same has not been proved by prosecution.

39. The submission of the learned counsel is that there is no supplementary report of any doctor under whom Abdul Wafa was under treatment. Moreover, there is no evidence that he was ever treated in Medical College, Lucknow as alleged in F.I.R. and injured Abdul Wafa in his statement has also not stated so and instead, he has stated that when he got conscious, he found himself in Mayo Hospital, Lucknow which is a private hospital. It has been further argued that the C.T. scan report and the discharge slip was not delivered to the I.O. and even the statement of Abdul Wafa was not recorded by I.O. nor he was named in the list of witnesses in charge-sheet.

40. So far as not showing Abdul Wafa as witness in charge-sheet, or not recording his statement by I.O., this lapse can be assigned to investigating agency and that cannot be given much importance as F.I.R. contains that he sustained injuries and he was a necessary witness. Injury to him also finds mention in the corresponding G.D. of F.I.R. lodged by Hameed and it shows that he was taken to Police Station and he was medically examined by police in P.H.C. on the same day.

41. PW-1 has stated in his examination-in-chief that after the incident he became unconscious and when he got conscious, he was in Mayo Hospital, Lucknow. There is no such report on record that he remained unconscious for 4-5 days as he was admitted there on 8.1.2009. On the contrary, PW-2 Dr. A.K. Choudhary who examined him on the date of incident at 2.10 P.M., has stated that the patient vomited once before him and complained that he has feeling of vomiting regularly and he has vomited 7 times prior to that. Though the doctor has mentioned nothing about his mental and physical condition, but from his statement, it is clear that the injured was conscious at the time of medical examination. It has been said by the witness that he was provided some treatment in District Hospital, Basti, but, there is no evidence on record regarding his treatment there. In my view this discrepancy could only be explained by

Abdul Samad (informant) who died without being examined and PW-1 Abdul Wafa because of injuries might not be able to notice the treatment in District Hospital. The informant being illiterate villager might not have been able to distinguish between Medical College and Mayo Hospital.

42. The learned counsel to the accused-appellants has submitted that there is no reason shown by the prosecution that the F.I.R. lodged by Abdul Hameed was not correct nor it has been anywhere asserted that he was having any reason to lodge F.I.R. with wrong facts. If Abdul Wafa was not present there, was there any convincing reason available to PW-3 to allege that he sustained injuries in the same incident. This fact is also significant in view of the on oath statement of the I.O. in the court that during investigation he found that Abdul Wafa got injured in the same dispute which took place near pond/pit on the issue of fishing. The learned counsel has argued that a conviction cannot be recorded on the basis that some one has sustained injuries and has been under treatment here or there. For conviction, it is necessary for the prosecution to prove the events in the way they have been alleged without anything unnatural, contradictory and discrepant. The non-explanation and no account of 4-5 days from the date of incident and admission in Mayo Hospital, Lucknow about the injured also creates a lot of doubt because, if his condition was so serious, the treatment for those 4-5 days must have been placed on record or the reason for not doing so must have been put forward before the court.

43. So far as the discrepancy and contradiction is concerned, as laid down in ***State of U.P. v. Naresh; 2011 (75) ACC 215) (SC),*** in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror because of occurrence. Contradictions/inconsistencies/embellish ments or improvements of minor nature on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

44. In ***Gosu Jayarami Reddy and another Vs. State of Andhra Pradesh; (2011) 3 SCC (Cri) 630,*** it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix-up or confusion.

45. Further, in ***Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v. State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581***, it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on

which they give their depositions in Court. In ***Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench) and Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 53,*** it was reiterated that minor contradictions in the testimonies of the Prosecution Witnesses are bound to be there and in fact they go to support the truthfulness of the witnesses.

46. There is no doubt that there is lapse in the prosecution version, but the same is because of investigating agency as the I.O. should have taken the statement of injured and he should have collected the evidence which took place in District Hospital, Basti and should have also verified his treatment in Mayo Hospital, Lucknow. In his statement also, the I.O. has not given any cogent reason for not doing so except that he has stated more than once that there was bonafide mistake committed by him. There is discrepancy in the prosecution case, but the same has occurred because of mistake committed by police machinery and investigating agency. Two F.I.R. was registered in respect of the incident, injured Abdul Wafa was got medically examined in PHC by the police as there is mention of his being brought to police station in injured condition in the corresponding G.D. of registration of F.I.R. by Abdul Hameed, but no further step was taken towards collection of evidence regarding nature and seriousness of injury and even he was not made a witness in the charge-sheet. Of course, there is exaggeration in the testimony of injured and PW-6 as they have tried to involve and implicate more persons in the incident. But, experience shows that this is a tendency which is found prevalent, particularly in rustics society as people try to implicate more persons even though they are innocent.

47. Now, accepting all the submissions with regards to discrepancies in prosecution version and lapse in investigation, the question is whether the role of criminal court is to lay emphasis on the same and acquit those who appears to have committed offence or to unveil the curtain and discover truth behind it. In India doctrine of falsus in uno, falsus in omnibus does not apply. The Supreme Court has been constantly of the view that the trial as well as appellate courts have to play a very important role in India in criminal justice administration and while appreciating the evidence efforts have to be made to arrive at the truth and to separate from the statements of the witnesses what is untrue and exaggerated. The Supreme Court, from ***Nasir Ali Vs. State of U.P., AIR 1957 SC 366 and Ugar Ahir Vs. State of Bihar, AIR 1965 SC 277, Sucha Singh Vs. State of Punjab, (2003) 7 SCC 643 to Babu Vs. State of Tamilnadu, (2013) 8 SCC 60 and State of Karnataka Vs. Suvarnamma, (2015) 1 SCC 323,*** has time and again observed:

"Maxim "falsus in uno, falsus in omnibus' is not applicable in India. It is merely a rule of caution. Thus even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. The court has to separate grain from chaff and appraise in each case as to what extent the evidence is acceptable. If separation cannot be done, the evidence has to be rejected in

toto. A witness may be speaking untruth in some respect and it has to be appraised in each case as to what extent the evidence is worthy of acceptance and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. Falsity of particular material witness on a material particular would not ruin it from the beginning to end. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain untruth or at any rate exaggeration, embroideries or embellishment."

48. In ***Ram Gulam Chowdhary Vs. State of Bihar, 2001(2) JIC 986 (SC)***, upholding the conviction of the accused, the Supreme Court held that since the I.O. is not an eye witness to the incident and the reliable eye witnesses had proved the place of occurrence by their testimony, so non proving the map by I.O. or his non-examination is not fatal to the prosecution case. Meaning thereby, where ocular testimonies are reliable, even non-examination of I.O. is not relevant, then the lapse committed by him during investigation, can also be not given so much of importance to render the prosecution version false or unbelievable.

49. In ***Khem Ram Vs. State of Himachal Pradesh, (2018) 1 SCC 202 State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408 and Leela Ram Vs. State of Haryana, (1999) 9 SCC 52510***, it has been held that incomplete or defective investigation or any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement is use of extra caution in evaluation of evidence. A defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent. In ***Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475,*** it has been remarked by the supreme court that even if there is lapse in investigation, the same cannot be used to give advantage to accused person in cases where prosecution has led credible evidence, as it is difficult to determine that the investigative defect occurred due to general inefficiency of system or deliberated to shield the accused.

50. The prosecution case may be considered from a different angle also. What could have been the fate of the case, had it been a case based on complaint without police or investigating agency being involved? Could it make any difference if written report is considered to be a complaint and both witnesses would have been examined as injured complainant and eye-witness? Certainly, the defect and investigating lapse could not have occurred. In that situation, whether it was possible to completely disbelieve the prosecution version?

51. Viewing from that angle, I find that there is a written report given by the father of the injured on the basis of which F.I.R. was registered. If it is considered to be second F.I.R. about the same incident, it is fault of the police. Why the informant lodged this, could be explained by the informant but he could not be examined as he died before being examined. He was an illiterate villager and if he wrote that his son is under treatment in Medical College, Lucknow, the mistake is bonafide as according to injured he was

admitted in Mayo Hospital, and the same eventually is situated in Lucknow. In the corresponding GD of the F.I.R. of Abdul Hameed, it is mentioned that the injured was brought to police station and he had head injury which was bleeding and he was sent by police for medical in PHC. The medical report proved by PW-2 Dr Choudhary shows that he had sustained two lacerated wound over his head and in CT Scan, depressed fracture was found on his head. The discharge slip of Mayo Hospital has not been proved nor the CT Scan Report has been clinically co-related by any doctor nor any supplementary report has been prepared to show the seriousness of injury, but, even without that, it is clear in view of medical report and CT Scan, that the head injury of Abdul Wafa was grievous in nature. But, there is no opinion of doctor that by the said injury, death of the injured was in any way possible. The injury was caused by blunt object like lathi and not by any deadly weapon, and therefore, intention to cause death cannot be imputed and instead of offence under section 307 I.P.C., only an offence under section 325 and 323 I.P.C. for voluntarily causing grievous hurt and simple hurt is proved. In the earlier discussion, it has been found to have been established that the accused persons were present together at the place of occurrence and on the exhortation of Khaliq, Jameel Ahamad, Abdul Mutaliq and Ujer Ahamad hit the injured by lathi by which he sustained injuries. It also shows their common intention in causing injuries and section 34 I.P.C. is very much applicable.

52. On the basis of above discussion, I find the impugned judgment in ST No. 168 of 2011, Crime No. 2 of 2009, passed by Addl. Sessions Judge/Fast Track Court-II, Basti on 31.8.2018 is perverse, illegal and not sustainable under law and the appeal is liable to be **allowed**. So far as the appeal against the judgment in ST No. 110 of 2011 is concerned, the appeal is liable to be **partly allowed** with modifications, as the conviction and sentence of accused-appellants, Razi Ahmad @ Raju, Tufel Ahmad and Nurul Huda for the offence under section 307/323 read with 149 and section 147, 148 I.P.C. and the conviction and sentence of accused-appellants Jamil Ahmad, Abdul Khailq, Ujer Ahmad and Abdul Mutaliq for the offence under section 147,148 I.P.C. is perverse, illegal and not sustainable under law and is liable to be set aside. The conviction of accused-appellants Jamil Ahmad, Abdul Khailq, Ujer Ahmad and Abdul Mutaliq for the offence under section 307 I.P.C. is liable to be converted for the offence under section 325/34 I.P.C. and the sentence is liable to be reduced and modified for both offences under section 325/323 read with section 34 I.P.C..

53. Accordingly, following order is passed in respect of both session trials-

1. The conviction and sentence in ST No. 110 of 2011 of the accused-appellants, Razi Ahmad @ Raju, Tufel Ahmad and Nurul Huda for the offence under section 307/323 read with 149 and section 147, 148 I.P.C. is set aside and consequently they are acquitted. They be released from jail forthwith.

2. The conviction and sentence in S.T. No. 110 of 2011 of accused-appellants Jamil Ahmad, Abdul Khailq, Ujer Ahmad and Abdul Mutaliq for the offence under section 147, 148 I.P.C. is set aside and consequently they are acquitted from the said charge.

3. The appeal in respect of ST No. 168/11 is allowed and the impugned judgment is set aside. Consequently, the

accused-appellants Islahur Rahman @ Islam, Miswahur Rahman, Abdul Mutaliq, Abdul Khaliq, Jamil Ahmad, Tufel Ahmad, Wasiullah, Ujer Ahmad, Nurulhuda, Ainuullah, Iflahur Rahman, Gulam Husen, Israhul Haq, Taufiq Ahmad and Razi Ahmad are acquitted from the charge for the offence under Section 147, 323/149 I.P.C.. All the accused-appellants be released from jail forthwith.

4. The conviction of Jamil Ahmad, Abdul Khailq Ujer Ahmad and Abdul Mutaliq in ST No. 110 of 2011 for the offence under Section 307/149 I.P.C. is converted into the offence under section 325/34 I.P.C. and are sentenced for one year and six months simple imprisonment and fine of Rs. 2000/- each and in default 1 month additional imprisonment and under Section 323/34 I.P.C. for 3 months simple imprisonment and fine of Rs. 500/- each and in default 15 days additional imprisonment. The sentence for both the offences shall run concurrently and the period underwent by them in jail shall be adjusted against awarded sentence.

54. The office is directed to transmit back the lower court record to the learned trial court immediately along with a copy of this judgment for information and compliance.

(2019)10ILR A 140

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE
THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 21 of 2000

Malkhan Singh ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri V.S. Kushwaha, Sri R.B. Sahai, Sri Shailendra Singh, Sri Raghuraj Kishor.

Counsel for the Respondent:
A.G.A

A. Indian Penal Code, 1860 - Sec. 302, 302/34,307/34 and Arms Act, 1959 - Section 25 - Criminal Appeal - Section 313 Cr.P.C - Examination of accused persons- Relationship is not a factor to affect credibility of a witness - interestedness of the witnesses-direct evidence- charges proved against the appellant beyond doubt.

Held:- A relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible - In case there is direct trustworthy evidence of witnesses as to commission of an offence, the motive part loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence cannot be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance - Proved from all the evidence and records available on the record that at the time of the alleged incident, the appellant shot dead from the gun and killed the deceased - charges against the appellant have been proved under Section 302, 307 indian Penal Code and Section 25 of Arms Act Act beyond doubt. (Para 35,38 & 43)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Bhargav & ors. Vs st. of Kerala (2004) 12 SCC 414

2. Khurshid Ahmed vs. St. of J&k 2018 SCC 529

3. Sadiq alias Lalo Ghulam Hussain Shekha & ors. St. of Guj. 2016(4) crimes 68 SC

4. Hari Shankar Vs St. of U.P. (1996) 9 SCC40

5. Bikau Pandey & ors. Vs St. of Bihar (2003) 12 SCC 616

6. Abu20Thakir & ors. Vs St. of T.N. (2010) 5 SCC 91

7. St. of U.P. Vs Kishanpal & ors. (2008) 16 SCC 73

8. Bipin Kumar Mondal Vs St. of W.B. (2010) 12 SCC 91

9. Yogesh Singh per Mahabir Singh & ors. (2016) 4 Crime 121 SC

(Delivered by Hon'ble Bachchoo Lal, J.)

1 यह दाण्डिक अपील, अपीलार्थी मलखान सिंह की ओरसे **सत्र परीक्षण संख्या 218 वर्ष 1998 ,** अन्तर्गत धारा 302,302/34, 307/34 भा0 दं0 सं0, थाना हुसैनगंज, जिला फतेहपुर (राज्य प्रति मलखान सिंह एवं अन्य) एवं सत्र परीक्षण संख्या 219वर्ष 1998, अन्तर्गत धारा 25 आयुध अधिनियम, थाना हुसैनगंज,जिला फतेहपुर (राज्य प्रति मलखान सिंह) में विद्वान नवम् अपर सत्रन्यायाधीश, फतेहपुर द्वारा पारित निर्णय एवं आदेश दिनांक12–11–1999 के विरूद्व योजित की गयी है जिसके द्वारा
अपीलार्थी को धारा 302 भा0 दं0 सं0 के अन्तर्गत दोषी पाते हुएकठोर आजीवन कारावास, धारा 307 भा0 दं0 सं0 के अन्तर्गत दोषीपाते हुए पांच वर्ष के कठोर कारावास तथा धारा 25 आयुधअधिनियम के अन्तर्गत दोषी पाते हुए दो वर्ष के कठोर कारावास केदण्ड से दण्डित किया गया है तथा यह भी आदेशित किया गया किअपीलार्थी की सभी सजायें साथ–साथ चलेगीं।

2 अपील के निस्तारण हेतु आवश्यक तथ्य संक्षेप में इसप्रकार है कि वादी मुकदमा कमलेश कुमार ने दिनांक 19–10–1997समय 1–20 ए0 एम0 पर थाना हुसैनगंज, जिला फतेहपुर में एकतहरीर बाबू लाल से लिखवाकर इस आशय के साथ प्रस्तुत कियाकि उसकी चाची गीता देवी उम्र 30 वर्ष पत्नी सुरेश गड़रिया कोउसके ही गांव का मलखान गड़रिया पुत्र बचई गड़रिया करीब सवातीन माह पहले भगा ले गया था। दिनांक 15–10–1997 को उसकेचाचा, उसकी चाची को फतेहपुर से घर लेकर आये थे और वहींकचहरी में ही मलखान ने उसके चाचा से सुलहनामा कर लिया था।आज दिनांक 18–10–1997 को रात्रि करीब साढे सात बजे की बातहै उसके चाचा के घर के आंगन में लालटेन जल रही थी उसकेचाचा सुरेश व उसकी दादी बृजरानी व चाची आंगन में थी वह तथाउसके पिता राम नारायन कटिया मशीन पर चारा काट रहे थे तभीउसकी चाची अपने बच्चे को नापदान पर टट्टी करा रही थी किउसके गांव का मलखान पुत्र बचई व उनका बहनोई अनन्तू निवासीमसवानी फतेहपुर आकर उसके चाचा को गाली गुफ्ता देने लगें किसाले अब यह मेरी औरत होकर रहेगी कि उसकी चाची गाली देनेव साथ रहने को मना किया तभी मलखान ने उसकी चाची कोगोली मार दी। गोली लगने से उसकी चाची गिरकर वहीं पर मरगयी उसके चाचा व उसने व उसके पिता ने मलखान व अनन्तू कापीछा किया तो वे लोग उसके चाचा को खेत में गोली मार दियेंजिससे उसके चाचा घायल होकर गिर गये। हम लोग अपने चाचाको लेकर अस्पताल में भर्ती कराकर थाने आया हूॅ। इस वाक्या कोउसने व उसके पिताजी ने व उसके चाचा व दादी ने लालटेन कीरोशनी में देखा है। वह रिपोर्ट को आया है। उसकी रिपोर्ट लिखकरआवश्यक कार्यवाही करने की कृपा की जाए।

3 वादी की उक्त लिखित तहरीर प्रदर्श क–1 के आधारपर अपीलार्थी एवं एक अन्य के विरूद्व भा0 दं0 सं0 की धारा 302,307, 504 के अन्तर्गत थाना पर मुकदमा पंजीकृत किया गया। चिकप्रथम सूचना रिपोर्ट प्रदर्श क–4 है तथा कायमी मुकदमा से सम्बन्धित जी0 डी की प्रति प्रदर्श क–5 है।

4 मामले की विवेचना उदल सिंह, थानाध्यक्ष (अभियोजनसाक्षी संख्या 5) द्वारा स्वयं ग्रहण की गयी। उन्होंने मुख्य आरक्षीश्याम बिहारी मिश्रा व अभियोजन साक्षी संख्या 1 कमलेश (वादी)का बयान अंकित किया। घटनास्थल पर जाकर उपनिरीक्षक, आर0एस0 शुक्ला से मृतका का पंचायतनामा तैयार कराया। पंचायतनामाप्रदर्श क–6 है तथा उससे सम्बन्धित प्रपत्र चालान लाश, फोटोनाश, चिट्ठी प्रतिसार व चिट्ठी मुख्य चिकित्साधिकारी क्रमशः प्रदर्शक– 7 लगायत प्रदर्श क–10 हैं। विवेचनाधिकारी ने घटनास्थल कानिरीक्षण कर उसका मानचित्र प्रदर्श क–11 तैयार कियातथा घटनास्थल से खून आलूदा व सादी मिट्टी कब्जा पुलिस मेंलेकर सर्वमोहर कर उसकी फर्द प्रदर्श क–12 तैयार की। चुटैलसुरेश जिस स्थान पर गिरा था उस स्थान से भी उन्होनें खून आलूदाव सादी मिट्टी मय घास पत्ती के कब्जे में लेकर उसकी फर्द प्रदर्शक–13 तैयार की। चुटैल सुरेश के घायल होने के स्थान खेत बचूनसिंह में से एक खोखा कारतूस 12 बोर मिला जिसे सर्वमोहर

करउसकी फर्द प्रदर्श क–14 तैयार की। इसी खेत से एक पैंट व चप्पलमुलजिम मिला जिसे कब्जा पुलिस में लिया गया जिसकी फर्द प्रदर्शक–15 है। मुलजिम मलखान की साइकिल ननकू के खेत में खडी थीउसको कब्जे में लिया तथा उसकी फर्द प्रदर्श क–16 को अपने लेख
व हस्ताक्षर में तैयार किया। तहरीर लेखक बाबू लाल के बयानअंकित किया। दिनांक 20–10–1997 को पंचायतनामा व शेष गवाहोंके बयान लिया।

5 मृतका गीता देवी के शव का शव विच्छेदन दिनांक19–10–1997 को समय साढे चार बजे शाम डाक्टर हरिश चन्द्रश्रीवास्तव (अभियोजन साक्षी संख्या 4) द्वारा किया गया। डाक्टर केअनुसार, मृतका की आयु करीब 30 वर्ष थी तथा उसकी मृत्यु हुएलगभग एक दिन हो चुका था। मृतका सामान्य कद काठी की थीचेहरे पर सफेदी मौजूद थी। दाहिनी आ ँख तथा मु ँह आधा खुला था।बांयी आ ँख बंद थी सिर पर मौजूद बालों तथा चेहरे पर खून के4थक्के मौजूद थे। पेट फूला हुआ था तथा पेट के ilioc हिस्से पर हरेरंग का रंग परिवर्तन मौजूद था। शव में अकडन मौजूद थी। मृतकाके शरीर पर मृत्युपूर्व की निम्नलिखित चोटें पायी गयीः–

1– आग्नेयास्त्र के प्रवेश का घाव 15 ग 9 सेमी0 ग गुहा की गहराईतक सिर के बांये हिस्से पर बांये कान से 4 सेमी0 ई३पर था, बालजले हुए थे। चोट के किनारे अन्दर की तरफ मुडे थे।

2– आग्नेयास्त्र के निकास का घाव 17 सेमी0 ग 11 सेमी0 सिर केदाहिने हिस्से तथा ई३परी हिस्से पर दाहिने कान से 10 सेमी0 ई३परतथा बांयी भौं से 1 सेमी0 ई३पर किनारे बाहर की तरफ मुडे थे।

3– खोपडी की सारी हड्डियां जैसे पैरिटल हड्डियां आक्सीपीटलहड्डी और फ्रेन्टल हड्डी सभी टटू ` हुए थे। मस्तिष्क की झिल्लियांफटी हुई थी, मस्तिष्क फटा हुआ था खून भी मिला हुआ था। फेफडेमें सफेदी मौजूद थी। हृदय खाली था। अमाशय में 250 ग्रामआ िशक रूप से पचा हुआ चावल माजै दू था। छोटी आतं में गैस तथाद ्व मौजदू था। बडी आतं में मल तथा गैस माजै दू थी। यकृत परसफेदी मौजूद थी। स्पलीन तथा गुर्दा पर सफेदी मौजूद थी। पिताशयभरा हुआ था, पेशाब की थैली खाली थी।

6 डाक्टर के अनुसार मृतका की मृत्यु उसके शरीर परआयी मृत्युपूर्व चोटों से उत्पन्न अत्याधिक रक्तस्राव तथा सदमें से हुईथी। मृतका की पोस्टमार्टम रिपोर्ट प्रदर्श क–2 है।

7 अभियोजन साक्षी संख्या 5 उदल सिंह (विवेचनाधिकारी)ने दिनांक 22–10–1997 को अपीलार्थी मलखान सिंह को गिरफतारकिया तथा उसकी निशानदेही पर आलाकत्ल तमंचा ननकू के खेत सेबरामद किया। फर्द बरामदगी एक अदद तमंचा 12 बोर नाजायजप्रदर्श क–17 है। फर्द बरामदगी के आधार पर थाना पर अपीलार्थीमलखान सिंह के विरूद्व धारा 25 आयुध अधिनियम के अन्तर्गतमुकदमा पंजीकृत कराया गया। धारा 25 आयुध अधिनियम सेसम्बन्धित मुकदमें की चिक प्रथम सूचना रिपोर्ट प्रदर्श क–18 है तथाकायमी मुकदमा से सम्बन्धित जी0 डी0 की प्रति प्रदर्श क–19 है।विवेचनाधिकारी ने बरामदगी स्थल का मानचित्र भी तैयार किया ज5प्रदर्श क–20 है। दौरान विवेचना गवाहों के बयान अंकित किया तथाचुटैल सुरेश की इंजरी रिपोर्ट प्राप्त कर उसका इन्द्राज केस डायरीमें किया।

8 अग्रिम विवेचना उपनिरीक्षक, वी0 एम0 शर्मा द्वारा सम्पन्नकी गयी उन्होने चुटैल सुरेश का बयान अंकित किया तथा विवेचनासम्बंधी समस्त कार्यवाही पूर्ण कर अपीलार्थी व एक अन्य के विरूद्वआरोप पत्र प्रदर्श क–21 न्यायालय प्रेषित किया। धारा 25 आयुधअधिनियम से सम्बन्धित मुकदमें की विवेचना अभियोजन साक्षी संख्या6 उपनिरीक्षक,अशोक कुमार द्वारा की गयी उन्होंने गवाहों के बयानअंकित किया तथा बरामदगी स्थल का मानचित्र प्रदर्श क–22 तैयारकिया। जिला मजिस्टे ्ट से अभियोजन की स्वीकृति प्रदर्श क–23प्राप्त कर अपीलार्थी मलखान सिंह के विरूद्व आरोप पत्र प्रदर्श क–24न्यायालय प्रेषित किया।

9 अपीलार्थी के मुकदमें को विचारण हेतु सत्र न्यायालय केसुपुर्द किया गया।

10 विद्वान विचारण न्यायालय ने अपीलाथी मलखान सिंह केविरूद्व धारा 302 एवं 307 सपठित धारा 34 भा0 दं0 सं0 के अन्तर्गतएवं धारा 25 आयुध अधिनियम के अन्तर्गत आरोप विरचित किया तथाएक अन्य अभियुक्त अनन्तू के विरूद्व धारा 302 सपठित धारा 34 भा0दं0 सं0 व धारा 307 सपठित धारा 34 भा0 दं0 सं0 के अन्तर्गतआरोप विरचित किया जिससे उन्होंने इंकार किया तथा परीक्षण कीमांग की गयी।

11 अभियोजन पक्ष की ओर से अपने कथन के समर्थन मेंअभियोजन साक्षी संख्या 1 कमलेश (वादी मुकदमा), अभियोजन साक्षीसंख्या 2 राम नरायन, अभियोजन साक्षी संख्या 3 सुरेश (चुटैल),
अभियोजन साक्षी संख्या 4 डाक्टर हरिशचन्द्र श्रीवास्तव, अभियोजनसाक्षी संख्या 5 उदल सिंह

(विवेचनाधिकारी) तथा अभियोजन साक्षी 6अशोक कुमार (विवेचनाधिकारी, अन्तर्गत धारा 25 आयुध अधिनियम),
को परीक्षित कराया गया है।

12 अपीलार्थी मलखान सिंह एवं सह–अभियुक्त अनन्तू केबयान धारा 313 दं0 प्रं0स0 के अन्तर्गत अ ंकित किये गये जिसमेंउन्होंने अभियोजन कथानक को गलत बताते हुए अपीलार्थी मलखान सिंह ने अपने बयान अन्तर्गत धारा 313 दं0 प्र0 सं0 में यह कहा किसुरेश व राम नरायन गीता को परेशान करते थे एक दिन गीता नेसुरेश की मा ँ को मारा तब सुरेश व राम नरायन ने गीता को मारनेका प्लान बनाया व जलाने की कोशिश किया गीता सुबह भाग गयीतीन माह बाद लौटी। यह भी कहा कि राम नरायन ने फायर सेपहले गीता को मारा फिर उसे मारने आये वह भागा तब राम नरायनने फायर मारा जो उसके पैर में लगा। सुरेश आगे से घेर रहा था।दूसरा फायर झल्लर ने किया जो सुरेश को लगा। उसने दं0 प्र0 सं0की धारा 156 (3) के अन्तर्गत दरखास्त दिया था उस पर मुकदमाकायम हुआ।

13 अभियुक्तगण की ओर से अपने बचाव में बचाव साक्षीसंख्या 1 गौरी शंकर तथा बचाव साक्षी संख्या 2 जैराम सिंह कोपरीक्षित कराया गया है।

14 अभियुक्तगण की ओर से अभिलेखीय साक्ष्य के रूप मेंधारा 156 (3) दं0 प्र0 सं0 के अन्तर्गत प्रस्तुत आवेदन पत्र कीप्रमाणित प्रतिलिपि प्रदर्श ख–2 तथा उक्त आवेदन पत्र पर मुख्यन्यायिक मजिस्टे ट, फतेहपुर द्वारा पारित आदेश दिनांकित21–11–1997 की प्रमाणित प्रतिलिपि प्रदर्श ख–3 एवं पुलिस अधीक्षकको प्रेषित आवेदन पत्र दिनांकित 8–10–1997 की छाया प्रति वरजिस्ट ी की रसीद तथा अपीलार्थी मलखान सिंह की इंजरी रिपोर्ट कीछाया प्रति प्रदर्श ख–1 दाखिल की गयी है।

15 विद्वान विचारण न्यायालय ने पत्रावली पर उपलब्धसमस्त साक्ष्य एवं अभिलेखों पर सम्यक विचार करने के उपरान्तसह–अभियुक्त अनन्तू के विरूद्व आरोप को संदेह से परे साबित नहींपाया तदनुसार उन्होंने सह–अभियुक्त अनन्तू को दोषमुक्त कर दियालेकिन अपीलार्थी मलखान सिंह को धारा 302, 307 भा0 दं0 सं0एवं धारा 25 आयुध अधिनियम के अन्तर्गत दोषसिद्व पाते हुएउपरोक्तानुसार दण्डित किया है जिससे क्षुब्ध होकर अपीलार्थी कीओर से यह अपील इस न्यायालय के समक्ष योजित की गयी है।

16 अपीलार्थी की ओर से विद्वान अधिवक्ता श्री रघुराजकिशोर, राज्य की ओर से श्री एल0 डी0 राजभर, विद्वान अपरशासकीय अधिवक्ता को विस्तार पूर्वक सुना तथा पत्रावली एवंप्रश्नगत निर्णय व आदेश का सम्यक परिशीलन किया।

17 अपीलार्थी के विद्वान अधिवक्ता द्वारा मुख्य रूप से यहतर्क प्रस्तुत किया गया कि अपीलार्थी निर्दोष है उसे इस प्रकरण मेंझूंठा फसाया गया है। अपीलार्थी को मृतका की हत्या कारित करनेका कोई हेतुक नही था। मृतका एक सहमत पक्ष थी तथा अपीलार्थीके साथ वह स्वयं भागकर गयी थी। ऐसी दशा में अपीलार्थी द्वारामृतका की हत्या करना स्वाभाविक एवं विश्वसनीय नहीं है बल्किइसके विपरीत मृतका के घर से भाग जाने के कारण, मृतका के पतिव उसके परिवारजन की बदनामी हुई थी इसी बदनामी के कारणमृतका के पति व उसके परिवारजन द्वारा मृतका की हत्या कारित कीगयी है। अपीलार्थी को महज झूंठा फसाया गया है। यह भी तर्क रखागया कि अभियोजन कथानक स्वाभाविक एवं विश्वसनीय नहीं है। इसघटना में अपीलार्थी मलखान सिंह को भी आग्नेयास्त्र की चोटें आयीहै लेकिन उसकी चोटों का कोई स्पष्टीकरण अभियोजन की ओर सेनहीं दिया गया है। प्रश्नगत प्रकरण में सह–अभियुक्त अनन्तू की भीसंलिप्तता बतायी गयी है तथा उसके विरूद्व भी थाना पर प्रथमसूचना रिपोर्ट नामजद दर्ज करायी गयी थी। विद्वान विचारणन्यायालय ने सह–अभियुक्त अनन्तू की प्रश्नगत अपराध में संलिप्ततासाबित नहीं पायी और उसे दोषमुक्त किया है और उन्हीं साक्षियों कीसाक्ष्य पर अपीलार्थी को दोषसिद्व एवं दण्डित किया है जो विधिसंगत नहीं है। विद्वान विचारण न्यायालय का प्रश्नगत निर्णय एवंआदेश निरस्त होने योग्य है एवं अपीलार्थी दोषमुक्त होने योग्य है।

18 इसके विपरीत विद्वान अपर शासकीय अधिवक्ता द्वारा यहतर्क प्रस्तुत किया गया कि कि घटना के करीब सवा तीन माह पूर्वअपीलार्थी, मृतका को भगाकर ले गया था। मृतका का पति सुरेश8बम्बई में काम करता था जब उसे सूचना प्राप्त हुई तब वह घरवापस आया एवं दिनांक 15–10–1997 को मृतका को अपने घरवापस ले आया। घटना के दिन अपीलार्थी अपने बहनोई अनन्तू केसाथ मृतका के घर पर गया तथा मृतका के पति को गालियां दतेहुए मृतका को अपने साथ ले जाने के लिए कहने लगा जिस परमृतका ने उसके साथ जाने से इंकार कर दिया इस पर अपीलार्थी नेमृतका को तमंचे से गोली मार दी जिससे मौके पर मृतका की मृत्युहो गयी जब वादी तथा उसके पिता राम नरायन व मृतका के पतिसुरेश ने अपीलार्थी का पीछा किया तो उसने बचुन सिंह के खेत मेंमृतका के पति सुरेश को भी गोली मार दी जिससे उसे भी चोटेंआयी। अभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2राम नरायन तथा

अभियोजन साक्षी संख्या 3 सुरेश (चुटैल) इस घटनाके प्रत्यक्षदर्शी साक्षी हैं जिन्होनें अपने बयानों में अभियोजन कथानकका भली भा ँति समर्थन किया है। विद्वान विचारण न्यायालय नेसह–अभियुक्त अनन्तू की संलिप्तता साबित नहीं पायी तदनुसार उसेदोषमुक्त कर दिया है लेकिन अपीलार्थी के विरूद्व लगाये गये आरोपसंदेह से परे साबित पाते हुए अपीलार्थी को प्रश्नगत अपराध मेंदोषसिद्व एवं दण्डित किया है जिसमें कोई विधिक त्रुटि अथवाअनियमितता नहीं है।

19 उल्लेखनीय है कि यह घटना दिनांक 18–10–1997समय 7–30 बजे शाम की बतायी गयी है तथा इस घटना की प्रथमसूचना रिपोर्ट वादी कमलेश ने दिनांक 19–10–1997 को 1–20 ए0एम0 पर थाने पर दर्ज करायी है। घटनास्थल से थाने की दूरी आठकिमी. दर्शायी गयी है। प्रथम सूचना रिपोर्ट में यह उल्लेख किया गयाहै कि वादी अपने चाचा को अस्पताल में भर्ती कराकर थाने आया है।उपरोक्त से यही स्पष्ट होता है कि चुटैल सुरेश को उपचार हेतुअस्पताल में दाखिल कर वादी कमलेश ने इस घटना की तहरीर बाबूलाल से लिखवाकर थाने में दाखिल कर अपीलार्थी एवं एक अन्य केविरूद्व मुकदमा पंजीकृत कराया है।

20 अपीलार्थी मलखान सिंह ने अपने बयान अन्तर्गत धारा313 दं0 प्र0 सं0 में यह उल्लेख किया है कि सुरेश व राम नरायनगीता को परेशान करते थे एक दिन गीता ने सुरेश की मा ँ को मारातब सुरेश व राम नरायन ने गीता को मारने का प्लान बनाया वजलाने की कोशिश किया गीता सुबह भाग गयी तीन माह बाद लौटीतब राम नरायन ने फायर मारा पहले गीता को मारा फिर उसे मारनेआये वह भागा तब राम नरायन ने फायर मारा जो उसके पैर मेंलगा। सुरेश आगे से घेर रहा था। दूसरा फायर झल्लर ने किया जोसुरेश को लगा। यह भी कहा है कि उसने दं0 प्र0 सं0 की धारा 156 (3) के अन्तर्गत दरखास्त दिया था उस पर मुकदमा कायम हुआ।

21 अब विचारणीय प्रश्न यह है कि क्या घटना अभियोजनके कथनानुसार घटित हुई अथवा बचाव पक्ष के अनुसार तोअभियोजन कथानक यह है कि मृतका गीता को घटना के करीब सवातीन माह पहले अपीलार्थी मलखान भगा ले गया था। दिनांक15–10–1997 को मृतका का पति सुरेश मृतका को फतेहपुर से घरले आया था। घटना के दिन दिनांक 18–10–1997 को रात्रि करीबसाढे सात बजे मृतका अपने बच्चे को नाबदान पर टट्टी करा रहीथी उसी समय अपीलार्थी मलखान व उसका बहनोई अनन्तू आकरमृतका के पति को गालियां देने लगे और कहा कि यह मेरी औरतहोकर रहेगी। मृतका ने गालियां देने व साथ जाने से मना किया इसपर अपीलार्थी मलखान ने मृतका को तमंचे से गोली मार दी जिससेवह मौके पर मर गयी। वादी कमलेश उसके पिता राम नरायन तथामृतका के पति सुरेश ने जब अपीलार्थी व अभियुक्त अनन्तू का पीछाकिया तो खेत में अपीलार्थी मलखान ने चुटैल सुरेश को गोली मारदी जिससे उसे चोटें आयी।

22 अभियोजन की ओर से अपने कथन के समर्थन मेंअभियोजन साक्षी संख्या 1 कमलेश (वादी मुकदमा), अभियोजन साक्षीसंख्या 2 राम नरायन तथा अभियोजन साक्षी संख्या 3 सुरेश (चुटैल/मृतका के पति) को परीक्षित कराया गया है।

23 अभियोजन साक्षी संख्या 1 कमलेश ने अपने बयानमें यह कहा है कि वह मुलजिमान अनन्तू व मलखान को जानता है।मलखान उसके गांव का रहने वाला है। अनन्तू, मलखान के बहनोईहै। अनन्तू उसके गा ँव आते जाते थे। वह उन्हें भी घटना के पहले सेजानता है। उसकी चाची गीता देवी थी। गीता की गोली मारकरहत्या हो गयी है। कत्ल के लगभग सवा तीन माह पहले मुलजिममलखान गीता को भगा ले गया था उसके चाचा कत्ल के चार दिनपहले कचहरी में मलखान से सुलहनामा लगवा कर घर ले आये।आज से लगभग एक साल पांच माह की घटना है। लगभग साढेसात बजे रात्रि का समय था वह व उसके पिता राम नरायन अपनेकटिया मशीन से चारा काट रहे थे। घर में उसके चाचा सुरेश, दादीबृजरानी, चाची गीता देवी थी और कोई नहीं था। आंगन में अंधेरा थालेकिन लालटेन जल रही थी। उसकी चाची गीता अपने बच्चे कोनाबदान पर टट्टी करा रही थी उसी समय मलखान व अनन्तूआया। ये लोग आकर उसके चाचा को गाली देने लगे मलखान कहरहे थे कि यह तुम्हारी औरत नहीं है मेरी है तथा मेरी बनकर रहेगी।उसकी चाची ने मलखान को गाली देने से मना किया तथा साथ मेंजाने से मना किया। वह व उसके पिता, चाचा के दरवाजे पर आगये। मलखान ने अपने हाथ में लिए तमंचा से उसकी चाची कोगोली मार दिया। गोली मारकर मुलजिमान भागे उसके चाचा सुरेश,वह तथा उसके पिता ने मुलजिमान का पीछा किया। पीछा करने परकुछ दूर जाने पर मलखान ने बचुन के खेत में उसके चाचा सुरेशको भी गोली मार दिया उसके चाचा वहीं गिर गये। इसके बाद हमलोगों ने चाचा को सदर अस्पताल में लाकर भर्ती किया। यह भीकहा कि उसकी चाची आंगन में ही जहां उन्हें गोली मारी गयी थीगिरकर मर गयी। चाचा को अस्पताल में भर्ती कराने के बाद उसनेबाबू लाल से तहरीर लिखाया। इस साक्षी ने तहरीर प्रदर्श क–1 परअपने

हस्ताक्षर की पुष्टि करते हुए साबित किया है तथा यह कहा हैकि वह तहरीर लेकर अकेले थाना हुसैनगंज गया तथा तहरीर दीवानसाहब को दिया। मुकदमा लिखा गया उसके बाद दरोगाजी घर आयेउसने दरोगाजी को घटनास्थल दिखा दिया था।

24 अभियोजन साक्षी संख्या 2 राम नरायन ने अपने बयान मेंयह कहा है कि घटना के करीब सवा तीन माह पहले मलखान, गीतादेवी जो उसके छोटे भाई सुरेश की पत्नी थी को भगा ले गया था।घटना हुए लगभग एक साल पांच माह हुआ जब गीता का कत्लसाढे सात बजे शाम को हुआ था उस समय वह व कमलेश कटियामशीन पर चारा काट रहे थे। सुरेश व उसकी मां तथा गीता घर केअन्दर थी। वहां लालटेन जल रही थी। मलखान व अनन्तू साढे सातबजे शाम को आये तथा उसके भाई सुरेश को गाली देने लगे कहनेलगे कि साले यह तुम्हारी नही रहेगी हमारी बनकर रहेगी। हम लोगमशीन बंद कर दरवाजे के पास आ गये। गीता ने जवाब दिया किमलखान गाली से मतलब नहीं है अब हम तुम्हारे साथ नहीं जायेगेंतब मलखान ने अपने हाथ में लिए तमंचे से गोली मार दिया। गोलीगीता के सिर में लगी और वह खत्म हो गयी जब मलखान गोलीमारकर भगे तब वह, उसका लडका कमलेश व सुरेश ने पीछा किया
भाग कर 2–3 घर बाद घुमते हुए बचुन सिंह के खेत में मलखान वहम लोग पहुंचे उसका भाई आगे था। मलखान ने घूमकर उसके भाईसुरेश को गोली मारा। गोली सुरेश को लगी वह गिर गया तबमुलजिमान भाग गये। वह उसका लडका तथा गांव के और लोगसुरेश को सदर अस्पताल ले आयें। वह अस्पताल रह गया तथालडके को थाने भेजा। कमलेश ने बाबू लाल से तहरीर लिखवाया।फतेहपुर में डाक्टर ने जवाब दे दिया तब भाई को लखनई३ ले गया।जिरह में यह बताया है कि घटना के समय वह व सुरेश एक हीमकान में अलग अलग रहते थे। उसे दिशा की जानकारी है। मकानमें वह उत्तर रहता है व सुरेश दक्षिण रहते हैं उनका मुहार पूरब है।उसके मकान के पूरब व उत्तर रास्ता है। उसके मकान के उत्तररास्ते के बाद उसका छप्पर है जिसमें उसकी कटिया मशीन है। उसीमशीन के पास वह व कमलेश मौजूद थे।

25 अभियोजन साक्षी संख्या 3 सुरेश (चुटैल) हैं उसने अपनेबयान में यह कहा है कि वह मुलजिमान हाजिर अदालत को जानताहै इनके नाम मलखान व अनन्तू हैं। मृतका गीता उसकी पत्नी थी।गीता का सम्बंध मलखान से हो गया था। कत्ल के सवा तीन माहपहले मलखान उसकी पत्नी गीता को लेकर भाग गया था। घटना केतीन दिन पहले वह गीता को फतेहपुर से अपने घर ले गया। घटनाहुए डेढ साल हुआ। शाम के साढे सात बजे का समय था वह घर मेंबैठा था। गीता बच्चे को नाबदान में टट्टी करा रही थी। उसकाभाई व भतीजा मशीन में चारा काट रहे थे। मलखान व अनन्तू तमंचालिए हुए उसके दरवाजे पर आये तथा उसे गाली देने लगे। मलखानने कहा कि मादरचोद गीता मेरी है वह उसे ले जायेगा इस पर गीताने मना किया और कहा कि गाली मत दो अब मैं तेरे साथ नहींजांई३गी तब मलखान ने गीता को तमंचे से गोली मार दिया। गीताको गोली लगी गीता तब गिर कर मर गयी। वह, उसका भाई रामनरायन, भतीजा कमलेश तीनों ने मलखान व अनन्तू का पीछा कियाजब घर के पीछे बचुन सिंह के खेत में पहुंचा तब मलखान व अनन्तूने गोली मारा। मलखान की गोली उसे नाक व आंख पर लगी तथा
अनन्तू की गोली मलखान को लगी वह वहीं गिर गया तथा मलखानभाग गया। मलखान की गोली से चोट लगने पर उसके दाहिनी आंखकी रोशनी चली गयी। उसे राम नरायन व कमलेश उठाकर लाये।बैलगाडी में लादकर बारहमील नाम के चौराहे पर लाये फिर उसकाभाई चमरावा से बस लाया जिससे वह फतेहपुर अस्पताल गया।फतेहपुर अस्पताल में उसका डाक्टरी मुआइना हुआ। फतेहपुरअस्पताल से उसे लखनई३ मेडिकल कालेज भेजा गया जहां उसकाइलाज हुआ ।

26 इस प्रकार उपरोक्त तीनों साक्षियों ने अपने बयानों मेंअभियोजन कथानक का समर्थन करते हुए यह बताया है किअपीलार्थी मलखान ने गीता को गोली मारी जिसके फलस्वरूप उसकीमृत्यु हो गयी और जब गवाहान व चुटैल ने अपीलार्थी का पीछाकिया तो बचुन सिंह के खेत में अपीलार्थी ने चुटैल सुरेश को भीगोली मार दी जिससे उसे चोटें आयी। यद्यपि अपीलार्थी का यहकथन है कि बदनामी के कारण वादी पक्ष के लोगों ने मृतका कोगोली मारी थी। फिर उसे मारने आये जब वह भागा तो राम नरायनने फायर मारा जो उसके पैर में लगा। यह भी कहा कि सुरेश कोझल्लर का फायर लगा था।

27 बचाव पक्ष की ओर से बचाव साक्षी संख्या 2 के रूप मेंजैराम सिंह को परीक्षित कराया गया है उसने अपने बयान में यहकहा है कि वह सिधारी के पुरवा के राम नरायन, कमलेश, सुरेश कोजानता है। शिवमंगल के पुरवा के विजयपाल व मेवा को जानता हैतथा हरीराम को जानता है। मलखान मुलजिम को भी जानता है।सुरेश की औरत का कत्ल हुए लगभग दो साल हुआ। आठ बजे रात्रिको हुआ था। फायर पर वह वहां पहुंचा। सुरेश ने बताया कि उसनेअपनी पत्नी को मार दिया है वह बदजात थी। इसको मारने के बादउपरोक्त 6 लोग सुरेश आदि मलखान के घर गये वह भी गया, बहुतलोग गये थे। सुरेश कह रहा था कि

उसने अपनी पत्नी को मारदिया है अब मलखान को मारेगें। मलखान भागकर खेत में पहुंचा।विजयपाल ने पीछे से फायर किया वह मलखान को लगा। मेवा ने भीफायर किया वह सुरेश को लगा। विजय पाल के पास दो नलीलाइसेंसी बन्दूक व मेवा के पास एकनली बन्दूक थी। बाकी सब लोग
तमंचा लिए थे। इस तरह यह स्पष्ट है कि इस साक्षी ने सुरेश केबताने पर मृतका की हत्या ुरेश द्वारा करने की बात कही हैतथा यह भी बताया है कि विजयपाल का फायर अपीलार्थी मलखानको लगा था और मेवा के फायर से चुटैल सुरेश को चोटें आयी थीतो उल्लेखनीय है कि अपीलार्थी मलखान ने अपने बयान अन्तर्गतधारा 313 दं0 प्र0 सं0 में राम नरायन द्वारा मृतका पर फायर करनेकी बात कही है और राम नरायन के फायर से ही उसके पैर में चोटलगने का उल्लेख किया है। ऐसी दशा में अपीलार्थी के बयान
अन्तर्गत धारा 313 दं0 प्र0 सं0 में उल्लिखित कथन व बचाव साक्षीसंख्या 2 जैराम सिंह के बयानों में विरोधाभास है। अपीलार्थी मलखानने राम नरायन द्वारा मृतका की हत्या कारित करना व उसे भी फायरकर चोट पहुंचाने की बात कही है जब कि बचाव साक्षी संख्या 2जैराम सिंह का इससे भिन्न कथन है कि विजयपाल सिंह का फायर14अपीलार्थी मलखान को लगा तथा मेवा का फायर सुरेश को लगा।इस स्थिति में बचाव साक्षी संख्या 2 जैराम सिंह का कथन किसी भीप्रकार से स्वाभाविक एवं विश्वसनीय प्रतीत नहीं होता है। फिर कोईव्यक्ति अपने विरूद्व साक्ष्य एकत्रित करने हेतु किसी से यह नहींकहेगा कि उसने अपनी पत्नी का कत्ल कर दिया है। ऐसी दशा मेंभी इस साक्षी का उक्त कथन किसी भी प्रकार से स्वाभाविक एवंविश्वसनीय प्रतीत नही होता है बल्कि अपीलार्थी को बचाने के आशयसे गलत कथन करने के तथ्य से इंकार नहीं किया जा सकता है।

28 यहा ँ यह भी उल्लेखनीय है कि बचाव साक्षी संख्या 1गौरी शंकर ने अपने बयान में यह बताया है कि अनन्तू उसकी दुकानपर काम करता था। घटना के दिन वह सुबह 10 बजे से रात्रि 8 बजे
तक उसकी दुकान पर काम करता था। चूंकि अभियुक्त अनन्तू कोविद्वान विचारण न्यायालय द्वारा दोषमुक्त कर दिया गया है। ऐसीदशा में बचाव साक्षी सख्ं या 1 गौरी शकं र की साक्ष्य पर अब इसस्तर पर विचार करने की कोई आवश्यकता नहीं रह जाती है।यहां यह भी उल्लेखनीय है कि अपीलार्थी ने अपने बयान अन्तर्गतधारा 313 दं0 प्र0 सं0 में यह कथन किया है कि उसने एक आवेदनपत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 के अन्तर्गत प्रथम सूचनारिपोर्ट दर्ज कराने हेतु प्रस्तुत किया था। अपीलार्थी की ओर सेअभिलेख पर धारा 156 (3) दं0 प्र0 सं0 के आवेदन पत्र की प्रमाणितछाया प्रतिलिपि प्रदर्श ख–1 भी दाखिल की गयी है जिसमें अपीलार्थीने झल्लर का फायर उसके दाहिने पैर में लगने का उल्लेख किया है उक्त आवेदन पत्र अन्तर्गत धारा 156 (3) दं0 प्र0 सं0 में अपीलार्थीमलखान ने झल्लर के फायर से उसे चोट आने का उल्लेख किया हैजब कि अपने बयान अन्तर्गत धारा 313 दं0 प्र0 सं0 में राम नरायन
के फायर से चोट आने की बात कही है। ऐसी दशा में अपीलार्थी काकथन बनावटी प्रतीत होता है। फिर बचाव पक्ष की ओर सेअभियोजन साक्षी संख्या 1 कमलेश को यह सुझाव दिया गया है किझल्लर के फायर से मलखान को चोटे आयी तथा अभियोजन साक्षीसंख्या 2 राम नरायन को यह सुझाव दिया गया कि सुरेश ने मलखानको गोली मारी व अभियोजन साक्षी संख्या 3 सुरेश को यह सुझावदिया गया कि मलखान के भागने पर झल्लर ने उसे गोली मारी हो।इस तरह गवाहों को बचाव पक्ष की ओर से भिन्न भिन्न सुझाव दिएगये हैं। अपीलार्थी के बयान अन्तर्गत धारा 313 दं0 प्र0 सं0 एवंगवाहों को दिये गये सुझाव तथा बचाव साक्षी संख्या 2 जैराम सिंहके कथन में भिन्नता है। ऐसी दशा में बचाव पक्ष की कहानीस्वाभाविक एवं विश्वसनीय नहीं पायी जाती है।

29 यह बात अवश्य है कि अभियोजन साक्षी संख्या 1कमलेश तथा अभियोजन साक्षी संख्या 2 राम नरायन की साक्ष्य मेंअपीलार्थी की चोटों के सम्बंध में कोई स्पष्टीकरण नहीं आया है।
अभियोजन साक्षी संख्या 3 सुरेश ने अपने बयान में यह बताया है किअनन्तू के फायर से अपीलार्थी मलखान को चोटें आयी थी। अपीलार्थीमलखान की चोटों का डाक्टरी परीक्षण डाक्टर के0 डीउपाध्याय द्वारा दिनांक 18–10–1997 को समय 10–45 बजे रात्रि परकिया गया था। डाक्टरी परीक्षण के समय अपीलार्थी मलखान केशरीर पर निम्नलिखित चोटें पायी गयी हैंः–

1– आग्नेयास्त्र का प्रवेश घाव दाहिनी जांघ पर सामने बीच में 2.5सेमी0 ग 2 सेमी0। ताजा खून भरा था।

2– आग्नेयास्त्र का निकास घाव 2.5 सेमी0 ग 1ण्5 सेमी0 दाहिनीजांघ पर। चोटों में खून भरा था।

30 अपीलार्थी की इंजरी रिपोर्ट को प्रदर्श ख–1 के रूप मेंअभियोजन साक्षी संख्या 4 डाक्टर हरिश चन्द्र श्रीवास्तव द्वाराप्रमाणित किया गया है।

31 उल्लेखनीय है कि डाक्टर कपिल देव उपाध्याय कोसाक्ष्य में परीक्षित नहीं कराया गया है। ये

चोटें चुटैल के किसीमर्मस्थल पर नहीं हैं। चोटें अपीलार्थी मलखान की जांघ पर पायेजाने का उल्लेख किया गया है। अन्तरिक क्षति एवं हड्डी टूटनेआदि के सम्बंध में कोई साक्ष्य अभिलेख पर उपलब्ध नहीं है। यद्यपिअभियोजन साक्षी संख्या 3 सुरेश ने अपने बयान में अपीलार्थीमलखान को अनन्तू के फायर से चोटें आने का उल्लेख किया है।यदि हम इस स्पष्टीकरण को पर्याप्त भी न माने तब भी उक्त आधार
पर अभियोजन कथानक किसी प्रकार से प्रभावित नहीं होता है।अभियोजन की ओर से घटना के संदर्भ में तीन गवाहों का परीक्षितकराया गया है जिसमें अभियोजन साक्षी संख्या 3 सुरेश स्वयं चुटैलहै तथा उसका डाक्टरी परीक्षण डाक्टर कपिल देव उपाध्याय द्वारादिनांक 18–10–1997 को समय 10–30 बजे रात्रि किया गया थाउसके शरीर पर निम्नलिखित चोटें पायी गयी हैं:–

1– आग्नेयास्त्र का प्रवेश घाव दाहिने कान के पीछे 2 सेमी0 व्यासका, ताजे खून से भरा हुआ मांस तक गहरा।

2– आग्नेयास्त्र के निकलने का घाव दाहिने गाल पर नाक केबगल में 5 सेमी0 ग 4 सेमी0। हड्डियां टटू ी हुई ताजा खूननिकलता हुआ मांस तक गहरा।

32 चुटैल की इंजरी रिपोर्ट की छाया प्रति प्रदर्श क–3 कोअभियोजन साक्षी संख्या 4 डाक्टर हरिश चन्द्र श्रीवास्तव द्वारा साबितकिया गया है।

33 इंजरी रिपोर्ट के अवलोकन से यह विदित होता है किचुटैल सुरेश को उसके कान के पास आग्नेयास्त्र का प्रवेश घाव पायागया था जिसका निकास घाव गाल पर नाक के बगल में था तथाहड्डियां भी टूटी हुई पायी गयी है। इससे यह स्पष्ट है कि चुटैलसुरेश को उसके चेहरे व कान के पास मर्मस्थल पर आग्नेयास्त्र कीचोटें पायी गयी थी तथा हड्डियां भी टूटी हुई थी।

34 मृतका का पोस्टमार्टम अभियोजन साक्षी संख्या 4 डाक्टरहरिश चन्द्र श्रीवास्तव द्वारा किया गया था। मृतका के सिर मेंआग्नेयास्त्र का प्रवेश घाव व उसका निकास घाव पाया गया था।मृतका के पैराईटल, आक्सीपीटल व फ्रन्टल बोन सभी टूटे हुए थे।डाक्टर ने अपने बयान में यह उल्लेख किया है कि मृतका की मृत्युदिनांक 18–10–1997 को समय साढे सात बजे शाम को हो सकतीहै तथा मृतका की चोटें तत्काल मृत्यु के लिए पर्याप्त थी। मृतका केशव का पंचायतनामा अभियोजन साक्षी संख्या 5 उपनिरीक्षक उदलसिंह ने अपने हमराही उपनिरीक्षक, आर0 एस0 शुक्ला से तैयारकराया था। मृतका का शव आंगन में पडा पाया गया था। अभियोजनसाक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 राम नरायन तथाअभियोजन साक्षी संख्या 3 सुरेश (चुटैल) की साक्ष्य से यह साबित हैकि मृतका को अपीलार्थी मलखान द्वारा तमंचे से फायर कर चोटेंपहुंचायी गयी थी जिसके परिणाम स्वरूप उसकी मृत्यु हुई है।अभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 रामनरायन तथा अभियोजन साक्षी संख्या 3 सुरेश की जिरह में ऐसा कोईतथ्य नहीं आया है जिससे घटना के सम्बंध में कोई सन्देह व्यक्तकिया जा सके बल्कि उपरोक्त तीनों साक्षियों ने जिस तरह से घटनाका वर्णन किया है वह स्वाभाविक एवं विश्वसनीय पाया जाता है। यहबात अवश्य है कि घटना के संदर्भ में किसी स्वतन्त्र एवं निष्पक्ष साक्षीको परीक्षित नहीं कराया गया है तो उल्लेखनीय है कि मृतका कीहत्या उसके घर के अन्दर आंगन में हुई थी। घटना के समय मृतकाका पति मौजूद था। अभियोजन साक्षी संख्या 1 कमलेश तथाअभियोजन साक्षी संख्या 2 राम नरायन वहीं घर के पास मौजूद थेजो कटिया मशीन पर चारा काट रहे थे शोरगुल सुनकर वे भीदरवाजे पर आ गये थे। अभियोजन साक्षी संख्या 2 राम नरायन कीसाक्ष्य में यह आया है कि मृतका के पति व अभियोजन साक्षी संख्या2 राम नरायन का एक ही मकान था जिसके अलग अलग हिस्से मेंअभियोजन साक्षी संख्या 1 कमलेश तथा अभियोजन साक्षी संख्या 2राम नरायन व अभियोजन साक्षी संख्या 3 सुरेश निवास करते थे। इनपरिस्थितियों में गालियों के शोर पर अभियोजन साक्षी संख्या 1कमलेश तथा अभियोजन साक्षी संख्या 2 राम नरायन का दरवाजे परपहुंचकर घटना देखना स्वाभाविक एवं विश्वसनीय है। चूंकियह घटना शाम साढे सात बजे की है और मृतका के घर के अन्दरआंगन की है वहां मोहल्ला पडोस व गांव का कोई व्यक्ति मौजूद नहींथा। ऐसी दशा में घटना के सम्बंध में यदि किसी स्वतन्त्र एवं निष्पक्षसाक्षी को परीक्षित नहीं कराया गया है तो उससे अभियोजन कथानककिसी भी प्रकार से प्रभावित नहीं होता है। फिर अभियोजन साक्षीसंख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 राम नरायन तथाअभियोजन साक्षी संख्या 3 सुरेश की घटना के समय मौके परउपस्थिति साबित है और उनकी साक्ष्य चिकित्सीय साक्ष्य से भीसम्पुष्ट है। ऐसी दशा में उपरोक्त तीनों साक्षियों की साक्ष्य परअविश्वास करने का कोई आधार प्रतीत नहीं होता है।

35 अपीलार्थी की ओर से एक तर्क यह रखा गया किअभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 रामनरायन पुत्र व पिता है तथा

अभियोजन साक्षी संख्या 3 सुरेश,अभियोजन साक्षी संख्या 1 कमलेश का चाचा व अभियोजन साक्षीसंख्या 2 राम नरायन का भाई है जो एक ही घर के सदस्य है एवंहितबद्व साक्षी है तो उल्लेखनीय हे कि मात्र मृतका के परिवार केसदस्य होने के नाते उपरोक्त साक्षियों की साक्ष्य पर अविश्वास करनेका कोई पर्याप्त आधार प्रतीत नहीं होता है। ***2004 (12) एस0सी0 सी0 414 भार्गवन एव ं अन्य प्रति राज्य केरला*** केमामले में माननीय उच्चतम न्यायालय द्वारा यह अवधारित किया गयाहै किः–

7. We shall first deal with the contention regardinginterestedness of the witnesses for furthering prosecution version.Relatinship is not a factor to affect credibility of a witness. It is more oftenthan not that a relation would not conceal actual culprit and makeallegations against an innocent person. Foundation has to be laid if pleaof false implication is made. In such cases, the court has to adopt acareful approach and analyse evidence to find out whether it is cogent
and credible.

36 ***2018 एस0 सी0 सी0 529 खुर्शीद अहमदप्रति राज्य जम्म ू एव ं कश्मीर*** के मामले में भी माननीय उच्चतमन्यायालय द्वारा यह अवधारित किया गया है कि घटना के प्रत्यक्षदर्शीसाक्षियों की साक्ष्य यद्यपि वह पीडित का सम्बंधी हो यदि उसकीसाक्ष्य विश्वसनीय है तो ऐसे साक्षियों की साक्ष्य पर विश्वास कियाजाना चाहिए।

37 अभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षीसंख्या 2 राम नरायन तथा अभियोजन साक्षी संख्या 3 सुरेश कीसम्पूर्ण साक्ष्य पर सावधानी पूर्वक विचार करने के उपरान्त हम इसीमत के हैं कि उपरोक्त तीनों साक्षियों की साक्ष्य पर अविश्वास करनेका कोई आधार प्रतीत नहीं होता है बल्कि उपरोक्त साक्षियों कीकथित घटना के समय मौके पर उपस्थिति साबित है और उनकीसाक्ष्य चिकित्सीय साक्ष्य से भी सम्पुष्ट है। ऐसी दशा में अपीलार्थी कीओर से रखे गये उक्त तर्क में हम कोई बल नहीं पाते हैं।

38 अपीलार्थी की ओर से एक तर्क यह रखा गया किमृतका, अपीलार्थी के साथ भागी थी तथा वह सहमत पक्ष थी। ऐसीदशा में अपीलार्थी को उसकी हत्या कारित करने का कोई हेतुक नहींथा बल्कि मृतका का अपीलार्थी के साथ भाग जाने से वादी पक्ष केलोगों की बदनामी हुई थी इसी बदनामी के कारण उन्होंने मृतका कीहत्या कारित की है और मृतका की हत्या वादी पक्ष के लोगों द्वाराकरने का हेतुक भी प्रबल है। ऐसी दशा में अभियोजन कहानीस्वाभाविक एवं विश्वसनीय नहीं है। उल्लेखनीय है कि यह घटनाप्रत्यक्षदर्शी साक्ष्य पर आधारित है जहा ँ घटना की प्रत्यक्षदर्शी साक्ष्यउपलब्ध हो वहां घटना के हेतुक का कोई विशेष महत्व नहीं रहजाता है। ***2016 (4) क्राइमस 68 एस0 सी0 सुप्रीम कोर्टआफ इण्डिया सद्दीक उर्फ लालो गुलाम हुसैनशेख एव ं अन्य प्रति राज्य गुजरात*** के मामले में माननीयउच्चतम न्यायालय द्वारा यह व्यवस्था दी गयी है किः–

22. It is settled leagal position that even if the absence of motive, asalleged, is accepted, that is of no consequence and pales intoinsignificance when direct evidence establishes the crime. Therefore, incase there is direct trustworthy evidence of witnesses as to commissionof an offence, the motive part loses its significance. Therefore, if thegenesis of the motive of the occurrence is not proved, the oculartestimony of the witnesses as to the occurrence can not be discardedonly on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [See: **Hari Shankar Vs. State of U.P., (1996) 9 SCC40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; Abu20Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91 ; State of U.P.Vs. Kishanpal & Ors., (2008) 16 SCC 73; and Bipin Kumar MondalVs. State of West Bengal, (2010) 12 SCC 91]**

39 इसी आशय का मत माननीय उच्चतम न्यायालय ने***2016 (4) क्राइमस 121 एस0 सी0 सुप्रीम कोर्ट आफइण्डिया योगेश सिंह प्रति महाबीर सिंह एव ं अन्य*** में व्यक्तकिया है।

40 उल्लेखनीय है कि अभियोजन के अनुसार यह घटना इसप्रकार बतायी गयी है कि घटना के

करीब सवा तीन माह पहलेअपीलार्थी मलखान मृतका को भगा ले गया था। दिनांक15–10–1997 को मृतका का पति उसे फतेहपुर से वापस घर लेआया था। दिनांक 18–10–1997 को रात्रि करीब साढे सात बजेअपीलार्थी मलखान अपने बहनोई अनन्तू के साथ मृतका के घर गयातथा मृतका के पति को गालियां देते हुए बोला कि यह औरत उसकीहोकर रहेगी। मृतका ने गाली देने से मना किया और अपीलार्थी केसाथ जाने से इंकार कर दिया तब अपीलार्थी ने तमंचे से मृतका कोगोली मार दी जिससे उसकी मौके पर मृत्यु हो गयी। अभियोजनसाक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 राम नरायन तथाअभियोजन साक्षी संख्या 3 सुरेश ने जब अपीलार्थी व सह–अभियुक्तअनन्तू का पीछा किया तो खेत में अपीलार्थी ने मृतका के पति सुरेशको भी गोली मार दी जिससे उसे गम्भीर चोटें आयी। अभियोजनकहानी से यह स्पष्ट है कि यह घटना दो भागों में घटित हुई है।प्रथम मृतका के घर में तथा दसू री खेत मे। अभियोजन के अनुसार,अपीलार्थी व उसका बहनोई अनन्तू मृतका के घर पर गये तथाअपीलार्थी मलखान ने गालियां देते हुए मृतका के पति से यह कहाकि यह औरत उसकी होकर रहेगी जब मृतका ने गाली देने से मनाकिया तथा अपीलार्थी के साथ जाने से इंकार कर दिया तबअपीलार्थी मलखान ने मृतका को उसके घर के अन्दर गोली मार दी।इस घटना को मृतका के पति सुरेश (अभियोजन साक्षी संख्या 3),कमलेश अभियोजन साक्षी संख्या 1 तथा राम नरायन अभियोजनसाक्षी संख्या 2 ने देखा है। उपरोक्त तीनों साक्षियों के बयानों में इसतरह की कोई बात नही आयी है जिससे की घटना के सम्बंध में कोईसंदेह व्यक्त किया जा सके बल्कि उपरोक्त तीनों साक्षियों के बयानोंसे यह सिद्व है कि कथित घटना के समय अपीलार्थी ने मृतका कोतमंचे से गोली मार दी जिससे उसकी घर के अन्दर आंगन में मृत्युहो गयी तत्पश्चात अभियोजन साक्षी संख्या 1 कमलेश, अभियोजनसाक्षी संख्या 2 राम नरायन तथा अभियोजन साक्षी संख्या 3 सुरेश नेअपीलार्थी व सह–अभियुक्त अनन्तू का पीछा किया तो थोडी दूरजाकर खेत में अपीलार्थी ने सुरेश को गोली मार दी जिससे उसकेचेहरे व कान के पास घातक चोटें आयीं। अपीलार्थी को भी जांघ मेंआग्नेयास्त्र की चोटें आना बताया गया है। यद्यपि अभियोजन साक्षीसंख्या 3 सुरेश ने अनन्तू के फायर से अपीलार्थी मलखान के पैर मेंचोटें आने का उल्लेख किया है। अपीलार्थी मलखान ने अपने बयानअन्तर्गत धारा 313 दं0 प्र0 सं0 में राम नरायन के फायर से उसे चोटेलगने का उल्लेख किया है इससे यह स्पष्ट है कि अभियोजन साक्षीसंख्या 3 सुरेश तथा अपीलार्थी मलखान को जो चोटें आने का

उल्लेख किया गया है उसको पीछा करते समय खेत में आनाबताया गया है। चूंकि यह घटना शाम साढे सात बजे की बतायी गयीहै और मृतका की हत्या कारित करने के पश्चात जब अपीलार्थी वसह–अभियुक्त भागे तो गवाहों द्वारा उनका पीछा करने की बात कहीगयी है। यद्यपि अभियोजन साक्षी संख्या 1 कमलेश तथा अभियोजनसाक्षी संख्या 2 राम नरायन ने अपने बयानो में अपीलार्थी मलखान कोचोट कैसे और किन परिस्थितियों में आयी है इसका उल्लेख नहींकिया गया है तो यह हो सकता है कि अंधेरा होने के कारण वहउसकी चोटों को न देख पाये हों। फिर चोट जांघ पर पैर में थी।ऐसी दशा में अपीलार्थी को चोट कैसे और किन परिस्थितियों में लगीवे न देख पायें हो। अभियोजन साक्षी संख्या 3 सुरेश ने अपने बयानमें अपीलार्थी मलखान को अनन्तू के फायर से चोट आने की बातकही है। थोडी देरे के लिए यह मान लिया जाए कि अभियोजन साक्षीसंख्या 3 सुरेश को चोट लग गयी थी इसलिए वह यह न देख सकाहो कि अपीलार्थी मलखान को चोट कैसे आयी। गवाहों की साक्ष्यसे यह साबित है कि मृतका की हत्या अपीलार्थी द्वारा तमंचे से गोलीमारकर मृतका के घर के अन्दर आंगन में की गयी थी जिसेगवाहों द्वारा देखा गया है और जब गवाहान ने उसका पीछा कियातो खेत में उसने चुटैल सुरेश को भी गोली मार दी।

41 यहा ँ यह भी उल्लेखनीय है कि जिस स्थान पर चुटैलसुरेश को गोली मारी गयी थी उस स्थान पर विवेचनाधिकारी को एकखोखा कारतूस मिला था तथा घटना में प्रयुक्त तमंचे को भीअपीलार्थी मलखान के निशानदेही पर बरामद किया गया है उक्ततमंचा व खोखा कारतूस को विधि विज्ञान प्रयोगशाला परीक्षण हेतुभेजा गया। विधि विज्ञान प्रयोगशाला की रिपोर्ट प्रदर्श क–25पत्रावली पर उपलब्ध है। विधि विज्ञान प्रयोगशाला की रिपोर्ट केअनुसार बरामद खोखा कारतूस को अपीलार्थी की निशानदेही पर

बरामद तमंचे से चलना पाया गया है। इससे यही स्पष्ट होता है किखेत में जो खोखा कारतूस बरामद हुआ था उसे अपीलार्थी कीनिशानदेही पर बरामद तमंचे से चलना पाया गया है। ऐसी स्थिति मेंभी यही स्पष्ट होता है कि पीछा करते समय खेत में फायर करअपीलार्थी मलखान ने चुटैल सुरेश को चोटें पहुंचायी थी। ऐसी दशामें चुटैल सुरेश की चोटों के सम्बंध में संदेह का कोई आधार नहींपाया जाता है। उपरोक्त परिस्थितियों में यदि अपीलार्थी की चोटों काकोई स्पष्टीकरण अभियोजन की ओर से नहीं भी दिया गया है तबभी घटना के सम्बंध में संदेह का कोई आधार प्रतीत नहीं होता है।अभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या 2 रामनरायन तथा अभियोजन साक्षी संख्या 3 सुरेश की जिरह में ऐसा कोईतथ्य नहीं आया है जिससे की मृतका की हत्या, मृतका के पतिअथवा उसके परिवारजन द्वारा बदनामी के कारण करने की बातस्वीकार की जा सके। पत्रावली

पर उपलब्ध साक्ष्य से यही स्पष्ट हैकि मृतका की हत्या अपीलार्थी द्वारा कारित की गयी थी तत्पश्चातगवाहों द्वारा पीछा करने पर अपीलार्थी ने सुरेश को भी तमंचे सेफायर कर चोटें पहुंचायी थी। ऐसी दशा में अपीलार्थी की ओर सेरखे गये उक्त तर्क में हम कोई बल नहीं पाते हैं।

42 अपीलार्थी की ओर से एक तर्क यह भी रखा गया किजिस बस से चुटैल सुरेश उपचार हेतु सदर अस्पताल गया था उसीबस से अपीलार्थी मलखान भी गयाथा तथा वह भी अस्पताल में भर्तीहुआ है। अभियोजन साक्षी संख्या 1 कमलेश, अभियोजन साक्षी संख्या2 राम नरायन ने अपनी जिरह में यह स्वीकार किया है कि मलखानभी उसी अस्पताल में भर्ती हुआ था। उल्लेखनीय है कि यदिअपीलार्थी मलखान उसी बस से गया था जिस बस से चुटैल उपचारहेतु गया था और अस्पताल में भर्ती हुआ तो मात्र उक्त आधार
पर यह उपधारणा कायम नहीं की जा सकती है कि यह घटनाअपीलार्थी द्वारा कारित नहीं की गयी है। अभियोजन साक्षी संख्या 1कमलेश, अभियोजन साक्षी संख्या 2 राम नरायन तथा अभियोजनसाक्षी संख्या 3 सुरेश इस घटना के प्रत्यक्षदर्शी साक्षी हैं तथाअभियोजन साक्षी संख्या 3 सुरेश (चुटैल) को भी इस घटना मेंआग्नेयास्त्र की चोटें आयी है उपरोक्त साक्षियों ने अपने बयान मेंकथित घटना अपीलार्थी द्वारा कारित करने की पुष्टि की है तथा यहस्पष्ट रूप से कहा है कि अपीलार्थी मलखान ने मृतका को घर के अन्दर आंगन में गोली मार दी थी जिससे उसकी मौके पर मृत्यु होगयी जब उन्होने अपीलार्थी व सह–अभियुक्त का पीछा किया तो खेतमें अपीलार्थी ने सुरेश को भी तमंचे से गोली मार दी जिससे उसे
चोटें आयीं। ऐसी दशा में पत्रावली पर उपलब्ध समस्त साक्ष्य से यहभली भांति सिद्व है कि अपीलार्थी ने कथित घटना के समय मृतकाको तमंचे से गोली मारकर उसकी हत्या कारित की एवं पीछा करने
पर चुटैल सुरेश को भी आग्नेयास्त्र से फायर कर चोटें पहुंचायी।अपीलार्थी की निशानदेही पर मृतका की हत्या में प्रयुक्त तमंचादिनांक 22–10–1997 को ननकू के खेत से बरामद हुआ था।अभियोजन साक्षी संख्या 5 उपनिरीक्षक, उदल सिंह बरामदगी केसाक्षी है उक्त साक्षी ने अपने बयान में यह कहा है कि उसने दिनांक22–10–1997 को अभियुक्त मलखान सिंह को गिरफतार किया तथाउसकी निशानदेही पर आलाकत्ल एक अदद तमंचा गांव के ननकू केखेत से बरामद किया था जिसकी फर्द उसने तैयार की थी जो प्रदर्शक–17 है। यह भी कहा कि माल व मुलजिम को लाकर थानादाखिल किया तथा धारा 25 आयुध अधिनियम के अन्तर्गत मुकदमापंजीकृत कराया। धारा 25 आयुध अधिनियम से सम्बन्धित चिक प्रथमसूचना रिपोर्ट प्रदर्श क–18 तथा मुकदमा कायमी से सम्बन्धित जी0डी0 की प्रति प्रदर्श क–19 कांस्टेबिल मोहर्रिर चिन्तामणि के लेख एवंहस्ताक्षर में होना बताते हुए साबित किया है। यह भी कहा कि उसनेबरामदगी स्थल का मानचित्र प्रदर्श क–20 तैयार किया था। इससाक्षी ने अपीलार्थी की निशानदेही पर बरामद तमंचे को वस्तुप्रदर्श–1 के रूप में साबित किया है। अभियोजन साक्षी संख्या 6अशोक कुमार धारा 25 आयुध अधिनियम के मुकदमें के विवेचक हैजिन्होनें अपने द्वारा की गयी विवेचना तथा उसके द्वारा विवेचना केदौरान तैयार किये गये कागजात, घटनास्थल का मानचित्र प्रदर्शक–22 व आरोप पत्र प्रदर्श क–24 को साबित किया है। विद्वानविचारण न्यायालय ने अपीलार्थी के विरूद्व धारा 25 आयुध अधिनियमके अन्तर्गत लगाये गये आरोप को भी साबित पाया है जिसमें हमकोई विधिक त्रुटि अथवा अनियमितता नहीं पाते हैं।

43 पत्रावली पर उपलब्ध समस्त साक्ष्य एवं अभिलेखों से यहसाबित है कि कथित घटना के समय अपीलार्थी ने तमंचे से गोलीमारकर मृतका गीता देवी की हत्या कर दी तथा चुटैल सुरेश को भी
तमंचे से फायर कर चोटें पहुंचायी है तथा घटना में प्रयुक्त तमंचा भीअपीलार्थी की निशानदेही पर बरामद हुआ है तदनुसार अपीलार्थी केविरूद्व लगाया गया आरोप अन्तर्गत धारा 302, 307 भा0 दं0 सं0एवं धारा 25 आयुध अधिनियम संदेह से परे सिद्व है। हम विद्वानविचारण न्यायालय के निर्णय एवं निष्कर्षों में कोई विधिक त्रुटि अथवाअनियमितता नहीं पाते हैं।

44 विद्वान विचारण न्यायालय का प्रश्नगत निर्णय एवं आदेशसमुचित विवेचना पर आधारित है जिसमें हस्तक्षेप का कोई आधारनहीं पाया जाता है तदनुसार यह दाण्डिक अपील बलहीन है एवंनिरस्त होने योग्य है।

45 तदनुसार यह दाण्डिक अपील **निरस्त** की जाती है तथाविद्वान विचारण न्यायालय द्वारा पारित दोषसिद्वि एवं दण्डादेश कीपुष्टि की जाती है।

46 अपीलार्थी **मलखान सिंह** जमानत पर है उसे आदेशितकिया जाता है कि वह सजा भुगतने हेतु सम्बन्धित न्यायालय केसमक्ष अविलम्ब आत्मसर्मपण करे।

47 निर्णय की प्रति एवं अधीनस्थ न्यायालय की पत्रावलीअविलम्ब सम्बन्धित न्यायालय को अनुपालनार्थ भेजी जाए।

(2019)10ILR A 151

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 4288 of 2019

Sri Mazhar Husain & Ors. ...Appellants (In jail)

Versus

State of U.P. ...Respondent

Counsel for the Appellants:

Sri Ahmad Saeed, Sri Ajay Yadav, Sri Alok Kumar Yadav, Sri Ambrish Kumar, Sri Anil Raghav, Sri Braham Singh, From Jail, Sri J.S. Sengar, Sri Ramesh Singh, Sri S.K. Singh, Sri S.P.S. Raghav, Sri Sanjai Kumar Singh, Sri Shamsher Singh, Sri Syed Mushfiq Ali, Sri V.M. Zaidi.

Counsel for the Respondent:

D.G.A., A.G.A., Smt. Uma Srivastava, Sri V.K. Srivastava, Sri Syed Ali Murtaza (A.G.A)

A. Indian Penal Code, 1860 - Section 302 read with Section 34 I.P.C- Section 25 of Arms Act,1959 -Criminal Appeal filed by accused-appellants under Section 374 Cr.P.C - enmity between Informant and his cousin and others in respect of a land - statement under Section 313 Cr.P.C. - section 207 Cr.P.C - testimonies of witnesses closely related to deceased cannot be discarded - where direct evidence is worthy, it can be believed, then motive does not carry much weight - sentenced to life imprisonment. (Para 4,15,33 & 37)

B. Indian Evidence Act, 1872 - Section 134 –number of witness - Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable - if there are doubts about the testimony, Court will insist on corroboration. It is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. (Para 39 & 40)

C. Indian Penal Code, 1860 - whether Section 34 read with Section 302 IPC is attracted in the case in hand in respect of appellants - A Constitution Bench has dealt with Section 34 IPC and held that Section 34 deals with cases of constructive criminal liability provides that if a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone. (Para 45 & 65)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

2. Bhagalool Lodh & anr. Vs St. of U.P. AIR 2011 SC 2292

3. Dhari & ors. Vs St. of U.P. AIR 2013 SC 308)

4. Sampath Kumar Vs Insp. of Police Krishnagiri (2012) 4 SCC 124

5. Smt. Shamim Vs St. of (NCT of Delhi) Criminal Appeal No. 56 of 2018

6. Lokesh Shivakumar Vs St. of Kar. (2012) 3 SCC 196

7. Namdeo Vs St. of Mah. (2007) 14 SCC 150

8. Kunju @ Balachandran Vs St. of T.N. AIR 2008 SC 1381

9. Jagdish Prasad Vs St. of M.P. AIR 1994 SC 1251

10. Vadivelu Thevar Vs St. of Madras AIR 1957 SC 614

11. Yakub Ismailbhai Patel Vs St. of Gunj. reported (2004) 12 SCC 229

12. St. of Har. v. Inder Singh & ors. (2002) 9 SCC 537

13. Queen Vs Gora Chand (1866) 5 Suth WR 45 (FB)

14. Krishna Govind Patil Vs St. of Mah. AIR 1963 SC 1413

15. Gurdatta Mal Vs St. of Punj. AIR 1965 SC 257 = (1965) 1 Cri LJ 242 (SC)

16. Shankarlal Kachrabhai & ors. Vs St. of Guj. AIR 1965 SC 1260

17. Mahbub Shah Vs King-Emperor L.R. 72 I.A. 148

18. Barendra Kumar Ghosh Vs Emperor (1924) I.L.R. 52 Cal. 197

19. Hethubha alias Jithuba Madhuba & ors. Vs St. of Guj. AIR 1970 SC 1266

20. Jai Bhagwan & ors. Vs St. of Har. AIR 1999 SC 1083

21. Harjit Singh & anr. Vs St. of Punj. (2002) 6 SCC 739

22. Dani Singh & ors. Vs St. of Bihar (2004) 13 SCC 203

23. Surendra Chauhan Vs St. of M.P. AIR 2000 SC 1436

24. Nand Kishore Vs St. of M.P. (2011) 12 SCC 120

25. Shyamal Ghosh Vs St. of W.B. 2012(7) SCC 646

26. Barendra Kumar Ghosh Vs King Emperor (1924-25) 52 IC 40

27. Dharnidhar & Ors. Vs St. of U.P. & ors. (2010) 7 SCC 759

28. Ramesh Singh alias Photti Vs St. of A.P. (2004) 11 SCC 305

29. Mohan Singh & Vs St. of Punj. AIR 1963 SC 174

30. Balu & ors. Vs St. (U.T. of Pondicherry) (2016) 15 SCC 471

31. Vijendra Singh & ors. Vs St. of U.P. (2017) 11 SCC 129

32. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

33. Sham Sunder Vs Puran (1990) 4 SCC 731

34. M.P. Vs Saleem (2005) 5 SCC 554

35. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This Criminal Appeal under Section 374 Cr.P.C. has been filed by accused-appellants Mazhar Husain, Zafar Husain and Azhar Husain against the judgment and order dated 12.05.2000 passed by Sri Syed Nazim Husain Zaidi, First Additional District and Sessions Judge, Kanpur Dehat in Session Trial No. 296 of 1998, convicting appellant-1 Mazhar Husain under Section 302 I.P.C. and sentencing him to undergo life imprisonment with a fine of Rs. 10,000/-. In case of default in payment of fine, he has to undergo one year's further imprisonment. Accused-appellants Zafar Husain and Azhar Husain were convicted under Section 302 read with Section 34 I.P.C. and sentenced to life imprisonment and a fine of Rs. 5,000/- each. In case of default in payment of fine, they have to undergo further six months' imprisonment.

2. This appeal survives only in respect of appellants-1 and 2 inasmuch appellant-3, Azhar Husain, having died, appeal in respect of him stood abated as evident from order dated 19.12.2017.

3. Factual matrix of the case as appearing from First Information Report

(hereinafter referred to as "FIR") as well as material available on record may be stated as followed.

4. A written report (EX.Ka-1) dated 26.05.1998 was presented at Police Station Rajpur, Sub-Division Sikandara, District Kanpur Dehat at 9.39 PM the same day by PW-1 Sajjad Husain, alleging that there existed enmity between Informant and his cousin Mazhar Husain and others in respect of a land. On the fateful day, i.e., 26.05.1998 accused-appellant Mazhar Husain went to the disputed field along with Tractor of Thakur of Silhaira with intention to plough the field. He was accompanied with his brothers Zafar and Azhar. Shabbir Husain, father of Informant, PW-1, was going by cycle to the field for bringing straw. Apprehending that Informant's father might not indulge in altercation with accused on the issue of ploughing of the field, Informant and his brother, Mohd. Farhan, proceeded towards the field. When reached near Puliya (small bridge), they noticed that accused-appellants were hurling abuses on Informant's father. At some distance Ranu, Informants' Bhanja (sister's sons) was also standing and some people were engaged in work in nearby fields. At about 6.00 PM Azhar and Zafar exhorted Mazhar and provoked him to kill Informant's father saying that let the case/dispute be finished that day. In the meantime Mazhar took out countrymade pistol from his right Phent (upper portion of lower or Dhoti which is tied in waist) and opened two fire at Informant's father. Informant and others ran towards his father who fell down there. Tractor Driver left the Tractor and fled away. Seeing the Informant and others approaching, accused-persons fled sitting in Tractor. On reaching nearer the accused Mazhar tried to load cartridges in the country-made pistol held in his hand but since the pistol was jammed with empty cartridge, he struck the pistol on the body of tractor and got butt and barrel of pistol separated and threw it there. Thereafter they fled away towards village. Informant and his brother found that gunshot hit right side neck and shoulder of their father who was about 65 years old. FIR further states that no confrontation or altercation ever had taken place between accused and Informant. Only a civil litigation was going on. It is further stated that dead body of Informant's father Shabbir is lying on spot.

5. On the basis of written report (EX.Ka-1), PW-3, Constable Moharrir Ram Asrey Verma registered FIR (Kx.Ka-2) on 26.05.1998 at 9.30 PM against the three accused-appellants at Case Crime No. 31 of 1998 under Section 302 I.P.C., PS Rajpur, District Kanpur Dehat. He also prepared Chik FIR No. 30 and made relevant entry in G.D. at report No. 35.

6. Immediately after registration of the case, investigation was undertaken by PW-4, Mohd. Yaqoob Khan. He recorded statement of Informant Sajjad Husain and Constable Clerk Ram Asrey Verma. He proceeded for the place of occurrence in the morning of 27.05.1998 at 5.45 AM and prepared inquest in respect of deceased Shabbir Husain. He also prepared Panchayatnama (Ex.Ka-4) and other relevant documents namely Photo Nash, Challan Nash, specimen seal, letter to C.M.O. and R.I. (Ex.Ka-5 to Ka-9 respectively). He also took sample of blood stained and simple earth from the place of occurrence and sealed them in

separate bundles and prepared recovery memo (Ex.Ka-10). He also found and took in possession an empty cartridge of 12 bore besides pellets and cap from the place of occurrence; a cycle and a gunny bag said to belong deceased and prepared recovery memo. The I.O. found a broken countrymade pistol at the place of occurrence, butt and barrel whereof were separate. A separate case under Section 25 Arms Act was also registered.

7. Autopsy over the dead body of deceased Shabbir was conducted by PW-5, Dr. Narendra Kumar Singh Yadav. On external examination he found the deceased to be of average body built. Rigor mortis passed off from upper half of the body and present in lower half; eyes and mouth closed; abdomen distended, P.M. staining present whole of the back buttock and thigh. He found following ante-mortem injuries on his person:

(1) Firearm wound of entry 2 cm x 2 cm x bone deep on the left side of neck, 3 cm below the left angle of the mandible, margins inverted. Blackening, tattooing and charring present around the wound.

(2) Firearm wound of entry 4 cm x 3cm x bone deep on the left side of top of the shoulder. Margins inverted, charring present around the wound. 20 small pallets and one wadding piece were recovered from the wound.

8. On internal examination, nothing abnormal was detected with respect to thorax, pleura, pericardium, abdominal walls, pancreas; both chambers of heart were empty; left carotid artery was ruptured. Teeth 14x15; stomach contained watery fluid 4 ounce; small intestine half full with gases; large intestine contain faecal matter and gases; gall bladder half full and pale; both kidney pale, urinary bladder empty. In the opinion of Doctor, death was caused due to shock and hemorrhage on account of gunshot wounds. He (PW-5) prepared post-mortem report (Ex.Ka-12).

9. PW-6, S.I. Dhirendra Singh Yadav, was Station Officer P.S. Rajpur on 27.05.1998, on which date he had taken investigation from PW-4 Mohd. Yakoob Khan, and recorded statements of Farhan and Raju. He also inspected the spot and prepared site-plan (Ex.Ka-13). He continued investigation upto 12.06.1998 when he was transferred from Rajpur. Thereafter investigation was undertaken by S.O. Vijendra Singh, who submitted charge-sheet (Ex.Ka-14) dated 01.07.1998 against accused-appellants.

10. Cognizance of the offence was taken by Chief Judicial Magistrate, Kanpur Dehat on 05.08.1998. Case being exclusively triable by Court of Sessions was committed by Chief Judicial Magistrate after necessary compliance under Section 207 Cr.P.C to Court of Sessions for trial wherefrom the case was transferred to First Addl. Sessions Judge, Kanpur Dehat.

11. Trial Court framed charges against the accused-appellants Zafar and Azhar under Section 302 I.P.C. read with Section 34 I.P.C., vide order dated 14.12.1998. The charge reads as under:

आरोप पत्र

मैं बी0डी0 चतुर्वेदी, प्रथम अपर जनपद एवं सत्र न्यायाधीश, कानपुर देहात, आप जफर हुसेन एवं अजहर हुसेन पर निम्नलिखित आरोप लगाता हूँ:–

यह कि दिनांक 26–5–1998 को समय लगभग 6.30 बजे शाम ग्राम रमऊ थाना राजपुर जनपद कानपुर देहात में स्थित खेत में आपने अपने एक अन्य साथी के साथ सामान्य आशय को अग्रसारित करते हुए सब्बीर हुसेन निवासी ग्राम रमऊ थाना राजपुर जनपद कानपुर देहात की तमंचे से गोली मारकर मृत्यु कारित करके हत्या कारित की।

और मैं, एतद्द्वारा आपको आदिष्ट करता हूँ कि उक्त आरोप के अधीन आपका परीक्षण इस न्यायालय द्वारा सम्पादित किया जाये।

Charge

I, V.D. Chaturvedi, First Additional District and Sessions Judge, Kanpur Dehat, charge you Zafar Hussain and Azhar Hussain as under :-

That on 26.5.1998 at about 6:30 p.m. in furtherance of your common intention you along with your another accomplice by opening fire with country made pistol caused death of Shabbir Hussain, resident of village Ramau, P.S. Rajpur, District kanpur Dehat in the field situated in village Ramau, PS. Rajpur, District Kanpur Dehat and thereby committed murder which is punishable under Section 302/34 I.P.C. and within the cognizance of this Court.

And I hereby directed that you be tried by this Court for the aforesaid charges. **(English Translation by Court)**

12. Accused-appellant Mazhar Hussain has been charged separately under Section 302 I.P.C. as under :

आरोप पत्र

मैं बी0डी0 चतुर्वेदी, प्रथम अपर जनपद एवं सत्र न्यायाधीश, कानपुर देहात, आप मजहर हुसेन पर, निम्नलिखित आरोप लगाता हूँ:–

यह कि दिनांक 26–5–1998 को समय लगभग 6.30 बजे शाम ग्राम रमऊ थाना राजपुर जनपद कानपुर देहात में स्थित खेत में आपने अपने दो अन्य साथियों के साथ सब्बीर हुसेन निवासी ग्राम रमऊ थाना राजपुर जनपद कानपुर देहात की तमंचे से गोली मारकर मृत्यु कारित करके हत्या कारित की। जो कि धारा 302 भा0द0सं0 के अन्तर्गत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

और मैं, एतद्द्वारा आपको आदिष्ट करता हूँ कि उक्त आरोप के अधीन आपका परीक्षण इस न्यायालय द्वारा सम्पादित किया जाये।

Charge

I, V.D. Chaturvedi, First Additional District and Sessions Judge, Kanpur Dehat, hereby charge you Mazhar Hussain as under :-

That on 26.5.1998 at about 6:30 p.m. by opening fire with countrymade pistol along with two other accomplice committed murder, by causing death of Sabbir Hussain in the field situated in village Ramau, PS. Rajpur, District Kanpur Dehat which is an offence punishable under Section 302 I.P.C. and within the cognizance of this Court.

And I hereby directed that you be tried by this Court for the aforesaid charges.

(English Translation by Court)

13. Accused-appellant pleaded not guilty and claimed to be tried.

14. In order to establish its case, prosecution examined as many as six witnesses, out of whom PW-1 Sajjad Husain, PW-2 Farhan Husain and PW-3 Ram Asrey Verma are witnesses of fact. Rest are formal witnesses. PW-4 S.I.

Yaqoot Khan is first Investigation Officer and has proved inquest, photo nash, challan nash, specimen seal, letter to C.M.O. and letter to R.I. (Ex.Ka-5 to Ka-9) as also the supurdginma (Ex.Ka-11) with respect to cycle and bag of deceased. PW-5, Dr. Narendra Kuamar Singh Yadav, who has conducted post-mortem on the dead body of deceased has proved post-mortem report (Ex.Ka-12). PW-6 is second Investigation Officer, S.I. Dhirendra Singh Yadav, who has proved site-plan (Ex.Ka-13) and charge-sheet submitted by S.I. Vijendra Singh, marked as Ex.ka-14.

15. In the statement under Section 313 Cr.P.C. accused persons denied the incident and stated the prosecution story to be false. They admitted that Informant is their cousin. A litigation with respect to land was going between Ahmad Husain and Shabbir and others. Pairavi was being done by Sajjad but they did not bear any enmity with him. It is further stated that in order to usurp the rights of accused and to exert pressure, they have been falsely implicated.

16. Accused-appellants have also produced Shiv Pal Singh, DW-1, in defense. He has stated that his Tractor was lying at his own house.

17. Trial Court vide its impugned judgment after evaluating the entire evidence led by prosecution as well as defense found the accused-appellants guilty of the charges leveled against them and convicted and sentenced them under Sections 302 and 302/34 I.P.C. as detailed above. Being dissatisfied from the judgment of Trial Court, accused-appellants preferred this Criminal Appeal.

18. As stated above, the appeal survives only with respect to accused-appellants-1 and 2.

19. We have heard Sri V.M. Zaidi, learned Senior Advocate, assisted by Sri Ramesh Singh Advocate for appellant and Sri Syed Ali Murtaza, Learned AGA for the State at length and have gone through the record available on file carefully.

20. Learned counsel for the appellants challenging impugned judgement and order of conviction advanced his argument in the following manner :-

(i) There is no independent witness. PW-1 and PW-2 are related and interested witnesses.

(ii) There is no motive to accused persons to commit the present crime like murder of his cousin brother Shabbir.

(iii) There is no reliable evidence so as to justify conviction of appellants.

(iv) There are major contradictions in the evidence of PWs which may render the prosecution story doubtful.

(v) As per prosecution case, accused Mazhar Husain is alleged to have opened fire on the victim through his country made pistol which is in broken position but rest other accused persons have been involved on account of previous enmity which is not sufficient to commit murder.

(vi) As per prosecution, witness Ranu is said to be present on spot but prosecution did not adduce him as witness, therefore, presumption of Section 114 (g) goes against him.

(vii) According to prosecution, fire is said to be opened by accused Mazhar Husain, therefore, conviction of accused Zafar Husain is not proper and unsustainable under Section 302/34 I.P.C.

21. Learned AGA opposed the submissions made from the side of appellant and submitted that evidently there existed previous enmity between the parties before incident and civil litigation was also pending. The incident had taken place in the light of day. Both parties, although were inimical, but known to each other. On the exhortation of other co-accused, accused Mazhar Hussain opened fire on the victim with intention to kill him in furtherance of common intention of all. All the three accused persons were present on the spot and their presence is fully proved and established from the evidence of PWs-1 and 2. Appellant could not dispute the factum of murder, time and place.

22. Although time, date and place, injuries found on the body of deceased as indicated in post mortem report could not be disputed by the accused-appellant but according to counsel for appellants, they are not responsible for the crime. PWs.1 and 2 supported the prosecution case.

23. PW-5 Dr. Narendra Kumar Singh Yadav conducted post mortem report and expressed his opinion that death of victim might have occurred due to ante-mortem fire arm injuries. From the evidence of PWs-1, 2 and 5, time date and place of death of Shabbir, and manner of injuries are fully established. PWs-1 and 2 categorically deposed that Mazhar Husain opened two fires on Shabbir. PW-5 Dr. Narendra Kumar Singh Yadav found two ante mortem gun shot injuries on the person of deceased. In this way ocular testimony is totally compatible with medical evidence.

24. Only question up for consideration is, "whether accused appellant Mazhar Husain and Zafar Husain are responsible for committing murder of informant's father Shabbir and Trial Court has rightly convicted them or not?"

25. We now proceed to consider briefly the evidence led by prosecution available on record.

26. PW-1 deposed that on the fateful day i.e. 26.5.1998, accused-appellant Mazhar Hussain went along with Azhar Husain and Zafar Husain to plough the field taking tractor of one Thakur. At about 6:00 p.m. at the same time his father Shabbir Husain was going to field by bicycle to take straw along with Ranu (Bhanja of Informant). When he (PW-1) and his brother Farhan heard that accused persons were ploughing the field and they were making altercation with his father, they rushed to the field and reached near Puliya, and, saw that on the exhortation and provocation of accused-appellant Zafar and Azahar, accused-appellant Mazahar Husain took out country made pistol and opened two fires on his father, who received fire arm injuries and fell down in the field. On seeing the firing, driver of tractor fled away from the spot leaving tractor there. Accused-appellant Mazhar Hussain again tried to load cartridges in the pistol but pistol could not be opened because of empty cartridge. Accused-appellant struck his pistol on tractor and got butt and barrel of pistol separated and threw it there. All the three accused-appellants fled away from the

spot towards village by tractor. Informant's father having been injured, succumbed to injuries on spot.

27. PW-2 Farhan deposed that on 26.5.1998 at about 6:00 p.m., accused appellant Mazhar Hussain, Zafar Hussain and Azahar Hussain were going to plough the field taking tractor of Thakur, at that time his father Shabbir was going to field for taking straw. On seeing that Mazhar Husain was ploughing field, he and his brother Sajjad (PW-1) rushed to the field, thinking that his father might not indulge in altercation with accused appellants in the field. They proceeded to field and when reached near Puliya, saw an altercation between accused persons and his father. Accused appellant Azahar Husain and Zafar Husain provoked Mazhar Husain to kill Informant's father saying that let the dispute be finished that day. Mazhar Husain took out country made pistol and opened two fires on his father Shabbir, who received serious injuries and fell down and succumbed to death.

28. Both the witnesses PW-1 and 2 withstood lengthy cross-examination but nothing material could be brought on record so as to dent the prosecution story doubtful.

29. PW-1 and PW-2 successfully established the presence of both accused appellants on spot and firing by accused-appellant Mazhar Husain at Shabbir Husain on the provocation of Zafar Husain and Azhar Husain. PW-5 Dr. Narendra Kumar Singh Yadav proved the post mortem report in which he found two fire arm injuries on the person of deceased, expressing his opinion that death might have occurred due to hemorrhage and coma on account of fire arm injuries and death was possible at 6.30 p.m. on 26.5.1998. From the statement of PWs- 1, 2 and 5, it is established that accused Zafar and Azhar and Mazhar were present on spot and on the provocation and exhortation made by Zafar and Azhar, accused-appellant Mazhar Hussain opened two fire on Shabbir Hussain, who received serious gun shot injuries and succumbed to death on spot.

30. Admittedly, PW-1 and 2 are real brother and sons of deceased. They are related to him but they appeared to be quite natural witness.

31. So far as argument of relation of witnesses is concerned, we are not impressed with submission made by learned Amicus Curiae for accused-appellant for reasons that if relation witnesses are found to be reliable, natural and trustworthy, their evidence cannot be discarded on the ground of their relationship with deceased or accused.

32. In ***Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,*** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308)***."

33. It is settled law that merely because witnesses are closely related to deceased, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal actual culprit and make allegation against an innocent person. However, in such a case, Court has to adopt a careful approach and analyse evidence to find out that whether it is cogent and credible evidence.

34. In so far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant are not entitled to get benefit of the same.

35. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

36. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of the Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, ***Smt. Shamim v. State of (NCT of Delhi),*** *decided on 19.09.2018.*

37. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellants.

38. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

39. So far as non-examination of eye witness Ranu shown in F.I.R. is concerned, in view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'), we do not find any substance in the submission of learned counsel for the appellant.

40. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is

the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

41. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150,** Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

42. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing reliance on earlier judgments including **Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.**

43. In ***Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229,*** Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

44. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

45. The further issue which has to be examined by this Court is, "whether conviction of appellants under Section 302 read with Section 34 IPC is justified and can it be said that they are guilty of offence u/s 302/34 and murder of Shabbir Husain can be said to be a part of common intention on the part of appellants in the above facts and circumstances of case". In other words, "whether Section 34 read with Section 302 IPC is attracted in the case in hand in respect of appellants is the crucial issue which has to be examined by us".

46. We, therefore, first proceed to examine Section 34 IPC, which reads as under :-

"Section 34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

47. As initially enacted, the words "in furtherance of the common intention of all" were not part of Section 34 but came to be introduced by Section 1 of Act XXVII of 1870. The reason for inserting such amendment was the observations made by Sir Barnes Peacock, CJ, in **Queen Vs. Gora Chand, (1866) 5 Suth WR 45 (FB)**, holding that mere presence of a person at the scene of crime would not be sufficient to hold him liable to be implicated under section 34 IPC as it stood then, unless such presence was an act in furtherance of a common design.

48. Ordinary rule of criminal liability is that a person who actually commits an offence has the primary responsibility to suffer punishment for the same. Section 34 IPC, however, brings within the ambit of penal liability even those person(s) who have not actually committed crime but there existed a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Thus to attract Section 34, which infact enumerates one of the principle of constructive liability, two conditions must be satisfied : (i) There must be common intention to commit a criminal act; and (ii) There must be participation by all the persons in doing such act in furtherance of that intention.

49. In **Krishna Govind Patil Vs. State of Maharashtra, AIR 1963 SC 1413,** Court construed Section 34 IPC and held that common intention within the meaning of section implied a prearranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of commission of the offence; but crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under Section 34 read with specific provision under which the person is charged, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.

50. In **Gurdatta Mal Vs. State of Punjab, AIR 1965 SC 257 =(1965) 1 Cri LJ 242 (SC)**, it was held that criminal sharing, overt or covert, by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of section 34 IPC.

51. Joel Prentiss Bishop in "Commentaries on the Criminal Law", an American Jurist said that every person is responsible criminally for what wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person the former is criminally guilty for its results. If he contemplated the result, he is answerable, though it is produced in a manner he does not contemplate. If he does not contemplate the result in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what might be presumed to have been his understanding of them, he is responsible. But, if the wrong done was a fresh and independent wrong, springing wholly from the mind of

the doer, the other is not criminal therein, merely because, when it was done, he was intending to be a partaker with the doer in a different wrong.

52. A similar observation was also made in **Shankarlal Kachrabhai & Ors. Vs. State of Gujarat, AIR 1965 SC 1260** by referring to a decision of Judicial Committee in **Mahbub Shah Vs. King-Emperor, L.R. 72 I.A. 148.** Court said that the criminal act mentioned, in Section 34 IPC is the result of the concerted action of more than one person; if the said result was reached in furtherance of the common intention, each person is liable for the result as if he had done it himself. Court also explained the meaning of word "in furtherance of the common intention" and said as under :

"The Dictionary meaning of the word "furtherance" is "advancement or promotion". If four persons have a common intention to kill A, they will have to many acts in promotion or prosecution of that design in order to fulfill it. Some illustrations will clarify the point. Four persons intend to kill A, who is expected to be found in a house. All of them participate in different ways. One of them attempts to enter the house, but is stopped by the sentry and he shoots the sentry. ***Though the common intention was to kill A, the shooting of the sentry is in furtherance of the said common intention. So Section 34 applies.*** *Take another illustration. If one of the said accused enters the room where the intended victim usually sleeps, but somebody other than the intended victim is sleeping in the room, and on a mistaken impression he shoots him. The shooting of the wrong man is in furtherance of the common intention and so, Section 34 applies. Take a third variation of the illustration. The intended victim has a twin brother who exactly resembles him and the accused who is entrusted with the part of shooting the intended victim, on a mistaken impression, shoots the twin brother. The shooting of the twin brother is also in furtherance of the common intention. Here also Section 34 applies. If that much is conceded we do not see any justification why the killing of another under a mistaken impression of identity is not in furtherance of the common intention to kill the intended victim. When the accused were shooting at Rama believing him to be Madha, they were certainly doing a criminal act in furtherance of the common intention which was to kill Madha. They killed Rama because they believed that they were shooting at Madha. Mr. Chari argues, how can a mistake committed by one of the accused be in furtherance of a common intention ? For it is said that to commit a mistake was not a part of the common intention of the accused. But the question is not, as we have pointed out, whether the committing of a mistake was a part of the common intention, but whether it was done in furtherance of the common intention.* ***If the common intention was to kill A and if one of the accused kills B to wreak out his private vengeance,*** *it cannot possibly be in furtherance of the common intention for which others can be constructively made liable. But, on the other hand, if he kills B bona fide believing that he is A, we do not see any incongruity in holding that the killing of B is in furtherance of the common intention."*

53. In this decision, Court also referred to the Judicial Committee decision in **Barendra Kumar Ghosh Vs.**

Emperor (1924) I.L.R. 52 Cal. 197 explaining the expression "criminal act" as under

"A criminal act means that united criminal behavior which results in something for which an individual would be punishable if it were all done by himself alone that is, in a criminal offence."

54. In **Hethubha alias Jithuba Madhuba and Ors. Vs. State of Gujarat, AIR 1970 SC 1266,** Court observed that dominant feature of Section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. Prior concert and pre-arranged plan is the foundation of common intention to establish liability and guilt.

55. In **Jai Bhagwan and others Vs. State of Haryana, AIR 1999 SC 1083,** Court said that to apply Section 34 IPC, apart from the fact that there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked.

56. In **Harjit Singh & Anr. Vs. State of Punjab, (2002) 6 SCC 739,** the Court said that "common intention" is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime as also prior and subsequent attendant circumstances. Mere participation in the crime with others is not sufficient to attribute "common intention" to one or others involved in the crime. The subjective element in "common intention" therefore should be proved by objective test.

57. In order to attract Section 34 IPC, the Court should be able to draw an inference that result reached was concerted action of the person said to have been liable.

58. The "common object" is different from "common intention". However, we do not propose to deal into this distinction for the reason that here Section 149 is not in issue and therefore this Court is confined only to examine whether Section 34 IPC has rightly been applied or not and there was evidence of common intention or not. However, suffice it to mention that dealing with distinction in "common object" and "common intention", in **Dani Singh & Ors. Vs. State of Bihar, 2004 (13) SCC 203,** Court explained the term "common intention" and said that "common intention" to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert.

59. In **Surendra Chauhan vs. State of Madhya Pradesh, AIR 2000 SC 1436** Court held that common intention could be developed on the spur of moment. To attract Section 34 IPC the essence of simultaneous consensus of the minds of

persons participating in criminal act and such consensus can be developed on the spot. It is not mandatory for prosecution to bring direct evidence of common intention on record and this depends on the facts and circumstances of the case. The intention could develop even during the course of occurrence.

60. In **Nand Kishore vs. State of Madhya Pradesh, 2011(12) SCC 120** Court observed that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of criminal act would be the requirement. Every individual member of entire group charged with aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different.

61. In **Shyamal Ghosh vs. State of West Bengal, 2012(7) SCC 646** Court referred to following observations from Privy Council decision in **Barendra Kumar Ghosh vs. King Emperor, (1924-25) 52 IC 40:**

"The words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, 'act' includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally cooperates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the Appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait".

62. In **Dharnidhar and others vs. State of U.P. and others, 2010(7) SCC 759** Court said that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of accused in crime. Section 34 IPC involves vicarious liability. If the intention is proved but no overt act was committed, the Section can still be invoked. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had common intention to commit the act. The phrase "common intention" means a pre-oriented plan and acting in pursuance of plan, thus, common intention must exist prior to commission of act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to facts of a given case.

63. In **Ramesh Singh alias Photti v. State of Andra Pradesh, 2004(11) SCC**

305 Court said that common intention essentially being a state of mind, it is very difficult to procure direct evidence to prove such intention. In most cases it has to be inferred from the act like, conduct of accused or other relevant circumstances of the case. The inference can be gathered from the manner in which accused arrived at the scene and mounted the attack, determination and concert with which attack was made and from the nature of injury caused by one or some of them. The contributory acts of persons who are not responsible for injury can further be inferred from the subsequent conduct after attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. Court held that totality of circumstances must be taken into consideration in arriving at conclusion whether accused had common intention to commit an offence of which they could be convicted.

64. The above observations have been followed in **Balu and others vs. State (U.T. of Pondicherry), 2016(15) SCC 471.**

65. A Constitution Bench has dealt with Section 34 IPC in **Mohan Singh and another vs. State of Punjab, AIR 1963 SC 174** and held that Section 34 deals with cases of constructive criminal liability provides that if a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for the act in the same manner as if it were done by him alone. It has been further observed that the essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. The common intention in question animates the accused persons and if the said common intention leads to commission of the criminal offence charged, each of the person sharing the common intention is constructively liable for the criminal act done by one of them. The Larger Bench dealing with the concept of constructive criminal liability under Sections 149 and 34 IPC, expressed that just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two Sections are similar and in some cases they may overlap. The common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessarily postulates the existence of a prearranged plan and that must mean a prior meeting of minds. It would be noticed that cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. Court further held:

"It is now well-settled that the common intention required by Section 34 is different from the same intention or similar intention. As has been observed by the Privy Council in Mahbub Shah v. King-Emperor (supra) common intention within the meaning of Section 34 implies a pre-arranged plan, and to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference of common intention should

never be reached unless it is a necessary inference deducible from the circumstances of the case. "

66. Referring to Constitution Bench judgment and some others recently in **Vijendra Singh and others vs. State of U.P., 2017(11) SCC 129** Court has said:

".... each case has to rest on its own facts. Whether the crime is committed in furtherance of common intention or not, will depend upon the material brought on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered from the circumstances that are brought on record by the prosecution. Common intention can be conceived immediately or at the time of offence. Thus, the applicability of Section 34 Indian Penal Code is a question of fact and is to be ascertained from the evidence brought on record. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts."

67. Our attention was drawn to an illustration given by Court in **Shankarlal Kachrabhai and others Vs. State of Gujarat (supra)** which reads as under:

"If the common intention was to kill A and if one of the accused kills B to wreak out his private vengeance, it cannot possibly be in furtherance of the common intention for which others can be constructively made liable."

68. Aforesaid exception has no application in the present case since it was never pleaded by Appellant that Mazhar Husain fired on Shabbir Husain to wreak out his private vengeance. Appellant Zafar Husain also did not take any such defence in the statement recorded under Section 313 Cr.P.C. that he (Mazhar Husain) fired upon Shabbir Husain to wreak out his private vengeance. Neither any such suggestion has come from any witness in the Court below nor any such case has ever been made out. Therefore, in the entirety of facts and circumstances and looking into the exposition of law as discussed above with respect of Section 34 IPC, we have no manner of doubt that conviction of Appellants Zafar Husain under Section 302 read with Section 34 IPC cannot be said to be erroneous or illegal.

69. In view of facts and legal position discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found them guilty and convicted accused Mazhar Husain for having committed murder of Shabbir Husain under Section 302 I.P.C. and accused Zafar for an offence punishable under Section 302/34 IPC. Conviction and sentenced awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court.

70. So far as sentencing of accused-appellants is concerned, it is always a difficult task requiring balance of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of

circumstances aggravating and mitigating in individual cases.

71. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation upon court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

72. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment awarded to accused-appellants by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

73. We, therefore, find no merit in appeal. It is accordingly, **dismissed** and judgement and order dated 12.05.2000 passed by First Additional District and Sessions Judge, Kanpur Dehat, is **maintained and confirmed.**

74. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

75. Accused-appellants 1 and 2 are in jail, they shall serve out sentence as per judgement dated 12.5.2000 passed by the Trial Court as confirmed by this Court.

(2019)10ILR A 167

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE

THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No.750 of 2004

Asgar Khan & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Braham Singh, Sri Arun Kr. Singh, Sri Arvind Kumar Srivastava (A.C.), Sri K.D.

Tewari, Sri M.D. Mishra, Sri N.I. Jafri, Sri P.K. Tripathi, Sri Sushil Kumar Tewari, Sri Pradeep Kumar Bishnoi, Dr. Arun Srivastava.

Counsel for the Opposite Party:
A.G.A., Mrs. Poonam Dubey.

A. Indian Penal Code, 1860 - Section 452 (house trespass), 307, 302/34 IPC and Arms Act, 1959 - Section 27 – accused-appellants examined under Section 313 Cr.P.C- No illegality or infirmity in Conviction under Sections 452 and 302/34 IPC - Life imprisonment – Direct evidence. (Para 14 & 35)

B. Basic principle of appreciation of evidence of a rustic witness -The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time-witness is bound to face shock of the untimely death of his near relative(s). (Para 19)

C. Relevancy of motive - motive becomes irrelevant in the presence of direct evidences - the accused appellants were bearing enmity on account of progress of the informant's family and they were bent upon for altercation. Informant used to avoid the altercation but they never relented before the accused appellants - fact corroborated by the testimony of the informant - Injury report and postmortem reports corroborate prosecution version regarding manner of assault and time of incident- ocular version also corroborated by the medical report. (Para 29, 30 & 33)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. St. of U.P. Vs Krishna Master & ors. (2010) 12 SCC (324)

2. St. of U.P. Vs Krishna Master & ors. (2010) 12 SCC (324)

3. Rajesh Govind Jagesha Vs St. of Mah. (1999) 8 SCC 428

4. Rajagopal Vs Muthupandi alias Thavakkalai & ors. (2017) 11 SCC 120

5. Banna Reddy & ors. St. of Kar. (2018) 5 SCC 790

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Braham Singh, learned counsel for the appellants, Sri Ratan Singh, learned A.G.A. for the State of U.P. and perused the material available on record.

2. This appeal has been preferred against the judgment and order dated 28.01.2004, passed in Session Trial No.709 of 1994, State of U.P. vs. Asghar and others, by which learned Additional Sessions Judge, Court No.13, Moradabad, has convicted and sentenced each of the appellants to undergo three years rigorous imprisonment and Rs.1000/- fine u/s 452 IPC, in default of fine to undergo three months additional simple imprisonment and to undergo life imprisonment and fine of Rs.5,000/-, u/s 302/34 IPC, in default of fine six months additional sentence.

3. In brief, prosecution case is that the house of informant Mohd. Ali is situated in the east at outer side of the village. In the intervening night of 26/27-6-1994 informant and his brother Arif were sleeping on the roof of his neighbour Komil Dhobi and his elder brother Farzand was sleeping on the roof above the door and his younger brothers Raees and Dhumi, mother, father, ladies and children were sleeping below in the courtyard.

4. All of sudden, near about at 02:30 A.M., on the scream of brother-Farzand

all the aforesaid family members woke up. Informant, at once, flashed a torch towards the cot of Farzand and saw and identified very well near the cot of Farzand, his neighbour Guddu Bara and Asghar khan, sons of Afsar Khan, resident of village Syaundara and their relative Khurshid son of Munna, village and police station Shahbad, District Rampur. On his interruption Asgar Khan inflicted knife injury on the stomach of his brother-Farzand and Guddu Bara fired a shot by country made pistol although he tried much to save himself by wrapping a quilt. All brothers, ladies and children exhorted them but it was in vain. When the informant tried to go ahead then Khurshid by pointing a country-made pistol towards them fired with intention to kill them. On account of fear, informant and Arif hid themselves in the *khandhar* (ruins of building) of Munne Khan. Dhoomi also hid himself by crossing the wall towards west in the street. Raees also tried to run away but all the three assailants jumping from the roof surrounded him at the cot and wounded him by beating him with the barrel and handle of the country-made pistol and firing. All the three brothers being alarmed called for help but due to fear no one from the village came to their rescue. When the informant's wife Bano interrupted then Khurshid stating that she is talking too much kicked on her face even then she did not keep mum then Khurshid fired a shot at her. When all the assailants went away towards north side of his house only then the informant saw and found that his brother-Farzand and his wife-Bano had expired and the condition of Raees also has become critical.

5. The assailants were bearing enmity with the informant's family because his family was doing well in life by doing hard work. Accused were bent upon for altercation but informant's family used to avoid it.

6. Informant-Mohammad Ali got scribed report (Ex. Ka-1) by Abdul Aziz (DW-1) and handed it over to the police station Vilari, district Moradabad. On the basis of written report (Ex.Ka-1), Case Crime No.228 of 1994 under Sections 452, 307 and 302 I.P.C. was registered under chik FIR (Ex.Ka-6) and investigation was handed over to the S.H.O., Dharam Singh Malik (PW-8). Investigating Officer recorded the statements of the informant-Mohammad Ali and injured-Raees Ahmad at the police station and thereafter proceeded to the place of incident along with S.S.I. Muneshwar Singh and other police personnel. He inspected the spot and prepared the spot map (Ex.Ka-17). He also took into his possession the torch from the informant and prepared its memo (Ex.Ka-2). On the instruction of the Investigating Officer inquest memo of the deceased-Farzand Ali (Ex.Ka-20) and relevant documents i.e. photo lash (Ex.ka-21), specimen seal (Ex.ka-22), proforma 33 (Ex.ka-23), inquest memo of the deceased-Smt. Bano Begum (Ex.ka-24), photo lash (Ex.ka-25), specimen seal (Ex.ka-26) and letter to C.M.O. (Ex.ka-27) were prepared and the dead-bodies of the deceased Farzand and Smt. Bano Begum were dispatched for autopsy. The injured-Raees Ahmad was sent to P.H.C. Moradabad for medical examination along with Homeguard-Bhure Singh Yadav.

7. Dr. V.N. Saxena (PW-7) conducted medical examination of injured Raees Ahmad on 27.06.1994 at 7:30 A.M. and prepared the report (Ex.Ka-15), according to which following injuries were found :-

(i) lacerated wound 2.5 cm x 0.5 cm x skull deep on back of left side head 12 cm above Rt. ear fresh bleeding present kept under observation advised X-ray skull.

(ii) lacerated wound 6.5 cm x 3.5 cm x bone deep in front of left upper arm 7 cm above left elbow fresh bleeding present kept under observation advised X-ray left upper ar1-17m.

(iii) lacerated wound 4 cm x 1 cm x muscle deep on the front of left forearm 6 cm below right elbow fresh bleeding present kept under observation advised X-ray left forearm.

(iv) firearm wound of entry 3 cm x 2 cm x muscle deep on the outer aspect of Rt. thigh 24 cm above on the right knee blackening and tattooing around the wound present kept under observation advised X-ray right thigh.

(v) lacerated wound 1 cm x 0.5 cm x depth not probed over the front rims of Rt. thigh 30 cm above the right knee. No blackening and tattooing. Fresh bleeding present kept under observation advised X-ray Rt. thigh.

(vi) traumatic swelling 5 cm x 3 cm on the right side chest kept under observation advised X-ray chest.

All the i1-17njuries were kept under observation for cause of nature except injury no. (4) by firearm. Injury no.(6) was caused by blunt object duration fresh.

8. Dr. Madan Mohan (PW-5) conducted autopsy on the dead-body of the deceased-Farzand Ali and prepared report (Ex.ka-6), according to which following injuries were found on the body of the deceased :-

(i) Gun shot wound of entry 4 cm x 2 cm x brain cavity deep on left side head about 5 cm above from left ear pinna skin 6 cm x 4 cm charred & tattooed & singing and gout present margin inverted lacerated. On opening there is fracture of both frontal bone (2 pieces). Both temporal bone & parietal bones. Recovered 2 wadding, (i) cap & (32) small metallic pellets from the brain cavity. Direction is downward & anteriorly. Brain is badly lacerated.

(ii) (4) Linear abrasion in an area 16 cm x 6 cm over the front of chest in middle & Rt. side of chest middle part.

(iii) incised wound 8 cm x 3 cm x abdominal cavity deep on Rt. side abdomen about 9 cm between Rt. nipple at 5 O'clock position margin clean cut. A loop of small intestine is coming out of the wound.

(iv) incised wound 4 cm x 2 cm x abdominal cavity deep on Rt. side abdomen about 1 cm lateral to injury no. (3) margin clean cut.

According to his opinion cause of death is due to shock and haemorrhage as a result of anti-mortem injuries.

9. Dr. Madan Mohan (PW-5) also conducted autopsy on the dead-body of the deceased-Smt. Bano Begum and prepared the report (Ex.ka-7), according to which following injuries were found :-

(i) gun shot wound of entry 2.5 cm x 1cm x chest cavity deep on left side back over scapula about 8 cm below left shoulder joint with charring and tattooing of surrounding skin area 19 cm x 13 cm margins inverted, lacerated. The direction is downward in wall and anteriorly & on opening there is laceration of pleura left

lung upper lobe of the heart and Rt. vertical and diaphragm & left lobe of liver is lacerated. One metallic bullet recovered on the abdominal cavity.

(ii) lacerated wound ½ cm x ½ cm on left side head about 9 cm above from upper ear.

According to his opinion cause of death is due to shock and haemorrhage as a result of anti mortem injuries.

10. On receiving the death information of injured Raees Ahmad S.I. T.R. Kothari conducted inquest of the deceased Raees Ahmad and prepared inquest memo (Ex.ka-6). He also prepared relevant documents i.e. chalan lash, letter to R.I., letter to C.M.O, specimen seal and photo lash (Ex.ka-7 to 11) respectively and after sealing and stamping the dead body he handed over the same for postmortem to constables Hakam Singh and Kailash.

11. P.W.-10 Dr. Kishore Kumar conducted autopsy on the body of the deceased-Raees Ahmad and prepared postmortem report (Ex.ka-28), according to which following injuries were found :-

(i) stitched wound 3 cm x 3 cm stitched on the middle of head.

(ii) stitched wound 7 cm x 7 cm stitched on the flexer aspect (Lt.) arm.

(iii) stitched wound 5 cm x 5 cm stitched on the flexer aspect of left forearm.

(iv) wound of entry 1 cm x 0.5 cm on the front of thigh through & through to injury no.(5).

(v) stitched wound 3 cm x 3 cm stitched at the lateral aspect of Rt. thigh as outer side of right thigh. Injury nos.2 and 4 were communicated to each other on opening of the brain and blood was found.

According to his opinion cause of death is due to head injury.

12. Investigating Officer, after completing the investigation, submitted charge-sheet (Ex.Ka-18), under Sections 452, 307, 302/34 I.P.C and 27 Arms Act against the accused persons before the Court of Chief Judicial Magistrate, Moradabad, who committed the accused for trial to the Court of Session, where Case Crime No.228 of 1994 was registered as Session Trial No.709/94 State of U.P. vs. Asghar and others, wherefrom, it was transferred to the Court of Additional Sessions Judge, Court No.13, Moradabad, who framed the charge against the accused persons, under Sections 452, 307, 302/34 I.P.C and 27 Arms Act. The accused-appellants denied the charge and claimed for trial.

13. Prosecution, to prove its case, has produced ten witnesses.

PW-1 Mohammad Ali-informant and eye witness. PW-2 S.I. T.R. Kothari prepared the inquest memo. PW-3 Constable Virendra Kumar is a formal witness. PW-4 Dhoomi is a witness of fact. PW-5 Dr. Madan Mohan conducted autopsy on the body of the deceased-Farzand Ali and Smt. Bano Begum. PW-6 Arif is a witness of fact. PW-7 Dr. V.N. Saxena conducted medical examination of the injured-Raees Ahmad. PW-8 Dharam Singh is Investigating Officer. PW-9 Veer Pal Singh, scribe of chik & G.D. and PW-10 Dr. Kishor Kumar, conducted postmortem of deceased Raees.

14. The accused-appellants were examined under Section 313 Cr.P.C in which they stated that they have been implicated falsely in the case. In defence accused persons have produced Abdul Aziz (DW-1) scribe of the written report (Ex.Ka-1).

15. Learned Additional Sessions Judge, Court No.13, Moradabad, after hearing the learned Additional District Government Counsel (Criminal), learned counsel for the accused-appellants and perusing the material available on record, passed the impugned judgment and order. Hence, the instant appeal.

16. Learned counsel for the appellants submits that there is no motive for the appellants to commit the offence. He also submits that PW-4 Dhoomi, who is brother of the deceased Farzand and Raees, has stated that he does labour work residing in village Ravana and take care of livelihood of his wife and children, so he cannot be an eye-witness of the incident. He further submits that according to PW-1 Mohammad Ali, 4-5 fires were made while PW-4 Dhoomi has stated that near about 20-25 fires were made. Thus, there is a contradiction in the statement of the prosecution witnesses regarding the fires made at the time of incident, which creates doubt in the prosecution case. He also submits that the scribe of the written report Abdul Aziz has stated that he had written the report Ext.Ka-1 at 9:00 A.M. in police station Vilari on dictation of daroga and not on dictation of informant P.W.1 Mohammad Ali and before him thumb impression of no one was obtained on the written report by the S.I. Hence, written report is not proved and creates doubt on the prosecution case. Lastly, he submits that PW-4 Dhoomi has stated that miscreants were threatening them not to come near otherwise they will be killed and he has also stated that it is not that miscreants took away ornaments snatching the same from the ladies. If accused appellants were known to the witness then in place of stating miscreants he should have taken the name of the accused appellants. Actually, the incident was not caused by the appellants. It was an incident of loot and due to enmity, the accused appellants have been implicated falsely in the case. From the evidence produced by the prosecution, charges are not proved so the judgment and order is liable to set aside and the accused appellants are entitled to be acquitted.

17. On the other hand, learned A.G.A. for the State submits that from the place of incidence, concerned police station is at a distance of 10 kilometers and regarding the incident of 26/27-6-1994, at about 02:30 a.m., prompt FIR naming the accused appellants has been lodged on 27.06.1994, at 5:05 a.m. By fire, stabbing by knife and beating by handle and barrel of country-made pistol incident has been caused by the appellants which has been witnessed by the informant PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif in the light of torch. During investigation, the torch was taken into possession by the Investigating Officer, a memo was prepared and returned the same to the informant which was produced before the court by the informant-Mohammad Ali. In the injury report and postmortem report firearm and knife injuries have been found to the deceased persons which corroborate the ocular version. It is the prosecution case that accused appellants were bearing enmity on account of progress of the

family of informant, accused appellants have admitted enmity in their statements under Section 313 Cr.P.C. The evidence of PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif are consistent as well as corroborated by the medical evidence. Charges against the accused appellants were proved fully from the evidences adduced by the prosecution and the trial court has rightly convicted and sentenced the accused appellants in which no interference is required by the Court and appeal is liable to be dismissed.

18. At the out set, it would be pertinent to consider whether written report Ext.Ka-1 was written on dictation of informant P.W.1 Mohammad Ali or on dictation of *daroga*, as stated by D.W.1 Abdul Aziz. Informant P.W.1 Mohammad Ali in his examination-in-chief has stated that he got scribed the report by Abdul Aziz and Abdul Aziz wrote what he had dictated to him. Thereafter, he read over the report to him and on hearing he put his thumb impression on it. He proved the written report as Ext.Ka-1. Defence has not put any question in this regard from P.W.1 Mohammad Ali. Thus, statement of P.W.1 Mohammad Ali regarding scribing the written report by Abdul Aziz is uncontroverted and there is no reason not to believe on it. On the other hand D.W.1 Abdul Aziz has stated that Ext.Ka-1 on the record is in his hand writing. He scribed this document at 9:00 A.M. at P.S. Vilari on the dictation of *darogaji*. P.W.9 H.C. Veer Pal Singh has stated that on 27.06.1994, he was posted at police station Vilari as Head Moharrir and he had prepared chik F.I.R. Ext.Ka-16 and G.D. Ext.Ka-19 in his hand writing and signature. He has denied in cross-examination that the report which he states to scribe was not scribed at the time and it was scribed anti time. As per chik F.I.R. Ext.Ka-16, it was scribed on 27.06.1994 at 5:05 A.M. From cross-examination of P.W.9 Veer Pal Singh by defence, nothing has been elicited, so that any adverse inference about scribing of F.I.R. and G.D. at 5.05 A.M. on 27.06.1994 can be drawn. In cross-examination P.W.1 Mohammad Ali has stated that he reached to the police station in the night at 3:30 to 4:00 A.M., when he reached the police station at that time there was some darkness. He has also stated that he proceeded to the police station from the house at about 3:00 A.M. Mohammad Ali is a rustic witness.

19. In ***State of U.P. vs. Krishna Master and others (2010) 12 SCC (324),*** the Hon'ble Supreme Court has held that "the basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

20. The incident has occurred on 26/27.06.1994, his statement has been recorded on 27.07.1999 near about after lapse of five years. Considering him to be a rustic witness, his statement has been recorded on 27.7.1999 i.e. after a lapse of five years of the incident. His statement

regarding reaching police station at 3:30 to 4:00 A.M. for lodging first information report, in view of the observation of Hon'ble Supreme Court in ***State of U.P. vs. Krishna Master and others (2010) 12 SCC (324)*** (supra), corroborates the timing of F.I.R. and G.D. prepared at 5:05 A.M. on 27.06.1994. Thus, with regard to registration of F.I.R. at 5:05 A.M. on 27.06.1994, prosecution evidence of P.W.1 Mohammad Ali and P.W.9 Head Moharrir Veer Pal Singh is consistent, corroborative and reliable.

In view of the above, the statement of D.W.1 Abdul Aziz does not appear convincing that he had scribed the written report Ext.Ka.1 at 9:00 A.M. in police station Vilari on dictation of daroga. Accordingly, we find no substance in the contention of learned counsel for the appellant in this regard.

21. In Ex.ka-1 proved by informant PW-1 Mohammad Ali, it is mentioned that in the intervening night of 26/27-6-1994, informant's younger brothers Raees and Dhoomi, mother, father, ladies and children were sleeping in the courtyard. As per FIR (Ex.Ka-16), proved by PW-9 HC Veer Pal Singh, distance of the police station concerned from the place of incident is 10 kilometers. The incident has taken place at 02:30 a.m. in the intervening night of 26/27-6-1994 and in the incident Farzand Ali and Smt. Bano Begam have died at the spot while Raees Ahmad became injured. Information of the incident was given to the police station on 27.06.1994 at 05:05 a.m. which in the facts and circumstances appears prompt one, without consultation and deliberation. The lodging of first information report has been supported by the informant PW-1 Mohammad Ali, PW-6 Arif and PW-9 HC Veer Pal Singh through their testimony and nothing has been elicited from their cross-examination by the defence so that regarding giving it by informant PW-1 Mohammad Ali at the police station and its date and time any adverse inference can be drawn.

22. Considering the fact that FIR (Ex.Ka-16) has been lodged promptly and in the FIR it is mentioned that PW-4 Dhoomi was sleeping in the courtyard along with other family members, informant PW-1 Mohammad Ali and PW-6 Arif have supported the FIR version through their testimony, therefore, presence of PW-4 Dhoomi, at the time of incident, cannot be doubted on the basis of his statement that he does labour work in village Ravana and takes care of livelihood of his wife and children. Accordingly, we do not find substance in the contention of learned counsel for the appellants in this regard.

23. As per FIR and testimony of informant PW-1 Mohammad Ali, it appears that four shots were fired by the accused appellants. PW-4 Dhoomi in his cross-examination has stated that the miscreants were present in his house for about half an hour he did not count that how many shots were fired. He further stated that near about 20-25 shots were fired. The incident has taken place on 26/27-6-1994 and his statement was recorded near about after six years on 28.11.2000. The witness is also a rustic witness.

24. In the incident, witness-Dhoomi's brother Farzand and sister-in-law Smt. Bano Begam (bhabi) have died and his other brother Raees Ahmad became injured. Witness-Dhoomi, who is

a rustic witness, his statement was recorded after a lapse of six years of the incident in which prior to the statement "near about 20-25 fires were made" he has stated that he did not count how many shots were fired. Considering his whole statement as held by Hon'ble Supreme Court in the case of State of U.P. Vs. Krishna Master and others (supra), in our opinion, on the basis of statement of PW-1 Mohammad Ali that 4-5 shots were fired and according to statement of PW-4 Dhoomi that near about 20-25 shots were fired that too qualified by statement that he did not count how many shots were fired, prosecution case cannot be doubted. Accordingly, we do not find substance in the contention of learned counsel for the appellants that there is contradiction in the prosecution witness regarding number of shots fired, which creates doubt in the prosecution case.

25. PW-4 Dhoomi in his cross-examination has stated that miscreants were threatening not to come here otherwise he will be killed. He has further stated that it is not that the miscreants took away the ornaments by snatching from the ladies. In the examination-in-chief, the witness has specifically stated that he heard scream of his brother Farzand near about 02:00 a.m. to 02:30 a.m. and on the scream of his brother, informant-Mohammad Ali flashed the torch towards the cot of his brother Farzand and he identified very well in the light of torch Asgar, Guddu Bara and Khursheed near the cot of Farzand and in cross-examination too he has described the circumstances regarding the incident. His statement under Section 161 Cr.P.C. has not been confronted with regard to being made first time in the court. Apart from it, it is the tact of counsel putting question to a witness and reply given by the witness is recorded accordingly. Thus, mere use of the word miscreants in the cross-examination, in place of name of assailants by PW-4 Dhoomi, the prosecution case cannot be doubted. Accordingly, we also find no force in the contention of learned counsel for the appellants that it was an incident of loot and due to enmity they have been implicated falsely in the case.

26. According to the FIR, on interruption of informant, accused Guddu Bara fired upon Farzand by country-made pistol and when informant and others exhorted the accused appellants then accused Khursheed pointing country-made pistol fired at them with intention to kill and they also by jumping from the roof surrounded Raees on the cot and caused injuries to him by firing and beating by handle and barrel of the country-made pistol. On interruption of wife of the informant, accused Khursheed also fired at his wife Bano Begam.

27. We have gone through the whole evidence of PW-1 Mohammad Ali and find that on the point of sleeping of informant Mohammad Ali in the night of 26/27-06-1994 along with brother Arif on the roof of Komil Dhobi, brother Farzand on the roof of his house at the door, brothers Raees and Dhoomi, mother, father, ladies and children in the courtyard, waking up on hearing scream of brother Farzand at about 02:30 a.m. in the night, flashing torch light by him towards the cot of Farzand and identifying his neighbour Guddu Bara, Asgar Khan and their relative Khursheed near the cot of Farzand, on his interruption inflicting knife injury by Asgar Khan in his stomach and firing shot by Guddu Bara

hitting on his head, on exhortation by them firing shot at them by Khursheed and due to fear hiding himself and Arif in the ruined building of Bhure Khan and Dhoomi in the street crossing the wall, surrounding Raees on the cot jumping from the roof, and causing him injuries by firing, handle and barrel of the country-made pistol, on interruption of Smt. Bano kicking on her face by Khursheed even then on making noise firing shot at her by Khursheed and after going accused finding brother Farzand and Smt. Bano Begum dead and condition of Raees being critical is intact, credible, consistent and reliable.

28. We have also gone through the statements of PW-4 Dhoomi and PW-6 Arif and find that on material point like sleeping of Mohammad Ali and Arif on the roof of Komil Dhobi, Farzand on the roof of house at the door, Arif, Raees, mother, father, ladies and children in the courtyard, hearing scream of Farzand at 2:00 to 02:30 a.m., flashing light of torch by Mohammad Ali towards the cot of Farzand and identifying Asgar, Guddu Bara and Khursheed standing nearby the cot of Farzand, on interruption of Mohammad Ali inflicting knife injury in the stomach of Farzand by Asgar and firearm injury by Guddu Bara, causing injury to Raees by firing, handle and barrel of country-made pistol, firearm injury to Smt. Bano by Guddu, thus, evidences of PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif are consistent, corroborated to each other, convincing and reliable.

29. In ***Rajesh Govind Jagesha vs. State of Maharashtra (1999) 8 SCC 428,*** Hon'ble Supreme Court has held that motive in criminal case based upon ocular testimony of witnesses is not at all relevant, in ***Rajagopal vs. Muthupandi alias Thavakkalai and others (2017) 11 SCC 120,*** Hon'ble Supreme Court has held that motive is not crucial if there is direct evidence and in ***Banna Reddy and others vs. State of Karnataka (2018) 5 SCC 790,*** Hon'ble Supreme Court has held that motive becomes irrelevant in the presence of direct evidences.

30. The instant case is based on direct evidence as discussed above, we have found the evidences of PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif consistent, corroborated to each other, convincing and reliable, so, in view of the opinion of Hon'ble Supreme Court, in view of the above mentioned cases, motive is not relevant in the instant case. Apart from it, in the written report (Ex.ka-1), it is mentioned that the accused appellants were bearing enmity on account of progress of the informant's family and they were bent upon for altercation. Informant used to avoid the altercation but they never relented before the accused appellants. This fact has been corroborated by the testimony of the informant PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif, so, also we do not find substance in the contention of learned counsel for the accused appellants that there was no motive for them to commit the offence.

31. As per Ex.Ka-1 and witnesses PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif incident was witnessed in the flash light of torch. The torch was also taken into possession. Recovery memo of the torch (Ex.ka-2) was prepared and proved by Investigating Officer-Dharam Pal Singh (P.W-8) as well as PW-1 Mohammad Ali. All the witnesses of fact

i.e. PW-1 Mohammad Ali, PW-4 Dhoomi and PW-6 Arif have deposed that in the flash light of torch they have very well identified the accused, namely, Asgar Khan, Guddu Bara Khan and Khursheed.

32. PW-8 Dharam Singh has proved spot map (Ex.Ka-17), in which place-A has been shown which is on the roof at the door where the dead body of the deceased Farzand Ali was found lying, at place-B in the courtyard, dead body of Smt. Bano Begum was found and at place-C in the courtyard sleeping of deceased Raees has been shown. P.W-8 Dharam Singh has stated that he had instructed S.I. Muneshwar Singh to conduct inquest memo of deceased Farzand Ali and Smt. Bano Begum. He has also stated that blood stained and plain earth related to deceased Farzand and Smt. Bano Begum and injured Raees were taken into possession by S.I. Muneshwar Singh and three separate memos were prepared by him. According to the Ex.Ka-3 blood stained and plain earth relating to deceased Farzand Ali in presence of witnesses were taken into possession from the roof of the house at the door and as per Ex-Ka-4 & 5, blood stained and plain earth related to injured Raees and deceased Smt. Bano Begum were taken from the courtyard which corroborate the prosecution version that at the time of incident deceased Farzand Ali was sleeping on the roof of the house at the door and deceased Raees and Smt. Bano begum were in the courtyard of the house.

33. According to PW-7 Dr. V.N. Saxena, who has proved the injury report of Raees as Ex.Ka-15, one incised wound, three lacerated wounds, one firearm wound and one traumatic swelling were found on the person of Raees, at the time of examination, on 27.06.1994 at 07:30 a.m. According to him, the injuries were possible at 02:30 a.m. in the night of 26/27-06-1994 by firearm, handle and barrel of the country-made pistol. PW-5 Dr. Madan Mohan has conducted postmortem of deceased Farzand Ali and Smt. Bano Begum, prepared postmortem report Ex.Ka-6 & 7, respectively, and proved it, according to which, one firearm injury, two incised wounds and an abrasion injury were found on the person of Farzand. A firearm injury and a lacerated wound on the person of Smt. Bano Begum were found, in his opinion, firearm injury to Smt. Bano begum and firearm and knife injury to Farzand are possible. He has also opined that the injuries are possible at 02:30 a.m. in the night of 26/27-06-1994. Injury report of Raees and postmortem reports of Farzand and Smt. Bano Begum corroborate prosecution version regarding manner of assault and time of incident. Thus, ocular version is also corroborated by the medical report.

34. Considering the evidence led by the prosecution and above discussion, we do not find substance in the contention of learned counsel for the appellants that it was an incident of loot and due to enmity accused appellants have been implicated falsely in the case.

35. Thus, upon a whole consideration of the facts of the case, attending circumstances and the evidence on record, we do not find that the learned trial Judge committed any illegality or infirmity in convicting and sentencing the appellants for the offence punishable under Sections 452 and 302/34 IPC and awarding sentence of imprisonment for life to them.

36. This appeal lacks merit and is, accordingly, **dismissed.**

37. The appellants are on bail. Chief Judicial Magistrate, Moradabad, is directed to take them into custody and send them to jail for serving out their remaining sentence.

(2019)10ILR A 178

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Criminal Appeal No. 826 of 1991

Rajveer Singh & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ravindra Singh, Sri Dinesh Kumar Bhaskar, Sri Pawan Singh.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 147, 148 , Section 307 read with Section 149 - criminal appeal under Section 374 of Code of Criminal Procedure, 1973 - Delay in lodging F.I.R - Section 313 Cr.P.C - appellants convicted under Section 307 read with Section 149 and 148 I.P.C. - entitles the surviving appellant the benefit of doubt - entitled to be acquitted of all the charges levelled against him.

The inordinate delay in lodging the F.I.R. as well as delay in medical examination; material contradiction between the statement of injured eye witnesses made during investigation and statement made during trial; reasonable doubt regarding sharing of common object by appellant as a member of unlawful assembly or having knowledge of any such common object, have created serious doubts in the prosecution case as against the sole surviving appellant which entitles the surviving appellant the benefit of doubt - entitled to be acquitted of all the charges levelled against him. (Para 28,31 & 40)

(B) Indian Penal Code, 1860 - applicability of Section 149 IPC - Mere presence of any person at the place of occurrence like a mute spectator or as witness would not create any liability upon him with aid of section 149 IPC unless it is proved or could be logically inferred from the facts of the case that he was part of that unlawful assembly and had knowledge that such an act would be committed or is likely to be committed in prosecution of the common object of the unlawful assembly. (Para 32)

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Nagesar Vs St. of CG. (2014) CrLJ 2948

2. Thulia Kali Vs St. of T.N. AIR 1973 SC 501

3. Baladin & ors. Vs St. of U.P. AIR 1956 SC 181

4. Rajendra Shantaram Todankar Vs St. of Mah. & ors. 2003 SCC (Cri) 506

5. Dani Singh Vs St. of Bihar (2004) 13 SCC 203

6. Kuldip Yadav Vs St. of Bihar (2011) 5 SCC 324

7. Nagesar Vs St. of CG. (2014) Cr.LJ. 2948

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. The instant appeal has been filed under Section 374 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Code") against the judgment and order

dated 23.4.1991 passed by Special Judge, Moradabad in Session Trial No. 586 of 1988 (State vs. Rajveer Singh and others), P.S. Naugawa Sadat, District Moradabad, U.P., whereby, appellants Rajveer Singh and Jagat Veer Singh have been convicted and sentenced to imprisonment for life, whereas, appellants Suresh, Viresh and Teeka Ram have been convicted and sentenced to undergo 7 years rigorous imprisonment for offence under Section 307 read with Section 149 and all the appellants have further been convicted for offence under Section 148 IPC and sentenced to undergo rigorous imprisonment for a term of 2 years. All the sentences have been directed to run concurrently.

2. The brief facts of the prosecution case are that appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram; PW-1, Hari Raj Singh; PW-4, Dinesh Kumar and PW-5, Dushyant are residents of Village Jamuna Khas, P.S. Naugawa Sadat, District Moradabad. Appellants, namely, Rajveer Singh and Jagat Veer Singh, are real brothers. Appellants Suresh and Viresh are also real brothers. PW-2, Shoorveer Singh is brother-in-law of PW-1, Hari Raj Singh.

3. It is the prosecution case that while, on 29.1.1984, PW-1, Hari Raj Singh was irrigating his field by a diesel pump set of PW-4, Dinesh Kumar, at about 10:00 p.m., PW-2, Shoorveer Singh came there and told that appellants Rajveer, Jagat Veer, Suresh and Viresh armed with guns, whereas, appellant Teeka Ram armed with sword, were coming from the *Haveli* of appellant Suresh towards him (Hari Raj Singh). PW-1, Hari Raj Singh told him not to worry as appellants Viresh and Suresh were also with them. As a result, both of them sat under the bullock cart with lantern, emmitting light, hanging at its back. At about 11:00 p.m., all the appellants reached the place of occurrence, where PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh were sitting. Seeing them, PW-1, Hari Raj Singh came out from under the bullock cart. Whereafter, appellant Jagat Veer fired at PW-2, Shoorveer Singh which hit his hands; PW-1, Hari Raj Singh caught appellant Jagat Veer Singh by his arms and bit his shoulder. Upon which, appellant Rajveer Singh exhorted appellant Teeka Ram to attack him with sword. As appellant Teeka Ram was about to attack Hari Raj Singh (PW-1), he released appellant Jagat Veer Singh and as soon as PW-1, Hari Raj released him, appellant Rajveer fired at PW-1, Hari Raj Singh which hit his left hand, whereby, he fell down. After the firing, appellants came near PW-2, Shoorveer, to verify whether PW-2, Shoorveer was alive or not. Upon information from Suresh that he was about to die, upon sensing that on alarm raised by PW-1, Hari Raj Singh and PW-2, Shoorveer Singh, persons present at a crusher nearby were coming, the appellants ran away. In the night, PW-1, Hari Raj Singh sent PW-5, Dushyant along with one Subhash and Ravindra to P.S. Naugawa Sadat to lodge First Information Report (hereinafter referred to as "F.I.R."), but the same was not lodged as Station Officer of P.S. Naugawa Shadat advised them to arrange for treatment of injured first instead of bothering to lodge an F.I.R. Next day, in the morning, PW-1, Hari Raj and PW-2, Shoorveer Singh were taken to Combined Health Centre (CHC), Amroha by tractor of PW-5, Dushyant.

4. PW-3, Dr. A.K. Mehrotra, Medical Officer, Combined Health Centre, Amroha, examined the injuries of PW-1, Hari Raj Singh and PW-2,

Shoorveer Singh on 30.1.1984. The injuries noticed were as follows:

(a) Injuries on PW-1, Hari Raj Singh.

(i) fire arm wound of entry, size 3.2 cm x 3.2 cm through and through on inner side of left upper arm, 4 cm above from the left elbow joint, margins everted, bleeding present after cleaning of wound.

(ii) fire arm exit wound, size 15.0 cm x 13.0 cm through and through on the injury no. 1; interior portion of left upper arm, left elbow joint and upper portion of left forearm, margins everted, bleeding present after cleaning the wound.

(iii) lacerated wound size 3 cm x 3 cm x muscle deep on the inner portion of left upper arm 2 cm below the injury no. 1, bleeding present, after cleaning of wound.

(b) Injuries on PW-2, Shoorveer Singh.

(i) fire arm wound of entry, size 3 cm x 3 cm through and through on the back of right elbow joint, inner side and margin everted, bleeding was present after cleaning. Blackening is present.

(ii) fire arm wound exit size 4.5 cm x 4.0 cm through and through to the injury no. 1 right in the arm, inner side. Margin everted 8 cm below the right elbow joint. Bleeding after cleaning the wound was present. Injuries was surrounded by swelling size 20.0 cm x 15.0 cm on the right upper arm and right forearm.

5. After medical examination, on the dictation of PW-1,Hari Raj Singh,written report Ex ka1 was prepared by Satyaveer Singh. After putting his thumb impression on it, PW-1, Hari Raj Singh , sent Satyaveer Singh to P.S. Naugawa Sadat to lodge the same. Whereafter, FIR (Ex.ka.4) was lodged at 12:30 on 30.1.1984.

6. Investigation was taken over by Hukum Singh Yadav, Inspector, P.S. Naugawa, *(hereinafter referred to as "I.O.')* who inspected the place of occurrence and took sample of blood stained and plain earth, blood stained bed sheet, empty cartridges from the place of occurrence and prepared recovery memo (Ex.Ka.14 and Ex.Ka.16); he also inspected the lantern, took it into his custody and prepared its recovery memo (Ex.Ka.17). During investigation, two persons, namely, Ram Singh and Om Pal Singh, were arrested and, it appears, from their possession, country made pistols were recovered which were sent for forensic science laboratory, Lucknow, along with empty cartridges found at the place of occurrence. On the application of Hari Raj Singh (PW-1), as he was not satisfied with investigation, investigation was transferred to CBCID, Lucknow and entrusted to PW-8, Sri Krishna Srivastava, Inspector in CBCID, Lucknow who inspected the place of occurrence, prepared site plan (Ex.Ka.9) and recorded the statement of witnesses. Meanwhile, PW-8, Sri Krishna Srivastava was transferred and investigation was handed over to another investigating officer. Thereafter, charge-sheet Ex.Ka.10 and Ex.Ka.11 u/s 147,148, 149 and 307 IPC, was filed against the appellants upon which cognizance was taken by the concerned Magistrate and since the offences were exclusively triable by a Court of Session, after providing copies

of necessary documents, as required u/s 207 of the Code, to the appellants, committed the case for trial to Court of Session, Moradabad.

7. Charges u/s 307 and 148 IPC were framed against appellants Jagatveer Singh and Rajveer Singh whereas u/s 148 and 307 read with 149 IPC were framed against appellants Suresh, Viresh and Teeka Ram, which were read over to the appellants. The appellants denied the charges and claimed for trial.

8. The prosecution examined eight witnesses, out of whom PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh Kumar are witnesses of fact and rest are formal witnesses. PW-3, Dr. A.K. Mehrotra had examined the injuries of PW-1 Hari Raj Singh and PW-2, Shoorveer Singh; PW-5, Dushyant is a formal witness, who was sent after the occurrence to inform the police and on whose tractor the injured were sent next day to the hospital.

9. PW-6, Const. Ibrahim Khan is a witness who has registered the chick F.I.R. and made entry of the occurrence in General Diary. PW-7, Hareram Singh is recordkeeper Safadarjang Hospital, New Delhi and PW-8, Sri Krishna Srivastava is investigating officer of the case.

10. After closure of prosecution evidence, appellants were examined under Section 313 of the Code. They denied the prosecution version and stated that they are innocent and have falsely been implicated. They had further stated that during investigation, Ram Singh and Om Pal Singh were arrested by the Investigating Officer who had confessed their guilt.

11. Appellants were afforded opportunity to lead evidence in their defence. DW-1 Basdev Prasad Sharma, Head Const. Sadar Malkhana, Moradabad was produced by the appellants in their defence.

12. After hearing counsel for the parties, Trial Court found accused-appellants guilty of the charge under Sections 307 read with Section 149 and Section 148 I.P.C. and, accordingly, convicted and sentenced them as above. Aggrieved by the impugned judgment and order, appellants have preferred this appeal.

13. At the very outset, it is pertinent to note that during the pendency of this appeal, appellants nos. 1, 2, 3 and 5 namely Rajveer Singh, Jagat Veer Singh, Suresh and Teeka Ram had died and appeal in regard to them had been abated vide order dated 1.7.2019. Therfore, the appeal of only Viresh survives.

14. We have heard Sri Pawan Singh Pundir, learned counsel for the appellant (Viresh) and learned A.G.A. for the State.

15. Learned counsel for the appellant Viresh has submitted that he is innocent and has been falsely implicated. He was not a member of any unlawful assembly; from the evidence on record, it has not been proved as to whether he had a common object or had knowledge regarding any such object; no evidence has been produced by the prosecution in this regard. Learned counsel has further submitted that F.I.R. was lodged after a delay of more than 13 hours of the occurrence without any satisfactory and plausible explanation. Medical evidence is also not corroborated with ocular

evidence. All the prosecution witnesses are interested witness. Conduct of injured witnesses is neither natural nor trustworthy. Appellant has no motive either to commit any offence or to be a member of any unlawful assembly. The impugned judgment and order passed by the Trial Court is against the settled principle of law and liable to be set aside. Appellant is entitled for acquittal. He has placed reliance on **Nagesar Vs. State of Chhatisgarh (2014) CrLJ 2948.**

16. Per-contra, learned A.G.A. , vehemently opposing the submission advanced by the learned counsel for the appellant, has submitted that alleged offence has been caused in the prosecution of a common object of member of unlawful assembly. Presence of appellant Viresh at the place of occurrence with deadly weapon has been proved by the prosecution beyond reasonable doubt. Learned A.G.A. further submitted that though the remaining appellants, who played active role in causing grievous injuries as also attempt to take the life of injured witnesses, have died, but appellant (Viresh) cannot be given any benefit on that score as he was part of the unlawful assembly. He has further submitted that the statement of injured witnesses supported with medical evidence cannot be disbelieved only on the ground of delay in F.I.R. because delay has been explained and is not fatal to the prosecution case.

17. We have considered rival submission of the learned counsel for the parties and have gone through the entire record.

18. PW-1, Hari Raj Singh has stated that accused-appellants, Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram are residents of his village and he knew them very well; appellants Raj Veer Singh and Jagat Veer Singh are real brothers; Suresh and Viresh are also real brothers who were his real nephews. He stated that at the time of occurrence, he had hired an engine of Dinesh (PW-4) to irrigate his field and when he was irrigating his field, Dinesh (PW-4) and his servant Khem Singh was present at his field. He stated that on the fateful day, irrigation started at 2:00 p.m. At about 8:00 p.m., his brother-in-law Shoorveer Singh (PW-2) and Balbeer Singh, (father of PW-4) brought their dinner at the tube well. After dinner, Balbeer Singh and Shoorveer Singh (PW-2) returned back. He stated that at about 10:00 p.m., Shoorveer Singh (PW-2) came and told him that appellants Rajveer Singh, Jagatveer Singh, Suresh, Viresh armed with gun and Teekaram armed with sword had emerged from the house of appellant Suresh and were coming towards him. On hearing that he told Shoorveer Singh (PW-2) that as his nephews were there with appellant Rajveer Singh, he does not apprehend any danger and therefore he sat under the bullock cart with Shoorveer Singh (PW-2) and Dinesh (PW-4). At that point in time a lantern was hanging from the rear side of bullock cart and was emmitting light. At about 11:00 p.m., all the five appellants appeared there. Seeing them, he (PW-1) came out from under the bullock cart. Whereafter, appellant Jagat Veer Singh fired from his gun at PW-2, Shoorveer Singh thereby causing injury to him (PW-2). PW-1 stated that he caught hold appellant Jagatveer Singh and bit his shoulder. Consequently, appellant Jagat Veer Singh cried. Seeing that appellant Rajveer Singh asked appellant Teeka Ram to attack PW-1 with sword. As appellant

Teeka Ram raised his sword towards him, he (PW-1) released appellant Jagat Veer Singh and let him move away. Thereafter, appellant Rajveer Singh fired at him (PW-1) from his gun which hit PW-1 on his left arm. As a result, he fell down. Thereafter, appellants went to PW-2, Shoorveer Singh. Appellant Jagat Veer Singh asked appellant Suresh to verify whether Shoorveer Singh was alive. Whereupon , he replied that although PW-2 was still breathing but was almost dead. Whereafter, appellants ran away from the place of occurrence towards west.

He further stated that, hearing the sound of fire, persons present at the crusher in village Dakhawada raised alarm but nobody came there. As a result, he called Dinesh (PW-4) to take him out of the water. Some how, he got up and sent Dinesh to the crusher with instruction to call persons present there to carry him from there. He narrated in detail as to how he and PW-2, Shoorveer Singh reached their house and from there he sent Ravindra @ Munne, Subhash and PW-5, Dushyant to lodge F.I.R. but at the police station, Station Officer Hari Raj Singh Tyagi told them that they should take injured for treatment and refused to lodge F.I.R. He further stated that they (PW-5, Dushyant and others) returned and told him about refusal to register the F.I.R. Thereafter, he and Shoorveer (PW-2) went to Amroha Hospital by tractor of Dushyant (PW-5) where they were medically examined. He dictated the F.I.R. (Ex.Ka.1) to Satyaveer Singh, who read it over to him and after putting his thumb impression on it; he sent Satyaveer, with medical report, to police station to lodge the F.I.R.. According to him, they were referred to District Hospital, Moradabad for treatment and thereafter to Safadarjung Hospital, New Delhi. During treatment, his left hand and right hand of PW-2, Shoorveer Singh were amputated. It was further stated by PW-1 that there is a pond in the village for Sigharha of which there was dispute between appellant Rajveer Singh and one Vikram Singh. In respect of which, PW-1 stood as surety for Vikram Singh and that once appellant Rajveer Singh had prevented him from irrigating from the canal. Stating that Hari Raj Singh Tyagi (I.O.) was favouring the appellants as he was married in the family where sister of appellant Rajveer Singh was married, he had given an application for transfer of investigation, whereupon, investigation was transferred to CID, he has stated that at the time of incident, lantern (Material Ex.Ka.1) emitting light at the place of occurrence was taken by the I.O. and returned to him.

19. In cross-examination, he stated that he had moved from his house for Amroha at 8:00 a.m. and had reached there at 11:00 a.m., whereafter he was medically examined there. He specifically stated in cross-examination that after medical examination, he got the report written and sent to Police Station . He also stated that in the night of occurrence, he had sent Ravindra @ Munne, Subhash and Dushyant (PW-5) to police station with direction to inform the police that he and Shoorveer had received fire arm injuries. He stated that he could not assign any reason as to why he did not send any written report to police station then.

20. PW-2, Shoorveer Singh, stating that he knows all the appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram; and that PW-1, Hari Raj Singh is his brother-in-law and appellants

Suresh and Viresh are cousin of PW-1, Hari Raj Singh, narrated the same story, as stated by PW-1, Hari Raj Singh. In cross-examination, he has stated that after the occurrence, Ravindra, Dushyant (PW-5) and Subhash were sent by motorcycle to P.S. Naugawa Sadat. He stated that report which was prepared at Amroha was prepared in his presence and he was aware that no report had been lodged at P.S. Naugawa Sadat in the night. He has specifically stated that he had said to his brother-in-law (PW-1), Hari Raj Singh to mention the fact in report that three persons were sent to Naugawa Sadat for lodging the report, but it was not lodged.

21. PW-3, Dr. A.K. Mehrotra is a medical officer who has inspected the injuries of PW-1, Hari Raj Singh and PW-2, Shoorveer Singh and prepared injury report (Ex.Ka.2 and Ex.Ka.3) *(details of injuries of these witnesses have already been mentioned in preceding paras of this judgment)*. He has stated that the injuries of both the witnesses may be caused on 29.1.1984 at about 11:00 p.m. According to him, injury no. 1 and 2 of P.W.1, Hari Raj Singh and all the injuries of PW-2, Shoorveer Singh were caused by fire arm, whereas, injury no. 3 of PW-1 could have been caused by a blunt object.

22. PW-4, Dinesh Kumar has stated that he was present with PW-1, Hari Raj Singh and PW-2, Shoorveer Singh at the time of occurrence. Stating that at the time of occurrence he was sitting under the bullock cart and saw the whole occurrence from that place he narrated the whole incident as narrated by PW-1, Hari Raj Singh. He further stated that during investigation, police of P.S. Naugawa Sadat had forcibly taken his signature on plain paper and thereafter appellants kidnapped him and took his photographs forcibly and got his affidavit in their favour. According to him, a report had been lodged by his brother in this regard. In cross-examination he stated that he could not tell as to after how many days his affidavit was prepared and photographs taken. During cross-examination, he admitted his photo and signature on affidavit (Ex.Kha.1) and (Ex.Kha.2) but stated that the paper pertaining to affidavit was a plain paper on which he had put his signatures.

23. PW-5, Dushyant has stated that, in 1982, Mohd. Ali, Baburam Jatav and 2-3 other persons of his village had contested election of Village Pradhan. He supported Baburam, whereas, appellants supported Mohd. Ali. Mohd. Ali won the election. In 1983, Village Pradhan Mohd. Ali had auctioned a village pond in favour of the appellants against which he had filed a suit before court. According to him, due to above mentioned incident, appellants were inimical towards him and a proceeding under Section 107/117 of the Code was initiated against him, wherein, Hari Raj Singh had submitted a surety bond for him; due to which, appellants Rajveer and others were also inimical to PW-1, Hari Raj Singh and had obstructed him from irrigating his field from that canal. On how he got information of occurrance, he stated that the said occurrence was narrated to him by PW-1, Hari Raj Singh and on his request, he, Ravindra and Subhash had gone to P.S. Naugawa Sadat at 3:30 a.m. where Station Officer Hari Raj Singh Tyagi and Head Constable (Diwan) had advised him to carry the injured to Hospital for treatment and report could be lodged at any time. According to him, he returned thereafter to his village and told PW-1, Hari Raj

Singh that report could not be lodged. He has stated that Satyaveer had written the report at Hospital on the dictation of PW-1, Hari Raj Singh who put his thumb impression on it. In cross-examination, he admitted that he had not requested police to lodge F.I.R. According to him, at Naugawa Sadat, there was a post office and also facility of telephone but he had made no attempt to inform any police officer telephonically or through radiogram.

24. PW-6, Const. 587 Ibrahim Khan has stated that on 30.1.1984, he was posted at P.S. Naugawa Sadat as Head Moharrir and had lodged the Chick F.I.R. (Ex.Ka.4) on the basis of written report and entered the same in General Diary (Ex.Ka.5).

25. PW-7, Hareram Singh, Medical Record Technician at Safdarganj Hospital, New Delhi, has proved the bed head ticket and other medical treatment documents (Ex.Ka.6 and Ex.Ka.7) of PW-2, Shoorveer Singh and PW-1, Hari Ram Singh.

26. PW-8, Sri Krishna Srivastava, Inspector in C.I.D., Lucknow has stated that on 4.6.1985, he was posted as Inspector CID, Lucknow and has investigated this case; that he recorded the statement of witnesses; and inspected the place of occurrence and prepared (Ex.Ka.9) site plan. According to him, investigation was transferred to another Inspector of CBCID and thereafter to D.S.P, B.C. Saxena who had filed charge-sheet (Ex.Ka.10 and Ex.Ka.11) against the appellants.

27. DW-1, Basdev Prasad Sharma, Head Const. 55 (Sadar Malkhana Muarir), Moradabad has been produced by appellants to prove that during investigation, a country-made pistol of 12 bore and 2 cartridges in Case Crime No. 49/1984 under Section 25 Arms Act, (State vs. Ram Singh), recovered by Investigating Officer, was filed in Sadar Malkhana. According to him, said country-made pistol was sent for examination to Forensic Science Laboratory, Lucknow along with empty cartridges; and blood stained bed sheet pertaining to Case Crime No. 12/1984 under Section 147/148/307/394 I.P.C. (State vs. Jagveer Singh and others) was filed.

28. F.I.R. when lodged promptly or with justified delay, may lend credence to the prosecution case. Neither the Indian Evidence Act, 1872 nor the Code prescribes any time limit for lodging the F.I.R. But if it has been lodged after considerable delay without any justifiable cause, it may damage the prosecution case. In **Thulia Kali vs. State of Tamil Nadu AIR 1973 SC 501,** where delay in lodging F.I.R., was of 20 hours without any proper justification, Court, setting aside conviction of appellant, held:-

"12. .....First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as

well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained....."

29. Coming to the facts of this case, F.I.R. (Ex.Ka.1) has been lodged by one Satyaveer Singh, sent by PW-1, Hari Raj Singh. Satyaveer Singh has not been examined by prosecution. Prosecution has also not placed any justification as to why injured witnesses PW-1, Hari Raj Singh or PW-2, Shoorveer Singh has not gone to police station even on next day when they had visited the hospital situated at Amroha. According to PW-1, Hari Raj Singh, the incident occurred on 29.1.1984 at 11:00 p.m. and, after occurrence, he had sent Subhash, Munnesh and Dushyant (PW-5) to lodge F.I.R. but the police did not lodge the F.I.R. and suggested to Dushyant for treatment of the injured. Thereafter, Dushyant returned and told him (PW-1) about non registration of the F.I.R. According to him, he along with PW-2, Shoorveer Singh went on 30.1.1984 by tractor of Dushyant (PW-5) to Amroha Hospital where they were medically examined and, thereafter, F.I.R. was prepared on his dictation at hospital and was sent through one Satyaveer Singh to police station. In examination-in-chief, neither PW-1, Hari Raj Singh nor PW-2, Shoorveer Singh have stated as to when they proceeded from their village for Hospital and when they reached the Hospital as also when their medical was conducted and when they sent Satyaveer Singh to police station to lodge the F.I.R. The Medico Legal Certificates (MLC) Ex.Ka.2 and Ex.Ka.3 of Hari Raj Singh (PW-1) and Shoorveer Singh (PW-2) reveals that they were medically examined on 30.1.1984 at 11:15 a.m. and 11:30 a.m. From perusal of Chick F.I.R. (Ex.Ka.4) and G.D. Report (Ex.Ka.5), it transpires that F.I.R. was lodged on 30.1.1984 at 12:30 O' clock. Thus, F.I.R. was lodged with a delay of 13:30 hours, whereas, the distance between the place of occurrence and police station has been shown as only nine kilometres in Ex.Ka-4, Chick FIR. According to prosecution case, grievous fire arm injuries were caused on the left arm of PW-1, Hari Raj Singh and right arm of PW-2, Shoorveer Singh. Neither PW-1, Hari Raj Singh nor PW-2, Shoorveer Singh have stated in their statement as to why they did not go to the hospital for medical treatment of their injuries till about noon next day. In same way, PW-1, Hari Raj Singh has also not stated as to why he had not approached the police station next day morning of 30.1.1984. In cross-examination, he has stated that he had proceeded from his house by tractor to Amroha at 8:00 a.m. on 30.1.1984 and reached at Amroha at 11:00 a.m. He further stated that after medical examination, he got the written report sent to police station. It means that he had not visited the P.S. Naugawa Sadat for lodging the F.I.R. It is normal human behaviour to either approach the police station to lodge the F.I.R. or to go to the hospital for medical treatment, particularly, when injury is grievous. In addition to above, PW-1, Hari Raj Singh has also stated in cross examination that

he had not sent any written information in the night with PW-5, Dusyant, Subhas and Munne rather had told them only to inform the police that fire arm injuries had been caused to them (PW-1, Hari Raj Singh and PW-2, Shoorbir Singh). Thus, non sending of written information and sending person with oral direction to inform the police regarding receipt of fire arm injuries without disclosing further details of the incident and lodging FIR next day after a delay of more than 13 hours, and approaching for medical treatment after 13 hours, creates a serious doubt about the prosecution case.

30. F.I.R. (Ex.Ka.1) states that at the time of occurrence, PW-1, Hari Raj Singh was irrigating his field where PW-2, Shoorveer Singh was also present along with Dinesh (PW-4) and all of them were sitting nearby a diesel engine pump set. At about 11:00 p.m., appellants Jagat Veer Singh and Rajveer Singh S/o Ghanshyam Singh, Suresh and Viresh S/o Om Prakash armed with their gun and appellant Teeka Ram S/o Babu Ram armed with sword appeared there, Jagat Veer Singh fired at PW-2, Shoorveer. Hari Raj Singh caught Jagat Veer Singh by his arms. Thereafter, appellant Rajveer Singh fired at Hari Raj Singh (PW-1). In the F.I.R., no active role of appellants Teeka Ram, Suresh and Viresh is mentioned. It has also not been mentioned that after the occurrence, on the direction of appellant, Jagat Veer Singh, appellant Suresh verified whether Shoorveer Singh (PW-2) is alive but in their statements they have added that Suresh verified whether Shoorveer Singh was alive. It appears that in order to justify the injury caused to Hari Raj Singh (PW-1) on his left arm, story of raising sword by appellant Teeka Ram, releasing of appellant Jagat Veer Singh by PW-1, Hari Raj Singh, moving of Jagatveer Singh away from Hari Raj Singh and then firing of shot by appellant Rajveer Singh on the hand of Hari Raj Singh (PW-1) was developed. Because as per F.I.R., appellant Rajveer Singh fired at Hari Raj Singh (PW-1) when he had caught hold appellant Jagat Veer Singh, which appeared improbable as appellant Jagat Veer Singh could also have sustained gun shot injury. Hence, the improvement in prosecution story appears to have been made to make the story appear more probable but this deliberate effort on the part of the prosecution casts a serious doubt on the prosecution story.

31. All the appellants have been convicted under Section 307 read with Section 149 and 148 I.P.C. Section 148 I.P.C. deals with the offence of rioting by any person armed with deadly weapons, whereas, Section 149 I.P.C. declares every member of unlawful assembly guilty of an offence committed by any member of an unlawful assembly in prosecution of common object. Section 141 and Section 146 of I.P.C. defines the unlawful assembly and offence of rioting respectively. Sections 141, 146, 148 and 149 are as under:-

Section 141. Unlawful assembly.--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--

(First) -- To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

(Second) -- To resist the execution of any law, or of any legal process; or

(Third) -- To commit any mischief or criminal trespass, or other offence; or

(Fourth) -- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(Fifth) -- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

Section 146. Rioting.--Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Section 148. Rioting, armed with deadly weapons. - Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

32. To attract the applicability of Section 149 IPC there must be an unlawful assembly, accused must be a member of that assembly having knowledge of the common object of that assembly and that the offence has been committed by any member of that unlawful assembly in prosecution of the common object. Mere presence of any person at the place of occurrence like a mute spectator or as witness would not create any liability upon him with aid of section 149 IPC unless it is proved or could be logically inferred from the facts of the case that he was part of that unlawful assembly and had knowledge that such an act would be committed or is likely to be committed in prosecution of the common object of the unlawful assembly.

33. At this very juncture, the law propounded by Hon'ble Supreme Court in land mark judgment of **Baladin and others vs. State of Uttar Pradesh AIR 1956 SC 181** may be noticed wherein Hon'ble Apex Court, while dismissing the appeal of the appellant who had played active role in the occurrence and allowing the appeal of appellant who had not played any active role, held as under:-

"28. .....*It remains to consider the cases of Thakur Das, Ishwari Prasad, Mulloo and Jagdish. These four*

appellants had not been assigned any particular part in the occurrence nor any overt act has been attributed to them. Of these, Thakur Das is a resident of another village in another police station, though he has cultivation in village Goran. They might possibly have been spectators who got mixed up in the crowd. They will, therefore, be given the benefit of the doubt and acquitted....."

34. In **Rajendra Shantaram Todankar v. State of Maharashtra and Others 2003 SCC (Cri) 506** Hon'ble Supreme Court while discussing the true scope and meaning of Section 149 observed that mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. The relevant protion of the judgment is extracted below:-

*"**14.** Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly.* ***A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly.*** *It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime.* ***Unless the applicability of Section 149 either clause is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for***

the said criminal act...." (Emphasis supplied)

35. Hon'ble Supreme Court in **Dani Singh vs. State of Bihar (2004) 13 SCC 203** while discussing the meaning of word common object in paras 11, 12 and 13 has held as under:-

*"**11.**.....The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.*

***12.** 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti.*

***13.** Section 149, IPC consists of two parts. The first part of the section means*

that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident....."

36. Hon'ble Supreme Court in **Kuldip Yadav vs. State of Bihar (2011) 5 SCC 324,** while discussing the principle of constructive liability as laid down by Section 149 I.P.C. has held as under:-

".....It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC....."

37. In **Nagesar vs. State of Chhatisgarh** (2014) Cr.LJ. 2948 Hon'ble Supreme Court while discussing the scope of Section 149 IPC has held as under:-

" It is settled law that mere presence or association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offences committed by the others unless there was sufficient evidence on record to show that one such also intended to or knew the likelihood of commission of such an offending act. (K.M Ravi and others Vs. State of Karnataka (2009) 16 SCC 337). As already seen in this case there is no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the murder of the deceased Korma Rao. At any rate in the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they share the common object of the unlawful assembly it is not possible to support their conviction and benefit of doubt has to be given to them."

38. Coming to the facts of this case, no active role of surviving appellant (Viresh) in the occurrence has been alleged by any of the witnesses produced by the prosecution. From perusal of statement of PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh Kumar, only allegation made against him (Viresh) is that he came with other accused persons at the place of occurrence. Appellant Viresh is nephew of injured Hari Raj Singh. On information given by PW-2, Shoorveer Singh, to PW-1, Hari Raj Singh, that appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram were coming towards him (PW-1), PW-1 responded by saying that there is nothing to worry as his own nephews (appellants- Suresh and Viresh) are with them. This shows that appellant Viresh was neither inimical to PW-1, Hari Raj Singh nor had any object / motive or intention to cause any injury to his own uncle (PW-1, Hari Raj Singh). It appears that due to that reason, he did not act as a culprit at the place of occurrence, inasmuch as he neither came near the injured person nor exhibited any conduct on the basis of which it could be inferred that he had shared the common object of the other appellants. In such a situation, it could be possible that he might have come at the place of occurrence only as spectator without being aware of common object of any of the accused-appellants.

39. From perusal of injury reports Ex.Ka.2 and Ex.Ka.3 of both the injured persons PW-1, Hari Raj Singh and PW-2, Shoorveer Singh it transpires that injury has not been caused on vital part of these witnesses. Though caused by fire arms the injuries are on inner portion of arms of both injured persons. PW-3, Dr. A.K. Mehrotra, in cross-examination has stated that injury no. 1 of PW-1, Hari Raj Singh was present on inner side of his upper arm and was not possible if, at the time of fire, he had caught hold any other person in his arms. PW-1, Hari Raj Singh, has, in examination-in-chief, stated that when appellant Jagatveer Singh fired at PW-2, Shoorveer Singh, from his gun, he had caught hold appellant Jagatveer Singh and had bit him on his shoulder; whereupon he raised alarm. As a result, appellant Jagatveer Singh asked appellant Teeka Ram to attack him (PW-1) with sword and as appellant Teeka Ram raised his sword towards him (PW-1), he released appellant Jagatveer Singh and when he (Jagatveer Singh) moved away, appellant Rajveer Singh fired at PW-1. PW-2, Shoorveer Singh has also narrated in same way. Both these witnesses in cross-examination have stated that they had told the said fact in their statement to the Investigating Officer and if the said fact has not been noted in their statement by any Investigating Officer, they could assign no reason for that. PW-8, Sri Krishna Srivastava (Investigating Officer) has stated that neither PW-1, Hariraj Singh nor PW-2, Shoorveer or PW-4, Dinesh in their statement have disclosed to any of the Investigating Officer about the above mentioned fact. Thus, there is a serious contradiction between the evidence of Investigating Officer and both the injured witnesses (PW-1, Hari Raj Singh and PW-2, Shoorveer Singh) on the point that when injury to PW-1, Hari Raj Singh was caused, he had caught hold Jagatveer Singh.

40. Thus in view of the above discussion, we are of the considered opinion that the inordinate delay in lodging the F.I.R. as well as delay in medical examination; material

contradiction between the statement of injured eye witnesses made during investigation and statement made during trial; reasonable doubt regarding sharing of common object by appellant Viresh as a member of unlawful assembly or having knowledge of any such common object, have created serious doubts in the prosecution case as against the sole surviving appellant which entitles the surviving appellant (Viresh) the benefit of doubt. He is therefore entitled to be acquitted of all the charges levelled against him. The judgment and order passed by the Special Judge, Moradabad in Session Trial No. 586 of 1988 is hereby set aside. Consequently, the appeal is **allowed.** The appellant, if on bail need not surrender.

41. Let a copy of this judgment be sent to Trial court for information and immediate compliance. Compliance report whereof be submitted within one month.

42. Lower court's record be also sent back along with a copy of this judgment.

(2019)10ILR A 193

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2018

BEFORE

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

Criminal Appeal No. 616 of 1982

Jauhari & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S. Hajela, Sri Ajay Kumar Srivastava, Sri S.A.N. Shah.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Sections 399 - making preparations to commit dacoity - Section 402 -assembling to commit dacoity- Section 307 IPC - Attempt to murder- Sections 25 and 27 of the Arms Act, 1959 - criminal appeal - The recovery of fire arms from the appellant and his companions is not established, or the credit of the independent public witnesses - in the circumstances of an area, that is afflicted by dacoity, the probability of a false implication by the police in a case of preparation to commit dacoity is far stronger, where there is no convincing and tangible evidence *aliunde* to establish facts that are necessary to prove a case of preparation - facts, in the clear opinion of this Court, have far from been proved. (Para 46)

B. Indian Evidence Act, 1872 - Section 114 – court may presume existence of certain facts - place and manner of arrest -mere consistency of witnesses would not turn falsehood to truth. The evidence even of eye witnesses, depending on the nature of the offence, ought to be corroborated by objective circumstances -The entries in the General Diary regarding manner and place of arrest, also cannot be held to prove what is recorded there on a presumption under Section 114 of the Evidence Act, which the Trial Court has raised against the accused, and then held it to be unrebutted. (Para 27 & 30)

C. Code of criminal procedure 1973 - Sections 51 and 100 - Search and Seizure -Failure to obtain signatures of the accused on the arrest-cum-recovery memo, and furnishing its copy to the appellant- no mandatory requirement of providing a copy of the seizure memo to the accused. (Para 35)

Held:- The prosecution had nothing in hand in the sense of tangible evidence, that may lend some credit to the ocular testimony to prove their case, except that they might have found the appellants for the worst, assembled at the place of occurrence - The prosecution account has been held to be unbelievable about the nature and place of occurrence - The recovery of fire arms from the appellant and his companions is not established, or the credit of the independent public witnesses - The entire story appears to be one where the appellant has been framed - The Trial Court appears to have believed the story because it was a dacoity affected area - In the circumstances of an area, that is afflicted by dacoity, the probability of a false implication by the police in a case of preparation to commit dacoity is far stronger, where there is no convincing and tangible evidence *aliunde* to establish facts that are necessary to prove a case of preparation. Those facts, in the clear opinion of this Court, have far from been proved - The prosecution has not been able to establish the appellant's guilt beyond reasonable doubt. (Para 46 & 47)

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Shokat Abdul Aziz Vs St. (2018) 5 ALJ 261

2. Badam Singh Vs St. of U.P. (2003) 12 SCC 792

3. Mahadeo Vs St. 1990 CriLJ 858

4. St. of Punjab Vs Jagga Singh (1998) 7 SCC 214

5. Jaspal Singh Vs St. of Punj. 1998 (7) SCC 289

6. Dev Dutta & anr. Vs St. 2017 (1) ACR 604

7. Chaturi Yadav & ors. Vs St. of Bihar AIR 1976 SC 1412

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

1. This appeal is directed against a judgment and order of Sri Vikramaditya Kulshreshth, the then Special Judge (Dacoity Affected Areas), Farrukhabad, dated 27.02.1982, passed in Special Sessions Trial no.3 of 1982, State vs. Jauhari and three others (arising out of Case Crime no.430/81 and Case Crime no.433/81), Police Station Kayamganj, District Farrukhabad, convicting the appellants of offences punishable under Sections 399, 402 IPC, Sections 25 and 27 of the Arms Act, and, sentencing them on each count, in the following manner:

Sl. No.	Name of accused	Under Section	Imprison ment
		399 IPC	3 years R.I.
		402 IPC	3 years R.I.
2	Jauhari, Phool Singh & Ram Prakash	399 IPC	4 years R.I.
		402 IPC	4 years R.I.
		27 Arms Act	4 years R.I.
		25 Arms Act	2 years R.I.
All the sentences were ordered to run concurrently.			

2. Be it noted here that this appeal that was filed jointly by Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai, survives to be heard at the instance of appellant no.2, Phool Singh alone. Appellants Jauhari, Ram Prakash and Bhagwan Sahai, died pending appeal and at their instance this appeal was ordered

to stand abated vide order dated 16.02.2016.

3. The prosecution commenced on a recovery-cum-arrest memo dated 19.12.1981, on the basis of which a single chik First Information Report giving rise to four Case Crimes, bearing nos.:430 of 1981, under Sections 399, 402, 307 IPC, 431 of 1981, 432 of 1981, and, 433 of 1981, the last three all under Sections 25/27 of the Arms Act, were registered at Police Station Kayamganj, District Farrukhabad. Case Crime no.430 of 1981 was registered against all the appellants, Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai, together, whereas Case Crime nos.431 of 1981, 432 of 1981 and 433 of 1981, were registered separately against Jauhari, Ram Prakash and Phool Singh, in that order.

4. According to the prosecution case, that originates in a description of the occurrence carried in a memorandum dated 19.12.1981 about encounter with dacoits-cum-recovery of unlicensed fire arms & ammunitions goes somewhat like this. One Babu Lal Ojha, a Senior Sub-Inspector of Police posted at Police Station Kayamganj, District Farrukhabad at the relevant time, received information on 19.12.1981 at the Station through a professional police informer described in vernacular as *Mukhbir Khaas*, about an impending plan to commit dacoity. This information was received at the Station at 9 p.m. The informer is said to have conveyed to the Sub-Inspector last mentioned, that some miscreants were planning to congregate in the mango grove of one Phool Khan, located within the Village Niyamatpur with further detail that these miscreants would arrive at the venue last mentioned, approaching it from the west. They would then assemble in the south-east corner of the grove. The information further went that the miscreants had a plan to loot vehicles moving on the road. The Sub-Inspector reposing faith in the veracity of the information took as companions, Sub-Inspectors Amar Singh, Chhotey Singh and Jamuna Prasad, besides, Constables Shobha Ram, Reghunath Singh, Vinod Kumar, Rajendra Singh Damodar Singh, Daya Shankar, Netrapal Singh, Indrapal Singh, Vishwanath Singh. The police team proceeded to the place of apprehended occurrence, riding a Government Jeep driven by Driver Shiv Veer Singh, whereas some of the party proceeded on bicycles. Constable Vishwanath Singh had on him his private SBBL Gun with ammunition. The Sub-Inspectors and men were variously armed with service rifles and revolvers, a detailed account of which is to be found in the memorandum under reference. The party reached Village Dhamdhera and parked their Jeep and bicycles away from the road. They secured the presence of certain public witnesses, to wit, Chhotey Lal Verma son of Ram Dayal, Mohan Singh son of Heera Lal, Babu Ram son of Jwala Prasad and Rajaram son of Raghuvar Dayal, all residents of Dhamdhera, Police Station Kayamganj, District Farrukhabad. These witnesses were acquainted with the secret information received by the police. The police party along with the public witnesses were divided into two groups. The first party was led by Babu Lal, whereas the second party was led by Sub-Inspector Amar Singh. The detailed composition of the parties also finds place in the memo under reference. The Senior Sub-Inspector appears to have instructed that his party would locate themselves at the eastern end of the grove, concealing

themselves from sight, whereas the second party would station themselves at the southern end of the grove, also concealed from sight. All were instructed to observe silence and take positions, concealing themselves. They were further instructed that except in self-defence and on instructions from the Senior Sub-Inspector, none would open fire. It was also conveyed that on the Senior Sub-Inspector challenging the miscreants, both parties would move into overpower them. A password was coined at spot, that was 'Ganga', and conveyed to one and all in the party. Thereupon, all in the party proceeded to the grove. The Senior Sub-Inspector inspected the sight, and directed both parties to proceed to their pre-determined stations at about 8.00 in the evening. A little later, one by one, 7 - 8 miscreants trickled in, and assembled on the south-eastern corner of the grove, all standing under a mango tree. They opened conversation. One of them said that other companions have not arrived at, to which another responded by saying that they were in sufficient number and adequately armed. He suggested that as soon as a truck appears on the road, they would proceed to stop it, and one amongst them would overpower the driver, whereas the others would loot the vehicle. Upon hearing the aforesaid conversation, the police party were assured that the congregated men were dacoits, who were preparing to commit dacoity by waylaying vehicles moving on the road. The Senior Sub-Inspector challenged the miscreants flashing his torch with words that all of them have been surrounded by the police; that they should lay down arms, and surrender; else they would be killed. Upon the aforesaid action by the police, the miscreants opened fire with an intention to kill members of the police party. It is recorded that driven by compulsion and in self-defence, the policemen opened fire, whereupon the miscreants ran pellmell. They were surrounded by both the police parties, who succeeded in capturing four of the miscreants. The rest of them escaped without being identified. The apprehended miscreants were asked to identify themselves. They disclosed their identities as follows:

(1) Jauhari son of Banwari Bahelia, resident of Bhrahmpuri;

(2) Phool Singh son of Murli Bahelia, resident of Bhrahmpuri;

(3) Ram Prakash son of Nathu, resident of Bhrahmpuri; and,

(4) Bhagwan Sahai son of Mathuri Bahelia, resident of Bhrahmpuri, all falling under the Police Station Kayamganj, District Farrukhabad.

The apprehended miscreants were searched before the witnesses at spot. The search led to recovery of a country-made 0.12 bore breach loading gun, the description of which is also given out in the memorandum under reference, and reported to be in working order. The gun had an empty in its barrel, whereas the apprehended man Jauhari, had on him a belt carrying five live 0.12 bore cartridges. The other apprehended, Ram Prakash also had on him a 0.12 bore country-made breach loading gun, the description of which is fully given out in the memorandum under reference, that was found to be firing fit. The said man on further search, was found in possession of four live cartridges, kept in his right coat pocket. The third miscreant

apprehended, that is to say, Phool Singh had a country-made pistol of 0.12 bore caliber, held in his right hand, the description of which has been given in the memorandum. It was in working order. Upon further search of his person from the right hand pocket of his pyjama, two live cartridges of 0.12 bore were recovered. The last of the four apprehended, Bhagwan Sahai was armed with a lathi, the description of which too finds place in the memorandum. The apprehended men were asked to show licenses to bear those fire arms, which they were unable to produce. As such, the empty found in the barrel of Jauhari's gun, was extracted, whereas all the other weapons recovered, as well as cartridges, were separately sealed into three bundles. Also, recovered from the place of arrest were seven empties of 0.12 bore calibre, besides, the empty, that was still in the chamber of Jauhari's gun. A total of eight empties, thus, recovered, were seized and sealed separately. The police party had fired differently from their weapons, about which there is a detailed description in the memorandum, which indicates that empties of the rounds fired, were also duly deposited at the station. These empties included mostly rounds fired from service rifles of the named Constables, that made for a total of eight empties of the fourteen rounds fired from those rifles. It is also recorded that Sub-Inspector Amarjeet Singh fired his stengun twice, leading to recovery of two empties. These 8 + 2 empties were also sealed with a specimen of the seal being retained separately. The entire memorandum of encounter-cum-recovery, dated 19.12.1981 is signed by various members of the police party and the four witnesses from the public. It must be remarked here that the aforesaid memorandum is not signed by the four apprehended accused, including the appellant, Phool Singh, at whose instance, this appeal is now proceeding.

5. On the basis of recovery-cum-arrest memo (Ex. Ka-1) scribed by Sub-Inspector Chhotey Singh at the dictation of Babu Lal Ojha, Senior Sub-Inspector, P.S. Kayamganj, a chik FIR (Ex. Ka-3) relating to the said occurrence was registered on 20.12.1981 in four case crimes, to wit, Case Crime no.430, under Sections 399, 402, 307 IPC against all the appellants; and, Case Crime nos.431, 432 & 433, under Section 25 of the Arms Act against the appellants, Jauhari, Ram Prakash, Phool Singh. The date and time of occurrence was shown in the chik as 20.12.1981 at 1.30 a.m. The place of occurrence was shown as the Grove of one Phool Khan near Village Nyamatpur. The distance from the police station was shown as 3 miles to the south. Investigation into the offence was handed over to S.I. Ram Lakhan Singh on 21.12.1981. He recorded the statements of the witnesses, inspected the place of incident and prepared a site plan, Ex. Ka-5 on the same day i.e. 21.12.1981. On 24.12.1981, he recorded the statements of PW-2, S.S.I. Babu Lal Ojha, PW-5, S.I. Chhotey Singh Bhadoria, PW-4, S.I. Amar Singh etc. On 01.01.1982, he obtained sanction with regard to cases under Section 25 of the Arms Act from the District Magistrate.

6. On 08.01.1982, after completion of investigating, PW-6, S.I. Ram Lakhan Singh submitted a charge sheet, Ex. Ka-9, against all the four appellants for the offences punishable under Sections 399, 402, 307 IPC. On the same day, separate charge sheets, Ex. Ka-10 to Ka-12 for the

offence punishable under Section 25 of the Arms Act were submitted against the appellants, Jahuari, Ram Prakash and Phool Singh.

7. The Special Judge, Farrukhabad vide order dated 18.01.1982 framed charges for the offences punishable under Sections 399 and 402 IPC against all the four appellants and the appellants, Jauhari, Ram Prakash and Phool Singh were separately charged for the offence punishable under Section 25/27 of the Arms Act vide orders dated 18.01.1982. Each of the appellants, denied the charges, pleaded not guilty and claimed trial.

8. The prosecution examined the following witnesses:

(1) PW-1, Chhotey Lal Verma, a native of Village Dhamdhera;

(2) PW-2, S.S.I. Babu Lal Ojha, P.S. Kayamganj, who headed the police team;

(3) PW-3, HC Babu Lal, posted as Head Moharrir at the Police Station Kayamganj;

(4) PW-4, S.I. Amar Singh, a member of the Police Team;

(5) PW-5, S.I. Chhotey Singh Bhadauriya, also a member of the Police Team; and,

(6) PW-6, S.I. Ram Lakhan Singh, Investigating Officer of the case.

9. The following documents were exhibited on behalf of the prosecution:

Sr. No.	Exhibit No.	Exhibited documents
1	Ex. Ka-1	Recovery-cum-arrest memo, proved by PW-1
2	Ex. Ka-2	Entry made by HM Sher Singh in GD no.13 at 19.15 hours dated 19.12.1981 with regard to Rawangi of SSI Babu Lal Ojha, proved by PW-3
3	Ex. Ka-3	Chik FIR written by PW-3, HM Babu Lal, proved by PW-3
4	Ex. Ka-4	Entry made by HM Babu Lal in GD no.3 at 1.30 a.m. dated 20.12.1981, proved by PW-3
5	Ex. Ka-5	Site Plan, Ex. Ka-5, proved by PW-6
6	Ex. Ka-6	Sanction by DM in Case Crime no.431/81 u/s 25 against the appellant, Jauhari, proved by PW-6
7	Ex. Ka-7	Sanction by DM in Case Crime no.432/81 u/s 25 against the appellant, Ram Prakash, proved by PW-6
8	Ex. Ka-8	Sanction by DM in Case Crime no.433/81 u/s 25 against the appellant, Phool Singh
9	Ex. Ka-9	Charge sheet against appellants Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai in Case Crime no.430/1981, proved by PW-6
10	Ex. Ka-10	Charge sheet u/s 25 Arms Act against appellant, Jauhari, proved by PW-6

11	Ex. Ka-11	Charge sheet u/s 25 Arms Act against appellant, Ram Prakash, proved by PW-6
12	Ex. Ka-12	Charge sheet u/s 25 Arms Act against appellant, Phool Singh, proved by PW-6

10. At the conclusion of the prosecution evidence, the statement of the appellant, Phool Singh (along with the deceased appellants) was recorded u/s 313 Cr.P.C., putting to him the circumstances appearing against him in the prosecution case, which he generally denied, and in answer to question no.7, which is a open question asking, whether the appellant had anything else to say, the appellant answered thus (in Hindi vernacular):

"मुझे व अन्य मुलजिमान को दरोगा अमर सिंह 19 ता० को सुबह घर से पकड़ कर लाये और इसमें झूठा चालान कर दिये।"

11. It is also relevant to mention here, that the deceased appellant, Jauhari in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had answered question no.7, identically worded, as under:

"दरोगा अमर सिंह मुझे व अन्य मुलजिमान को घर से पकड़ कर लाये थे।"

12. Likewise, the deceased appellant, Ram Prakash in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had answered question no.7, identically worded, as under:

"मुझे व अन्य मुलजिमान को दरोगा अमर सिंह घर से पकड़ कर ले आये थे व झूठा फंसा दिया है।"

13. Likewise again, the deceased appellant, Bhagwan Sahai in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had also answered question no.7, identically worded, as under:

"मुझे 19 ता० के सुबह दरोगा अमर सिंह घर से पकड़ कर ले आये थे और इस मामले में झूठा चालान कर दिये।"

14. The appellant (including the deceased appellants), entered defence, and, examined DW-1, Shivpal Singh Yadav, Assistant Jailer, DW-2, Thakuri, DW-3, Jagdish Singh, and DW-4, Anil Kumar Tiwari, Assistant Jailer, in support.

15. Thereafter, on an application moved by Sri Subedar Singh, learned defence counsel appearing before the Court below, the learned Judge inspected the spot and drew up a site plan of the place of occurrence, on 21.02.1981.

16. The learned Special Judge after hearing both the parties, discussing the evidence and material on record found the appellants guilty for the offences punishable under Sections 399, 402 IPC and Sections 25 and 27 of the Arms Act, sentencing them as above-detailed by the impugned judgment and order. Aggrieved by the impugned judgment and order, each of the four accused-appellant preferred this appeal, which now, as already said, proceeds at the instance of the appellant, Phool Singh alone.

17. Heard Sri S.A.N. Shah, learned counsel for the appellant and Ms. Meena,

learned A.G.A. appearing on behalf of the State.

18. In order to determine the veracity of the prosecution case, evidence may be marshaled and considered on the basis of various facts in issue and relevant facts, detailed hereinafter.

(1) Place and manner of arrest;

(2) Failure to obtain signatures of the accused on the arrest-cum-recovery memo, and furnishing its copy to the appellant;

(3) Whether public witnesses including PW-1, Chhotey Lal Verma, are unreliable and pocket witnesses of the police;

(4) Effect of failure to secure examination of the recovered weapons by a Ballistic Expert, and effect of non-production of Ballistic Report in evidence; and,

(5) Standard of proof by the prosecution in a case involving charges of preparation to commit dacoity and being one of the five persons assembled for the purpose

(1) Place and manner of arrest

19. The genesis of the occurrence is said to be based on an information received by Babu Lal Ojha, Senior Sub-Inspector of Police, then posted at Police Station Kayamganj on 19.12.1981 from a police informer. The information according to this witness reached him at 7.12 in the evening hours to the effect that a gang of 7 - 8 armed dacoits were scheduled to assemble in the grove of a certain Phool Khan at Village Niyamatpur, located on the Kayamganj - Aliganj Road at 9 p.m. According to the dock evidence of this witness, the informer had further confided in him that this gang of dacoits would loot vehicles proceeding on the Kayamganj - Aliganj Road. The testimony of this witness proceeds that at 7.12 p.m., he received this information, and within three minutes, he left the Station after making an entry in the General Diary with a police force of thirteen strong, besides himself. The police party included Babu Lal Ojha, PW-2, besides, three other Sub-Inspectors and ten men. This party, according to the evidence of PW-2, proceeded to the place of occurrence, as a divided group; some riding a Jeep and others on bicycles. They passed through Village Dhamdhera, where with the resource of a Constable in the party, Shobha Ram, four witnesses of the public with torches and licensed guns promptly became available. The Jeep and the bicycles, according to the version in the examination-in-chief, were left at Dhamdhera, where the witnesses joined.

20. Babu Lal Ojha, PW-2 divided the entire party into two; one under his charge and the other under the charge of Sub-Inspector, Amar Singh. Each of the two parties had its share of two public witnesses. The divided police team proceeded to the grove of Phool Khan on foot, necessary instructions being passed on to members of the party, as they proceeded to the grove. Once inside the grove, PW-2 has said that he inspected it and took position with his party on the south-eastern corner, whereas the other party were detailed to conceal themselves in a ditch on the southern end. This witness, who is the formal informant also,

said in his testimony during the examination-in-chief that at about 8.30, 7 - 8 miscreants entered the grove from the western end, one by one, till they were in full strength. They sat down under a mango tree and struck conversation saying that as soon as a bus or truck would alight, they would loot it. He has further said that the miscreants were talking amongst themselves that one of them would overpower the driver, whereas the others would loot the vehicle. Hearing the aforesaid conversation, the police team were assured that they were miscreants who had assembled to pull a dacoity. The witness says that thereupon opening his torchlight, he challenged the miscreants conveying that they were surrounded by the police, and better surrender. The time has been stated in the testimony with much precision to be 'twenty minutes past nine'. Upon being challenged, the miscreants opened fire. The witness has gone on to say in his examination-in-chief that the police party returned the fire. This led the miscreants to flee. The police upon seeing the miscreants take to their heels, both parties chased them and managed to overpower four, whereas another 2 - 4 escaped unidentified. The four appellants, including Phool Singh, were identified in Court and the recovery of different weapons and ammunition from each of the appellants was proved by PW-2. After the arrest, the witness says further in his testimony that the appellants were brought to the Station along with recovered weapons, ammunition and empties. The men were confined to the Lockup, and the recovered case property deposited with the Station Strong Room.

21. In his cross-examination at the instance of deceased appellant, Bhagwan Sahai and Ram Prakash, the schedule about receipt of information and leaving the police station is again mentioned with precision. The information was received at twelve minutes past seven, and it is said by PW-2 that within 2 - 3 minutes, the entire force assembled, armed and left Station within an exceptionally short time. The police party reached Village Dhamdhera on two modes of transport with quite a difference in the speed of the vehicles. The Constable detailed to secure witnesses, got four ready with licensed weapons. This is described by PW-2 in his cross-examination thus (in Hindi vernacular):

"सिपाही 5 - 7 मिनट में गवाहों के साथ लौट आया था। जिस सिपाही को गवाह लेने भेजा था वह जीप में हमारे साथ आया था। जब तक वह गवाह लेकर आया, तब तक साईकिलो वाला force भी आ गया। बाग, इस स्कूल से 3 - 4 फरलाँग होगा।"

22. This witness on being cross-examined on behalf of the deceased appellant, Jauhari, acknowledged the fact that he does not remember if a copy of the memorandum of recovery was given to the arrested appellants, and further that he is not aware whether it is necessary to do so. He has further said in his cross-examination that fire was opened on both sides, but he did not see any pellet embedded in the trees or elsewhere in the drain or on the road. He has also said that two rounds were fired by S.I. Amar Singh from his stengun, acknowledging further, that a round fired from the stengun could bring down a tree branch.

23. PW-4, Amar Singh, a companion Sub-Inspector, who was with the team in his examination-in-chief, has

generally corroborated the testimony of PW-2, Babu Lal Ojha. He has, however, said that on the miscreants opening fire, the police returned the fire and while doing so, shot some 16 - 17 - 15 rounds. This led to a commotion amongst the miscreants, who took to their heels. In his cross-examination, he has again categorically said that a copy of the recovery memo was not given to any of the appellants. This witness has further said in his cross-examination that the place where the police were stationed, was at a distance 10 - 12 paces from where the dacoits were located. He has also said that when the miscreants opened fire, they had shot at the police party too. The police party returned fire in self-defence, but not to kill.

24. PW-5, Chhotey Singh, another Sub-Inspector on the team, has also generally corroborated the prosecution case, and in his cross-examination, has not said anything of much significance to either party, different from the other witnesses.

25. The sole public witness, who is a native of Village Dhamdhera, one Chhotey Lal Verma son of Ram Dayal, has given a graphic account of the occurrence in his examination-in-chief, generally corroborating the other witnesses. He has narrated the precise words in the dock what the assembled miscreants uttered, the words in which they were challenged by the police, and has, most particularly, given a numerical account of the rounds fired on both sides: 8 - 7 by the miscreants, and 8 - 10 by the police. The witness identified the appellant in Court, as also the other deceased appellants. This witness has also said that both, guns and rifles, opened fire on the side of the police. The witness has also acknowledged that the place of occurrence, that is to say, the grove of Phool Khan is located at a distance of one furlong from Village Niyamatpur. He has acknowledged the fact that when the aforesaid shootout took place between the police and the miscreants, nobody from the adjoining villages reached the place of occurrence.

26. The Investigating Officer of the case, one Ram Lakhan Singh, Sub-Inspector posted at Police Station Kayamganj, has, in his examination-in-chief, formally proved the various documents that have been exhibited, including the sanction orders under the Arms Act and the charge sheets. He has said in his cross-examination about the telltales signs of a shootout, thus (in Hindi vernacular):

"मुझे पूरे बाग में कोई निशानात ऐसे नहीं मिले थे जिससे जाहिर होता कि फायरिंग हुई थी।"

27. It must be remarked here that mere consistency of witnesses would not turn falsehood to truth. The evidence even of eye witnesses, depending on the nature of the offence, ought to be corroborated by objective circumstances. This case appears to be one where the manner and place of occurrence are telltale of utter falsehood of the prosecution story. The falsehood of it, is somewhere to be found in the inception of the prosecution, where it is said by PW-2 that on receipt of information about the assemblage of some miscreants planning to pull a dacoity at twelve minutes past seven, he could collect a force of fourteen strong, arm them, make an entry in the General Diary, and leave the Station, all within the

fantastically short time of three minutes. The said fact has been acknowledged in his evidence by PW-2 that all this was done in that unbelievably short duration of just three minutes; but that is only one unbelievable feature. The main event which is the shootout between police and the miscreants is said to have taken place in a mango grove at a distance of 10 - 12 paces, as appears in the evidence of PW-4, S.I. Amar Singh. Even if the said estimation of distance is considered to be an overenthusiastic statement, or an arithmetical miscalculation, the evidence of all witnesses is consistent that the distance between the encountering parties was not, indeed, beyond the safe distance of gun fire. It has also figured in the statement that 16 - 17 rounds from rifles, shot guns and two from a stengun, were fired by the police party, whereas the miscreants are said to have fired 7 - 8 rounds. Indeed, it is very unlikely that a divided party of 16 men on one side and 7 - 8 on the other, firing so many rounds, at close quarters, would leave everyone uninjured - even without the graze of a pellet. If that possibility is also accepted, it certainly defies all logic that in the consistent statement of PW-4 and the Investigating Officer, no pellet or bullet was found anywhere embedded in anything, such as a tree or elsewhere. The Investigating Officer who inspected the spot, has conceded in his cross-examination that in the entire grove, he did not find any telltale marks that would show that any shootout took place there.

28. There is another feature about the prosecution case and their evidence, which makes it sound, rather incredible. Assuming that the miscreants had assembled in the mango grove to pull a dacoity, there is no good reason why they would talk aloud amongst themselves, about their plan to pull a dacoity, and the precise manner of executing it. If one were to assume that they were blissfully assured that there was no one about the place where they had assembled, it is against behaviour native to man that in a place that was certainly not a home to any of the miscreants gathered, they would go about loudly discussing, as if announcing their plans to commit dacoity. It seems to be a baseless allegation introduced by the police in order to bring home the charge under Section 399 IPC. In similar circumstances, this Court in **Shokat Abdul Aziz vs. State, 2018 (5) ALJ 261,** held:

"26. A perusal of the recovery memo shows that there is no signature or thumb mark of the appellants on it. The copy of the recovery memo was not given to any of the appellants which is a mandatory provision. The information has been given by a police informer. Several Police Officials have raided at the spot and it appears unnatural that the appellants without showing any apprehension or indication, all of a sudden, started speaking so loudly about their plan for committing dacoity in the house of Dhanumal Sarraf, that it was easily overheard by the police party. Two miscreants are said to have escaped from the spot, but the police has not made any effort to arrest them despite the fact that their faces were seen by the police party in the torch light."

(Emphasis by Court)

29. The submission of Ms. Meena, learned A.G.A. on behalf of the State that since the entire episode has been consistently recounted by all the eye witnesses, one of whom is a public

witness, the same is a dependable guarantee of its truthfulness. This Court is afraid that this submission does not accord with law about evaluation of a consistent eye-witness account. In this connection, **the decision of the Supreme Court in Badam Singh vs. State of U.P., (2003) 12 SCC 792,** may be gainfully referred to. Their Lordships in **Badam Singh** *(supra),* criticizing the approach of the High Court in accepting the ocular testimony of three eye-witnesses in a murder case, merely because it was consistent, held:

"16. The learned Sessions Judge after considering the evidence on record and accepting the evidence of the eyewitnesses found the appellant guilty of the offence under Section 302 IPC and sentenced him to imprisonment for life. The High Court by its impugned judgment dismissed the appeal preferred by the appellant. We have perused the impugned judgment of the High Court. The High Court which was the first court of appeal did not even carefully appreciate the facts of the case. It mentions that the FIR was lodged by PWs 5 and 6 whereas the fact is that the FIR was lodged by PW 4, the Forest Officer. Without subjecting the evidence on record to a critical scrutiny, the High Court was content with saying that the three eyewitnesses having deposed against the appellant, the prosecution had proved its case beyond reasonable doubt. In our view, the High Court has not approached the evidence in the manner it should have done being the first court of appeal. The mere fact that the witnesses are consistent in what they say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a court to hold, that though consistent, their evidence is not acceptable for any other reason. If the court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible or that their presence at the place of occurrence as eyewitnesses is suspect, the court may reject their evidence. That is why it is necessary for the High Court to critically scrutinise the evidence in some detail, it being the final court of fact. We have, therefore, gone through the entire evidence on record with the assistance of the counsel for the parties."

30. A perusal of the finding of the Trial Court, who has rather unconventionally written his judgment by framing issues held on this aspect of the matter that evidence of prosecution witnesses who are policemen, cannot be discarded on the basis alone that they are policemen. The learned Trial Judge has then forayed into considering the effect of police record about arrest, such as, entries in the General Diary, to raise a presumption against the accused about the manner and place of arrest, contrary to that alleged by the accused, who said that they were arrested from home. While it may be true that policemen cannot be disbelieved for the reason alone that they are members of the police force, their word can equally not be accepted on a presumption of regularity, otherwise available to official actions done in the ordinary course of discharge of duties by a Government servant. The entries in the General Diary regarding manner and place of arrest, also cannot be held to prove what is recorded there on a presumption under Section 114 of the Evidence Act, which the Trial Court has raised against the accused, and then held it

to be unrebutted. Proceeding further about this particular fact of the manner and place of occurrence, the Trial Court has ventured into considering arguments based on the history of Senior Sub-Inspector, Babu Lal Ojha, who was found in the past to have falsely implicated a blind man in some crime involving a gang. It is pointed out that he was suspended in connection with the said implication in a false case. The Trial Court has remarked that since he was reinstated in service and exonerated, the said charge is of no consequence. Similarly, the history of Sub-Inspector, Amar Singh regarding the issue of false implication urged on behalf of the accused, has occupied a good length of the judgment by the learned Trial Judge to draw an inference about the place and manner of occurrence. This Court thinks that those facts on the basis of which the Trial Court has drawn an inference against the accused, are not of much relevance. The approach of the Trial Court in evaluating evidence about this very relevant fact, does not commend itself to this Court. It is for the reason that evaluation of evidence on the issue is not based on a clear approach, that may test the veracity of the prosecution account about the occurrence. The Trial Judge has proceeded more on irrelevant considerations, and touching hardly any good and relevant evidence, that would prove or dispel the prosecution case about the manner and place of occurrence.

31. In the totality of circumstances, this Court is of clear opinion that the manner and place of occurrence, as put forward by the prosecution, is not established by cogent and convincing evidence.

(2) Failure to obtain signatures of the accused on the arrest-cum-recovery memo, and furnishing its copy to the appellant

32. It is submitted by Sri S.A.N. Shah, learned counsel for the appellant that the most vital and earliest record about the occurrence is the memorandum of encounter and recovery of illegal weapons drawn up at site by the police. He submits that the said recovery memo does not bear the signatures of any of the appellants, including the appellant, Phool Singh. It is signed by the police officials and the four public witnesses, who were claimed to be with the police party. He urges that it was imperative for the police to have furnished a copy of the said recovery memo to each of the then arrested accused, including the appellant, Phool Singh. It is pointed out that a copy of this recovery memo was not handed over to the appellant, including the three deceased appellants. Learned counsel further submits that there is no mention of the fact that the appellant, Phool Singh or any of the other three deceased appellants refused to sign the recovery memo. It also does not carry any remark or explanation to show why a copy of the said recovery memo was not furnished to the appellant, Phool Singh and the deceased appellants. In the submission of the learned counsel for the appellant, the failure to secure the signatures of the appellant, Phool Singh, or the other deceased appellants on the memo of recovery, falsifies the entire prosecution story, and lends credence to the version of the appellants that they were arrested from home and framed in the case.

33. Ms. Meena, learned A.G.A. on the other hand has refuted the aforesaid submission, not in point of fact, but for a legal proposition. She does not deny the

fact that signatures of the appellant, Phool Singh and the deceased co-appellants, were not secured on the recovery memo, a fact which she can possibly not deny. She also does not deny the fact that a copy of the recovery memo was not handed over to the appellant, Phool Singh, or the three others arrested along with him. She submits that it is not necessary under the law that a copy of recovery memo must be got signed by the arrested accused, from whom recovery is made, or that its copy be supplied to such accused.

34. She has placed reliance on a decision of this Court in **Mahadeo vs. The State, 1990 CriLJ 858**, where with reference to the provisions of Sections 51 and 100 Cr.P.C., it has been held that there is no requirement under the law about accused being asked to sign a recovery memo. However, the failure of the police to give a receipt of the articles recovered was held to be requirement of the law, but non-adherence, a mere procedural irregularity that would not vitiate the trial. Moreover, **Mahadeo** (supra) was a case where no public witness was available, whereas in the present case, there are four public witnesses of the recovery who have signed the recovery memo.

35. Learned counsel for the appellant on the other hand has depended again on the decision of this Court in **Shokat Abdul Aziz** *(supra)*, where in paragraph 26 of the report it has been held that failure of the prosecution to give a copy of the recovery memo to the appellant amounts to violation of mandatory provisions. A perusal of the provisions relating to search and seizure, in particular, the provisions of Sections 51 and 100 Cr.P.C. would indicate that there is no mandatory requirement of providing a copy of the seizure memo to the accused. So far as giving of a receipt of articles seized under Section 51 of the Cr.P.C. is concerned, it would appear that the provision is attracted to cases where arrest is made under a non-bailable warrant or under a bailable warrant, where the person arrested is unable to furnish bail. Section 100 Cr.P.C. pertains to the class of provisions relating to execution of search warrants. The provision in sub-Section (7) of Section 100 Cr.P.C. requiring a list of all things taken possession of to be prepared and a copy of the same to be delivered to the person in occupation of the place searched, does not appear to bear much relevance in the facts of the present case. It may not be strict requirement of the law to provide a copy of the recovery memo to the accused much less requiring him to sign it, but the failure of even a slight mention of the fact that the accused were asked to sign and refused, or a copy of the memo was delivered to them, which they declined to accept, in the togetherness of other circumstances makes the entire prosecution story suspect. It is a circumstance that lends credence to the appellant's defence that after all nothing of the kind ever happened. They were simply implicated in the present crime, after being picked up by the police from home.

(3) Whether public witnesses including PW-1, Chhotey Lal Verma, are unreliable and pocket witnesses of the police

36. The question whether public witnesses who accompanied the police party, and one of whom Chhotey Lal Verma testified in support of prosecution,

are pocket witnesses of the police, is a fact, the proof of which would depend much on circumstances, including evidence of these witnesses. PW-2, Babu Lal Ojha, who headed the police party, that claims to have busted a dacoity in preparation, has said in his examination-in-chief, that on way from the Police Station to the place of occurrence, the police party passed through Village Dhamdhera. There, on his instructions, Constable Shobha Ram went to fetch the witnesses. The witnesses arrived armed with torches (electric), and each had his licensed gun on him. This evidence of PW-1 is expressed in the words of the witness as follows (in Hindi vernacular):

"हम लोग जीप व साईकिलो से रवाना हुये। रास्ते में ग्राम ढमढेरा पड़ा जहाँ रुक कर सिपाही शोभाराम को गवाहों को लेने के लिये भेजा। गवाहान आ गये जो टार्च व अपनी लाईसैन्सी बन्दूखे लेकर आये थे।"

During his cross-examination, this witness said that the Constable took 5 - 7 minutes to come back with the witnesses (public witnesses). It is also mentioned that the said Constable, who was detailed to secure the attendance of witnesses, had accompanied the police team in the Jeep, whereas a backup force had cycled its way. This part of the cross-examination has already been detailed hereinabove verbatim.

37. Now, a reading of this evidence indicates that these public witnesses came forth as if they were standing ready for the job, which was certainly not a pleasant one. In fact, witnessing apprehension of a suspected gang of dacoits for a common man, like these witnesses including Chhotey Lal Verma, could only be ascribed to two different motives. The first could be that these witnesses were truly spirited citizens and gallant man, ever ready to stand by the law, risking even their life for it, if the need arose. The other motivation could be that they were, indeed, pocket witnesses of the police, who neither saw or did anything, except that they owed some loyalty to the police for whatever consideration it be. It is not said anywhere in the evidence of these witnesses that they had some kind of a background of military, police, or other martial training, or antecedents of a kind that would make their rather unusual behaviour in joining the police on a escapade with dacoits in preparation at the short notice of 5 - 7 minutes, ready with their torches and guns, something of a conduct expected of these men. It is true that no particular question was put to them during cross-examination about their background, but it is equally true that the prosecution could have removed a hovering cloud about the behaviour of these witnesses consistent with their conduct as upright citizens, in going about the task they did. If even slight evidence had come forthwith about the background of these witnesses, it would have sufficed. But, with not a word in evidence about the background of these public witnesses, that would legitimately account for their very public spirited conduct, the inference from the conduct of these witnesses tends to sway heavily in support of what learned counsel for the appellant says, that all of them are pocket witnesses of the police. To this conclusion, if one were to look to the cross-examination of Chhotey Lal Verma, one of these four public witnesses, who testified in the witness-box as PW-1, he has responded about his past association with being a police witness in the following words (in Hindi vernacular):

"मेरे गाँव में मेरी वल्दियत का और कोई नहीं है नाम के कई हैं। आज से पहिले मैने एक case में गवाही दी है। यह याद नहीं है कि वह शराब का मुकदमा था या बन्दूख का। यह गलत है कि मैं 4 - 5 मुकदमों में गवाही दे चुका हूँ।"

This witness has acknowledged the fact that he has been a witness for the police in a case under the Excise Act or the Arms Act in the past, though he has denied the suggestion that he has stood for the police in 4 - 5 other criminal cases. Though standing witness in one case by itself may not lead to any inference, but in the totality of circumstances where the conduct of PW-1, together with the other public witnesses has been rather unusual, the fact that he has in the past stood for the police in a case, that was also one entirely at the instance of the police (as distinguished from a case initiated at the instance of a member of a public), the inference that PW-1 and his associated public witnesses are, indeed, pocket witnesses of the police, is clearly established.

(4) Effect of failure to secure examination of the recovered weapons by a Ballistic Expert, and effect of non-production of Ballistic Report in evidence

38. PW-6, Ram Lakhan Singh, a Sub-Inspector of Police, who was the Investigating officer, said, thus, in his cross-examination when asked if he had sent the weapons and cartridges to the Ballistic Experts (in Hindi vernacular):

"मैने चले हुए कारतूस व weapons को बैलेस्टिक Expert के पास नहीं भेजा। काम की ज्यादती के कारण मैं बैलेस्टिक Expert के पास नहीं भेज सका।"

39. The law relating to the prosecution's burden to be discharged, that fire arms recovered from the appellant and his associates were in working order, or that live cartridges recovered from their possession were indeed live can only be discharged by sending those weapons, the ammunition recovered and the empties to the Forensic Science Laboratory, and by proving the report received from the Lab to show that the recovered weapons were in working order. The law in this regard has been laid down by the Supreme Court in **State of Punjab vs. Jagga Singh, (1998) 7 SCC 214**, where it is held:

"..... Though the evidence of PW.1 H.C. Baldev Singh and PW.3 Basant Singh establishes that the respondent was found in possession of one. 12 bore DBBL Gun and four live cartridges, there is no satisfactory evidence to show that the said Gun and the cartridges were sent for examination by the Central Forensic scientific Laboratory. There is no report from the forensic Scientific Laboratory nor any other evidence to prove that the said gun was in a working condition or that the said cartridges were live cartridges. An entry made in the Malkhana register was relied upon by the prosecution. It does not mention that Gun bearing No. 14119-88 was sent to the Central Forensic Laboratory nor does it contain any description of the cartridges."

40. Still earlier, in **Jaspal Singh vs. State of Punjab, 1998 (7) SCC 289**, it was held by their Lordships of the Supreme Court thus:

"2. Admittedly, no evidence was led by the prosecution to prove that the

gun was in working condition and that the cartridges which were found from the person of the appellant were live cartridges. Neither ASI - Balbir Singh had stated so nor any report from an expert was obtained to establish that the gun was in working condition and that five cartridge were live. What was found in the gun were two empties and not live cartridges and, therefore, it was not proper to presume that it was in working condition. In absence of any evidence to that effect, the conviction of the appellant under both these aforesaid Section cannot be upheld. ....."

41. In **Dev Dutta and another vs. State, 2017 (1) ACR 604**, this Court following the aforesaid decisions of their Lordships in a case relating to preparation to commit dacoity, held:

"34. In view of what has been indicated herein above, I am of the opinion that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt. Recovery of pistols and cartridges from the appellants are also doubtful in the absence of any C.F.S.L. report and benefit of doubt is to be given to the appellants."

42. T his Court finds, from the evidence of the Investigating Officer, that he never sent any of the weapons for analysis to the Ballistic Expert. He has said that he did not do so because he was overburdened with work. Whatever be the reason, in the absence of a report from a Ballistic Expert, that the weapons were in working order, the ammunition was live, or the empties were fired from the guns said to have been recovered from the appellant's possession and that of his associates, makes the entire recovery of fire arms very doubtful. That apart, it has not figured in the evidence of any of the witnesses before the Court that the fire arms were in working order, or that the cartridges were live.

43. In the circumstances, it is held that the prosecution have failed to prove that the weapons shown to be recovered from the appellants were, indeed, recovered from their possession or that the said weapons were employed in exchange of fire with the police party.

(5) Standard of proof by the prosecution in a case involving charges of preparation to commit dacoity and being one of the five persons assembled for the purpose

44. It must again be remarked that the offence under Section 399 IPC is one of the few offence that is punishable at the stage of preparation. Once the offence is punishable at the stage of preparation and there is evidence about it, it cannot go unpunished. But, it would be prudent to remember that an offence punishable at the stage of preparation is founded on an act or omission that is so inchoate, that it is still not an attempt. Therefore, evidence about the offence must be scrutinized with circumspection to find out whether, in fact, the fact in issue is clearly established by good evidence.

45. In **Chaturi Yadav and others vs. State of Bihar, AIR 1976 SC 1412,** conviction for offences under Sections 399, 402 IPC, was overturned by their Lordships of the Supreme Court on facts that the appellants in that case were found to have assembled in the odd hours by night at 1 a.m. in the premises of a school. On seeing a police party, they tried to run, but some of them were apprehended. One

of the appellants, was found to be in possession of a gun and live cartridges, whereas the others had merely one live cartridge each, in their pockets. In those circumstances, their Lordships held thus:

"4. The Courts below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 A.M. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 A.M. does not, by itself, prove that the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself has, in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of, by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under Sections 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing some other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court."

46. A wholesome look at the evidence in this case would show that the prosecution had nothing in hand in the sense of tangible evidence, that may lend some credit to the ocular testimony to prove their case, except that they might have found the appellants for the worst, assembled at the place of occurrence. The prosecution account has been held to be unbelievable about the nature and place of occurrence, earlier in this judgment. The recovery of fire arms from the appellant and his companions is not established, or the credit of the independent public witnesses. The entire story appears to be one where the appellant has been framed. The Trial Court appears to have believed the story because it was a dacoity affected area. This Court thinks that in the circumstances of an area, that is afflicted by dacoity, the probability of a false implication by the police in a case of preparation to commit dacoity is far stronger, where there is no convincing and tangible evidence *aliunde* to establish facts that are necessary to prove a case of preparation. Those facts, in the clear opinion of this Court, have far from been proved.

47. This Court finds and holds that the prosecution has not been able to establish the appellant's guilt beyond reasonable doubt.

48. In the result, the appeal succeeds and is **allowed.** The impugned judgment and order dated 27.02.1982 passed by the Special Judge (Dacoity Affected Areas), Farrukhabad in Special Sessions Trial no.3 of 1982, State vs. Jauhari and three others, under Sections 399 & 402 IPC (arising out of Case Crime no.430/81) and under Sections 25/27 of the Arms Act (arising out of Case Crime no.433/81), Police Station Kayamganj, District Farrukhabad, is hereby set aside and the appellant, Phool Singh is acquitted.

49. The appellant, Phool Singh is on bail. He need not surrender. The bail bonds are cancelled and sureties stand discharged. However, the appellant, Phool Singh, is ordered to comply with the provisions of Section 437-A Cr.P.C. before the Trial Court.

50. A copy of this judgment along with Trial Court record be sent to the learned Sessions Judge, Farrukhabad for information and necessary compliance. Judgment be certified and placed on record.

(2019)10ILR A 211

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

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

Criminal Appeal No.2434 of 2009

Subhash ...Appellant (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Sarvesh, Sri R. C. Yadav
Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 504, Section 506(II), Section323/34 and Section 304/34- Section 313 Cr.P.C - criminal appeal - chose vital parts of the body to inflict injuries - accused appellant had inflicted repeated blows on the vital parts of the body of deceased - knowing fully well the consequences of his act that it may cause death of deceased - guilty of the offence U/s 304(II) Indian Penal Code - imprisonment for offence. (Para 19,25,27 & 30)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Jai Prakash reported in (1991) 2 SCC 32

2. Virsa Singh's case AIR 1958 SC 465

3. Jagrup Singh's case AIR 1981 SC 1552

4. Sadha Singh & anr. Vs St. of Punj. (1985) 3 SCC 225

(Delivered by Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Sarvesh, learned counsel for the appellant and Mr. Prashant Kumar, learned Additional Government Advocate for the State.

2. This criminal appeal has been filed by accused appellant Subhash S/o Shrinath, R/o village Basawanpur, police station Ghosi, District Mau against the judgment and order dated 30/31.03.2009, whereby appellant Subhash has been convicted under section 323/34 and 304 (II) Indian Penal Code and has been sentenced for one year rigorous imprisonment for offence under section 323/34 Indian Penal Code and for seven years rigorous imprisonment and a fine of Rs. 500 and in default of payment of fine

two months further imprisonment for offence under section 304(II) Indian Penal Code. All the sentences are directed to run concurrently.

3. According to prosecution version as narrated by informant Ram Lakhan, on 25.04.2006 at about 12:00 in the day, accused Subhash, Gulab and Dayanand came to his house and started abusing him and thereafter assaulted him with lathi, danda. Upon hue and cry, the co-villagers gathered there and saved him. The record further reveals that P.W.1 Smt. Dhanmati took her husband-informant to Community Health Centre, Ghosi, where his injuries were examined by Dr. D.N. Rai and thereafter he was referred to District Hospital, Mau where he was given treatment and after being relieved from the hospital, Smt. Dhanmati and Ram Lakhan came to their house in the village and remained in the house. On fourth day of incident, deceased Ram Lakhan went to the police station and on the oral dictation of first informant Ram Lakhan (deceased), one Non-Cognizable Report no. 86/2006 was registered on 28.04.2006 at about 12:30 P.M. in Police Station Ghosi, District Mau for offences under section 323/504,506 IPC against accused Subhash, Gulab and Dayanand. After eighteen days from the incident, Ram Lakhan died on account of injuries and the P.W.1 Smt. Dhanmati gave information to police station about death of her husband Ram Lakhan, whereupon section 304 IPC was added and being cognizable offence, the case was converted into case crime no. 429 of 2006 U/s 304 IPC. After investigation, the Investigating Officer submitted charge sheet against the named accused persons for offence under section 304 IPC and subsequent to the cognizance of offence, the learned Magistrate committed the case to the Court of Sessions and trial proceeded.

4. The learned Trial Court framed charge against the accused persons for offence under section 504, 506(II), 323/34 and 304/34 IPC vide order dated 02.03.2007. In order to prove its case, the prosecution also relied upon documentary evidence, which were duly proved and consequently marked as Exhibits. The same are cataloged herein below:-

i). Application made by the informant Dhanmati qua the death of the deceased during treatment to the Police Station Ghoshi was marked as Exhibit-Ka-1 and the same was proved by the informant (P.W.1);

ii). Medical examination report of the deceased before his death was marked as Exhibit-2 and the same was proved by Dr. D.N. Rai, Primary Health Centre, Ghosi, Mau (P.W.-4);

iii). Post-mortem report of the deceased was marked as Exhibit-3 and the same was proved by Dr. A.K. Srivastava (P.W.-5);

iv). Entry made in G.D. regarding registration of Case Crime No. 429 of 2006 under Section 304 I.P.C. after the death of the deceased was marked as Exhibit-Ka-4 and the same was proved by the Constable Dhanoday Pandey (P.W.-6);

v). Entry made in G.D. regarding death of the deceased given by the informant was marked as Exhibit-Ka-5 and the same was also proved by the Constable Dhanoday Pandey (P.W.-6);

vi). Site plan was marked as Exhibit-Ka-6 and the same was proved by Sub-Inspector Sheetala Prasad Upadhaya (P.W.-7);

vii). The charge-sheet was marked as Exhibit Ka-7 and the same was proved by Sub-Inspector Sheetala Prasad Upadhaya (P.W.-7);

viii). Non-Cognizable Report (N.C.R.), which was registered on oral information given by the Informant regarding the incident, was marked as Exhibit Ka-8 and the same was proved by Constable Radhey Shyam Yadav (P.W. 8);

ix). Entry made in G.D. regarding the N.C.R. was marked as Exhibit-Ka-9 and the same was also proved by Constable Radhey Shyam Yadav (P.W. 8);

x). Inquest report of the deceased was marked as Exhibit-Ka-10 and the same was proved by Sub-Inspector Mithlesh Kumar Mishra (P.W.-9);

xi). Chalan lash was marked as Exhibit-Ka-11 and the same was proved by Sub-Inspector Mithlesh Kumar Mishra (P.W.-9);

xii). Photo lash was marked as Exhibit-Ka-12 and the same was proved by Sub-Inspector Mithlesh Kumar Mishra (P.W.-9);

xiii). Letter written to the Reserved Inspector, Police Line, Mau was marked as Exhibit-Ka-13 and the same was proved by Sub-Inspector Mithlesh Kumar Mishra (P.W.-9); and

xiv). Letter written to the Chief Medical Officer, Mau regarding post-mortem of the deceased was marked as Exhibit-Ka-14 and the same was proved by Sub-Inspector Mithlesh Kumar Mishra (P.W.-9).

5. The prosecution also examined total nine witnesses in the following manner:-

P.W.1 Smt. Dhanmati wife of deceased Ram Lakhan is an eye witness of the incident. P.W.2 Manraj is neighbor of the deceased and is another eye witness of the incident. P.W.3 Smt. Gyanti @ Gyanmati wife of Rama Shanker is daughter-in-law of the deceased and she was also present in the house at the time of the incident and is an eye witness. P.W.4 Dr. D.N. Rai was posted at CHC, Ghosi, who examined the injuries of Ram Lakhan on 25.04.2006 at about 06:00 P.M. and has proved the same. P.W.5 Dr. A.K. Srivastava had conducted post mortem examination of the cadaver of Ram Lakhan and has proved the post mortem examination report. P.W.6 Constable Dhanoday Pandey was posted as Constable Clerk in the police station Ghosi, who proved the registration of non-cognizable report and its subsequent conversion into cognizable report. P.W.7 Sub-Inspector Sheetla Prasad Upadhaya had conducted investigation and had submitted charge sheet and has proved the same. The P.W.8 Constable Radhe Shyam Yadav has proved the non-cognizable report lodged by Ram Lakhan (deceased). The P.W.9 Sub-Inspector Mithilesh Kumar Singh had conducted inquest and has proved the same along with other police papers.

6. The defense has challenged the prosecution case by submitting that:-

(a) There is delay in registration of the non-cognizable report in as much as the incident alleged to have taken place on 25.04.2006 at about 12:00 in the afternoon, while the non-cognizable report is said to have been lodged on 28.04.2006 at about 12:30 P.M. with delay of about three days, which fact gives an obvious inference that the prosecution case is concocted.

(b) Looking into the injuries of the deceased, it is highly improbable that the deceased had himself dictated the non-cognizable report at police station after three days of receiving the injuries and hence, this circumstance creates serious doubt about prosecution version. The prosecution case has been materially improved from stage to stage with the passage of time in as much as the first information report does not disclose any specific role and contains allegations about assault by lathi, danda only but in the statement of witnesses before the court, the allegation with regard to the exhortation and assault by fist has also been introduced and role of lathi injury has been specified against the appellant Subhash. All these improvements make the prosecution case wholly unreliable.

(c) The alleged eye witnesses are not reliable and their presence at the scene of occurrence is highly improbable as they did not receive any injury and they did not try to save the deceased, which is quite unnatural.

(d) The alleged non-cognizable report cannot be treated as dying declaration of the deceased.

(e) The appellant had no intention or knowledge to commit the offence, even according to the prosecution's own case and the accused persons were not armed with any weapon at initial stage and admittedly the accused appellant merely used lathi against the deceased.

(f) In any view of the matter, the sentence of seven years rigorous imprisonment is too severe and is liable to be reduced.

7. On the other hand learned Additional Government Advocate has contended that the prosecution has proved its case beyond reasonable doubt. The deceased had himself given the information to police station and the non-cognizable report was registered on his dictation and has been duly proved by the prosecution witnesses and thus the prosecution evidence is wholly reliable and intact and as such, the accused appellant has been rightly convicted and the quantum of sentence is proportionate to the guilt of accused appellant.

8. In order to appreciate rival submissions mentioned above, the court proceeds to examine the evidence on record.

9. P.W.1 Smt. Dhanmati wife of deceased Ram Lakhan has stated in her examination in chief that on the day of the alleged incident at about 12:00 O'clock in the afternoon, her husband was sitting on a cot under the shed in front of his house and she was also present sitting on earth. Suddenly the accused persons namely Subhash, Gulab and Dayanand arrived there crossing the boundary of her house and started abusing her husband with filthy language and asked her husband as to how he was talking to Raj Kumar. At

this juncture, her husband as well as she protested and asked the accused persons not to abuse like this. Thereafter the accused Dayanand exhorted to kill her husband and all of them dragged her husband from the shed. The appellant Subhash picked up the lathi, which was kept near the cot of her husband and assaulted upon him with lathi and accused Gulab assaulted with kick and fist causing injuries. She took her husband to Amila Police Outpost and informed the police but the police personals had stated that first of all medical treatment may be given to the victim and thereafter she may to register the case. She took her husband to Govt. Hospital Ghosi where her husband was medically examined and he was referred to District Hospital, Mau. In District Hospital Mau, her husband was treated and thereafter on fourth day of the incident her husband himself went to the police outpost and lodged the report. However on 18th day of the incident, her husband died on account of injuries. She sent written information regarding death of her husband to police station, which has been proved by her as exhibit Ka-1. Thereafter the police arrived and prepared inquest and site plan etc. and also recorded her statement. Two **days** prior to the incident, a quarrel had taken place with Raj Kumar and the aforesaid Raj Kumar belongs to the gang of the accused persons.

10. She has also stated in her cross examination that two **months** prior to this incident, a quarrel had taken with Raj Kumar and in that quarrel Raj Kumar had beaten her daughter-in-law by fist and kick and it was reported by her husband to the police and the medical examination of her daughter-in-law was also conducted. She has also stated in her cross examination that after treatment of her husband in District Hospital, she took him to the village on the same day and since then, her husband remained at home till his death.

11. The P.W.2 Manraj son of Jallu, whose house is situated at about 25 steps ahead from the house of the deceased, has stated in his testimony that he was present in front of his house at the time of the incident and after hearing hue and cry, he reached at the place of incident and saw the accused Subhash, Gulab and Dayanand abusing and assaulting Ram Lakhan. When Ram Lakhan protested, appellant with the danda and accused Gulab and Dayanand with fists and kicks, assaulted Ram Lakhan. Thereafter he and many persons intervened and saved Ram Lakhan. He has also stated in his testimony that Ram Lakhan was taken to the hospital by his wife and other persons and he died after 17-18 days of the incident. He has further stated that deceased Ram Lakhan had received injuries in his head and chest region. He also identified accused Gulab and Subhash in the court and has stated that accused Dayanand is not present in the court. He corroborated the statement of P.W.1 in all material aspects. He was cross examined at great length but nothing substantial could be elicited in his cross examination.

12. P.W. 3 Smt. Gyanti @ Gyanmati is daughter-in-law of deceased Ram Lakhan. She was there in the house when the incident occurred. She corroborated the statement of P.W.1 and P.W.2 in all material aspects with regard to the abuse and the manner of assault by accused persons and also other relevant facts. She has been cross examined and in her cross

examination she states that during quarrel with Raj Kumar, she was not assaulted and beaten. She has denied the suggestion made to her in cross examination that on the alleged date of incident, she was in her Maika.

13. P.W.4 Dr. D.N. Rai who firstly examined the victim on 25.04.2006 at 06:00 P.M. at C.H.C., Ghosi has stated that at about 06:00 P.M., Ram Lakhan was brought before him by his wife Smt. Dhanmati and was examined by him, whereupon the injuries mentioned in the medical examination report were found on the person of Ram Lakhan and thereafter, the victim was referred to District Hospital, Mau. This prosecution witness has proved the medical examination report and has stated that all the injuries had possibly occurred on 25.04.2006 at about 12:00 O'clock in the afternoon and were caused by hard, blunt object and were fresh and the injuries no. 1 & 5 were on vital part of the body. He did not give any opinion regarding nature of injuries and had referred the victim to District Hospital, Mau for further management.

14. P.W.5 Dr. A.K. Srivastava had conducted the post mortem and has proved the post mortem examination report, in which he found five ante mortem injuries on the person of deceased and has stated that the cause of death was subdural hematoma on account of head injuries. He found the fracture of left parietal bone and also found fracture of 10th, 11th & 12th ribs of left side back. Membranes, brain, pleura were found congested and peritonea and spleen was found contused. He has stated that injuries of head and chest were sufficient in the ordinary course of nature to cause death and it could have been caused by lathi. He has also stated that if the proper medical treatment would have been given to the deceased, his life would have been saved.

15. P.W.6 Constable Dhanoday Pandey has stated in his examination-in-chief that on 17.05.2006, he was posted as Constable Clerk in police station Ghosi. The then In-charge Inspector Sri Bachha Paswan submitted post-mortem examination report no.106/2006 at police station and directed him to alter the offences and in pursuance thereof, he altered the non-cognizable report no.86/2006 U/s 323, 504, 506 IPC to Case Crime No.429/2006 U/s 304 IPC. He was also present at police station on 13.05.2006, when Smt. Dhanmati informed in writing about the death of Ram Lakhan. This prosecution witness has proved the relevant G.D. entry in this regard.

16. P.W.7 Sub-inspector Sheetla Prasad Upadhyay has stated that on 18.05.2006, he was posted in police station Ghosi as Sub-inspector (Civil Police) and the investigation of Case Crime NO.429 of 2006 was entrusted to him. He investigated the same and had submitted a charge-sheet.

17. P.W.8 Constable Radhe Shyam Yadav has stated in his examination-in-chief that on 28.04.2006, he was posted as Constable Clerk at police station Ghosi. On 28.04.2006, at about 12.30 P.M. Ram Lakhan came to police station and gave oral information about the incident and in pursuance thereof, a non-cognizable report no.86/2006 u/s 323, 504, 506 IPC was registered. This prosecution witness has proved the non-cognizable report to the incident of Ram Lakhan.

18. P.W.9 Constable Mithilesh Kumar has stated that on 13.5.2006, he was posted as In-charge police outpost Amila of police station Ghosi and he had conducted inquest of deceased Ram Lakhan. This prosecution witness has proved the inquest report and other police papers prepared by him.

19. In their examination U/s 313 Cr.P.C., the accused persons have denied their involvement in the offence and have stated that they have been falsely implicated on account of enmity and the evidence adduced against them is false. An application 63Kha was moved by accused Dayanand showing his date of birth as 07.05.1991 and claiming to be juvenile on the date of incident. He produced the entries of Kutumb register mentioning his date of birth, voter list and his medical examination showing his age on the date of medical examination in between 20-21 years. The learned Trial Court conducted enquiry and came to the conclusion vide order dated 15.01.2009 that the accused Dayanand was juvenile at the time of incident and his case was separated and the trial continued for accused appellant Subhash and co-accused Gulab.

20. From a careful scrutiny of the evidence available on record, it is undoubtedly apparent that the witnesses of fact i.e. P.W.1 Smt. Dhanmati and P.W.3 Smt. Gyanti @ Gyanmati are most natural witnesses as P.W.1 Smt. Dhanmati is wife of deceased and her presence with her husband Ram Lakhan in daytime at her house cannot be doubted. Similarly, Smt. Gyanti @ Gyanmati is daughter-in-law of the deceased and according to the normal course of daily life, she is also supposed to be there in the house, as she is also a housewife. The presence of both these witnesses has not been seriously challenged by the defense. Even a suggestion has not been given to P.W.1 Smt. Dhanmati that on the alleged date and time of occurrence, she was not there in the house with Ram Lakhan. A half hearted suggestion has been given to P.W.3 Smt. Gyanti @ Gyanmati that she was at her Maika on the date of the incident but she has denied the same. Similarly no suggestion has been given to P.W.2 that he was not there in his house when the incident took place. A lengthy cross examination has been made from all the three witnesses, but nothing could be achieved to raise slightest doubt regarding the veracity of their deposition, which is otherwise natural and truthful and is corroborated by medical evidence. The statement of P.W. 1 Smt. Dhanmati corroborates other independent circumstances and evidence available on record. In the medical examination report of deceased Ram Lakhan prepared in Community Health Center, Ghosi, the injured was shown to be brought by Smt. Dhanmati and this fact has also been proved by P.W.4 Dr. D.N. Rai in his deposition.

21. Learned defense counsel has tried to argue that the investigation of the case is not proper and there appears cutting and over-writing in police papers and in addition to this circumstance, the registration of non-cognizable report by Ram Lakhan after third day of the incident is also doubtful in as much as after receiving such injuries, he would have been in a state of coma on account of subdural hematoma as suggested by the doctor and it is highly improbable for him to reach to the police station and lodge the non-cognizable report at his own instance.

22. This submission made by the learned Counsel for the accused appellant prima facie appears to be attractive but a conspicuous view over evidence available on record reveals its weakness. The P.W. 1 has categorically stated in her statement that after medical examination in District Hospital, the deceased Ram Lakhan was taken back to his home and he remained at his home continuously till his death. Not a single question has been put by the prosecution, while cross-examining P.W.1 about the condition of the victim Ram Lakhan when he was at home since 25.04.2006 to 13.05.2006. There is not even a suggestion to this effect that after coming from the hospital, the victim regained his health and was capable of speaking something or not or whether he was bed-ridden or was in a state of coma. On the other hand, there is specific averment made by P.W.1 that the deceased went to police station and lodged the non-cognizable report. This fact has been corroborated by Constable Clerk P.W. 6 Dhanoday Pandey and P.W. 8 Constable Radhey Shyam Yadav, who have proved the registration of non-cognizable report by deceased Ram Lakhan and have also proved thumb impression of the deceased on that report. The defense has tried to challenge aforesaid facts by pointing out some cuttings and over writing in the police papers and General Diary entries but such shortcomings has been duly explained by the witness P.W. 8 Constable Radhey Shyam Yadav. Hence, there is no such circumstance available on record, which may raise doubt about the registration of the non-cognizable report by the deceased himself. Rather it makes out an additional factor in support of eye-witness account of the incident.

23. Thus, from the evidence available on record, this Court comes to the definite conclusion that the prosecution evidence and the alleged eye-witnesses are natural and truthful and the prosecution has succeeded beyond reasonable doubt in proving the participation of the accused in commission of the offence.

24. With respect to the submission on behalf of appellant regarding absence of intention or knowledge about inflicting deadly injuries to the deceased, it born out from the statement of P.W.4 Dr. D.N. Rai and from the medical examination report of deceased dated 25.04.2006 proved by him and from the post mortem examination report proved by P.W.5 Dr. A.K. Srivastava and from his other part of statement, it is established that multiple blows were inflicted to the deceased by blunt weapon on the vital parts of the body and this role has been specifically assigned to accused appellant Subhash. The injury no. 5 shows multiple abraded contusions in an area of 28 cm and 10 cm over left side of abdomen and chest and underlying the seat of injuries, three ribs were found fractured and many internal organs were found contused. In the head region, the parietal bone was found fractured. The P.W.5 Dr. A.K. Srivastava has specifically stated that the injuries received by the deceased in his head and chest were sufficient in the ordinary course of nature to cause death.

25. To ascertain element of knowledge regarding any criminal act, whenever any person with conscious state of mind about his act causes injury to another without any reasonable excuse, it is required to be inferred that he was knowing about the outcome of injuries so caused by him and like-wise, repeated blow of Lathi as a weapon to an old age

person on his vital parts like head, chest, abdomen, etc. would certainly give inference that he was having complete knowledge about its result. The term "intention" and "knowledge" have been discussed and explained in catena of judgments of Hon'ble Supreme Court and this court. While intention requires guilty state of mind or what we say ill will, the law provides punishment for those acts too, which doesn't have element of "intention" but the awareness of the consequences of the act. Without burdening the judgment with bunch case-laws, one celebrated judgment of Hon'ble Supreme Court may be referred in this regard. In the case of ***Jai Prakash reported in (1991) 2 SCC 32***, the Hon'ble Supreme Court while referring to ***Virsa Singh's case, AIR 1958 SC 465 and Jagrup Singh's case, AIR 1981 SC 1552*** made observations about element of "knowledge", which are worth quoting and are recapitulated as follows: -

"In both these cases it is clearly laid down that the prosecution must prove (1) - that the body injury is present, (2) - that the injury is sufficient in the ordinary course of nature to cause death, (3) - that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words Clause Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury. The language of Clause Thirdly of S. 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence, has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

26. The Hon'ble Supreme Court further elaborated the discussion by referring to Russell on Crime (12th edn. at page 41) and observed as follows:

"..... .....

"In the present analysis of the mental element in crime the word 'intention' is used to denote the mental attitude of a man who has resolved to

bring about a certain result if he can possibly do so. He shapes his line of conduct so as to achieve a particular end at which he aims."

It can thus be seen that the 'knowledge' as contrasted with 'intention' signify a state of mental realization with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore in the case of 'intention' mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention or not is a question of fact. In Clause Thirdly the words "intended to be inflicted" are significant. As noted already, when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in Virsa Singh case the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused. In some cases, an explanation may be there by the accused like exercise of right of private defence or the circumstances also may indicate the same. Likewise there may be circumstances in some cases which attract the first exception. In such cases different considerations arise and the court has to decide whether the accused is entitled to the benefit of the exception, though the prosecution established that one or the other clauses of S. 300 Indian Penal Code is attracted. In the present enquiry we need not advert to that aspect since we are concerned only with scope of Clause Thirdly of S. 300 IPC."

27. In view of above discussed position of law, it is established beyond doubt that accused appellant Subhash had inflicted repeated blows on the vital parts of the body of deceased Ram Lakhan and the only inference, which can safely be drawn is that he was knowing fully well the consequences of his act that it may cause death of deceased Ram Lakhan and thus, he is guilty of the offence U/s 304(II) Indian Penal Code.

28. Lastly, the learned counsel for the defense has submitted that in view of the facts and circumstances of the case, the sentence is too severe and it may be reduced as may deem fit.

29. In this regard, the position of law as held by Hon'ble Supreme Court in ***Sadha Singh And Anr. vs State of Punjab, (1985) 3 SCC 225*** is as follows: -

"5. The next question is what should be the adequate sentence. We must confess that what ought to be the proper sentence in a given case is left to the

discretion of the trial court, which discretion has to be exercised on sound judicial principles. Various relevant circumstances which have a bearing on the question of sentence have to be kept in view. Before deciding the quantum of sentence the learned Sessions Judge has to hear both the sides as required by the relevant provision of the Cr.P.C.

6. In an appeal against the conviction, it is open to the High Court to alter or modify or reduce the sentence after confirming conviction. If the High Court is of the opinion that the sentence is heavy or unduly harsh or requires to be modified, the same must be done on well recognised judicial dicta. Therefore, we may first notice the reasons which appealed to the learned Judge to reduce the substantive sentence awarded to the appellants to sentences undergone."

30. This Court has considered submission in this regard in the light of the evidence, facts and circumstances of the case and finds in the present case that the deceased who is an old man, aged about 60 years, has been assaulted without any provocation. He was beaten mercilessly by repeated blows of lathi. The accused appellant Subhash is a healthy men aged about 40 years. The accused chose vital parts of the body to inflict injuries. In these circumstances the sentence of seven years rigorous imprisonment appears to be appropriate and does not call for any interference.

31. The appeal fails and is, accordingly, dismissed.

32. Since the appellant is already on bail, the Chief Judicial Magistrate, Mau is directed to ensure that the appellant is taken into custody and sent in jail for serving out of his sentence awarded by the trial court. The bail bond of the appellant is cancelled and his sureties are also discharged.

33. A copy of this order be sent to the Chief Judicial Magistrate, Mau immediately for necessary compliance of this judgment and order.

(2019)10ILR A 221

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No.1335 of 1988

Dinesh & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri T.M. Rizvi, Sri Abhishek Tripathi, Sri Amit Tripathi, Sri Vishesh Kumar (A.C.)

Counsel for the Opposite Party:
Sri J.K. Upadhyay, A.G.A.

A. Indian Evidence Act, 1872 - It is the quality of the evidence which is required to be seen and not the quantity -trial court justified in convicting the appellants- imprisonment for life. (Para 7 & 25)

B. Indian Evidence Act, 1872 - Section 118 - competency of person to testify- evidence of a child witness - Child not an incompetent witness by reason of its age. There is no precise age which determines the question of competency- - child of tender age is a competent witness, if it

appears that it can understand the questions put to him and give rational answers thereto. This section vests in the Court's discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding-The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. - before recording conviction on the solitary testimony of a child witness, the court has to ensure that he is a reliable witness - If testimony found to be trustworthy and reliable then conviction can be recorded on his sole testimony. (Para 17,18,19 ,20 & 21)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Panchi Vs St. of U.P. (1998) 7 SCC 177

2. St. of Karnataka Vs Shantappa Madivalappa Galapuji & ors. (2009) 12 SCC 731

3. Nivrutti Pandurang Kokate & ors. V. St. of Mah. 2008 (12) SCC 565

4. Golla Yelugu Govindu Vs St. of A.P. (2008 (4) SCALE 569)

5. St. of U.P. Vs Krishna Master & ors. (2010) 47 OCR (SC) 263

6. Namdeo Vs St. Of Mah. (2007) 14 SCC 150

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of the impugned judgement and order dated 03.05.1988 passed by II Additional District & Sessions Judge, Kanpur Dehat in Sessions Trial Nos. 50 of 1985 (State Vs. Dinesh) and 104A of 1985 (State Vs. Surendra Singh), convicting the accused-appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life.

2. In the present case, name of the deceased is Ram Swaroop Tiwari. Deceased stood as a surety for appellant Dinesh but as Dinesh continued to commit crimes, deceased informed him that if he will not make himself correct, in such a condition, deceased would be compelled to get his bail cancelled. Looking to this attitude of the deceased, accused Dinesh got annoyed with him and with the help of co-accused Surendra Singh, Umesh (died during investigation) and Ramesh (absconded during trial), on 03.08.1984 committed the murder of the deceased by causing gun shot and axe injury to him. Incident has been witnesses by Shiv Kant Tiwari (PW-2), a child witness aged eight years (son of deceased), who at the time of commission of offence was with the deceased. Hearing the cries of the deceased, his another son Kamal Kant Tiwari (PW-1) rushed to the spot and saw the accused persons fleeing from the spot. On the written report Ex.Ka.-1 lodged by Kamal Kant Tiwari (PW-1) on 03.08.1984 at 07.45 pm, FIR was registered against four accused persons under Section 302 of I.P.C.

3. Inquest on the dead body of the deceased was conducted, on the same day i.e. 03.08.1984, vide Ex.Ka.4, which started at 09.30 pm and completed at about 11.00 pm and body was sent for postmortem, which was conducted by Dr. Anil Bihari Lal Saxena (PW-7) vide Ex.Ka.15 on 04.08.1984.

As per Autopsy Surgeon, as many as seventeen following injuries were found on the body of the deceased:

"1. An incised wound 12cm x 3cm x brain cavity deep, right side of scalp, 3cm above Rt. ear.

2. An incised wound 9cm x 3cm x bone deep cut on posterior side of scalp,

1½ cm behind right ear temporal bone fractured.

3. An incised wound 8cm x 3cm x bone cut deep on right side face upto right ear, temporal bone fractured.

4. An incised wound 11cm x 4cm x bone cut on rt. side neck extended above upto the scalp behind the ear-temporal bone fractured.

5. An incised wound 6cm x 2½ cm on the rt. side neck just below the injury no. 4.

6. An incised wound 27cm x 5½ cm x bone cut posterior and left side of neck, occipetal bone and vertebra upper fractured.

7. An incised wound 10cm x 2½ cm x muscle deep on the upper part of back just below the root of neck.

8. An incised wound 8cm x 1½ x muscle deep on the back of right shoulder.

9. An abrasion-contusion 5½ cm x 3½ cm on the back of right shoulder just below on injury no. 8.

10. An incised wound 4 cm x 1½ cm x muscle deep on the epigastric fossa.

11. An incised wound 10 cm x 3½ cm x muscle deep on ventral aspect of rt. hand forearm in its middle part.

12. A gun shot wound of entry 4 cm x 3½ cm x through and through on the dorsal aspect of right forearm, 8 cm below the right elbow, margins inverted and ulna bone fractured.

13. A gun shot wound of exit 10 cm x 3 cm x through and through communicating to the injury no. 12 on the ventral aspect of rt. forearm 2½ cm above the wrist joint-margins everted and one wadding piece is recovered.

14. A gun shot wound of exit 8 cm x 3 cm x through and through communicating to the injury no. 12 on the medial side of rt. forearm, 1½ cm away from injury no. 13, margins everted and one wadding piece is recovered from the wound.

15. Multiple gun shot wound of entry in an area of about 20 cm x 6 cm x muscle deep on rt. side of lower part of chest and upper part of abdomen, 18 pellets (16 small + 1 big and one broken) recovered from the wound.

16. One gun shot wound of entry 1 cm x 1 cm x through and through 4 cm above the left writ joint on ventral aspect medial side, margins inverted.

17. One gun shot wound of exit 1½ cm x 1½ cm x through and through communicating to the injury no. 16 on the ventral aspect and above the writ joint margins everted."

Cause of death of the deceased was due to shock and haemorrhage as a result of antemortem injuries.

4. During investigation, accused Umesh died and, therefore, charge sheet was filed against the appellants and one absconded accused Ramesh.

5. While framing charge, the trial Judge has framed charge against the accused-appellants under Section 302/34 of I.P.C.

6. During trial accused Ramesh had absconded and, therefore, the trial court

proceeded with the trial of Dinesh and Surendra Singh.

7. So as to hold the accused appellants guilty, prosecution has examined eight witnesses, whereas one defence witness has also been examined. Statements of the accused-appellants were recorded under Section 313 Cr.P.C. in which, they pleaded their innocence and false implication.

8. By the impugned judgment, the trial Judge has convicted and sentenced the accused-appellants as mentioned in paragraph no. 1 of this judgment. Hence this appeal.

9. Learned counsel for the appellants submits:

(i) that the FIR is ante-dated, inquest was prepared on 03.08.1984 and in the same, reference of seizure memo has been given whereas seizure was affected on 04.08.1984. Learned counsel submits that in the inquest, crime number and other details have not been mentioned, whereas as per requirement of law, the same ought to have been mentioned.

(ii) that Kamal Kant Tiwari (PW-1) had not even seen the accused persons fleeing from the spot, but with the help of police, he has put forth an absolute false case.

(iii) that Shiv Kant Tiwari (PW-2), a child witness, had not seen any occurrence nor he was present at the spot and it was only after tutoring him, he has been made as an eye-witness to the incident. Had this witness would have seen the occurrence, in the spot map, details of the place from where he saw the incident would have been shown.

(iv) that there is delay in recording 161 Cr.P.C. statement of Shiv Kant Tiwari (PW-2) and the said delay has not been explained by the prosecution. Even otherwise, PW-2 does not appear to be a competent witness.

(v) that motive assigned by the prosecution appears to be very weak and for such a small thing, nobody would commit a murder.

(vi) that as per prosecution case, Gauri Nath, Shyama Devi and Sudha had also seen the occurrence, but these witnesses have not been examined by the prosecution.

(vii) that there is inordinate delay in sending the copy of special report to the Magistrate.

10. On the other hand, supporting the impugned judgment, it has been argued by the State counsel:

(i) that there is no evidence on record to show that FIR is ante-timed. He submits that inquest started on 03.08.1984 at 09.30 pm and the same continued till 11.00 in the night and that could be the reason that in the recovery memo, next date i.e. 04.08.1984 has been mentioned. He points out that in the inquest, FIR number has been mentioned and the other details have also been shown therein and thus, it cannot be said that the FIR is ante-dated. It has been argued that even assuming that there is some clerical mistake in mentioning the time or date, it would not be fatal for the prosecution when there is other conclusive evidence available on record. He submits that

police had gone to record 161 Cr.P.C. statement of the witnesses, but as the entire family was in a shock and was crying, the statement could not be recorded.

(ii) that Shiv Kant Tiwari (PW-2) appears to be a fully competent witness and from his statement, it is apparent that he is a mature boy and had not been tutored.

(iii) that Kamal Kant Tiwari (PW-1) appears to be another witness. He states that he saw the accused persons fleeing from the spot and had he been a planted witness, he would have become an eye witness to the incident.

(iv) that non-examination of Gauri Nath, Shyama Devi and Sudha would not be fatal for the prosecution, as it is the choice of the prosecution to examine its witnesses.

(v) that motive part has been duly proved by the prosecution wherein in the FIR itself, it has been stated that despite request of the deceased when appellant no. 1 Dines continued his illegal activities, he was warned, which was not liked by him, as a result of which Dinesh was having animosity with the deceased.

(vi) that Shiv Kant Tiwari (PW-2) has categorically stated that when his father was being killed, he hide himself near the bundle of wood and cow dung.

(vii) that FIR was registered at 07.45 pm and the inquest was prepared till late in the night and on the next morning, special report was sent to the Magistrate.

11. We have heard counsel for the parties and perused the record.

12. Kamal Kant Tiwari (PW-1), is a son of the deceased and the informant. He has stated that his father stood as surety for accused Dinesh in the earlier criminal case but even thereafter, appellant Dinesh continued to commit theft and dacoity. His father had asked appellant Dinesh that in such eventuality, he would get his bail cancelled and hearing this, appellant Dinesh was annoyed with his father. On the date of incident at about 4:00 pm, when his father was sitting at the door steps of one Gauri Nath along with Shiv Kant Tiwari (PW-2), he heard the cries when he was sitting in his house which is about 200-250 yards from the house of Gauri Nath. He along with Vimal Kant, Krishna Swaroop and several other persons immediately rushed to the house of Gauri Nath and then heard the sound of gunshot. Thereafter, he saw accused appellant Dinesh, Surendra Singh and Ramesh coming out from the house. He states that accused-appellants Dinesh and Surendra Singh @ Babua were having gun with them whereas Umesh and Ramesh were having country made pistols. In the house, he saw the dead body of his father having number of gunshot and axe injuries. He states that Shiv Kant Tiwari (PW-2) was found in the same room where dead body of the deceased was lying. He further states that thereafter, he lodged the FIR. He has clarified that as Radha, one of the witness has been married in the family of accused Dinesh, she is not willing to adduce her evidence. In the cross-examination, he has clarified that he had not seen any accused carrying axe. It is relevant to note that recovery of axe was made from the spot itself and this he has clarified in paragraph no. 10 of his cross-examination. In the cross-examination, this witness remained firm and has

reiterated as to the manner in which the incident occurred. He has further stated that in a room where dead body was found there were bundles of wood and cow dung.

13. Shiv Kant Tiwari (PW-2) is a child witness and at the time of recording his evidence, he was 10 years of age. The trial court before recording his evidence, first recorded its satisfaction regarding competence of witness and then proceeded further. He has stated that four accused persons came in the house of Gauri Nath, where his father was sitting. They had some talk with his father regarding bail and then they threatened/scolded his father. His father took him inside the room and bolted the room from inside. The accused persons made an attempt to break open the door and after doing so, they entered the room and caused gunshot and axe injuries to his father. He has clarified that he hide himself near the wood and cow dung bundle and from there, he saw the entire incident. In the cross-examination, several questions were put to him but he answered all those questions in a best possible manner and has reiterated as to the manner in which his father was killed by the accused-appellants.

14. Chotey Lal Tiwari (PW-3), is a Head Moharrir, who recorded the FIR. Mirza Ishtiaq Beg (PW-4) is first Investigating Officer. He has categorically denied that till preparation of inquest, no FIR was registered. Madho Singh (PW-5) is a third Investigating Officer, who filed the charge-sheet against accused Dinesh and Ramesh (absconded accused). Ram Jiyawan (PW-6) took the dead body of the deceased for postmortem. Dr. Anil Bihari Lal Saxena (PW-7) is the doctor, who conducted post-mortem on the body of the deceased. Yogendra Singh (PW-8) is a second Investigating Officer, has duly supported the prosecution case.

15. Ram Gopal (DW-1) has not stated anything specific, which may be of any help to the defence.

16. Close scrutiny of evidence makes it clear that deceased stood as a surety for accused Dinesh and when he continued to indulge himself in the case of theft and dacoity, deceased asked him for withdrawing himself as his surety as a result of which, accused Dinesh was annoyed with him and on 03.08.1984, with the help of other co-accused persons, in the house of Gauri Nath, he committed his murder. Seeing the accused person, deceased entered the room of Gauri Nath along with his minor son Shiv Kant Tiwari (PW-2), but the accused persons broke open the door, gained entry in the room and committed murder of the deceased. Incident has been witnessed by Shiv Kant Tiwari (PW-2), a child witness, who remained very firm in the court, has reiterated as to the manner in which, he saw the incident. Hearing cries of the deceased, his another son Kamal Kant Tiwari (PW-1) rushed to the house of Gauri Nath and there he heard the sound of gunshot and soon thereafter, he saw accused persons carrying firearm with them and fleeing from the spot.

17. The case of the prosecution mainly rests on the testimony of Shiv Kant Tiwari (PW-2), who is a child witness, aged about 10 years, when his evidence was recorded. Before discussing the evidence of a child witness, it would be advantageous to refer to the law

relating to child witness. Section 118 of the Evidence Act deals with the question of competency of person to testify. Under this Section, all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of its age. A child of tender age is not, by reason of its youth, as matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to Section 118 of the Evidence Act, a child of tender age is a competent witness, if it appears that it can understand the questions put to him and give rational answers thereto. This section vests in the Court's discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take, is to satisfy himself that the child is a competent witness, within the meaning of Section 118 of the Evidence Act and for this purpose, preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words, the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in positive, the Court will not, as a rule of prudence, convict the accused of a major offence on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has

to be judged on the touchstone of its own inherent intrinsic worth.

18. In the matter of **Panchi V. State of UP,** (1998) 7 SCC 177 the Hon'ble Supreme Court has held as under:-

".....It cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

19. With regard to the testimony of child witness the Hon'ble Supreme Court in State of Karnataka v. Shantappa Madivalappa Galapuji & others reported in (2009) 12 SCC 731 had noticed the case law and held as under:

"The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. {See Suryanarayana v. State of Karnataka (2001) 9 SCC

129)]. In Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341] it was held as follows: (SCC p. 343, para

5) :-

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

20. The position of law relating to the evidence of a child witness has been dealt with also by the Apex Court in **Nivrutti Pandurang Kokate and others V. State of Maharashtra,** 2008 (12) SCC 565 and **Golla Yelugu Govindu v. State of Andhra Pradesh,** (2008 (4) SCALE 569). In the case of **State of U.P. vs. Krishna Master & Others,** (2010) 47 OCR (SC) 263, the Hon'ble Apex Court also has gone a step ahead in observing

that a child of tender age who has witnessed the gruesome murder of his parents is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time notwithstanding the gap of about ten years between the incident and recording his evidence.

21. The legal position which can be culled out from the aforesaid decisions is that before recording conviction on the solitary testimony of a child witness, the court has to ensure that he is a reliable witness. If his testimony is found to be trustworthy and reliable then conviction can be recorded on his sole testimony.

22. Considering the above position of law, if we apply the above principles in the present case, it is apparent that at the time of recording the evidence of Shiv Kant Tiwari (PW-2), his age was about 10 years. Before recording his satisfaction in respect of competency of this witness, the trial judge has asked certain questions to him and after satisfying himself of the fact that the witness understands the duty to speak truth and is able to rationally answer the questions put to him, the court has examined him. In the court, he has literally given the vivid description of the entire incident and has stated as to the manner in which his father was done to death by the appellants. Number of questions, including tricky questions were put to him by the defence, but all those questions have been answered very sensibly and with responsibility by the witness.

Lengthy cross-examination of this witness by the defence has further strengthened the case of the prosecution, where it can be said that Shiv Kant Tiwari (PW-2) was a competent witness and in no manner, he can be called a tutored witness.

23. We find no substance in the argument of the defence that the FIR is ante-dated. There is no legally admissible evidence on record to substantiate this argument. The mere fact that the inquest was conducted on 03.08.1984 and the recovery has been affected on 04.08.1984 will not establish the point that the FIR is ante-dated. In the inquest, details of FIR, including crime number have been mentioned and the most important aspect of the case is that the inquest started at 9:30 pm on 03.08.1984 and continued till 11:00 pm in the night. If the recovery has been shown on 04.08.1984, no fault can be attributed to the prosecution. Assuming that there is some mistake in mentioning the date in these two documents, this itself would not be sufficient to prove that the FIR is ante-dated.

24. We further find no substance in the argument of the defence that Kamal Kant Tiwari (PW-1) and Shiv Kant Tiwari (PW-2) are not reliable witnesses. As stated above, both these witnesses have duly supported the prosecution case and PW-2, though a child witness, appears to be fully trustworthy and reliable. The statements of PW-1 and PW-2 further find support from the post-mortem report of the deceased.

25. There is some substance in the argument of the prosecution that had the prosecution wanted to put forth any fabricated evidence, they would have projected PW-1 as an eye witness to the incident, but PW-1 has merely stated that when he reached the place of occurrence,

he saw the accused persons fleeing from the spot. Similarly, non examination of some of the witnesses, whose reference has been given in the FIR, is also not fatal for the prosecution because it is the quality of the evidence which is required to be seen and not the quantity. Law in this respect is very clear.

26. In the case of **Namdeo vs State Of Maharashtra**; (2007) 14 SCC 150, the Supreme Court has held as under:

"It is not seldom that a crime had been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution.

The Court also stated;

There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable.

*In the leading case of **Shivaji Sahebrao Bobade v. State of Maharashtra**, (1973) 2 SCC 793, this Court held that even where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs." In **Anil Phukan v. State of Assam**, (1993) 3 SCC 282 : JT 1993 (2) SC 290, the Court observed; "Indeed, conviction can be based on the testimony*

of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect." In ***Kartik Malhar v. State of Bihar****, (1996) 1 SCC 614 : JT 1995 (8) SC 425, referring to several cases, this Court stated; "On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar case and, therefore, conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence." In Chittar Lal v. State of Rajasthan, (2003) 6 SCC 397 : JT 2003 (7) SC 270, this Court had an occasion to consider a similar question. In that case, the sole testimony of a young boy of 15 years was relied upon for recording an order of conviction. Following Mohamed Sugal and reiterating the law laid down therein, this Court stated:"*

27. We further find no substance in the argument of the defence that motive has not been proved by the prosecution. From the evidence, it is clear that deceased had asked the appellant Dinesh to correct himself and when he did not, he made it clear to him that he would withdraw himself as surety. Hearing this, appellant Dinesh was annoyed with the deceased and he, with the help of other accused persons, committed his murder.

28. We further find no substance in the argument of the defence that there is any discrepancy in the spot map. These minor technicalities, if any, do not affect the prosecution case, as they do not go to the root of the matter.

29. After appreciation of the entire evidence, we are of the considered view that the trial court was fully justified in convicting the appellants. Judgement of the trial court deserves to be affirmed and the same is accordingly affirmed.

30. The appeal has no substance and the same is accordingly **dismissed.** Appellants are reported to be on bail, they be taken into custody forthwith to serve the remaining sentence.

31. This Court appreciates the assistance rendered by Sri Vishesh Kumar, learned Amicus. The State Government is directed to pay Rs. 10,000/- towards his remuneration.

(2019)10ILR A 232

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 5240 of 2018

Arvind Parmar @ Bunty Raja & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Datt Dauholia, Sri Nanhe Lal Tripathi.

Counsel for the Opposite Party:
A.G.A.

A. Code of criminal procedure, 1973 - Section 374 (2) - Criminal Appeal - statement of accused persons under Section 313 Cr.P.C.- **Presumption, under Section 114, Indian Evidence Act, 1872 - judgment of conviction and sentence, awarded is illegal, perverse and against the weight of evidence on record.** (Para 1, 8,19 & 26)

Offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court. (Para 8,24 & 25)

B. Indian Penal Code, 1860 - conviction, under Section 457 IPC- **When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass.** (Para 18)

C. Indian Evidence Act, 1872 - Section 114 - **Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.** (Para 19)

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Chhadami Vs Emperor 41 Cr.L. J, 623 (Ald.)

2. Trimbak Vs St. of M.P. AIR 1954 SC 39

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C.'), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Raheem Khan, against the judgment of conviction, dated 04.08.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area), Lalitpur, in Sessions Trial No. 25 of 2013 (State vs. Arvind Parmar @ Bunty Raja and others), arising out of Case Crime No. 1150 of 2012, under Sections 457, 380, 411, 413 of Indian Penal Code (Hereinafter in short referred to as "IPC'), Police Station-Kotwali Lalitpur, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra and Raheem Khan, have been sentenced with seven years' rigorous imprisonment and fine of Rs.10,000/-, each, under Section 380 IPC, and twelve years' rigorous imprisonment, with fine of

Rs.20,000/-, each, under Section 457 IPC and rigorous imprisonment of three years, with fine of Rs.5,000/-, each, under Section 411 of IPC. In case of default of deposit of fine of Rs.20,000/-, they will have to serve one year's additional simple imprisonment, in case of default of deposit of fine of Rs.10,000/-, they will have to serve six months' additional simple imprisonment and in case of default of deposit of fine of Rs.5,000/-, they will have to undergo three months additional simple imprisonment, with a further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjectures.

2. The occurrence of theft had been said to have taken place in the night of 10.06.2012 and a first information report was lodged on 11.6.2012 as Case Crime No.1150 of 2012, under Sections 457, and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Raheem Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments and cash, was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred on 10.06.2012, and first information report was lodged on 11.6.2012. PW-2, Sunit Kumar, had stated that the arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery was said to have been made from them, while appellant no.3 was said to be absconded, whereas it was a false recovery and false implication. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-9, dated 11.06.2012, was got lodged by the informant, Akhilesh Kumar Sharma, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that in the night of 10.06.2012, while, in connection with delivery of his wife, he was at District Hospital, Lalitpur, where, in the night at 12:20 PM, delivery of wife took place, whereafter the informant came to his home in the morning at 6:45 AM and found that the lock of main door and locker of the Almirah was broken and articles, such as, six bangles, weight about 4-5 Tola, one garland (Haar), weight about 37 gm, one Mangasutra weight 15 gm, two chains, weight about 70 gm, two pair ear rings (Jhumka), weight about 20 gm, six rings of male and five rings of ladies, weight about 30 gm, and one Bedi of 02 gm, all of gold, and 20 silver coins, ten pairs anklet, one Kardhan of silver, weight about 1.5 kg, one chain of Ventmen jewellery and Rs.2,70,000/-, cash, kept in the Almirah, were stolen by thieves. His house, at second and third storey, was under construction, which was being constructed by Masons Gangaram

and Kalyan, who left the construction work in midway. Informant expressed his suspicion of theft, over them. He submitted written complaint, in his own handwriting, at Police Station Kotwali, Lalitpur, which has been registered. Case Crime No.1150 of 2012, under Sections 457 & 380 IPC was got registered, against Gangaram and Kalyan, on 11.06.2012.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar, Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.*1*150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. Apprehended persons were made known about commissions of offence by them under above Sections of IPC. It was presumed that those accused persons were habitual offenders of theft, hence they

were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 and 413 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence. Charges for offence, punishable under Section 380, 457, 411 and 413 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Akhilesh Kumar Sharma, informant, PW-2, Sunit Kumar, Sub Inspector, PW-3, Shamshad Ahmad, retired Sub Inspector, Investigating Officer and PW-4, H.C., Amar Singh, scribe of Chik.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC and judgment of acquittal, under Section 413 IPC was passed.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. No appeal, by the State, against judgement of acquittal for offence, under Section 413 IPC, is there.

11. Written First Information Report, Exhibit Ka-1 (Paper No. 5Ka), was formally proved by PW-1, informant-Akhilesh Kumar Sharma, and it has been lodged against labours, working at his home, on the basis of suspicion, because this witness was not present at the place of occurrence, i.e., at the time of alleged occurrence of theft.

In examination-in-chief, this witness has said that in the night of 10.06.2012, while, in connection with delivery of his wife, he was at District Hospital, Lalitpur, where in the night at 12:20 PM, delivery of wife took place. On coming back to home next day, in the morning at 6:45 AM, he found that the lock of main door and locker of the Almirah was broken and articles, such as, six bangles, weight about 4-5 Tola, one garland (Haar), weight about 37 gm, one Mangasutra of 15 gm., two chains, weight about 70 gm, two pair ear rings (Jhumka), weight about 20 gm, six rings of male and five rings of female, weight about 30 gm, and one Bedi of 02 gm, all of gold, and 20 silver coins, ten pairs anklet, Kardhan (an ornament of waist) of silver, weight about 1.5 kg, one chain of Ventmen jewellery and Rs.2,70,000/-, in cash, kept in the Almirah, was taken away by the the thieves. Construction work at upper storeys of his house was being carried out. He expressed suspicion for occurrence of theft on labour, who were doing construction work in his house. Further on 14.8.2012, on coming to know that Police called him at Cremation Ghat where Police personnel and members of S.O.G. (Special Operation Group) were present, he went there. On reaching there, he found that, apart from Police Personnel, Premlata Jain, Balram Pachauri, Niraj Nayak, Satendra Parma and other persons, not known to him, were present. Four accused persons, namely, Naval Ahirwar, Jitu, Arvind and Rajan, who were

apprehended by the Police, were sitting thereat. Accused, Naval, confessed to have stolen two rings and Rs.20,000/- in cash, from his house. Recovery memo was written and prepared, on the spot, at about 3.30 PM. Thenafter, he came back and not gone there again nor signed recovery memo. Lateron, what Police personnel written in recovery memo, he was not aware.

On the date when occurrence of theft was reported, at about 11 AM, a lady Police personnel came there and took specimen of finger prints of door and locker of the Almirah. Bundle of sealed articles were produced before the court and upon opening of said Bundle, four small Bundles were found. Upon one Bundle, Crime Number 1150/12 was written. On being opened, out of this bundle, three rings, one Pendle of yellow metal, 28 currency notes of Rs.500/- and 18 currency notes of Rs.1,000/-, total amount of Rs.32,000/- were recovered. Witness identified two small rings, being stolen from his house. He said that total Rs.2,70,000/-, in cash, were stolen from his home, which were in denomination of Rs.500/- currency notes and Rs.1,000/- currency notes, which were recovered from possession of accused-Naval, and have been identified by him. Rings have been exhibited as Exhibit 1 & 2, currency note of Rs.5,00/- has been exhibited as Exhibit 3 and currency note of Rs.1000/-, has been exhibited as Exhibit-4.

On being cross-examined, this witness has stated that he did not see anyone committing theft. In the first information, he did not mention that how many currency notes were of Rs.1000/- denomination and how many were of Rs.5,00/-, however, it was told to the Sub Inspector that currency notes were of which denomination. If it was not written in the report, he could not disclose reason. Receipt of stolen articles were with him, but this fact was not written by him in the report. He could not tell the boundary of the place where recovery was made and did not sign the recovery memo. Currency notes appear to be same, which are available with everyone. It was wrong to say that it was a false recovery and by showing false recovery, accused persons were arrested. In the testimony, this witness has stated that he never identified recovered articles in the court nor identified accused persons. His statement was recorded by the Sub Inspector on the day of theft of occurrence. His statement could not be recorded in the court. He read recovery memo and his statement in the court itself.

Meaning thereby, informant neither has seen anyone, while committing theft in hishouse nor was there at the time when locks of his house were broken nor any accused was produced before him for identification. Neither any recovery was made before this witness nor any specific mark of identification/denomination of alleged recovered article/currency notes was there nor any recovery memo was signed by him nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, this witness does not support prosecution case at all and prosecution failed to prove case set up by it, so far as testimony of this witness is concerned.

12. PW-2, Sub Inspector, Sunit Kumar, in his testimony, has stated that on 14.8.2012, he, alongwith other Police

personnel apprehended four persons at Cremation Ghat, Gandhi Nagar, Nai Basti, Lalitpur, on the information received from informer. They disclosed their names as Arvind @ Bunty, Rajan, Jitu Parihar and Naval. From their possession ornaments of gold and silver as well as cash was recovered. They confessed to have been involved in various occurrence of theft in the district of Lalitpur. Many persons, including Akhilesh Sharma, informant, reached on the spot. Akhilesh Kumar Sharma said about theft of Mangalsutra, Gold Bangles, ring, Bedi, 20 coins of silver, ten pairs anklet of silver, one chain of Vintex and Rs.2,70,000/- in cash. Out of stolen articles, two rings of gold and Rs.20,000/- were recovered. He got the recovery memo prepared on the spot, which bore his signature. The original memo was enclosed in S.T. No. 53/13 and from that file a photo copy of the same was got prepared, which had been placed on the record of this file. It was exhibited as Exhibit Ka-2.

On being cross-examined, this witness has stated that accused-persons have not been named in any F.I.R. There was no eye-witness account of the incident. No identification proceedings of recovered articles had been conducted. He did not remember whether copy of the recovery memo had been provided to the accused persons or not. It was also not known to him as to who made call to the complainants to come to the spot. The recovered articles were not produced before him. It is wrong to state that the accused persons had been falsely implicated after arresting them from their homes and showing false recovery.

Accused persons were not named in the first information report nor any identification parade was conducted in accordance with law nor identification proceeding of recovered articles was got conducted nor copy of the recovery was given to the accused persons nor there was any eye witness account of the occurrence of theft. Meaning thereby, it was a cooked-up and concocted story set up by the Police and as such testimony of this witness neither supports version of the prosecution in any way nor is of any relevance to the case set up by the prosecution.

13. PW-3, Shamshad Ahmad, retired Sub-inspector, in his testimony has stated that on 2.11.2006, while having been posted as Sub-inspector at P.S. Kotwali, Lalitpur, he has been entrusted with investigation of the Case Crime no. 1150/12, U/s 457, 380, 411 I.P.C. against unknown accused persons. After receiving copy of the report, Chik F.I.R., he got recorded statement of the scribe and that of the complainant, namely, Akhilesh Kumar, thenafter, inspected the place of incident, the house of the complainant, wherein occurrence of theft said to have taken place and prepared the site-plan on the spot, which was paper no. 12ka/5, in his handwriting and signature. It was marked as Exhibit Ka-3.

On 14.8.2012, while, he, along with S.H.O. Uday Bhan Singh, was engaged in search of the wanted criminals in the area, they were called by the S.O.G. In-charge Sumit Kumar at Varni *Chauraha*, and after being told the purpose, reached at the temple of Chandi Mata and parked the official Jeep and reached Cremation Ghat, where, upon pointing of the informer, found accused persons sitting thereat. Thereupon, the Police Team apprehended persons threat,

along with articles. Site-plan, paper no. 12ka/4, of the place, where the accused persons had been apprehended, was got prepared, whiche was in his handwriting and under his signature. It was Exhibit Ex.Ka-4. He had entered the copy of recovery of the articles in the C.D. and recorded the statements of accused persons namely Nawal Kishore, Bunty, Jeetu Parihar. On 18.8.2012, having received the copy of the report of the arrested accused persons- Arvind Pal and Raju Soni, they were taken into custody in connection with case and thereafter after making entry in respect thereof statements of accused Raju Soni and Arvind Pal, were recorded. On 20.8.2012, statement of Const. Sumit Kumar, Const. Ranveer, Const. Arun Kumar, Const. Omveer, SHO Uday Bhan Singh, SI Subhash Yadav, Const. Raghvendra Singh, Const. Sumit Kumar, Const. Imran were recorded and site plan paper no-12Ka/4, Exhibitt Ka-4, of the place, where the accused have been stated to be arrested, was also got prepared. On 03.9.12, report with regard to arrest of accused Raheem was received and an entry to that effect has been made in the Case Diary, and he has been taken into police custody. On 18.9.12, the statement of the accused Banti @ Vinod has been recorded after being arrested. Thereafter papers with regard to statement of witnesses and the arrest memo were prepared. Statement of Uday Bhan Singh and other police personnel accompanying him, SI Subhash Chandra Yadav, Const. Bahadur Singh, SI Varun Pratap Singh, Const. Aditya Kumar and Saroj Kumar were recorded. He also inspected place of occurrence and prepared site plan, bearing his signature, Exhibit Ka-5. On being pointed by the SHO Uday Bhan Singh, inspected the gate no-2 of the District Hospital. On 17.9.12, inspected the place of occurrence on being pointed out by Uday Bhan Singh and prepared the site plan of the spot, which was in his handwriting and under his signature. Same was paper no-7Ka and was exhibited as Exhibit Ka7. Thenafter, recorded statement of Neeraj Nai and Rajesh Sharma. On 20.9.12, on the basis of all the evidences, filed the charge sheet, marked as Exhibit Ka-8, which was in his handwriting and under his signature.

In his cross-examination, this witness has stated that he did not arrest the accused Raju @ Rajendra Soni, nor did recover any booty from him. He found the accused in custody in the police station. He made entries in the Case Diary. After having recorded his statement in the police station, filed the charge sheet against him in this crime number. No case property was produced before him. However, he denied of having filed a false chargesheet against accused Raju @ Rajendra Soni.

On being cross-examined, further, this witness, has stated that no FIR was lodged against the above accused persons, nor has anyone stated in first information report having seen any one, committing occurrence of theft, nor was there any mark of identification of any accused person nor there was any eye witness account of occurrence. Any specific mark of identification of stolen article was also not mentioned in the report. Neither identification parade of the accused-persons nor of articles was conducted. While mentioning fact of calling the complainant on the spot, name of the police personnel, who called him, was not mentioned. Recovered articles, which were shown to have been

recovered, are usually available in every family and are also available in the market. Entries made in the G.D. by him on 02.11.2006 were not before him nor he remember what was the number of that G.D. Whose statements were recorded by him at what time in the C.D. is not under his remembrance.

In the testimony of this witness, who has Investigated this case crime number, there appears to be material contradiction. In his testimony, this witness has stated that neither the accused persons were arrested by him nor there was any identification of the accused persons nor of recovered articles. In the first information report, there was suspicion on the labours, who were working in the house of the complainant, whereas appellants, herein, were made accused persons. Neither accused persons were named in the first information report nor there was any eye witness account of occurrence of theft, which took place in the house of the complainant. Meaning thereby, testimony of this witness could not have been relied upon by the trial court, because of having contradiction. Thus, testimony of this witness appears to be shaky and is not worth credit, thereby, does not support prosecution case in any way.

14. P.W.-4, HC. 26, Amar Singh, in his testimony, has stated that while he was posted as Head Moharrir at Lalitpur Kotwali on 11.6.2012, complainant Akhlesh Kumar Sharma had given an application, about this incident, on which he had lodged case crime no. 1150/2012 u/s 459, 380 IPC vs Ganga Ram and others. Chik FIR was in his handwriting, under his signature, which was marked as Exhibit Ka-9.

In his cross-examination, he stated that he did not register any case against Shivam that day nor did he remember the name of the Kotwal who was there. Other than the complainant, no one else had accompanied him to the police station. In written complaint, which was given for registration of first information report, name of any accused person was not mentioned nor there was any eye witness account of occurrence nor there was any mark of identification of accused. Who wrote complaint was not known to him. In the testimony, this witness has formally proved registration of first information report wherein name of accused persons was not mentioned nor any specific mark of identification of accused persons or of stolen articles was there nor there was any eye witness account of the occurrence. Meaning thereby, testimony of this witness is of formal nature and is of not much relevance to the prosecution.

15. After careful scrutiny of testimonies of the witnesses produced by the prosecution, it is clear that testimonies of witnesses produced by the prosecution, is with full of variance with material contradictions. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft

was there on record nor any independent public witness account was there and as such in absence of any such evidence, prosecution miserably failed to prove its case.

16. Meaning thereby, neither identity of recovered article was established nor produced before the court nor alleged recovered article was connected with above occurrence of theft nor it was put under identification proceeding. Hence, the very essential requirement of theft, taking of articles in above theft, with dishonest intention, and possession of the same could not be proved by the prosecution beyond doubt. But, learned Trial Judge has passed the judgment of conviction and sentence, as above, literally, when no cogent evidence was there.

17. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

18. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

19. Allahabad High Court in ***41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,*** has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

20. In present case, no evidence of house breaking by night or lurking house-

trespass by appellants was there, except alleged recovery of cash and one gold ornament, but the same was not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above breaking locks of house and locker of the Almirah or recovery of cash from convict-appellants.

21. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

22. *Apex Court* in ***AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh***, has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person other than accused had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

23. In present case, neither property was duly identified by any specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered in presence of informant, who had disputed alleged preparation of recovery memo nor any independent public witness was there.

24. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC, is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

25. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

26. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

27. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

28. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 04.08.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

29. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

30. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

(2019)10ILR A 242

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal No. 5242 of 2018

Arvind Parmar @ Bunty Raja & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Datt Dauholia, Sri Nanhe Lal Tripathi.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Sections 457, 378, 380, 411, 413 - **convict-appellants - Criminal Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 - Statement of accused persons under Section 313 Cr.P.C**.- **Presumption, under Section 114, Indian Evidence Act, 1872 - judgment of conviction and sentence, awarded is illegal, perverse and against the weight of evidence on record.** (Para 1,8,19 & 26)

Offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court. (Para 24 & 25)

B. Indian Penal Code, 1860 - conviction, under Section 457 IPC - **When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass.** (Para 18)

C. Indian Evidence Act, 1872 - Section 114 - Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession. (Para 19)

Criminal Appeal allowed (E-7)

List of Cases Cited: -

1. Chhadami Vs Emperor, 41 Cr.L., 623(Ald.)

2. Trimbak Vs St. of M.P. AIR 1954 SC 39

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as "Cr.P.C."), has been filed by the convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra, and Raheem Khan, against the judgment of conviction, dated 30.07.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area), Lalitpur, in Sessions Trial No. 53 of 2013 (State vs. Arvind Parmar @ Bunty Raja and others), arising out of Case Crime No. 1612 of 2012, under Sections 457, 380, 411, 413 of Indian Penal Code (Hereinafter in short referred to as "IPC'), Police Station-Kotwali Lalitpur, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunty Raja, Rajan @ Rajendra and Raheem Khan, have been sentenced with seven years' rigorous imprisonment and fine of Rs.10,000/-, each, under Section 380 IPC, twelve years' rigorous imprisonment, with fine of Rs.20,000/-, each, under Section 457 IPC, and rigorous imprisonment of three years, with fine of Rs.5,000/-, each, under Section 411 of IPC. In case of default of deposit of fine of Rs.20,000/-, they will have to serve one year's additional simple imprisonment, in case of default of deposit of fine of Rs.10,000/-, they will have to serve six months' additional simple imprisonment and in case of default of deposit of fine of Rs.5,000/-, they will have to undergo three months additional simple imprisonment, with a further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjectures.

2. The occurrence of theft had been said to have taken place in the night of 10.08.2012 and a first information report was lodged on 12.8.2012, as Case Crime No.1612 of 2012, under Sections 457 and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Bunty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Raheem Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments and cash, was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred on 10.08.2012, but first information report was lodged on 12.8.2012. PW-2, S.I. Man Singh, had stated that the arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery was said to have been made from them, while appellant no.3 was said to be absconded, whereas, it was a false recovery and false implication. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-1, dated 12.08.2012,

was got lodged by the informant, Kalyan, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that while, on 10.8.2012, he was away from his home, in connection with some urgent work, keeping his house lock, in the night, occurrence of theft, by unknown thieves, took place, by breaking lock and anklet of silver, weight 500 gm, Kardhna of silver (an ornament of waist for woman), weight 500 gm, and Rs.5,000/-, in cash, were stolen, and other household goods were scattered here and there.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team, was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom, three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar, Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. Apprehended persons were made known

about commissions of offence by them under above Sections of IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 and 413 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence. Charges for offence, punishable under Section 380, 457, 411 and 413 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Constable 99 Sushil Kumar, PW-2, S.I. Man Singh Pal, PW-3, S.I. Sunit Kumar Singh, PW-4, Kalyan and PW-5, S.H.O., Retired, Uday Bhan Singh.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC and judgment of acquittal, under Section 413 IPC was passed.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. No appeal, by the State, against judgement of acquittal for offence, under Section 413 IPC, is there.

11. PW-1 is Constable 99 Susheel Kumar, who, in his testimony, has formally proved registration of first information report, received by Post, which was in respect of lodging of report for occurrence of theft, on the basis of which, he got a first information report, being Chik No. 284/12, Case Crime No.1612/2, under Sections 457 and 380 of IPC, against unknown thieves, registered, which was Exhibit No. Ka-1, in his handwriting and under his signature.

Since first information report was against unknown accused persons, cross-examination was not done.

12. PW-2 is S.I. Man Singh Pal, who, in his testimony, has stated that some unknown persons on 10.08.2012, having broken the lock of the house of Kalyan s/o Gorelal, r/o 464 Civil Lines, Laltipur, committed theft of cash, jewellery, ornaments etc. An FIR in this connection was lodged at the police station on 12.08.2012, the investigation of which was done by him. On 14.08.2012, SOG In-charge Suneet Kumar and his police team arrested the accused persons Arvinda Parmar @ Bunty Raja, Rajan S/o Govind Singh, Jeetu Parihar s/o Parmanand, Nawal s/o Har Narain, R/o Lalitpur from whom the articles related to crime in the case crime nos. 1150/2012, 1210/2012, 1420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012, 1612/2012 u/s 457, 380 IPC were recovered, and upon interrogation name of other accused persons came into the light. On 27.08.2012, SO Udaibhan Singh, accompanied by the present witness, Subhash Chandra Yadav, SI Varun Pratap Singh and constable Bahadur Singh, on reaching, Nehru Nagar, while on surveillance duty for

locating the whereabouts of wanted, got an information that the accused person Shivam Tiwari, wanted in the aforesaid case, is standing at the Bal Sudhar Grih Road. On the aforesaid information, the police personnel reached there where the accused person after seeing the police personnel tried to flee from the spot, but Police managed to apprehend the accused person Shivam Tiwari at 9:30 hours. While he was being searched, Rs. 5000/-, related to occurrence of theft, committed in the house of informant, a gold ring weighing around 1.5 gm, related to the case crime no. 1492/2012, and a silver silver box ***(Dibiya),*** in connection with case crime no. 1420/2012, were recovered. The accused person, on being investigated, confessed that he and his accomplices, Arvinda Parmar @ Bunty s/o Devendra Singh, Rajan s/o Govind Singh Bundel, Jeetu Parihar s/o Parmanand, Nawal Ahirwar s/o Harnarain, Arvinda Pal s/o Ram Sewak, Bunty Dhobi, Rahim s/o Sagir, had committed theft in the house of Kalyan, s/o Gorelal, in the night of 10.08.2012. From the aforesaid theft, he had got Rs. 5000/- as his share, which was recovered from him.

On getting the information of arrest and recovery of related articles, present complainant of the case Kalyan s/o Gorelal, Niraj Nayak s/o Shaligram Nayak and Sanjay Tiwari s/o Sukhdev Tiwari reached on the spot, who stated about the thefts committed in their houses, and identified jewellery and said that that the recovered items had been stolen from their houses. Recovery memo was got scribed on the spot by S.I. Varun Pratap Singh on the dictation of the S.O. Recovered items were separately sealed casewise. Sample seal was prepared on which this witness as well as complainant put their signatures. Accused also signed the memo. A copy of memo was given to the accused. Recovery memo, so prepared, was Exhibit Ka-3 (Paper nos. 8ka/1 to 8ka/2).

On 13.8.2012, investigation of the offences related to crime no 1612/12 was started by this witness, under sections 457, 380 IPC. On 2.9.2012, S.O Udaibhan Singh, alongwith present witness, Man Singh Pal, S.I. Subhash Chandra Yadav and Constable Bahadur Singh left police station in search of some lead and while taking round via Nai Basti, Railway Station, came to Sadan Sah four-way Junction, on the information of the informer, arrested, accused Raheem Khan (appellant no.3) from Gate No. 2 of District Hospital at 15.00 hours, on whose personal search, one ring of yellow metal of gold, weight about one gram and one pair anklet of silver, weight about 150 gram, was recovered from his possession. On being investigated, accused person confessed to have committed theft in the house of Balram Pachauri in the night of 14.6.2012 and this ring was given to him as his share, likewise, in the night of 31.7.2012, he confessed to have committed theft in the house of Niraj Nayak and got anklet as his share, which has been recovered from him. Arvind, Naval, Jeetu, Batti and Arvind Pal were also with him in commission of theft, recovery of which has been made from him. They committed various other thefts in the city. Upon hearing information regarding recovery, complainants had come to the spot, who after seeing the recovered items, identified them to be theirs, which had been stolen. Recovered items were sealed in separate clothes. Sample seal was prepared. The recovery memo was got scribed by him on dictation of the S.O. Police personnel and

other witnesses put their signature on the recovery memo after reading the contents. A copy of memo was given to accused on the spot and his signature was obtained.

In cross-examination, this witness has said none of the complainants have mentioned any mark of identification of stolen articles nor receipt in respect thereof was given. He also did not get it verified from any jeweller whether this article is pure metal or duplicate. Though arrest of Raheem Khan was made from the gate of District Hospital, which was a crowded placed, but no independent public witness was made because none was ready to become a witness of arrest or recovery, so made. He also did not note name and address of the witnesses and, therefore, was not able to even tell the name of witness. On the spot, though he stayed for about one and an half hour and prepared recovery memo, but was not able to tell the boundary of the spot. Though a copy of the recovery memo was given to the accused persons, after getting it signed by the accused, but at the time of police custody, recovery memo was not with the accused, though it was not thrown before him. Neither there was any specific mark of identification of the stolen articles was mentioned in the report nor any mark of identification of accused person was there. Though at the time of recovery of articles, informant did identify recovered articles, but there was no mention of this fact in the statement recorded in the case diary. No receipt of recovered articles was with the informant nor was there any paper pertaining to his claim over recovered articles. Such articles are usually used in each house.

Meaning thereby, testimony of this witness is full of variance and is having material contradiction, which is not trustworthy at all and prosecution miserably failed to prove its case.

13. PW-3, Sub Inspector, Sunit Kumar Singh, is witness of arrest of accused and recovery of stolen articles. He, in his testimony has stated that while he, alongwith his Police Team, was on surveillance duty, informer gave information about presence of thieves, who have committed various thefts in the city, with stolen articles, near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday Bhan Singh and was called to Varni Four-way Junction. A Police Team led by him, with the Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunty Raja, Resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, Resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, Resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from

whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar, Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others reached on the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak, Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Raheem. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. Apprehended persons were made known about commission of offence by them under above Sections of IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared, which was signed by him, other police personnel as well as by independent witness. It has also been stated by this witness, in his testimony, that on 18.8.2012, being Incharge SOG, while, he was in the search of suspicious persons and criminals, on the information received from informer, called Incharge, Kotwali, Lalitpur, and with the informant of Case Crime No.1612 of 2012, Kalyan, reached Malu Petrol Pump where at four-lane by-pass, informer pointed towards two persons standing thereat, who have been arrested at 11-30 AM. On making personal search, one disclosed his name as Arvind Pal, from whose possession Kardhan of Silver (an ornament of waist of woman), of white metal of 300 gm, was recovered and the second one disclosed his name as Rajendra Soni, from whose possession, anklet of silver of white colour, and Rs.10,000/- in cash was recovered. On being investigated, Arvind, admitted his mistake and said that he was having friendship with Shivam Tiwari and Bunty. They were having a gang and were committing occurrence of theft and stolen articles were being sold to Raju Soni. On that day, they were selling the articles, stolen from the house of the informant to Raju and the articles which were recovered from Raju, were stolen from the house of Balram Pachauri, out of which he got Rs.10,000/- as his share, which he gave to Raju Soni as loan. Informant identified Kardhan of silver and anklet thereat. Recovery memo (Exhibit Ka5) was prepared on the spot, which was signed by this witness as well as by the informant.

One bundle was opened before the court from which Rs.12,000/-, in cash, one chain of yellow metal (of gold), was

taken out, from second bundle one pair ear ring (Jhala) and from another bundle, one ***Mangal Sutra*** was taken out, which, after being seen by the witness, has been said to have been recovered on 14.8.2012 from the joint possession of Arvind Parmar, Govind Singh, Jitu Parihar and Naval Ahirwar, and were verified by the witness. From one other bundle three rings of gold, Rs.32,000/-, in cash, and one golden pendent was recovered. However, in cross-examination, this witness, has stated that the recovered articles were not before him. He was not investigating case Crime No. 1612/12. About informant, he was informed by Incharge, Kotwali, Uday Bhan Singh. Informer gave information before him, but did not tell that stolen articles, pertaining to Case Crime No.1612/12, were with the accused persons. On being asked by Incharge, Kotwali, informant of Case Crime No.1612/12, Kalyan, was called. Though the place, from where accused were arrested, was crowded one, but none from the public was called as witness. Nothing was recovered from accused, Arvind Pal. There was no specific mark of identification on the recovered anklet nor it was enquired from the informant as to on what basis recovered articles were being claimed by him of his article. He did not get signature of informants of various reports, except Prem Lata Jain and Gita. Accused persons were not named in any first information report nor any mark of identification nor age of accused persons were mentioned in the first information report. In between informed place and Cremation Ghat, there were several houses and traffic was also there, but none from public had been asked to accompany the Police. Meaning thereby, testimony of this witness is full of material contradiction and shaky and appears to be concocted and cooked-up story, without any concrete evidence or cogent material to corroborate testimony given by this witness. There was no independent public witness of the arrest and the recovery made from the accused persons, though the place was crowded one, as stated by the witness in his testimony. Therefore, renders testimony doubtful and as such cannot be relied.

14. PW-4, Kalyan, is the informant of the present case crime number, who, in his testimony, has stated that on 10.8.2012, he, alongwith his other family members, was living in the house of Vimlesh Kumar Jain, on rent. On that day, after locking his house, when he went out of station, in connection with some urgent work, and came back on third day, found the locks of his house were broken and upon entering into the house, he has seen that all household articles were scattered here and there and silver anklet of 500 gm and Rs.5,000/-, in cash, kept in a bag, were stolen by unknown thieves. He has lodged a first information report of this occurrence at the Police Station against unknown thieves, Paper no. 5K, having his signature and exhibited as Exhibit K-6. After 10-15 days, he came to know that Police has arrested some thief at Juvenile Jail Road, Nehru Nagar and he reached thereat. One thief caught by the police was sitting there, who disclosed his name Shivam Tiwari from whose possession Rs.5,000/-, in cash, alleged to have been recovered, which was confessed by the accused Shivam Tiwari to have been stolen from his house. Anklet, Kardhani (an ornament of waist of woman) and cash money, stolen from his home, has been handed over to him. While, being cross-examined, this witness has stated that though he produced receipt in respect

of stolen articles, but the same were not on record. He was not having bill of stolen articles. Stolen articles were purchased by him from shop. After ten days, Inspector called him. Inspector recorded his statement on the date of lodging of report itself. At the place, where he met with Inspector, 2-4 persons were standing. Inspector told name of arrested person Shivam Tiwari. He did not recognise Shivam Tiwari. Shivam Tiwari is not appellant in the present case. Meaning thereby, it was all the story cooked-up by the Police. Neither there was any independent public witness of the arrest nor of recovery of stolen cash nore any specific mark of identification of stolen case was there. The testimony of this witness is of no relevance to the prosecution because in the present case Shivam is not under Appeal and present appellants were not apprehended alongwith accused-Shivam Tiwari.

Meaning thereby, informant neither has seen anyone, while committing theft in his house nor was there at the time when locks of her house were broken nor any accused was produced before him for identification. Neither any recovery was made before this witness nor any specific mark of identification/denomination of alleged recovered article/currency notes was there nor any recovery memo was signed by him nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, testimony of this witness does not support prosecution case at all and the case set up by the prosecution falls flat, so far as testimony of this witness is concerned.

15. PW-5 is, SHO, Retd. Uday Bhan Singh. This witness, in his examination-in-chief, has stated that on 27.8.2012, while, being posted as SHO Kotwali, he with his accompanying Police team, Man Singh Pal, S.I Subhash Chand, S.I Varun Pratap Singh, and other constables went to Nehru Nagar, Bachha Jail Road, and arrested accused Shivam Tewari in the matter of a case of theft. On making personal search, Rs. 1000/- cash, a gold ring and a white silver small box (Dibiya) were recovered from him as stolen goods. He, on being enquired, disclosed names of all the accused involved in the theft. Non one from the public, present there, was ready to become a witness. Complainant of the case was called on the spot to identify stolen articles. He verified them. He had mentioned details of the goods in the memo,Ext. Ka3. He further stated that on 17.9.2012, he, along with S.I Man Singh Pal, S.I Shamshad Ahmad and other accompanying constables, during patrolling, when reached Govind Sagar Dam, an informer gave information that an accused of theft was going towards Puliya. On being caught, he disclosed his name Banti @ Vinod Rajak. Articles stolen by him and anklets of silver, weighing 250 gram, were recovered from him. On being investigated, he confessed to have committed theft alongwith co-accused on 21/07/12 in the house of Neeraj Nayak, r/o-Azadpur. Recovery memo was prepared on the spot and it was marked as Ext ka-6. Site plan of place of recovery, prepared by S.I. Man Singh from where recovery from accused Shivam Tiwari was made on 19/09/12. (Ext ka-7)

On being cross-examined, this witness has stated that Banti Dhobi was not named in first information report. It was against unknown thieves. There was no eye-witness of this incident. There was no specific mark of identification of the

goods stolen nor of thief in first information report. No proceedings for identification of recovered articles nor of accused were conducted. He did not remember whether copy of memo was recovered from accused or not. He also did not remember as to whether entry of recovered goods were made or not. Articles recovered from Shivam were not produced in the court. Rupees 5000/- cash, gold ring and one small box of silver had been recovered from Shivam, but did not remember the denomination of currency notes. Articles, pertaining to three occurrence of theft, have been recovered from Shivam. Rupees 5000/-, in cash, from Kalyan's house, ring from Neeraj Nayak's house and small box of silver from Sanjay Tiwari had been stolen. He had given the statement on the basis of recovery memo. Meaning thereby, though accused Shivam and Bunty @ Vinod Rajak were arrested and recovery was made, but there was no public witness of arrest and the recovery, so made, which makes testimony of this witness unreliable, having full of variance, with material contradiction and is shaky as such does not support case set up by the prosecution. Moreover, Shivam and Banty @ Vinod Rajak, are not appellants in this Appeal and as such their statement, given to the Police, will have no bearing on the case of the appellants.

16. After careful scrutiny of testimonies of the witnesses produced by the prosecution, it is clear that testimonies of witnesses, produced by the prosecution, is with full of variance with material contradictions. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, in the absence of any independent public witness or any corroborative evidence, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft was there on record, which was not there and as such in absence of any such evidence, prosecution miserably failed to prove its case.

Meaning thereby, neither identity of recovered article was established nor produced before the court nor alleged recovered article was connected with above occurrence of theft nor it was put under identification proceeding nor there was any independent public witness or any corroborative evidence. Hence, the very essential requirement of theft, taking of articles in above theft, with dishonest intention, and possession of the same could not be proved by the prosecution beyond doubt. But, learned Trial Judge has passed the judgment of conviction and sentence, as above, literally, when no cogent evidence was there.

17. Section 457 of Indian Penal Code (IPC) provides that "whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft,

the term of the imprisonment may be extended to fourteen years'.

18. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

19. Allahabad High Court in ***41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor,*** has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114, Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

20. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash and ornament, but the same was not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above breaking locks of house or recovery of cash from convict-appellants.

21. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

22. Apex Court in ***AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh,*** has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person other than accused had possession of the property before the

accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

23. In present case, neither property was duly identified by any specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered in presence of informant, who had disputed alleged preparation of recovery memo.

24. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC, is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

25. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money and ornaments was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

26. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

27. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

28. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 30.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

29. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

30. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

(2019)10ILR A 254

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 288 of 1988

Ram Kishan & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Ram Milan Dwivedi (A.C.), Sri A.B.N. Tripathi.

Counsel for the Opposite Party:
A.G.A., Sri J.K. Upadhyay.

A. Indian Penal Code,1860 - Section 302/34 of IPC - Indian Evidence Act, 1872 - Evidence of an interested witness - the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity - The evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should be relied upon. (Para 18)

Held:- All that the Courts require as a rule of prudence, not as a rule of law, is that the evidence of such witness should be scrutinized with a little care. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places .The evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon (Para-18)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. (1983) 3SCC217

2. Anil Rai Vs St. of Bihar (2001) 7 SCC 318

3. State of U.P. Vs Jagdeo Singh, (2003) 1 SCC 456

4. Bhagalool Lodh & anr. Vs St. of U.P. (2011) 13 SCC 206

5. Dahari & ors. Vs St. of U.P. (2012) 10 SCC 256

6. Raju @ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

7. Gangabhavani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

8. Jodhan Vs St. of M.P. (2015) 11 SCC 52

9. Bur Singh & anr. Vs St. of Punj. (2018) 16 SCC 65

10. Sudhakar Vs St. AIR 2018 SC 1372

11.Ganapathi Vs St. of T.N. AIR 2018 SC 1635

12. Harbans Kaur & anr. Vs St. of Har. 2005 AIR SCW 2074

13. Namdeo Vs St. of Mah. 2007 AIR SCW 1835

14. Sonelal Vs St. of M.P. 2008 AIR SCW 7988

15. Dharnidhar Vs St. of U.P. & ors. (2010) 7 SCC 759)

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 29.1.1988 passed by 1st Additional Sessions Judge, Mathura in Sessions Trial No.94 of 1987, convicting the appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life. However, they have been

acquitted of the charge under Sections 147 and 148 of IPC.

2. As per prosecution case, on 6.9.1986 a written report Ex.Ka.1 was lodged by (PW-1) Dal Chand, alleging in it that there was an old enmity between the accused persons and the deceased on account of a boundary (medh) of the agricultural field and due to the said dispute, on 6.9.1986 at about 6:15 am, when his cousin brother Chokhey Lal was ploughing his field, the accused persons caused several injuries to him by Farsa, Ballam and Club. While they were talking to each other, accused Ram Kishan was shouting for ensuring the death of the deceased. After hearing the voice of accused Ram Kishan, he along with his brother Ram Singh (PW-2) and one Lakkhi reached to the place of occurrence and seeing them, the accused persons entered into the sugarcane field. He states that when he reached near the deceased, he found him dead. Based on this report, FIR Ex.Ka.14 was registered on 6.9.1986 at 9:30 am under Sections 147/148/149 and 302 of IPC against the present accused persons and two acquitted accused, namely, Tej Ram and Kalyan.

3. Inquest on the dead body of the deceased was conducted vide Ex. Ka.7 on 6.9.1986 and the body was sent for postmortem which was conducted on 7.9.1986 vide Ex. Ka.2 by (PW-3) Dr. M K Srivastava.

As per Autopsy Surgeon, following injuries were noticed on the body of the deceased:

1. Lacerated wound 3 cm x 1 cm x bone deep on the back of left side head 1 cm from left ear.

2. Incised wound 6 cm x 2 cm x bone deep on back left side forearm upper part front in direction.

3. Incised wound 5 cm x 1.5 cm x bone deep on back of left forearm upper part transverse in direction both bone cut.

4. Incised wound 8 cm x 5 cm x bone deep on back of left knee joint transverse in direction lateral anckle of femur cut top lateral blood vessels cut.

5. Abrasion 5 cm x 2 cm on outer side of left thigh middle part.

6. Abrasion 10 cm x 1 cm on outer side of left buttock.

7. Abrasion 11 cm x 0.5 cm outer side of left side abdomen.

8. Abrasion 8 cm x 0.3 cm outer side of right leg middle part.

9. Incised wound 3 cm x 1 cm x muscle deep back of left corm middle part vertical.

10. Incised wound 1 cm x 0.3 cm x muscle deep on back of right arm lower part.

11. Incised wound 4 cm x 2.5 cm x bone deep on back right shoulder transverse in direction upper and lateral part of scapula cut. Body smeared with mud front side at places.

Cause of death of the deceased was due to coma.

4. While framing charge, the trial judge has framed charge against accused Girraj under Sections 147, 302/149 of

IPC, whereas against remaining four accused persons charge was framed under Sections 148, 302/149 of IPC.

5. So as to hold accused persons guilty, prosecution has examined seven witnesses, whereas one defence witness has also been examined. Statements of accused persons were recorded under Section 313 of Cr PC in which, they pleaded their innocence and false implication.

6. By the impugned judgment and order, the trial Judge has acquitted accused Tej Ram and Kalyan of all the offences, but has convicted accused-appellants Ram Kishan, Sri Ram and Girraj under Section 302/34 and sentenced them as mentioned in para 1 of this judgment. The trial Judge has, however, acquitted the accused-appellants of the charge under Sections 147 and 148 of IPC. Hence this appeal.

7. Counsel for the accused appellants submits:-

(i) that (PW-1) Dal Chand and (PW-2) Ram Singh are not the actual eye-witnesses to the incident and when, on 6.9.1986 early in the morning they saw the dead body of the deceased lying in the field, they have lodged a false report implicating the appellants. This has been done by the complainant as there was an old enmity between the two families.

(ii) that only interested witnesses, i.e. (PW-1) Dal Chand and (PW- 2) Ram Singh have been examined and the important witness Lakkhi has not been examined.

(iii) that there are material contradictions in the statements of two eye-witnesses.

(iv) that on the same set of evidence Tej Ram and Kalyan have been acquitted and, therefore, there was no occasion for the trial Court to convict the appellants.

(v) that the witnesses have reached to the place of occurrence after the incident and, therefore, question of seeing them the incident does not arise at all.

(vi) that motive part has not been proved by the prosecution as required under the law.

(vii) that the postmortem report of the deceased does not tally with the statements of eye-witnesses because it is not the case of the prosecution that before committing the murder of the deceased he was dragged, however, the injuries sustained by the deceased suggest that he was dragged.

8. On the other hand, supporting the impugned judgment and order, it has been argued by learned State Counsel:

(i) that a very prompt report was lodged by (PW-1) Dal Chand. The incident occurred at 6:15 am, on 6.9.1986 and at 9:30 am, FIR was registered against all the accused persons. The distance between the place of occurrence and the police station is of 9 kms. and thus, for all practical purposes, it can be said that a very prompt report was lodged. Learned counsel submits that there was no occasion for PW-1 to lodge a false report and he had hardly any time to think over the same and then to lodge a false report.

(ii) that minor contradictions in the statements of PW-1 and PW-2 are

required to be ignored considering the fact that they are rustic villagers. While referring to the postmortem report of the deceased Ex. Ka.2, it has been argued by the State counsel that the same duly confirms the version of two eye-witnesses.

(iii) that acquittal of Tej Ram and Kalyan is though not challenged before this Court but the same appears to be contrary to the law. He, however, submits that if some of the co-accused persons have wrongly been acquitted, it will not give any benefit to the present appellants.

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

10. (PW-1) Dal Chand, is the informant and an eye-witness to the incident. He is also a real brother of (PW-2) Ram Singh and deceased Chokhey Lal was his cousin. He states that there is a common bund between his field and that of accused Ram Kishan, Sri Ram and Girraj. At the time of occurrence, he was cutting fodder along with PW-2 in the field, whereas deceased Chokhey Lal was ploughing his field. All the five accused persons reached there, carrying weapons with them; accused Ram Kishan and Sri Ram were having farsa, accused Tej Ram and Kalyan were having ballam, whereas accused Girraj was having club with him. After hearing the voice of accused Ram Kishan to kill the deceased, he and his brother immediately rushed to Chokhey Lal and tried to save him. Accused persons were beating the deceased and after seeing them, they entered in the nearby sugarcane field. By the time, he and (PW-2) Ram Singh could reach to Chokhey Lal, he was already expired and, thereafter he lodged the report.

In the cross-examination, he states that prior to four years of this incident, on the report lodged by accused Tej Ram, a case was registered under Section 325 of IPC against accused Ram Kishan, Lakkhi and one Pooran and Raja Ram. He however, has denied the fact that he took any surety for accused Pooran or Lakkhi. He has clarified that at the time of occurrence, no one else was there in their field and deceased alone was ploughing his field. He states that at the time of occurrence, he and his brother were cutting fodder. In the lengthy cross-examination, though this witness was subjected to various questions, including tricky questions, but he remained firm and has reiterated as to the manner in which the deceased was done to death by the accused persons. He has clarified that before he could reach to the place of occurrence, incident of marpeet was already going on and then, he also clarified as to which of the accused was having which weapon and how the same was used. No doubt, there are minor contradictions in the statement of this witness, but they are all of insignificant nature and are required to be ignored considering the fact that he is a rustic villager.

11. (PW-2) Ram Singh, is another eye-witness to the incident. While supporting the prosecution case, he too has stated that after hearing the voice of accused Ram Kishan to kill someone when he reached to Chokhey Lal, he saw the accused persons beating him. He has also clarified that which of the weapon was being carried out by which of the accused. When he and his brother reached to the place of occurrence and tried to help the deceased, then the accused persons entered in a nearby sugarcane field.

In the cross-examination, but for minor contradictions this witness also remained firm and reiterated as to the manner in which Chokhey Lal was done to death.

12. (PW-3) Dr M.K. Srivastava, conducted postmortem on the body of the deceased. He has clarified that injury nos. 2, 3, 4, 9, 10 and 11 could have been caused by a weapon like ballam/farsa, whereas rest of the injuries found on the body of the deceased could have been caused by a club.

13. (PW-4) Birpal, is a Head Moharrir who recorded the FIR. (PW-5) Jaganpal Singh did initial part of investigation. (PW-6) N P Singh, is the Investigating Officer, has duly supported the prosecution case. (PW-7) Charan Singh, is a Police Constable, who assisted during initial investigation.

14. (DW-1) Kamal Singh, has made an attempt to prove that (PW-1) Dal Chand and (PW-2) Ram Singh were not having any joint account of the field and likewise, there was sufficient distance between their field and the field of Ram Chand. Reading of his statement makes it clear that the same is of no help to the defence.

15. Close scrutiny of the evidence makes it clear that on 9.6.1986 at about 6:15 am, when deceased Chokhey Lal was ploughing his filed, accused persons reached there and caused number of injuries on his body by *farsa, ballam and lathi*, resulting his instantaneous death. After hearing the voice of accused Ram Kishan to kill someone, eye-witnesses (PW-1) Dal Chand and (PW-2) Ram Singh reached to the place of occurrence and saw the accused persons beating the deceased. PW-1 and PW-2 have made an attempt to save Chokhey Lal and seeing them, accused persons fled away from the spot and entered in the nearby sugarcane field. By the time PW-1 and PW-2 reached to the deceased, he was already dead. It can be said that there are minor contradictions in the statements of PW-1 and PW-2, but they are not of significant nature. These contradictions do not go to the root of the matter and do not affect their version otherwise. Yet another aspect of the matter is that these witnesses are the rustic villagers and they have been examined in the Court after one year of the incident and, therefore, minor contradictions in their statements are bound to be there. Law in this respect is very clear.

In **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**, the Supreme Court, while considering the minor contradictions in the statement of the witnesses, held as under:

"5 ... ... We do not consider it appropriate or permissible to enter upon a reappraisal or re-appreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed in the mental screen.

(2) Ordinarily, it so happens that a witness is overtaken by events. The

witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation defer from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in short time span. A witness is liable to get confused or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

16. If the entire statement of these eye-witnesses, i.e. (PW-1) Dal Chand and (PW-2) Ram Singh is seen, it is apparent that they are very firm and have reiterated as to the manner in which, the deceased was done to death by the accused persons. The statements of these two eye-witnesses also find support from the postmortem report of the deceased Ex. Ka.2 and number of injuries of the weapons used by the accused persons have been found on the body of the deceased.

17. We find no substance in the argument of the accused appellants that when Tej Ram and Kalyan have been acquitted, the same treatment ought to have been given to them also. Even assuming that Tej Ram and Kalyan have wrongly been acquitted, their acquittal would be of no help to the accused-appellants because the evidence clearly shows their involvement in the commission of offence.

18. We further find no substance in the argument of the defence that only interested/related witnesses have been examined, and the important witness Lakkhi has not been examined.

It is settled position of law that the evidence of an interested witness should not be equated with that of a

tainted evidence or that of an approver so as to require corroboration as a matter of necessity. All that the Courts require as a rule of prudence, not as a rule of law, is that the evidence of such witness should be scrutinized with a little care. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house then the only witnesses who could see the occurrence may be the family members. In such cases, it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness is scrutinized with a little care and the Court is satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. **(See Anil Rai vs. State of Bihar (2001) 7 SCC 318; State of U.P. vs. Jagdeo Singh (2003) 1 SCC 456; Bhagalool Lodh & Anr. vs. State of U.P. (2011) 13 SCC 206; Dahari & Ors. vs. State of U.P. (2012) 10 SCC 256; Raju @ Balachandran & Ors. vs. State of Tamil Nadu (2012) 12 SCC 701; Gangabhavani vs. Rayapati Venkat Reddy & Ors. (2013) 15 SCC 298; Jodhan vs. State of M.P. (2015) 11 SCC 52)**

The Supreme Court in **Bur Singh and Anr. vs. State of Punjab** has held that merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Further, the Supreme Court in **Sudhakar v. State** and **Ganapathi v. State of Tamil Nadu** relying in its earlier judgments held as under:

"18. Then, next comes the question 'what is the difference between a related witness and an interested witness?. The plea of "interested witness", "related witness" has been succinctly explained by this Court that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. In this case at hand PW 1 and 5 were not only related witness, but also 'interested witness' as they had pecuniary interest in getting the accused petitioner punished. [refer State of U.P. v. Kishanpal and Ors., (2008) 16 SCC 73] : (2008 AIR SCW 6322). As the prosecution has relied upon the evidence of interested witnesses, it would be prudent in the facts and circumstances of this case to be cautious while analyzing such evidence. It may be noted that other than these witnesses, there are no independent witnesses available to support the case of the prosecution."

Relationship is not a factor to affect credibility of a witness. There is no proposition in law that relatives are to be treated as untruthful witnesses. To the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. A witness who is a relative of deceased or victim of the crime cannot be characterized

as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness. **(See- Harbans Kaur and another vs. State of Haryana, 2005 AIR SCW 2074; Namdeo vs. State of Maharashtra, 2007 AIR SCW 1835; Sonelal vs. State of M.P., 2008 AIR SCW 7988; and Dharnidhar vs. State of Uttar Pradesh and Others & other connected appeals, (2010) 7 SCC 759).**

19. Taking the cumulative effect of the evidence, we are of the considered opinion that the trial Court was fully justified in convicting the accused-appellants. The impugned judgment and order deserves to be affirmed and accordingly, the same is affirmed.

20. Appeal has no substance, the same is, accordingly, dismissed. The appellants are reported to be on bail, they be taken into custody forthwith to serve the remaining sentence.

21. We appreciate the assistance rendered by Sri Ram Milan Dwivedi, learned Amicus, who has argued on behalf of appellant no.1. The State Government is directed to pay Rs.5000/- to the Amicus towards his remuneration.

22. Let a copy of this judgment be sent to the concerned trial Court for compliance.

(2019)10ILR A 261

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.09.2019

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 1180 of 2003

Ram Ashrey ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sampurnanand, Sri A.P. Singh, Sri Amar Nath Dubey., Sri Md. Abid Ali, Sri Ravi Shankar Singh, Sri Sachin Pratap Singh.

Counsel for the Respondent:
Govt. Advocate.

A. Code of criminal procedure 1973 - Section 384 (Summary dismissal of appeal), Section 385 (Procedure for hearing appeals not dismissed summarily) and Section 386 Cr.P.C (Powers of the Appellate Court) - that a criminal appeal cannot be dismissed for default or as not pressed - The Court has to decide the appeal on merits and pass final orders - criminal appeal, if not dismissed summarily and has been admitted for hearing, must be considered and disposed of on merits irrespective of the fact whether the appellant or his counsel or the public prosecutor is present or not or even if the appeal has been "not pressed". (Para 4 & 9)

B. Indian Evidence Act, 1872 - Section 134 - Number of witnesses -no legal impediment in convicting a person on the sole testimony of a single witness - if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration- court to act upon the testimony of witnesses - not

the number, the quantity, but the quality which is material - evidence has to be weighed and not counted - The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise. (Para 25 & 26)

Criminal Appeal dismissed (E-7)

List of Cases Cited: -

1. Jeetu & ors. Vs St. of CG. MANU/SC/1056/2012

2. Dilip S. Dahanukar Vs Kotak Mahindra Co. Ltd. & anr. MANU/SC/1803/2007 (2007) 6 SCC 528

3. Babu Rajirao Shinde Vs St. of Mah. MANU/SC/0072/1971: (1971) 3 SCC 337

4. Siddanna Apparao Patil Vs St. of Mah. MANU/SC/0190/1970: (1970) 1 SCC 547

5. Padam Singh Vs St. of U.P. (2000) 1 SCC 621

6. Bani Singh & ors. Vs St. of U.P (1996) 4 SCC 720

7. Rishi Nandan Pandit & ors. Vs St. of Bihar (1999) 8 SCC 644

8. Vadivelu Thevar Vs St. of Madras AIR 1957 SC 614

9. Jagdish Prasad Vs St. of M.P. (AIR 1994 SC 1251)

10. Lallu Manjhi Vs St. of Jhk. AIR 2003 SC 854

11. Sucha singh Vs St. of Punj. AIR 2003 SC 3617

12. Masalti & ors. Vs St. of U.P. MANU/SC/0074/1964

13. St. of Punj. Vs Jagir Singh (AIR 1973 SC 2407)

14. Lehna v. St. of Har. (2002 (3) SCC 76)

15. Krishna Mochi & ors. Vs St. of Bihar etc (2002 (4) JT (SC) 186)

16. St. of Guj. Vs J.P Varu 2016 Cr.L. J 4185 (SC)

17. Raj Kumar Singh alias Raju alias Batya Vs St. of Raj. AIR 2013 SC 3150

18. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

19. St. of Raj. Vs Smt. Kalki & anr. MANU/SC/0254/1981: AIR 1981 SC 1390

20. Sachchey Lal Tiwari Vs St. of U.P. MANU/SC/0865/2004: AIR 2004 SC 5039

21. Bhagaloo Lodh & ors. Vs St. of U.P. MANU/SC/0700/2011

22. Sucha Singh & ors. vs. St. of Punj. MANU/SC/0527/2003

23. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

24. Rana Pratap & ors. Vs St. of Har. 1988 (3) S.C.C. 327

25. St. of U.P. Vs Devendra Singh MANU/SC/0343/2004

(Delivered by Hon'ble Ved Prakash Vaish. J. & Hon'ble Mohd. Faiz Alam Khan J.)

1. Heard learned counsel for the appellant/Shri Sachin Pratap Singh as well as learned Addl. G.A. for the State and perused the material on record.

2. This Criminal Appeal has been preferred against the judgment and order dated 11.07.2003 passed by learned Additional Sessions Judge (F.T.C.) IIIrd, Pratapgarh in Sessions Trial No. 185 of 2002, arising out of Case Crime No. 127 of 2001, under Section 302, 148, 323/149 and under Section 506 I.P.C., Police Station Baghrai, District Pratapgarh.

3. Shri Sachin Pratap Singh, learned counsel for the appellant on the basis of the instructions received by him from his client/appellant namely **Ram Ashrey,** who has been released from Jail on the basis of remission of sentence granted by the State Government, submits that he do not want to press the appeal. Learned counsel for the appellant also endorsed on the Memo of Appeal that he do not want to press the appeal on merits and the same be dismissed as not pressed.

4. In this regard, provisions of Section 384, 385 and 386 Cr.P.C. are relevant, which are being reproduced as under:

384. Summary dismissal of appeal.-(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal

385. Procedure for hearing appeals not dismissed summarily.-(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in this behalf;

(iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;

(iv) if the appeal is under section 377 or section 378, to the accused,

and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available in that Court, and hear the parties:

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

386. Powers of the Appellate Court.-After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence

by the Court passing the order or sentence under appeal.

5. In **Jeetu and Others Vs State of Chattisgarh reported in MANU/SC/1056/2012** it is held by Hon'ble Supreme Court in para 15, 20 and 21 as under :-

"15.The hub of the matter, as we perceive, really pertains to the justifiability and legal propriety of the manner in which the High Court has dealt with the appeal. It is clear as day that it has recorded the proponement of the learned Counsel for the Appellants relating to non-assail of the conviction, extenuating factors for reduction of sentence and proceeded to address itself with regard to the quantum of sentence. It has not recorded its opinion as regards the correctness of the conviction.

20.At this stage, we may refer with profit to a two-Judge Bench decision in ***Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr.*** *MANU/SC/1803/2007 : (2007) 6 SCC 528 wherein this Court, after referring to the pronouncements in Babu Rajirao Shinde v. State of Maharashtra MANU/SC/0072/1971 : (1971) 3 SCC 337 and* ***Siddanna Apparao Patil v. State of Maharashtra****MANU/SC/0190/1970 : (1970) 1 SCC 547, opined thus:*

An appeal is indisputably a statutory right and an offender who has been convicted is entitled to avail the right of appeal which is provided for Under Section 374 of the Code. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 is also a fundamental right. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

xxx xxx xxx xxx

The right to appeal from a judgment of conviction vis-à-vis the provisions of Section 357 of the Code of Criminal Procedure and other provisions thereof, as mentioned hereinbefore, must be considered having regard to the fundamental right of an accused enshrined under Article 21 of the Constitution of India as also the international covenants operating in the field.

21. *Tested on the touchstone of the aforesaid legal principles, it is luminescent that the High Court has not made any effort to satisfy its conscience and accepted the concession given by the counsel in a routine manner. At this juncture, we are obliged to state that when a convicted person prefers an appeal, he has the legitimate expectation to be dealt with by the Courts in accordance with law. He has intrinsic faith in the criminal justice dispensation system and it is the sacred duty of the adjudicatory system to remain alive to the said faith. That apart, he has embedded trust in his counsel that he shall put forth his case to the best of his ability assailing the conviction and to do full justice to the case. That apart, a counsel is expected to assist the Courts in reaching a correct conclusion. Therefore, it is the obligation of the Court to decide the appeal on merits and not accept the concession and proceed to deal with the sentence, for the said mode and method defeats the fundamental purpose of the justice delivery system. We are compelled to note*

here that we have come across many cases where the High Courts, after recording the non-challenge to the conviction, have proceeded to dwell upon the proportionality of the quantum of sentence. We may clearly state that the same being impermissible in law should not be taken resort to. It should be borne in mind that a convict who has been imposed substantive sentence is deprived of his liberty, the stem of life that should not ordinarily be stenosed, and hence, it is the duty of the Court to see that the cause of justice is subserved with serenity in accordance with the established principles of law."

6. The Hon'ble Supreme Court in **Padam Singh Vs. State of U.P., (2000) 1 SCC 621** in para-2 of its judgment has held as under:

".....It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court. The judicial approach in dealing with the case where an accused is charged of murder under Section 302 has to be cautious, circumspect and careful and the High Court, therefore, has to consider the matter carefully and examine all relevant and material circumstances, before upholding the conviction."

7. Hon'ble Apex Court in the case of **Bani Singh and others Vs. State of U.P., (1996) 4 SCC 720** held that "*the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the appellate court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross- checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case [AIR 1987 SC 1500 : 1987 Cri LJ 1856] that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution."*

8. Hon'ble Apex Court in the case of **Rishi Nandan Pandit and others Vs. State of Bihar, (1999) 8 SCC 644** has held that " *9. As a matter of legal position the court is not precluded from perusing the records and come to its own conclusion unaided by any legal*

practitioner to project the points favourable to the accused, when the counsel engaged by them does not turn up to argue. But the three-Judge Bench of this Court indicated in Bani Singh v. State of U.P. [(1996) 4 SCC 720 : 1996 SCC (Cri) 848] that it is a matter of prudence that the court may, in an appropriate case, appoint a counsel at the State's expense to argue for the cause of the accused. Of course it is for the court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could be disposed of unassisted by counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range it is advisable to seek the assistance of a legal talent."

9. A reading of Sections 384, 385 and 386 of the Code as well as the above legal position clearly demonstrate that a criminal appeal cannot be dismissed for default or as not pressed , if the same has been admitted for consideration. The Court has to decide the appeal on merits and pass final orders. The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits so as to pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are before the Court and the appeal is set down for hearing, it is essential that the appellate court should peruse such record, hear the appellant or his pleader, if he appears, and hear the public prosecutor, if he appears and after complying with these requirements, the appellate court has full power to pass any of the orders mentioned in the section, but the disposal must be after the appellate court has considered the appeal on merits. It is clear that the criminal appeal, if not dismissed summarily and has been admitted for hearing, must be considered and disposed of on merits irrespective of the fact whether the appellant or his counsel or the public prosecutor is present or not or even if the appeal has been "not pressed".

10. Keeping this in view, we are obliged to peruse the record of case and to scrutinize whether the reasoning of the trial court are based on proper appreciation of evidence available on record for the purpose of satisfying ourself that the reasonings and findings recorded by the trial court are consistent with the material on record. After this exercise we have to arrive at an independent conclusion as to whether the said evidence can be relied upon and whether the cumulative effect of such evidence results in proving the charges framed against the accused person(s) as beyond reasonable doubt. Therefore we proceed to dispose of this appeal on merits, irrespective of the fact that the same has been not pressed by Ld. Counsel for the appellant, in view of the grounds taken in memorandum of appeal.

11. The facts necessary for the disposal of this appeal unfolds from the record that, a written report was presented by informant namely Mohd. Asgar Ansari, the son of Mohd. Suleman to S.H.O. Police Station Baghrai, Pratapgarh on 07.12.2001 at about 11:30 am alleging that he along with his father Suleman, aged about 70 years, were irrigating their agricultural field, wherein the crop of "wheat' was standing. It is further stated that at about 11:00 am., Ram Asrey,

Meghai and Khairati all sons of Bachoolal Pasi and Pappu and Subhane son of Khairati Pasi came to his house armed with *"lathi, danda' and "country-made pistol'*. His brother Mohd. Azam and mother Khalikulnisa did not open the gate, on which the accused persons started abusing them. They saw him and his father in the field and rushed towards them and assaulted them with the intention to murder. He and his father Suleman attempted to run away, but after running for a short distance, the accused persons overpowered his father and assaulted him with *"lathi, danda'*. Accused-appellant, Ram Asrey fired at the head of his father with a country-made pistol. He succeeded in running away and also sustained injuries by the assault of the accused persons and some-how managed to escape. His father could not run due to his old age and his dead body is lying in the field of Bhagan Pasi. The incident was witnessed by his brother Mohd. Azam and his mother Smt. Khalikulnisa and many other persons of the village.

12. On the basis of this written information (Exhibit-ka-1), an FIR (Exhibit-ka-2) was registered at Police Station Kunda, District Pratapgarh at 11:30 am against Ram Asrey, Meghai, Khairati, Pappu and Subhane, under Sections 147, 148, 149, 302, 307, 323, 504, 506 I.P.C. at Case Crime No. 127 of 2001. The Investigation of the case was entrusted to S.I., Balram Mishra. An entry of this FIR was made in the G.D. No.-14 dated 07.12.2001 at 11:30 am, which is available on record as Exhibit-ka-3.

13. The Investigating Officer, P.W.-4/S.I. Balram Mishra arrived at the spot and prepared the Inquest Report of deceased Suleman (Exhibit-ka-4) and necessary papers for the purpose of the postmortem i.e. Letter to C.M.O, Seal sample, Report R.I., Challan Lash and Photo Lash (Exhibit-ka-5 to ka-9).

14. The postmortem on the dead body of deceased Suleman was conducted on 08.12.2001 at about 1:30 pm by Doctor Ravi Srivastava, the then Medical Officer, District Hospital, Pratapgarh and he also prepared the postmortem-report (Exhibit-ka-13). He found the body of the deceased as thin-build, eyes and mouth were closed, rigor mortis was present in both upper and lower limbs.

15. He also found following antemortem injuries on the body of deceased:-

Injury No.1/A fire arm wound of entry of Size 1.5 cm x 1.5 cm over the forehead direct downwards literally. Margins inverted over the forehead just above the middle of left eyebrow, tattooing and blackening present. pellets recovered from the wound.

Injury No.2/A fire arm wound of exit of size 2.5 cm x 2.5 cm over left side of face just adjacent to tragus of left tear, margins inverted.

Injury No.3/An abraided contusion of size 4.0 cm. 0.5 cm. over the right side of forehead 2.0 cm. above the middle of right eyebrow.

Injury No.4/An abraided contusion of size 3.0 cm x 1.0 cm over the left arm, 8.0 cm. above the left elbow joint. Humerous bone (left fractured).

Injury No.5/An abraided contusion of size 4 cm x 1.0 cm. over the back of left forearm just below the left elbow joint.

Injury No.6/An abraided contusion of size 4.0 cm x 1.0 cm. over the right forearm just above the right wrist joint. Both radius and ulna bone fractured.

Injury No.7/Abrasion of size 6 cm x 1.0 cm. over the posterior aspect of right shoulder 6 cm. below the tip of right shoulder.

The stomach contains two ounses of digested unidentified food particles, while small intestine was containing faecal matter and gases, the time of death was determined about one day before and the cause of death was stated as death due to *"Coma'*, as a result of fire arm injury.

The medical examination of the injuries of injured Mohd. Asgar Ansari was done by Doctor C.P. Sharma on 07.12.2001 at about 3:40 pm at PHC (Primary Health Center), Baghrai, Pratapgarh and he found following injuries on the person of the injured:-

Injury No.1/Abrasion 0.5 cm x 0.5 cm. on right forearm 14 cm. above from right chest.

Injury No.2/Contusion 6.0 cm. x 2.0 cm. on right shoulder.

Injury No.3/Contusion 4.0 cm. x 2.0 cm. on right knee.

Injury No.4/Complaint of pain on left big toe of the leg.

16. All injuries were stated to be simple, while Injury No.1 was caused by friction and rest of the injuries were stated to have been caused by blunt object. Duration of all injuries were noted as fresh.

17. The Investigating Officer also recorded the statement of the informant as well as of Mohd. Asgar Ansari and prepared the Site Plan (Exhibit-ka-10) on the pointing of him. He also collected the simple as well as blood stained soil from the spot and sealed them in a container separately and prepared an "Fard' (Exhibit-ka-11). He also recorded the statement of eye witness Mohd. Azam and the statement of another eye witnesses Smt. Khalikulnisa on 06.01.2002 and submitted the Charge-sheet (Exhibit-ka-12) against the accused persons, under Sections 147, 148, 149, 307, 302, 323, 504, 506 I.P.C.

18. The case being triable by the Court of Sessions was committed to the Sessions Court and charges against the appellant under Sections 148, 302, 307, 323 read with Section 149, 504 and 506 of I.P.C. were framed against the appellant. The appellant denied the charges and claimed trial.

19. During trial, the prosecution placed reliance on following documentary evidence:-

1. Tehrir FIR, (Exhibit-ka-1).

2. Chick FIR, (Exhibit-ka-2).

3. G.D. Quaymi, (Exhibit-ka-3).

4. Inquest Report, (Exhibit-ka-4).

5. Letter to C.M.O., (Exhibit-ka-5).

6. Sample soil, (Exhibit-ka-6).

7. Letter to R.I., (Exhibit-ka-7).

8. Challan R.I., (Exhibit-ka-8).

9. Photo lash, (Exhibit-ka-9).

10. Site Plan, (Exhibit-ka-10).

11. Fard blood stained and sample soil, (Exhibit-ka-11).

12. Charge-sheet, (Exhibit-ka-12).

13. Postmortem report, (Exhibit-ka-13).

14. Injury Report of informant, Asgar Ali, (Exhibit-ka-14).

20. In addition to the above documentary evidence, the prosecution also testified following witnesses in order to prove its case before the Court below:-

P.W.-1/Mohd. Azam (Eye witness)

P.W.-2/Mohd. Asgar Ansari (Informant/injured eye witness)

P.W.-3/Head Constable, (Durgvijay Singh, who recorded the First Information Report.)

P.W.-4/S.I. Balram Mishra (Investigating Officer)

P.W.-5/Doctor Ravi Srivastava, (Doctor, who did the postmortem.)

P.W.-6/Doctor C.P. Sharma, (Doctor, who examined the injured Mohd. Asgar Ansari.)

21. After the completion of the evidence of the prosecution, the statement of the accused persons including the appellant was recorded. The appellant, Ram Ashrey in his statement, recorded under Section 313 of the Cr.P.C., denied the prosecution evidence and stated that deceased Suleman and his sons had murdered Bachoolal. These peoples are "Gunda elements' and also informer of the police. The deceased Suleman had been killed by some unknown persons at unknown place, but to pressurize the appellant for compromise, this false case has been instituted against him.

22. Learned Trial Court after appreciating and analyzing the evidence of the prosecution came to the conclusion that the prosecution has proved its case beyond reasonable doubt and sentenced the appellant, Ram Ashrey under Sections 302, 323/149, 506 and 148 I.P.C. and acquitted the appellant of the charges under Section 307 and 504 of I.P.C.

23. Aggrieved by the judgment and order of conviction and sentence the appellant Ram Ashrey had filed this appeal challenging the judgment and order of the Trial Court on various grounds mentioned in the Memo of Appeal. A perusal of the memo of appeal would reveal that appellant, Ram Ashrey challenged the impugned judgment and order on the grounds that the same has been passed against weight of evidence available on record and the Court has admitted the evidence, which was otherwise not admissible. There was no evidence against the appellant on record and the judgment and order of the Trial Court was based on assumption, presumption, conjectures and surmises as well as the version of the prosecution has not been corroborated by the medical evidence and the whole case of the prosecution is highly improbable and also that the Trial Court has ignored material contradictions

in the testimony of the prosecution witnesses.

24. Since learned counsel for the appellant has not pressed the appeal and learned Addl. G.A. has supported the judgment and order of the Trial Court on the ground that there is no illegality in the finding and reasoning recorded by the Court, keeping in view the law mentioned herein-before, we have carefully perused the record of Sessions Trial No. 185/2000 "State Vs. Meghai and others", arising out of Case Crime No. 127/2001, Police Station Baghrai, District Pratapgarh in the background of the grounds of appeal taken by the appellant. This Court is conscious of the fact that being the Ist Appellate Court, it is the duty of this Court to go through the evidence on record and assess and analyze the evidence of prosecution to gauge as to whether the cumulative affect of such evidence results in proof beyond reasonable doubt and as to whether the Trial Court has erred in either marshalling of facts or in appreciation of evidence or in application of law.

25. Section 134 of Evidence Act do not require any particular number of witnesses to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent, it is not the quantity but quality which matters. Therefore, if the testimony of a witness is found reliable on the touch stone of credibility, accused can be convicted on the basis of testimony of even single witness. This principle was highlighted in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614,** wherein it is held by Hon,ble Apex Court that "The contention that in a murder case, the Court should insist upon plurality of witnesses, is much broadly stated."

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section has enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstance of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither

wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

26. Vadivelu Thevar case (supra) was referred to with approval in **Jagdish Prasad v. State of M.P. (AIR 1994 SC 1251**). It was held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'). But, if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses.Therefore, it is not the number, the quantity, but the quality which is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise.

27. In **Lallu Manjhi vs. State of Jharkhand, AIR 2003 SC 854** Hon,ble Supreme Court held in **Para 10**, that *"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely* ***(i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable, nor wholly unreliable.*** *In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimo*ny, direct or circumstantial, before acting upon testimony of a single witness."

28. In **AIR 2003 SUPREME COURT 3617, Sucha singh v/s State of Punjab** Honble Apex Court after considering **Masalti and others vs. State of U.P. MANU/SC/0074/1964, State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76),** opined as under:- *"Stress was laid by the accused-*

appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence.' (See Nisar Ali v. State of Uttar Pradesh (AIR 1957 SC 366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurcharan Singh and another v. (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because18witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justicewould come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and another v. State of Madhya Pradesh, 1972 3 SCC 751) and Ugar Ahir and others v. State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See

Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and others v.state of punjab (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and another (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in ***K*rishna Mochi and others v. State of Bihar etc. (2002 (4) JT (SC) 186)."**

29. In **State of Gujarat vs J.P Varu** reported in **2016 Cr.L.J 4185 (Supreme Court)** it has been propounded by the Supreme Court that, *" **Para 13** the burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favorable to the accused should be adopted."*

30. In **AIR 2013 SUPREME COURT 3150, Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan** Hon,ble Supreme Court held that **Para 17** *"Suspicion, however grave it may be, cannot take place of proof and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the Court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."*

31. In view of above legal position it is established that the golden rule which runs through the web of criminal jurisprudence is that every accused person is presumed to be innocent till the prosecution through reliable and acceptable evidence proves its case

beyond all reasonable doubt. In other words, in criminal trial, it is the duty of the prosecution to prove its case beyond all reasonable doubt. However, it is not each and every doubt which can be termed as reasonable and benefit of only that doubt can be claimed by the accused persons ,which is reasonable in the facts and circumstances of the case and which grow out of the evidence, itself. It is also settled that if the evidence of any witness is having a ring of truth around it, is cogent, credible and trustworthy, the Court will not hesitate in reposing confidence in such a witness.

32. Now we proceed to appreciate the evidence available on record in the background of above mentioned setlled principles of appreciation of evidence.

33. **P.W.-1/Mohd. Azam,** who is the son of the deceased in his statement recorded before the Court below has supported the version of the prosecution as contained in the First Information Report and stated that accused -appellant, Ram Ashrey, Meghai and Khairati are real brothers and accused Pappu and Subhane are the sons of Khairati. All of them are the residents of his village. He stated that before the instant incident, there was a quarrel between the accused persons and his family members, pertaining to some loss to crops by a cowed of accused persons. In that incident, accused person Meghai and his father Bachoolal and some other persons assaulted them and in their self defence, the lady members of the house pelted stones on them, as a result of which, the father of Meghai namely Bachoolal died. Accused persons are inimical to them since then. He further stated that on the fateful day at about 11:00 am, he and his mother was at their home and his father Mohd. Suleman and his younger brother Mohd. Asgar Ansari were irrigating their field. Accused-appellant, Ram Ashrey along with other co-accused persons came to his house and started abusing. He and his mother closed the door, where on the appellant started abusing and ran towards the direction, whether his father and brother were irrigating their field. They raised an alarm, but accused persons captured his father, who was attempted to ran away and accused persons Meghai, Khairati, Pappu and Subhane started assaulting his brother and his father with "lathi, danda'. His brother ran away and he also sustained some injuries, while his father, who was old could not run away and fell down. Appellant, Ram Ashrey fired at his father from country-made pistol on his head, whereby his father died at the spot instantly. He further stated to be a witness of the inquest of his father's dead body. A lengthy cross-examination has been done with this witness, but he remained consistent on the material points throughout cross-examination.

34. **P.W.-2/Mohd. Asgar Ansari** is also an eye witness of the incident and an injured in the incident as well as the informant of the case. He narrated the incident in the manner, written in the FIR and corroborated the testimony of P.W.-1/Mohd. Azam. He attributed the role of assault by "lathi, danda' to all the accused persons and also that appellant, Ram Ashrey was having a country-made pistol with him, whereby he fired at his father in his head, whereby his father died at the spot. This witness also stated to have sustained injuries by the assault made by the appellant and other accused persons by "lathi, danda' and also fixed the spot as the field of Bhagan Pasi. He proved the

FIR of incident as Exhibit-ka-1 and also that he was medically examined by the Doctor in police custody and was also a witness to the inquest of his father's dead body. He also stated that on his pointing the Investigating Officer prepared the Site Plan. This witness was also subjected to lengthy cross-examination, but he also remained consistent in material particulars.

35. **P.W.-3/Head Constable, Durgvijay Singh** is a formal witness, who has proved to have lodged the First Information Report as Exhibit-ka-1 at 11:30 am and also the Chick FIR as Exhibit-ka-2 as well as the entry of the G.D. made by him in his hand writing as Exhibit-ka-3.

36. **P.W.-4/Investigating Officer of the case** namely **S.I. Balram Mishra,** who has stated to have recorded the statement of the witnesses, prepared the necessary papers for the postmortem of the body of the deceased Suleman as Exhibit-ka-5 to ka-9. He further stated to have prepared the Inquest Report as Exhibit-ka-4 and also prepared the Site Plan, Exhibit-ka-10 and Fard of seizing blood stained as well as sample soil as Exhibit-ka-1 and also to have submitted the Charge-sheet, Exhibit-ka-12.

37. **P.W.-5/Dr. Ravi Srivastava** is the person, who has done the postmortem on dead body of deceased Suleman and prepared the Postmortem report in his hand writing and signature and proved the same as Ex-ka-13. The postmortem report as narrated by him has been discussed here in before. He further opined that the death of the deceased Suleman had occurred on 07.12.2001 at about 11:00 am due to fire arm injury.

38. The proved facts, which have also not been disputed by the accused persons are that the father of appellant Ram Ashrey namely Bachoolal was allegedly murdered by the deceased and his sons and at the time of the incident, a criminal case pertaining to that incident was pending against the deceased and his sons. The fact that deceased and his sons were charged for the murder of Bachoolal is also admitted to the prosecution witnesses, however, with a different version of the incident and it is claimed by them that Bachoolal along with others came to their house for the purpose of assaulting them and the ladies of the house pelted stones on them in their Self defence and in that incident Bachoolal got injured and died. However, the crux of the matter is that prior to the instant incident, the deceased and his sons were charged for the murder of Bachoolal and a criminal case was pending pertaining to that incident in the Court. It has also been admitted by the appellant in his statement recorded under Section 313 of the Cr.P.C. that his father Bachoolal was done to death by deceased and his sons and they were pressurizing him to make a compromise in the matter and on the basis of it, the appellant has been falsely implicated in this case. Therefore, it is established on record that both parties were highly inimical towards each other and this bitterness may provide sufficient motive to the appellant to commit the crime in order to take revenge of the death of his father Bachoolal and this may also be the basis of false implication. Therefore the duty of this Court is to analyze the evidence on record keeping in mind the above possibilities.

39. So far as the ground, which has been taken in the memo of appeal,

pertaining to the fact that all the witnesses of fact were related to the deceased, as P.W.-1/Mohd. Azam and P.W.-2/Mohd. Asgar Ansari were the sons of deceased Suleman, the law is well-settled on this point that the evidence of a related witness, who is also a natural witness could not be discarded only on the basis of his relation with the deceased on the point of admissibility of the evidence of related witness, following case laws are relevant:-

40. In **Gangabhavani vs. Rayapati Venkat Reddy and Ors., MANU/SC/0897/2013** Hon'ble Supreme Court held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

12. In ***State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390, t****his Court held:*

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the Respondents."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In ***Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039,*** *while dealing with the case this Court held:*

"7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must

have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

41. In **Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011** it was held as under :-

"14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. ***(Vide: M.C. Ali and Anr. v. State of Kerala MANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).***

In view of the law laid hereinabove, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses."

42. It is therefore settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyze the evidence to find out, whether it is cogent and credible .

43. The above reports would show that the ratio, which has been propounded by the Hon'ble Supreme Court is that the evidence of a witness, who is related to the deceased, his testimony could not be discarded only on the basis of his relationship with the deceased, rather his evidence is to be scrutinized with care and caution, keeping in view in mind that he is relative of the deceased. It is also to be seen whether the witnesses, who are being termed as related witnesses were also natural witnesses or not.

44. In **Sucha Singh and Ors. vs. State of Punjab, MANU/SC/0527/2003** Hon'ble Supreme Court has observed as follows :-

"15. In Dalip Singh and Ors. v. The State of Punjab MANU/SC/0031/1953 : [1954]1SCR145 it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely, Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

16. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan MANU/SC/0107/1973 : 1974CriLJ331 in which Vadivelu Thevar v. State of Madras MANU/SC/0039/1957 : 1957CriLJ1000 was also relied upon.

17. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness. should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. It the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan MANU/SC/0036/1951 : 1952CriLJ547 . we find, however, that it unfortunately still persists, it not in the judgements of the Courts, at any rate in the arguments of counsel."

18. Again in Masalti and Ors. v. State of U.P. MANU/SC/0074/1964 : [1964]8SCR133 this Court observed: (p, 209-210 para 14):

"but it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses .....

The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure

of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

19. To the same effect is the is the decision in State of Punjab v. Jagir Singh MANU/SC/0193/1973 : 1973CriLJ1589 and Lehna v. State of Haryana MANU/SC/0193/1973 : 1973CriLJ1589 . Stress was laid by the accused- appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end.

The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that, it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh MANU/SC/0032/1957 : 1957CriLJ550). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab MANU/SC/0122/1955 : 1956CriLJ827). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration,

embroideries or embellishment.(See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh MANU/SC/0254/1972 : 1972CriLJ1302) and Ugar Ahir and Ors. v. The State of Bihar MANU/SC/0333/1964 : AIR1965SC277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh MANU/SC/0093/1952 : AIR1954SC15 and Balake Singh and Ors. v. The State of Punjab. MANU/SC/0087/1975 : 1975CriLJ1734). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : 1981CriLJ1012, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. MANU/SC/0327/2002 : 2002CriLJ2645 . Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned.

20. As observed by this Court in State of Rajasthan v. Teja Ram and Ors. MANU/SC/0189/1999 : 1999CriLJ2588 the over-insistence on witnesses having no relating with the victims often results in criminal justice going away. When any incident happens in a dwelling house or nearby the most natural witnesses would be the inmates of that house. It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also."

45. Coming to the facts of this case, the story as unfolds from the FIR and the statement of the two witnesses namely P.W.-1/Mohd. Azam and P.W.-2/Mohd. Asgar Ansari is that the appellant along with other accused persons went to the house of deceased Suleman, where P.W.-

1/Mohd. Azam and his mother Khalikulnisa were present. Accused persons threatened them to open the door and when they did not open the door, they hurled filthy abuses and then noticed the deceased Suleman and P.W.-2/Asgar Ali, who were working in a nearby field and all of them rushed towards them and in the process caught Suleman, while the P.W.-2/Mohd. Asgar Ansari, after receiving some injuries from the appellant and his companions, managed to escape. Thereafter, deceased Suleman was assaulted by the appellants and instant appellant namely Ram Ashrey took out a country-made pistol and fired at the head of Suleman, whereby he died on the spot.

46. It is clear from the aforesaid factual matrix that P.W.-1/Mohd. Azam, who was with his mother Khalikulnisa at the house of the deceased as well as P.W.-2/Asgar Ansari, who was with the deceased in the field and was irrigating the wheat crop are natural witnesses, it is otherwise that they are also related to the deceased. Their presence at the spot is natural, as the incident is of the house and agriculture field of the deceased.

47. Though, it has come in the FIR as well as in the testimony of both eye witnesses that other villagers were also present in the nearby fields, who have witnessed the incident and on the basis of this, a ground has also been taken by the appellant that the independent witnesses have not been produced by the prosecution and, therefore, the testimony of the interested witnesses is doubtful. Perusal of record in the backdrop of this argument would show that the parties were having bitter enmity in between them. Informants' side was charged for the murder of the father of appellant namely Bachoolal, therefore, it was not easy for any person to earn enmity of the accused persons and to stand as a witness against them. Secondly, the informant/P.W.-2/Asgar Ansari in his statement at Page No. 9 has stated that the villagers, who were working in the nearby fields did not came to the spot due to the fear of the country-made pistol, possessed by the appellant and when the accused persons fled from the spot, then villagers , working in nearby fields, came to the spot. P.W.-1/Mohd. Azam in his statement at Page No. 3 has also stated that the appellant fired at head of the deceased Suleman, as a result of which, he died instantly on the spot and the incident was witnessed by him, his brother and his mother along with other villagers, who were working in the nearby fields. It has been categorically mentioned by him in his statement that the accused persons are of bad characters and nobody in the village is ready to give evidence against them. The statement of this witness appears acceptable and truthful in the light of the fact that in village or even in urban areas where the presence of police is conspicuous, nobody wants to get himself involved in the enmity of two parties, which are having very bitter relations, going to the extent that father of the appellant was allegedly eliminated by the deceased and his sons and as a revenge, the deceased was allegedly eliminated by the appellant and his companions. In this background, if other independent witnesses have not come forward to depose against appellant, it is not a circumstance, which may adversely affect the case of the prosecution.

48. In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** The Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

49. We have carefully perused the evidence of P.W.-1/Mohd. Azam and P.W.-2/Mohd. Asgar Ansari. P.W.-1/Mohd. Azam is a natural eye witness. He in his statement has narrated the incident by mentioning minute details. This witness has been cross-examined at length by the appellant and barring some minor contradictions, pertaining to the manner of assault and as to who hit first by *"lathi, danda'*, there is no material contradictions in his testimony, which may adversely affect the prosecution. P.W.-2/Asgar Ali is the witness, who was with deceased Suleman at the time of incident and was irrigating the agriculture field and he has also sustained injuries in the incident. The law is well-settled, so far as the evidentiary value of an injured witness is concerned, that the testimony of an injured witness, if his presence on the spot is established, is on a higher pedestal than others because he is the person who has actually received injuries in the incident. In the instant case, the First Information Report has also been lodged by this witness namely P.W.-2/Asgar Ali, within half an hour of the incident. Therefore, in the facts and circumstances of the case, the FIR is prompt and rules out the possibility of any fabrication and concoction. This witness has also received injuries in the incident and keeping in view his whole testimony, the same inspires confidence of this Court. His presence on the spot along with other witness was natural and nothing has been culled out from his cross examination, which may cause any doubt on the sanctity of the evidence of this witness. Despite being the son of deceased, his testimony is well-balanced and is consistant on material particulars and despite lengthy cross-examination, the appellant has failed to impeach his testimony. Therefore, this Court is having no doubt in categorizing the testimony of this witness as truthful, reliable and acceptable.

50. The circumstance of P.W.-2/Asgar Ali not attempting to save the life of his father Suleman is also of no consequence, it is established on record that, he first tried to defend himself, as appellant was having a country-made pistol in his hand, so the conduct of this witness to run away from the spot is not a circumstance, which may affect the testimony of this witness. The witnesses of heinous crimes behave in a different ways and there is no straight-jacket formula, which may apply to all the witnesses to behave in a particular manner.

51. In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** The Supreme Court held as under :-

"The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor

do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their, course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner."

52. In **Rana Pratap and Ors. v. State of Haryana 1988 (3) S.C.C. 327.** Chinnappa Reddy J. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed; (at p. 330).

"Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

11. These may be some of the reactions. There may be still more. Even a man of prowess may become pusillanimous by witnessing a serious crime. In this case, the courts below, in our opinion, have taken into consideration of all those respects and rightly did not insist upon the evidence from other independent witnesses. The prosecution case cannot be doubted or discarded for not examining strangers at the bus stand who might have also witnessed the crime. We, therefore, reject the first contention urged for the appellants."

53. In **State of Uttar Pradesh vs. Devendra Singh, MANU/SC/0343/2004** while discussing the issue of behavior of witness commented as under :-

"Human behavior varies from person to person. Different people behave and react differently in different situations. Human behavior depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. (See Rana Partap and Ors. v. State of Haryana MANU/SC/0137/1983 : 1983CriLJ1272)."

54. In **Sucha Singh v. State of Punjab reported in MANU/SC/0527/2003** the Supreme Court held So far as inaction of witnesses

in not coming to rescue of deceased is concerned, it has to be noted that both of the witnesses were unarmed and bare handed and the accused persons were armed with deadly weapons. How a person would react in a situation like this cannot be encompassed by any rigid formula. It would depend on many factors, like whether witnesses are unarmed and the assailants are armed with deadly weapons. In a given case instinct of self-preservation can be the dominant instinct. That being the position, their inaction in not coming forward to rescue the deceased cannot be a ground for discarding their evidence.

55. Therefore, keeping in view the above factual matrix as well as the law propounded by the Hon'ble Supreme Court, if P.W.-2/Asgar Ali ran away from the spot to save his life is not a circumstance, which may adversely affect or impeach his testimony.

56. The spot has been fixed in the instant case by the testimony of P.W.-1/Mohd. Azam and P.W.-2/Asgar Ansari. The Investigating Officer namely S.I. Balram Mishra (P.W.-4) arrived at the spot and also prepared the inquest and necessary papers and have found the dead body of the deceased in the agricultural field of Chedi son of Bhagan Pasi and the testimonies of the both witnesses of fact is also to the tune that the deceased fell down in the agricultural field of Bhagan Pasi. The Investigating Officer has also prepared Site Plan, which is Exhibit-ka-10 and has also collected the blood stained as well as simple soil from the spot, and as per the report of the Forensic Lab, human blood has been found in the blood stained soil. No significant or material illegality in the investigation has been highlighted which may render the investigation as tainted. After carefully perusing the statement of the Investigating Officer, P.W.-4 S.I. Balram Mishra, we are satisfied that there is no illegality in the investigation process.

57. The medical evidence has been produced in the form of P.W.-5/Dr. Ravi Srivastava, who has conducted the postmortem on the dead body of Suleman as well as P.W.-6/Dr. C.P. Sharma, who has prepared the injury report of P.W.-2/Asgar Ansari. . The evidence of both medical witnesses is in the line of eye witnesses and in fact corroborating the testimony of P.W.-1/Mohd. Azam and P.W.-2/Asgar Ansari. P.W.-5/ Dr. Ravi Srivastava in his statement has categorically opined and corroborated the time of death of deceased Suleman as 11:00 am on 07.12.2001 and also that the Injury No.1 to the deceased might have been caused by fire arm and other injuries found on the person of the deceased as may be caused by blunt object. In cross-examination, nothing has been culled out, which may adversely affect, the otherwise reliable testimony of this witness. This witness has also opined that the death of the deceased has been caused due to the *"Coma'* occurred as a result of ante-mortem fire arm injury.

58. P.W.-6/Dr. C.P. Sharma has also proved the injuries found by him on the person of P.W.-2/Asgar Ansari and he also proved the injury report as Exhibit-ka-14 and opined that barring one injury, which may be caused by friction, the other injuries to the injured may be caused by "lathi' and the duration of the injuries were fresh.

59. The cumulative effect of the above discussed evidence is that the eye witness account of the incident has been

corroborated by the medical witnesses. Keeping in view the above evidence of the prosecution available on record, we are satisfied and is of the considered view that the FIR in this case has been lodged promptly. Nothing has been placed on record, which may reflect that the FIR is either ante-timed or delayed. In our opinion, the FIR is prompt and inspires the confidence of this Court. The testimony of both factual witnesses namely P.W.-1/Mohd. Azam and P.W.-2/Asgar Ansari, despite being related to the deceased , in the facts and circumstances of the case, is truthful, reliable and can be safely acted upon as they are also natural witnesses of the crime and their testimony could not be disbelieved only on the allegation that they are related to the deceased. The time, place and day of incident has been fixed by the factual witnesses as well as by the medical witness and Investigating Officer. There is no material contradictions or embellishments in the testimony of eye witnesses. Though, the motive is not relevant in this case, as it is a case based on the direct evidence of witnesses and the crime has been proved by cogent and acceptable, truthful eye witnesses, but keeping in view the evidence available on record the motive was certainly available to the appellant i.e. to take the revenge of murder of his father allegedly caused by the deceased Suleman and his sons.There is no irregularity or illegality in the investigation. Therefore, in the considered opinion of us, the cumulative affect of the evidence produced by the prosecution on record is that the prosecution has been successful in proving the charges against the appellant beyond all reasonable doubts.

60. Learned Addl. G.A. for the State has placed before this Court a letter dated 18.07.2019 of the Senior Superintendent, Central Jail, Naini, Prayagraj along with Government Order dated 11.02.2019, whereby the appellant, Ram Ashrey has been released from Jail on 14.02.2019 after the remission of his sentence has been made by the State Government. A copy of the letter of Jail Superintendent, Central Jail, Naini Prayagraj as well as a copy of Government Order dated 11.02.2019 has been taken on record.

61. The aforesaid Government Order dated 11.02.2019 further reveals that the appellant has completed period of imprisonment, without remission, 17 years and 09 days and imprisonment of 22 years 02 months and 14 days with remission till 26.01.2019 and his remaining period of imprisonment/sentence has been remitted and the appellant has been released on furnishing a personal bond of Rs. 50,000/- .

62. In view of above discussion and the evidence available on record, the impugned judgment and order dated 11.07.2003 can not be termed as either perverse or against the evidence available on record, therefore, the conviction and sentence of the appellant is liable to be upheld and, therefore, it is affirmed. The appeal lacks merit and is, accordingly, **dismissed**.

63. Appellant, Ram Ashrey has been released on remission of the sentence, he need not surrender.

64. A copy of this judgment be sent to the learned Trial Court for information.

65. The Trial Court record be also sent back along with a copy of this judgment, if not required in any other connected appeal.

(2019)10ILR A 287

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.10.2019

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 584 of 1982

Ram Kishan & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri L.R. Acharya, Sri R.R. Acharya, Sri Wasim Ahmad.

Counsel for the Respondent:
A.G.A.

A. Indian Evidence Act, 1872 - Section 118 and 134 - Neither any number of witness required to prove a fact nor evidence of a witness can be rejected only on the ground of his relationship with the victim - The whole prosecution case can be proved by a single witness if evidence is natural and trustworthy.

Held:- It is therefore settled that merely because witnesses are close relatives of the victim, their testimonies cannot be discarded - Relationship with the deceased is not a factor that affects credibility of a witness - a relative would not conceal the actual culprit and make allegation against an innocent person - Court to adopt a careful approach and analyse the evidence to find out, whether it is cogent and credible evidence - appellants deserve to be convicted with regard to the common object of the unlawful assembly of causing grievous hurt to which they concurred i.e. under Section 326 read with Section 149 of the I.P.C. instead of Section 302 read with Section 149 of the IPC. (Para 16,33 & 64)

B. Indian Evidence Act, 1872 - Section 45 - Opinions of experts - the evidence of any medical witness is only an evidence of an expert admissible under Section 45 of the Indian Evidence Act, therefore, it is not conclusive.

Held:-when a case of prosecution is based on direct evidence of eye witnesses the medical witness should follow such trustworthy and acceptable oral account of the wittiness's unless the trust worthy oral account of the incident is completely eclipsed by the medical evidence. Otherwise no dent can be made in the story of prosecution on the basis of hypothetical answers of any medical witness. In the instant case there is no material contradictions in the ocular and medical evidence available on record and the case of prosecution could not be doubted on the basis of hypothetical answers of Doctor who conducted the post mortem specially when he has supported the case of prosecution on the time of death of deceased. (Para 35 & 39)

C. Indian Penal Code, 1860 - Section 149 - accused-appellant certainly exceeded the common object of the unlawful assembly which was only to cause hurt or likely to cause grievous hurt, in order to restrain any one from digging the drain - other accused persons could not be held liable vicariously for the independent and isolated act of appellant , which was neither committed in furtherance of original common object of the unlawful assembly nor it was a possible or likely object which may come in the contemplation of any of the members of unlawful assembly, either at the time of initial formation of the unlawful assembly or even during the course of the incident.
(Para 62)

Criminal appeal partly allowed (E-7)

List of Cases Cited: -

1. Appabhai & ors. Vs St. of Guj. MANU/SC/0028/1988

2. Sucha Singh & ors. Vs St. of Punj. MANU/SC/0527/2003

3. Bhagaloo Lodh & ors. Vs St. of U.P. MANU/SC/0700/2011

4. Ramkant Rai Vs Madan Rai & ors. MANU/SC/0780/2003: 2004CriLJ36

5. Ram Praksh & ors. Vs St. of U.P. Manu/SC/0062/1968

6. Krishna Mochi & ors. Vs St. of Bihar MANU/SC/0327/2002

7. Gangabhavani Vs Rayapati Venkat Reddy & ors. MANU/SC/0897/2013

8. Bharwada Bhoginbhai Hirjibhai Vs St. of Guj. AIR 1983, 753, MANU/SC/0090/1983

9. Shashi Kant Vs St. of U.P. (2008)1 ALJ (Noc) 167

10. Sikandar Singh & ors. Vs St. of Bihar MANU/SC/0462/2010

11. Mariadasan &ors. Vs St. of T.N. (1980)3 SCC page 68

12. Chanakya Dhibar (Dead) Vs St. of W.B. & ors. MANU/SC/1096/2003

13. Roy Fernandes Vs St. of Goa & ors. MANU/SC/0072/2012

14. Kuldip Yadav & ors. Vs St. of Bihar MANU/SC/0390/2011

15. Manjit Singh Vs St. of Punj. MANU/SC/1195/2019

16. Bhimrao and ors. Vs St. of Mah. MANU/SC/0081/2003

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

1. Heard learned counsel for the appellants, Wasim Ahmad as well as learned AGA for the State and perused the record.

2. This criminal appeal has been preferred by appellants- Ram Kishan, Jagannath, Janki, Sri Ram, Babu, Ramadhar and Hardev, under Section 374(2) of the Cr.P.C. against the judgment and order dated 20.7.1982, passed by III- Additional District and Sessions Judge, Sitapur, in Sessions Trial No. 103 of 1980, "State Vs. Ram Kishan and others', arising out of Case Crime No. 154 of 1979, under Sections 147, 148, 149, 302 IPC, relating to Police Station Tal Gaon, District Sitapur, convicting the appellant Hardev under Sections 148, 302 and 149 read with Section 323 IPC and appellants- Ram Kishan, Jagannath, Janki, Sri Ram, Babu and Ramadhar for the charges under Sections 147, 149 read with Section 302 and 149 read with Section 323 IPC whereby Hardev was sentenced for imprisonment for life with fine stipulation for one year imprisonment, for the offence under Section 148 IPC, for imprisonment of one and half year and under Section 149 IPC rigorous imprisonment for six months and for the offence under Section 323 IPC six months rigorous imprisonment. The trial court further sentenced appellants- Ram Kishan, Jagannath, Janki, Shri Ram, Ramadhar and Babu for life imprisonment and fine stipulation for the offence under Section 149 IPC read with Section 302 IPC and six months rigorous imprisonment for offence under Section 149 read with Section 323 IPC and one year rigorous imprisonment for the offence under Section 147 IPC.

3. The prosecution story as unfolded from the record of the subordinate court is that on 14.8.1979 at 9.10 A.M a written report was submitted to the S.H.O., Police Station Talgaon, Sitapur by informant Ram Raj son of Suraj Deen R/o Mauza Jaraili, Police Station Talgaon, District Sitapur alleging that in the rainy season a heavy water logging occurred in village Jaraili, Jaraili Purwa and Makhpur. In

order to drain this water a drain was being dug from a pond situated in the west side of the village under the orders of the Block Development Authorities of Block Persendi. The drain was dug from village Jaraili till north of village Kailashpur. A part of this drain was passing in front of the field of accused Hardev. Today (14.8.1979) the labourers, namely, Shatrohan Lal Bahelia and Mahavir Chamar etc. were working in the drain. The informant was digging out weed from his paddy field. At that time Ram Kishan, Jagannath, Janki, Shri Ram, Babu and Ramadhar, armed with *"Lathis'* and Hardev armed with a "Kudal' arrived at the drain. Hardev scolded the labourers that as they have cut the roots of his trees and have also dug the "mend', he will see them. Accused persons started cutting the roots of their trees and also started pouring mud in the drain in order to fill it. The labourers stopped the works of drain and went to the village Jaraili. After some time at about 8 A.M. Ambika Prasad along with Shatrohan and Mahaveer came at the drain and started explaining and pacifying the accused persons. There happened an exchange of hot words and this got the attention of Ram Raj, Chhotakau, Sant Ram and Satguru Prasad who reached the spot. Ram Kishan and others who were armed with Lathis chased Ambika Prasad up to the paddy filed of Kallu by giving blows of Lathis to him. Ambika Prasad fell down in the field of kallu and thereafter all accused persons declared that they will finish him so that he may taste the consequences of getting the drain dug . On this Hardev gave four blows on the neck of Ambika Prasad with his Kudal and all accused persons fled away. Informant along with Shatrohan, Chhotkau, Sant Ram and Satguru went to see Ambika Prasad and found him lying dead in the Nali drenched with blood.

4. On the basis of the aforesaid written information, a case was registered against all above mentioned accused persons at Case Crime No. 154 of 1979 under Sections 147, 148, 149, 302 IPC and the investigation of the case was entrusted to S.H.O. Shri Shiv Shankar Singh.

5. The Investigating officer proceeded to the scene of the crime and prepared inquest report Ex. Ka-9 and necessary papers for the purpose of postmortem of the dead body of Ambika Prasad and handed over the dead body in a sealed condition to constable Satish Kumar Pandey and village Chaukidar Ram Pal. He also, after recording the statement of informant and injured witnesses as well as the eye witnesses Chhotaku and Shatrohan forwarded injured Chhotkau and Shatrohan to hospital for the purpose of medical examination of the injuries sustained by them. He also collected simple and blood stained soil from the paddy field of Kallu and prepared a memo Ex. Ka-15.

6. The postmortem on the dead body of the deceased Ambika Prasad was performed by Dr. Azeez Ahmad Khan, Medical Officer, District Hospital Lakhimpur Kheri on 15.8.1979 at about 4.30 P.M. The doctor found the age of the deceased about 35 years and probable time of death is about 1½ day before the time of postmortem. The deceased was a young man of good health. Rigor mortis passed from upper limbs and was passing from the lower limbs. He found blisters at some places. He also found following

ante-mortem injuries on the body of the deceased:-

(I) Incised wound with sharp edge cutting 9cm x 4 cm bone deep on right side of upper part of neck, 5 cm. Below the right ear, more towards back and extending up to occipital region.

(II) Multiple incised wounds, 4 in number in an area of 21 cm x 5 cm vertebra deep on right side of the neck extending up to the mid line in front and in the back, 5 cm. Below the angle of mandible, every wound was bone deep, all the articles and veins, trachea and thyroid cartilage were cut off, the margins were sharp cut, the injury was 1 ½ cm. below injury no.1.

(III) Incised wound 6 cm. X 1 ½ cm. X muscle deep, 2 cm. Below injury no.2, in the middle, just above the collar bone.

(IV) Incised wound 9 cm. X 3 cm. X bone deep, over collar bone, 2 1/2cm. Below injury no.3.

(V) Incised wound with sharp cutting edges 3.5 cm. X bone deep on right parietal region, 8 cm. Above the right of ear. Fracture of occipital, parietal and frontal bones were present.

(VI) Multiple contused area 21 cm. X 11 cm. On outer aspect of right arm, 11 cm. Below the acrominal prominence.

(VII) Seven contusions in area of 41 cm. X 15 cm. on the right side of chest and abdomen extending, 3 cm. Below the axilla up to the iliac cryst.

(VIII) Abrasion 2 cm. X 1 ½ cm., 22 cm. Above the right of knee.

(IX) Abrasion 2 cm. X 1 cm. In front of the right Shin, 16 cm. Below the right knee.

(X) Contused area 23 cm. X 4 cm. On outer aspect of left forearm just below the elbow.

(XI) Abrasion 4 cm. X 1 cm. In front of the left leg, 12 cm. Below the knee.

(XII) Multiple contused area 30 cm. X 30 cm. On the whole of the back, right and left both sides, extending from the root of the neck.

7. On internal examination half lb semi digested food was found in Stomach, the small intestine was partially full and large intestine was full in its upper side while the rectum was empty. Gallbladder was half full and cause of death was due to shock and hemorrhage as a result of ante-mortem injuries.

8. Injured witness Shatrohan Lal was medically examined on 14.8.1979 at 6 P.M. at P.H.C. Persendi, District Sitapur who was brought by the Constable Jasbeer Singh and following injuries were found on his person :-

(I) Contusion 4 cm. X 1.5 cm. In the back left thigh, middle.

(II) Contusion 7 cm. X 1.5 cm. In the calf of left leg (back).

(III) Contusion 5 cm. X 1.5 cm. In the back and inner side of right leg (middle).

9. All injuries were simple and caused by blunt weapon. The duration was about half day old.

10. Chhotakan was also medically examined on 14.8.1979 at 6.30 at P.H.C. Persendi who was brought by constable Jasbeer Singh of Police Station Talgaon, District Sitapur and following injuries were noticed on his person:-

(I) Contusion 7 cm. X 1.5 cm. In the back of left thigh.

(II) Complaint of pain in right hand middle finger but no external of injury is present.

(III) Injuries are simple and caused by blunt weapon duration about half day.

11. The Investigating Officer after completing the necessary formalities including sending blood stained soil collected from the place of occurrence along with Baniyan and underwear of the deceased to chemical examiner and the report so collected which Confirmed human blood on these articles and after completing investigation submitted charge sheet against all accused persons on 26.9.1979.

12. The case being exclusively triable by the court of sessions was committed to the sessions court.

13. The charges under Sections 148 and 302, and 323 read with Section 149 IPC were framed against the accused Hardev while the charges under Sections 147, 302 read with Section 149 IPC and under Section 323 read with Section 149 IPC were framed against the accused-appellant- Ram Kishan, Jagannath, Janki, Shri Ram, Ramadhar and Babu.

14. The prosecution in order to prove its case before the trial court produced following documentary evidence:-

(I) Postmortem report
Ex. Ka-1

(II) Chemical examiner reports
Ex. Ka-2 and Ka-3

(III) Injury report of Shatrohan Lal
Ex.Ka-4.

(IV) Injury report of Chhotakau
Ex. Ka-5

(V) Chick F.I.R.
Ex. Ka-6

(VI) G.D. Entry of the FIR
Ex. Ka-7

(VII) Special reprot sent to higher authorities Ex. Ka-8

(VIII) Inquest report
Ex. Ka-9

(IX) Challan Lash
Ex. Ka-10

(X) Seal sample
Ex. Ka-11

(XI) Scratch of dead body
Ex. Ka-12

(XII) Letter to C.M.O.
Ex. Ka-13

(XIII) Copy of FIR
Ex. Ka-14

(XIV) Memo of seizure of blood stained earth Ex. Ka-15

(XV) Site plan Ex. Ka-16

(XVI) Charge sheet Ex. Ka-17

15. The prosecution also produced following witnesses in support of its case:-

(I) P.W.1- Ram Raj (Informant)

(II) P.W.2- Shatrohan Lal (Injured)/ eye witness)

(III) P.W.3- Constable Satish Kumar Pandey, (who took the body to the postmortem house.)

(IV) P.W.4- Sant Ram (eye witness)

(V) P.W.5- Dr. Azeez Ahmad Khan, (who conducted the postmortem).

(VI) P.W.6- Constable Mohan Lal Rastogi, (who sent the blood stained earth to the chemical examiner)

(VII) P.W. 7-Dr. S. R. Verma (who inspected two injured persons)

(VIII) P.W.8- S.I. Ram Autar Singh (who kept the material in Sadar Malkhana)

(IX) P.W.9- S.O. Shiv Shankar Singh (Investigating Officer)

(X) P.W.10- Shri V.K. Tandon (who sent the material to chemical examination from the office of C.M.O.)

16. After completion of the evidence of the prosecution the statement of the accused persons was recorded under Section 313 of the Cr.P.C., wherein they denied the occurrence and stated that the evidence has been given on the basis of enmity. Accused Ram Kishan in his statement has further stated that the incident of cleaning of the drain had happened 10-12 days before the instant incident. Some quarrel happened with Mahaveer and Shatrohan who cut the roots of his trees. He moved an application against them and only on the basis of that enmity they have been falsely roped in . They did not allow Shatrohan to catch birds from their trees, so he was also having enmity on this score.

17. The accused persons in their defence produced D.W.1- Rajendra Prasad, who is the Lekhpal of the village concerned.

18. The trial court after analyzing and appreciating the evidence on record found the case of the prosecution proved beyond reasonable doubt and convicted and sentenced all the accused persons in the manner described in the second paragraph of this judgment.

19. Aggrieved by the impugned judgment and order of conviction and sentence the appellants have preferred instant appeal, however during the course of pendency of this appeal, appellant no.1 Ram Kishan, appellant no.2 Jagannath, appellant no.4- Shri Ram and appellant no.7- Hardev died and the appeal with regard to them was abated vide order dated 9.8.2019. Hence we are now left to decide the appeal pertaining to appellant no.3- Janki, appellant no.5- Babu and appellant no. 6- Ramadhar.

20. Learned counsel for the appellants while pressing the appeal

submits that the court below without appreciating the evidence available on record in right perspective has convicted the appellants for the offence which they have not done. There are material contradictions in the testimony of all the eye witnesses and prosecution story is highly improbable.

21. He further submits that the prosecution witnesses no.1- Raja Ram, PW-2 Shatrohan Lal and PW-4 Sant Ram are related witnesses as they are related to the deceased Ambika Prasad and their testimony could not have been believed by the court below.

22. He further submits that the First Information Report was after thought and prepared in consultation with Police Authorities of Police Station Talgaon.

23. He further submits that injuries allegedly sustained by witnesses Chhotakan and Shatrohan were self inflicted to carve out a false case against the appellants.

24. He further submits that from the evidence on record it is evident that Ambika Prasad has been done to death in the dead hours of night and therefore the prosecution case is not believable.

25. Learned counsel for the appellants overwhelmingly submits that the trial court has committed a manifest error in convicting the surviving appellants for the offence under Under Section 302 IPC read with Section 149 of the I.P.C. as there was no evidence that any unlawful assembly was formed by the appellants, object of which was to murder the deceased. Even if the story of prosecution is believed the ingredients of formation of unlawful assembly and sharing of its unlawful object are missing and it is evident from the facts and circumstances as well as the evidence on record that there was no unlawful assembly the object of which was to murder the deceased, therefore the finding of the trial court with regard to it is perverse. Learned counsel for the appellants in order to substantiate his argument has relied on following case laws:-

(I) Shashi Kant Vs. State of U.P., (2008)1 ALJ (Noc) 167 Allahabad.

(II) Sikandar Singh and others Vs. State of Bihar (2010)7 SCC page 477.

(III) Mariadasan and others Vs. State of Tamilnadu (1980)3 SCC page 68.

26. Per contra learned AGA appearing for the State submits that the prosecution has proved its case beyond all reasonable doubts and there is nothing illegal or wrong in the judgment of the trial court. Learned AGA further submits that it was established from the evidence produced by the prosecution that the drain was being dug in pursuance of the decision taken by the Block Development Authority and some time prior to the incident the labourers allegedly cut the roots of the trees standing on the land of the accused Hardev. All accused persons are related to Hardev and on the fateful day after hearing that the drain is being cleaned they reached the spot and scolded the labourers working there. He further submits that all accused persons were carrying lathis with them and accused Hardev was carrying a Kudal and keeping in view the arms carried by the accused persons it is established and evident that

the object of this unlawful assembly was to commit murder of anyone, who so ever will come in their way.

27. He further submits that at the fateful time deceased Ambika only came to persuade the accused persons for not to make any hindrance in a beneficial work being carried out by the labourers under the Authority of Block Development Parsenda. However, all the accused persons, in pursuance of common object of unlawful assembly, assaulted Ambika Prasad as well as Shatrohan and Chhotakau with lathis and when Ambika Prasad fell in the paddy field of Kallu, accused Hardev in furtherance of common object of the unlawful assembly assaulted him with Kudal, therefore all the accused persons have participated in the occurrence and hence have rightly been convicted for the murder of Ambika with the help of Section 149 IPC .

28. Before proceeding further we would like to have a brief survey of the evidence of the witnesses, so that submissions of the learned counsel for the rival parties could be appreciated in a better way.

P.W.1- Ram Raj is the informant of the FIR who in his statement has stated that under orders of Persendi block a drain was being dug, a part of which was situated adjacent to the land of accused Hardev. On the day of occurrence labourers were cleaning and digging this drain. He further stated that at the time of incident he was in his agriculture field. At about 8 A.M. in the morning accused persons arrived at the site of the drain. All accused persons except Hardev were carrying lathis, while accused Hardev was carrying a "Kudal'. After arriving at the drain accused persons asked the labourers to see them as they have cut the roots of their trees. The labourers departed from the site, however after a short time Ambika accompanied by Shatrohan and Mahaveer came at the site of the drain and started pacifying the accused persons. There were some verbal altercations and thereafter accused persons started assaulting Ambika with lathis, whereby Ambika Prasad fell in the paddy field of Kallu and thereafter accused persons Ram Kishan and Jagannath dragged Ambika Prasad from his legs and put him in a Nali situated on the other side of the drain towards the land of Hardev. Thereafter all accused persons asked to murder him and accused Hardev inflicted 3-4 Kudal blows on the neck of Ambika Prassad. He further stated that when Ambika Prasad was being dragged, Shatrohan Lal and Chhutkan attempted to save him but they were assaulted by Shri Ram, Janki, Babu and Ramadhar by lathis and they also sustained injuries. He stated to have informed the police by giving a written application. In his cross examination this witness stated that when the work started at the drain, Ambika Prasad was not there and only labourers were working. He (Ram Raj) came to his field at 6 A.M. and when Hardev and others were talking to the labourers he did not go there. However, he heard the conversation while staying in his field. He again stated in his cross examination that when at 8 A.M. Ambika Prasad came at the site along with Shatrohan Lal and Mahaveer they were not carrying any arm with them. He could not hear the conversation clearly but was able to hear that Ambika Prasad was saying that why they are making hindrance in the cleaning of the drain. At that point of time some accused persons were filling the drain with mud. This

witness admitted that deceased Ambika Prasad was related to him as he was the son of his maternal aunt. He further stated that at the time of assault on Ambika Prasad he was near the mend of the field of Kallu. He was standing about 10-15 paces from the place where Ambika Prasad fell . He was dragged by Ram Kishan and Jagannath across the drain. He could not say as to who assaulted which part of Ambika's body. He witnessed the murder of Ambika Prasad from the field of Kallu and at that point of time Shatrohan Lal and Mahaveer were in the drain and Sant Ram , Satguru and Chhutkan were standing towards the north of the drain. There were no verbal exchanges in between Ambika Prasad and accused persons in his presence. He further stated that before the incident there was no enmity in between Ambika Prasad and accused persons, rather they were having cordial relations.

P.W.2- Shatrohan Lal is the person who was a labourer engaged in digging of the disputed drain and was there since morning. He corroborated the statement of P.W.1- Ram Raj pertaining to the incident which happened in the morning when all accused persons armed with Lathis and Hardev armed with Kudal, arrived at the site of drain and scolded them that they have cut the roots of their trees and they will see them. He stated to have returned to the village and contacted Ambika Prasad, who was a social worker and he along with Ambika Prasad and Mahaveer returned to the drain at about 8 A.M.. He further stated that Ambika and accused persons had some hot verbal exchanges where after the accused persons assaulted Ambika Prasad with lathis, who fell down in the field of Kallu and was dragged by Ram Kishan and Jagannath. When Chhutkan and he tried to intervene, they were also assaulted by Ramadhar, Shri Ram Babu and Janki. He further stated that when Ambika Prasad was lying in the Nali Hardev gave 3-4 blows of Kudal on his neck whereby he died in the Nali. In cross examination he stated that Janki, Babu, Shri Ram and Ramadhar assaulted him and Chhutkan with lathis. According to him when he went to Ambika Prasad, he told him that he will talk to the accused persons and thereafter they returned to the site of drain within 10-15 minutes. He stated that when Ambika Prasad was being assaulted by accused persons, they did not assault either him or Mahaveer. Ambika Prasad fell in the field of Kallu about 20-25 paces away from the drain and when Ambika Prasad fell down, they dragged him (Ambika) and when he (satrohan) objected to it he was assaulted with lathis and Chhutkan was also present near him. Ram Raj at that point of time was in the field of Paragi, about 5-7 paces away from him. He witnessed the murder from about 4-5 paces away from the site. He categorically stated that Hardev was giving blows on the neck of the deceased while other accused persons were standing towards the west and he was crying and making an alarm. According to him the whole incident ended within 10 to 12 minutes and he sustained three injuries.

P.W.4- Sant Ram has stated to be present in his agriculture field along with his brother Satguru, at the time of the incident. He claimed to have seen the accused persons holding lathis and Kudal on the northern mend of Hardev's land and Ambika Prasad, Mahaveer and Shatrohan were standing towards the north of drain. He heard hot exchanges in

between Ambika Prasad and Hardev and other accused persons and thereafter he saw that Ambika Prasad is being assaulted by accused persons with lathis and thereafter Ambika Prasad fell in the paddy field of Kallu and was dragged from his legs by Ram Kishan and Jagannath, at this moment Shatrohan and Chhutkan objected to it on which Ramadhar, Shri Ram, Janki and Babu assaulted him and Chutkan by giving lathi blows and when Ambika Prasad was placed in a Nali situated towards the west of Hardev's land, Hardev gave 3-4 blows of Kudal on the neck of Ambika Prasad. In cross examination this witness admitted to be a relative of deceased Ambika Prasad and also that agricultural land where he was doing work, is in the name of his sons Prem Kumar and Kuldeep Kumar. He stated that he could not hear the conversation of accused persons and Ambika Prasad clearly as he was standing about 2 ½ - 3 meters away from the place where Ambika Prasad and accused persons were talking. He specifically stated that he did not hear the call of accused persons to murder Ambika Prasad before start of assault and also that "Marpeet' (assault) occurred in the filed of Kallu where Ambika Prasad fell down. He claimed that when Ambika Prasad was being assaulted, Hardev was also there but he was not assaulting with the "Kudal'. When Ambika Prasad fell in the field of Kallu he was standing 10-15 paces away from him and Chhutkan and Shatrohan were standing at about 10 paces away from Ambika Prasad towards the west. Ambika Prasad was dragged for about 28-30 paces from the place where he fell down.

P.W.3- Constable Satish Kumar Pandey is the witness who took the dead body of deceased Ambika for post mortem.

P.W.5- Dr. A.A. Khan has stated to have conducted postmortem on the dead body of the deceased and to have prepared the postmortem report in his hand writing and signature and proved the same as Ex. Ka-1. He also stated about injuries sustained by deceased and other particulars noted by him at the time of postmortem. He, in cross examination has stated that the death of the deceased might have happened at about 1.00 A.M. in the intervening night of 13/14.8.1979. However, in the next breath he stated that probable time of death of the deceased was about 8 A.M. on 14.8.1979. If the deceased had taken breakfast at about 5 or 5.30 A.M. semi-digested food will be found in the stomach. According to him the injuries no. 6, 7, 10 and 12 on the person of deceased were caused by some blunt object like lathis, and injury nos. 8 and 11 could have been caused by friction. Injuries no.1, to 5 sustained by deceased were caused by some sharp edged weapon like "Kudal' and the injuries no. 1, 2 and 5 were sufficient in the ordinary course of nature to cause death. Fracture in the head occurred due to injury no.5 and 3rd , 4th and 5th survical vertebra was cut against the injury no.2. All injuries according to him were 1 ½ day old.

P.W.6- Constable Mohan Lal Rastogi is a formal witness who testified to have seen material recovered from the spot and sent the same for forensic investigation.

P.W.7- Dr. S.R. Verma is the doctor, who examined injured persons, Shatrohan Lal and Chhutkan on 14.8.1979

about 6 and 6.30 pm. at Primary Health Centre Persendi. He proved the medical reports of the injuries of the two injured persons as Ex. Ka-4 and Ka-5. He claimed that the injuries found on the person of shatrohan and Chutkan were about one and half day old and were caused by some hard and blunt object.

P.W.8- Sub Inspector, Ram Autar Singh is also a formal witness who was Incharge of Sadar Mal Khana wherein the material pertaining to the case was kept and wherefrom sent to the Chemical Analyst.

P.W.9- S.O. Shiv Shankar Singh, is the Investigating Officer of the crime and he proved preparation of inquest and all necessary papers for the postmortem in his hand writing and also to have recorded the statement of the witnesses and after completion of investigation to have submitted the charge sheet against all accused persons under relevant sections of the Indian Penal Code. He has been cross examined by the accused persons at length but nothing significant has been derived. He also proved to have seen, Head Muharrir, Mohd. Hashim working and has proved Chick FIR and G.D. in his hand writing and signature as Ex. Ka-1 and Ex. Ka-7 respectively.

P.W.10- Shri V.K. Tandon, who is a clerk in the office of the C.M.O. and testified to have sent material for forensic examination.

D.W.1- Rajendra Prasad is the lekhpal of Village Jareli Majra and has stated that Gata No. 1204 and 1203 (grove land) belongs to accused Hardev while Gata No. 1122 is the field of Kallu. No Nali is shown in the revenue map towards the west of the grove of Hardev. Adjacent to the grove land of Hardev, towards west Gata No. 2000 is situated which belongs to Jagannath, Hardev and Janki. There is no khata belongs to Ram Raj. However, in his cross examination he admitted that towards the west of the field of Kallu the field of Gokul bearing Gata No. 562 is situated and after the death of Gokul this land has come in the name of Suraj Deen who is the father of Ram Raj. He further stated that the name of Suraj Deen has now been mutated on Gata No. 562 on 23.12.1980 and this land i.e. Gata No. 562 is about 2-2 ½ furlong away from the grove (Orchard) of Hardev.

29. Now we deal the submissions of Ld. Counsel for the appellants. The first submission of Ld. Counsel for the appellants is that P.W.1- Ram Raj and P.W.4- Sant Ram are related to the deceased and P.W.-2 Shatrohan is an interested witness, therefore their testimony could not be believed because of their relation with the deceased and these witnesses are highly interested witnesses.

30. In **Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988** Hon'ble Supreme Court held as under :-

"Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but

it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused."

31. In **Sucha Singh and Ors. vs. State of Punjab, MANU/SC/0527/2003** Hon'ble Supreme Court has observed as follows :-

"15. In Dalip Singh and Ors. v. The State of Punjab MANU/SC/0031/1953 : [1954]1SCR145 it has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely, Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

16. The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan MANU/SC/0107/1973 : 1974CriLJ331 in which Vadivelu Thevar v. State of Madras MANU/SC/0039/1957 : 1957CriLJ1000 was also relied upon.

17. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness. should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. It the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan MANU/SC/0036/1951 : 1952CriLJ547 . we find, however, that it unfortunately still persists, it not in the judgements of the Courts, at any rate in the arguments of counsel."

18. Again in Masalti and Ors. v. State of U.P. MANU/SC/0074/1964 : [1964]8SCR133 this Court observed: (p, 209-210 para 14):

"but it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses .....

The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

20. As observed by this Court in State of Rajasthan v. Teja Ram and Ors. MANU/SC/0189/1999 : 1999CriLJ2588 the over-insistence on witnesses having no relating with the victims often results in criminal justice going away. When any incident happens in a dwelling house or nearby the most natural witnesses would be the inmates of that house. It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also."

32. In **Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011** it was held as under :-

*"14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. (Vide: M.C. Ali and Anr. v. State of Kerala M**ANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).*

In view of the law laid hereinabove, no fault can be found with the evidence recorded by the courts below

accepting the evidence of closely related witnesses."

33. It is therefore settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with the deceased is not a factor that affects credibility of a witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out, whether it is cogent and credible evidence.

Coming to the facts of the instant case it is evident that P.W.1- Ram Raj in his cross examination has admitted that Ambika Prasad is the son of his maternal aunt and P.W.4- Sant Ram has also admitted in his cross examination that he is related to deceased Ambika Prasad and at the time of incident he was in his filed situated near drain. Keeping in view the whole testimony of these prosecution witnesses it is proved that the field of Ram Raj is also situated near the drain. An attempt has been made by the defence to create a doubt by producing D.W.1- Rajendra Prsad Lekhpal to the effect that Ram Raj is not having any agricultural land near the drain but in cross examination D.W.1- Rajendra Prasad had admitted that towards the west of Kallu's field, land of Gokul bearing Gata No. 562 is situated and after the death of Gokul this has come in the name of Suraj Deen who is the father of Ram Raj (informant) therefore P.W.1- Ram Raj and P.W.4- Sant Ram appears to be natural witnesses of the crime as they were working in their fields. P.W.2- Shatrohan was a labourer, who was digging the drain, who after being threatened by accused persons departed towards the village and after a short interval returned with Ambika and Mahaveer. Therefore, he is a natural witness as he was engaged as a labourer to dig the drain. So even if P.W.1- Ram Raj and P.W.4- Sant Ram are related to deceased, their testimony could not be discarded only on the basis of their relation with the deceased and in view of the above settled legal position the testimony of these witnesses has to be appreciated with care and caution. However, one glaring highlight of testimony of these witnesses, namely, P.W.1- Ram Raj and P.W.4- Sant Ram is that during the course of their evidence, they did not conceal their relation with the deceased Ambika and in absence of any motive and prior enmity of accused persons with Ambika Prasad it is not clear as to why they will falsely implicate any innocent person and will shield those who are actual wrong doers. Therefore in the facts and circumantances of the case these witnesses i.e. PW-1 Raja Ram, P.W.2- Shatrohan and P.W.4- Sant Ram are natural witnesses and their presence at the place of occurrence is also natural.

34. Highlighting an hypothetical answer given by PW-5 Dr. A.A. Khan in his cross examination that the deceased might have died at 1 A.M. in the intervening night of 13/14.8.1979, it has been submitted that the deceased had died at 1.00 am in the intervening night of 13/14.8.1979 in some other incident at some other place by some unknown person(s) and appellants have been falsely implicated in this case.

35. The submission of learned cousnel for the appellants does not carry much weight. It is to be understood that

the evidence of any medical witness is only an evidence of an expert admissible under Section 45 of the Indian Evidence Act, therefore, it is not conclusive.

36. In **Ramkant Rai v. Madan Rai and Ors. as reported inMANU/SC/0780/2003 : 2004CriLJ36 ,** the Apex Court has observed in ParaNo. 22 as under:

"22. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence Including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance In the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

37. Hon'ble Supreme Court in **Ram Praksh and others vs. The State of Uttar Pradesh** reported in **Manu/SC/0062/1968,** while dealing with a similar argument held in pargraph 5 of the report as under:-

"5. On the second point, it is urged, that according to the medical evidence the death might have been caused on the night intervening 18th and 19th July, 1966, Dr. S. P. Gulati P.W. 4, who had performed the postmortem examination stated that faecal matter and gas were present in the small and large intestines of Ganeshi Lal; owing to this reason he thought it probable that the deceased had not eased himself till the time of receiving the injuries. Mr. Anthony says that it is well-known that a person with normal habits particularly in villages empties his bowels early in the morning. The presence of the faecal matter in the small and large intestines showed that Ganeshi Lal must have died within some hours of his taking food on the previous night namely by the midnight of 18th and 19th July, 1966. This, according to Mr. Anthony, established that the prosecution case about the time of death cannot be accepted. Reliance has been placed on the statement in Modi's Medical Jurisprudence and Toxicology, 10th Ed., p. 151, that one can give an opinion that the death occurred some time after the deceased go up in the morning if the large intestines was found empty of faecal matter. It is submitted that conversely it can well be said that if the large intestine is found full of faecal matter it should be inferred that death did not take place in the morning. The learned trial judge discussed this matter in his judgment and disposed it of by saying that there was no proof that before the occurrence Ganeshi Lal had eased himself and that even if he had gone for that purpose there was no presumption that his bowels had moved. According to him, the question of time had to be decided on the basis of direct and other evidence on the record. We concur in that view and find it difficult to accept that the question of time should be decided only by taking into consideration the fact that

faecal matter was found in the intestines of the deceased. This may be a factor which might have to be considered along with the other evidence but this fact alone cannot be decisive."

38. Perusal of statement of Dr. A.A. Khan would reveal that he has stated that the death of the deceased is possible on 14.8.1979 at about 8 A.M. He further stated to have found semi-digested food in the stomach of deceased, the upper part of large intestine was full of faecal matter but the rectum was found empty. The postmortem report also contains that small intestine of the deceased was partially full. Considering the above factual matrix, the submission of learned counsel for appellants that the deceased would have died in the night in between 13/14.8.1979 does not appear to be of any substance and probable as the rectum of the deceased has been found empty and the small intestine was found partially full. It is a matter of common knowledge that in the villages people generally awake early in the morning and at first go to ease them out. Therefore the postmortem report suggests that early in the morning the deceased might have eased himself and thereafter had taken some food, as stated by P.W.5- Dr. A.A. Khan probably at 5.00 - 5.30 A.M. and it is only on account of this, the rectum has been found empty and small intestine was found partially full. This medical situation do not suggest that deceased may die at 1.00 A.M. in the dead of night, as it is not probable for him to go to ease in the night.

39. Moreover when a case of prosecution is based on direct evidence of eye witnesses the medical witness should follow such trustworthy and acceptable oral account of the wittinesses unless the trust worthy oral account of the incident is completely eclipsed by the medical evidence. Otherwise no dent can be made in the story of prosecution on the basis of hypothetical answers of any medical witness. In the instant case there is no material contradictions in the ocular and medical evidence available on record and the case of prosecution could not be doubted on the basis of hypothetical answers of Doctor who conducted the post mortem specially when he has supported the case of prosecution on the time of death of deceased.

40. The investigating officer has collected the blood stained soil from the place of occurrence and all witnesses have identified the place of occurrence with precision and clarity. Therefore there is no confusion pertaining to the place of occurrence.

41. The FIR in the matter has also been lodged at 9.10 a.m. in the morning, while the occurrence is stated to have happened at about 08.00 a.m. therefore the FIR is also prompt in the facts and circumstances of the case.

42. The next submission of Learned counsel for the appellants is that the court below without appreciating the evidence available on record in right perspective has convicted the appellants for the offence and there are material contradictions in the testimony of all the eye witnesses and prosecution story is highly improbable and could not be believed.

43. There can not be any doubt that while appreciating the evidence on record the court is required to exercise due

diligence though the standard of such exercise would be of a prudent person. The Court must bear in mind the facts and circumstances where in the crime has been committed, the quality of evidence, nature of the witnesses, their level of understanding and power of perception and reproduction. The quest must be to find out the truth from the evidence on record. At the same time, it must remain in the mind that there cannot be a prosecution case with a cast iron perfection. Nevertheless, obligation lies on the court to analyze, sift and assess the evidence on record, with reference to trustworthiness and truthfulness of the prosecution winesses, by a process of sincere judicial scrutiny adopting the yard stick of settled principles of appreciation of the evidence. What is to be insisted upon is proof beyond reasonable doubt. The contradictions, infirmities which might have been pointed out in prosecution case, must be assessed at the yardstick of probability. Unless, infirmities and contradictions are of such a nature so as to undermine the root of the evidence and which goes to the core of the prosecution case, over-emphasis may not be applied to such minor contradictions and infirmities. To judge the credibility of the evidence of a witness, one has to look into his evidence, and if any discrepancies is found in the ocular account of the witnesses not affecting the root of the case, the witness may not be labeled as not credit worthy. Even honest and truthful witnesses may differ in some details, which may not be related to the core of the prosecution case and their evidence therefore must be appreciated keeping in mind the power of observation, retention and reproduction as well as the human conduct and occurring incidents in ordinary course of nature.

44. **In Krishna Mochi and Ors. vs. State of Bihar, MANU/SC/0327/2002** held as under :-

"As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : 1981CriLJ1012 , normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against accused-appellants in the case at hand."

45. In **Gangabhavani vs. Rayapati Venkat Reddy and Ors. Reported in MANU/SC/0897/2013** held as under:-

*"In **State of U.P. v. Naresh MANU/SC/0228/2011 : (2011) 4 SCC 324,** this Court after considering a large number of its earlier judgments held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court,*

such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

A similar view has been reiterated by this Court in Tehsildar Singh and Anr. v. State of U.P. MANU/SC/0053/1959 : AIR 1959 SC 1012; Pudhu Raja and Anr. v. State, Rep. by Inspector of Police MANU/SC/0761/2012 : JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi) MANU/SC/0333/2013 : (2013) 4 SCC 557).

10. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence."

46. Honble Apex Court long back in the matter of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983** has held that *"The principles for appreciation of evidence in the said case came to be settled by the Apex Court in trial against the accused in a rape case but the principles apply as well to all trials. In para-5, the Apex Court observed and settled following principles for appreciation of evidence without entering into re-appraisal or re-appreciation of the evidence in the context of minor discrepancies. The principles laid down are as under:*

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed an the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one

may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

47. we have very carefully gone through the evidence of all three eye witnesses and have found that there is no material contradictions in their testimony pertaining to the occurrence of the incident. All the prosection eye witnesses are consistent on the point of begining of occurrence, assault given by all accused persons with lathis to Ambika, falling of Ambika Prasad in the field of Kallu and dragging of him by Ram Kishan and Jagannath by legs and also on the point of assault given to Shatrohan and Chhutkan by Ramadhar, Shri Ram, Janki and Babu when they tried to intervene and their testimony is also consistent on the point that when the deceased was placed in a Nali situated across the drain and all accused persons were standing towards the west of the field of Hardev, accused Hardev gave 3-4 Kudal blows on the neck of deceased Ambika causing his instant death.

48. P.W.1- Ram Raj in his statement has given minute details about the occurrence. He has witnessed the incident from the field of Paragi when Ambika Prasad was being first assaulted in the field of Kallu and P.W.4- Sant Ram was in his field, which is situated on the east of Hardev's grove. While Shatrohan was accompanying Ambika Prasad along with Mahaveer and at the time of assault he was also standing in the field of Kallu. It has also come in the evidence of these prosecution witnesses that there occurred some hot exchanges in between Ambika Prasad and accused persons, which in the facts and circumstances of the case were sufficient to attract P.W.1- Ram Raj and P.W.4- Sant Ram, particularly when an

incident has happened in the morning, pertaining to digging of drain. P.W.1- Ram Raj has also admitted that he arrived at the spot after hearing some noise. He further stated that when Ambika Prasad was being dragged towards the Nali, he advanced himself to the field of Kallu from the field of Paragi and at that time Shatrohan and Mahaveer were standing at the drain and Sant ram, Sat Guru and Chhutkan were standing towards the north side of the drain. They were standing about 10-15 paces away from Ambika Prasad. It has been categorically stated by him that the accused persons were not having any enmity with Ambika Prasad and that their relations were cordial. P.W.2- Shatrohan is a natural witness as he was accompanying the deceased Ambika Prasad at the time of incident. The evidence of this witness is consistent on material particulars and fully corroborates the evidence of P.W.1- Ram Raj. He corroborated the manner and method of assault and also as to how he intervened and was assaulted with lathis by accused persons. He admitted that at that point of time Chhutkan was also with him and was also asaulted. He categorically stated that Hardev was cutting the neck of deceased while other accused persons were standing towards the west in the field of Hardev. P.W.4- Sant Ram is also a natural witness who was working in his fields and stated to have seen the accused persons at northern mend of their grove. He has given his evidence describing minute details of the occurrence and keeping in view his testimony as a whole there appears no loopholes or material contradictions in his testimony. He has described the topography of the spot in detail with precision. He admitted that he did not hear any call of accused persons to kill Ambika Prasad before the start of assault. He claimed to have witnessed the whole incident from a distance of 2 ½-3 meters. He provided the full description of the field of Kallu where Ambika Prasad fell and when Ambika Prasad was being assaulted he claimed to be standing on the eastern side of the field of Kallu and was about 10-15 paces away from Ambika Prasad. He also stated that Chhutkan and Shatrohan Lal objected to the dragging of Ambika Prasad by Ram Kishan and Jagannath and they were also assaulted by Ramadhar, Shri Ram, Janki and Babu .

49. Therefore, apart from some minute and insignificant discrepancies and improvement, which are natural to occur, there is no material contradictions in the testimony of these witnesses, which may go to the root of the matter and in the facts and circumstances of the case, the testimony of P.W.1- Ram Raj, P.W.2- Shatrohan and P.W.4- Sant Ram is reliable, trustful, acceptable and is having a ring of truth around it and there is no harm in accepting such trustworthy testimony. Even After the meticulous analysis of the evidence of three eye witnesses, namely, P.W.1- Ram Raj, P.W.2- Shatrohan and P.W.4- Sant Ram, we are satisfied that the testimony of these witnesses is consistent through out, reliable and inspire the confidence of this Court. It is therefore proved from the evidence of these eye witnesses that on the day of occurrence at early morning some labourers including PW-2 Satrohan and Mahaveer were cleaning and digging this drain situated adjacent to the land of Hardev. At about 8 A.M. in the morning all accused persons arrived at the site of the drain, all of them except Hardev were carrying lathis, while Hardev was carrying a Kudal. After arriving at the

drain accused persons asked the labourers to see them as they have cut the roots of their trees. The labourers immediately departed from the site of drain , however after a short time Ambika accompanied by Shatrohan and Mahaveer came at the site of the drain and started pacifying the accused persons, resulting in hot verbal exchanges. All accused persons thereafter started assaulting Ambika with lathis, whereby Ambika Prasad fell in the paddy field of Kallu and thereafter Ram Kishan and Jagannath dragged Ambika Prasad from his legs and when they were challenged by PW-2 Shatrohan and Chutakan, both were assaulted with Lathi by Ramadhar, Shri Ram, Janki and Babu. However Ambika after being dragged for some distance was placed by accused persons Ram Kishan and Jagannath in a Nali situated on the other side of the drain towards the land of Hardev and while other accused persons were standing towards the west of hardev's field, He (Hardev) gave 4-5 blows of *Kudal* on the neck of Ambika Prasad causing his instant death and thereafter all accused persons fled away .

50. Learned counsel for the appellants overwhelmingly submits that the trial court has committed a manifest error in convicting the appellants for the offence under Under Section 302 IPC read with Section 149 of the I.P.C. as there was no evidence that any unlawful assembly was formed by the appellants, object of which was to murder the deceased. According to him even if the story of prosecution is believed the ingredients of formation of unlawful assembly and sharing of its unlawful object are missing and it is evident from the facts and circumstances as well as the evidence on record that there was no unlawful assembly formed with an unlawful object to murder the deceased, therefore the finding of the trial court with regard to it is perverse.

51. Ld. Counsel for the appellant in support of his argument at first relied on **Shashi Kant Vs. State of U.P., (2008)1 ALJ (Noc) 167** Allahabad wherein it is held that members of the unlawful assembly can only be convicted for the act of any member if they know that the offence actually committed by such member was either common object of such assembly or likely to be committed in prosecution of common object.

52. Ld. Counsel for the appellant also relied on **Sikandar Singh and others Vs. State of Bihar, MANU/SC/0462/2010** wherein Hon'ble Supreme Court opined that where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, only those accused persons, whose presence was clearly established and an overt act by any one of them was proved, should be convicted by taking into consideration particular fact situation.

53. Ld. Counsel for the appellant also relied on **Mariadasan and others Vs. State of Tamilnadu (1980)3 SCC page 68** wherein it is held , in the facts and circumstances of the case, that no unlawful assembly was formed and the appellants are responsible for their individual acts.

54. Hon'ble Supreme Court Of India in **Chanakya Dhibar (Dead) Vs. State of West Bengal and Ors., MANU/SC/1096/2003** while dwelling on

the scope of section 149 IPC held in para 11 and 13 as under :-

"11. The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it, a common object may be formed by express agreement after mutual constitution, but that is by no means necessary. It may be formed at any stage by all or a few members or the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

13. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that he offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is

shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikarange Gowda and Ors. v. State of Mysore, MANU/SC/0116/1956 : 1956CriLJ1365 ."

(Emphasis Ours)

55. Hon'ble Supreme Court in **Roy Fernandes vs State of Goa and Ors. Reported in MANU/SC/0072/2012** while eloborating the scope of section 149 of the penal code held as under :-

"19. In Gajanand and Ors. v. State of Uttar Pradesh MANU/SC/0173/1954 : AIR 1954 SC 695, this Court approved the following passage from the decision of the Patna High Court in Ram Charan Rai v. Emperor MANU/BH/0073/1945 : AIR 1946 Pat 242:

"Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

20. This Court then reiterated the legal position as under:

The question is whether such knowledge can be attributed to the Appellants who were themselves not

armed with sharp edged weapons. The evidence on this point is completely lacking. The Appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 Indian Penal Code. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the Appellants, much less that they would be used in order to cause death.

22. In Shambhu Nath Singh and Ors. v. State of Bihar MANU/SC/0214/1959 : AIR 1960 SC 725, this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court Gangadhar Behera and Ors. v. State of Orissa MANU/SC/0875/2002 : 2002 (8) SCC 381 and Bishna Alias Bhiswadeb Mahato and Ors. v. State of West Bengal MANU/SC/1913/2005 : 2005 (12) SCC 657 similarly explain and reiterate the legal position on the subject." (Emphasis Ours)

56. Supreme Court Of India in **Kuldip Yadav and Ors. Vs. State of Bihar,MANU/SC/0390/2011** while commenting on the scope of conviction with the aid of section 149 of penal Code held as under :-

"26. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established.

The above principles have been reiterated in Bhudeo Mandal and Ors. v. State of Bihar MANU/SC/0125/1981 : (1981) 2 SCC 755.

27. In Ranbir Yadav v. State of Bihar MANU/SC/0245/1995 : (1995) 4 SCC 392, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

28. In Allauddin Mian and Ors. Sharif Mian and Anr. v. State of Bihar MANU/SC/0648/1988 : (1989) 3 SCC 5, this Court held: ...Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC....

29. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

30. In Rajendra Shantaram Todankar v. State of Maharashtra and Ors. MANU/SC/0002/2003 : (2003) 2 SCC 257 : 2003 SCC (Crl.) 506, this Court has once again explained Section 149 and held as under:

14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section

149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 - either clause - is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act...." ***(Emphasis Ours)***

57. Hon'ble Supreme Court Of India in **Manjit Singh Vs. The State of Punjab, MANU/SC/1195/2019** held as under :-

"14.4. In the case of Subal Ghoral v state of West Bengal, MANU/SC/0296/2013 (supra), this Court, after a survey of leading cases, summed up the principles as follows:

"53. .....What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a Rule of caution."

58. We have perused the evidence of the prosecution specially the evidence of three eye witnesses, namely, P.W.1- Ram Raj, P.W. 2- Shatrohan Lal and P.W.4- Sant Ram in the back ground of the above

argument advanced by learned counsel for the appellants and have found that this is an admitted case of the prosecution that there was no previous enmity of deceased Ambika Prasad or injured Shatrohan and Chhotakau with accused persons. Ambika appears to be a person who was interested in the digging of the drain only for the purpose of well being of whole village where he was living as there was a complaint of water logging in and around his village and the digging and cleaning of the drain was beneficial for his village, though he was not directly associated in any manner with work of digging of drain . It is also established by the reliable testimony of three eye witnesses produced by the prosecution namely, P.W.1- Ram Raj, P.W.2- Shatrohan and P.W.4- Sant Ram that the incident on the fateful day has happened in three parts:-

(I) The first part of the incident is related to the fact that the drain was being dug from last 2-3 days before the incident and perhaps the roots of some of the trees of Hardev grove were cut in the digging and cleaning of drain. On the fateful day when labourers including Shatrohan, Mahaveer and others started digging the drain accused persons came to the site of drain. All accused persons except Hardev were carrying Lathis with them, while Hardev was carrying a Kudal in his hand and after arriving at the site of drain they scolded labourers that they have cut roots of their trees and they will see them today. Admittedly there was no altercation between the accused persons and the above named labourers as the labourers immediately left the place and went to the village of Ambika. At this juncture the first part of the incident was over.

(II) So far as second part of the incident is concerned, it is evident from the evidence on record that after departure of labourers, namely, Mahaveer and Shatrohan, accused Hardev started cutting roots of his own trees and all other accused persons started putting mud in the drain. It is also established from the evidence on reocrd that at this time deceased Ambika came there alongwith Shatrohan and Mahaveer and there they had some hot words, accused persons chased them and assaulted Ambika Prasad with lathis. In the process Ambika Prasad fell in the paddy field of Kallu. Thereafter accused-appellant Ram Kishan and Jagannath started dragging Ambika Prasad from his legs. At this moment when Ambika Prasad was being dragged by Ram Kishan and Jagannath, injured witnesses Chhotakau and Shatrohan attempted to save Ambika Prasad, on which Shri Ram, Janki, Babu and Ramadhar assaulted them with lathis. Ram Kishan and Jagannath after dragging Ambika Prasad for some distance left him in a Nali. PW4 Sant Ram has also stated in his cross examination that when Ambika fell in the field of kallu he was dragged and was not assaulted thereafter. Though Hardev was there but he did not use Kudal. At this juncture the 2nd part of the incident was also over.

(III) The third stage of the crime, as it is established from the evidence of the prosecution made available on record, starts when Ram Kishan and Jagannath after dragging Ambika Prasad for some distance put him in a Nali and according to P.W.1- Ram Raj after Ambika was put in Nali only Hardev assaulted him while all accused persons were standing there. PW-2 Shatrohan has also stated in his cross examination that when all accused persons were standing towards west of the

field of Hardev, Hardev alone assaulted Ambika from Kudal. In his Chief examination this witness has stated that after commanding other accused persons to kill Ambika, Hardev assaulted deceased by giving 3-4 blows of Kudal, however, at that stage, none of the accused person join him in assaulting Ambika Prasad.

59. The above established factual position as emerges out from the evidence of three eye witnesses clearly proves that when accused persons at first came at the site of the drain, certainly there assembly was to prevent any one from digging the drain and as they were carrying lathis with them, the object of this assembly was to cause bodily harm to any one, whosoever was to come in their way. Though the accused-appellant- Hardev was carrying a Kudal with him but the simplicitor act of carrying a Kudal in his hand will not suggest that the common object of this unlawful assembly was to kill some one, specially deceased Ambika Prasad, as he was not even in the picture till that stage. We arrive at this conclusion due to following reasons:-

(i) The unlawful assembly, when it was first formed, was not having any object of causing murder of someone, much less Ambika Prasad, as is evident from the fact that after reaching at the site of drain, none amongst the accused persons including Hardev made any attempt to hurt any labourer and only scolded them that as they have cut roots of their trees, they will see them today.

(ii) Secondly, as the drain was being dug and accused persons wanted to prevent it from further digging and wanted to fill the drain with mud, Hardev might have carried Kudal as the the drain could only be filled by digging some soil/mud and an implement like Kudal is the most appropriate implement for this purpose. Therefore the purpose of carrying kudal by Hardev was only for digging mud for the purpose of filling the drain and not for the purpose of killing some one. It is also evident by the evidence of PW-4 Sant Ram when he claimed that initially when Ambika Prasad was being assaulted by all the accused persons, Hardev was also there but he did not assault anyone with "Kudal'and all prosecution witnesses are consistent on this point that none of the labourer working in the drain was assaulted nor even threatened by Hardev by showing Kudal and that Hardev after arriving at the drain started cutting roots of his trees and other accused persons started filling the drain by mud. Therefore the initial purpose of carrying the kudal was for digging the soil and not to assault anyone, it is other thing that subsequently it was used by Hardev to kill Ambika and therefore, at the time of initial formation of unlawful assembly none of the members of this unlawful assembly could infer that the "Kudal' may be used for committing murder of someone. Hence, committing murder of someone was not the common object or likely object of this unlawful assembly at the time of its formation.

(iii) Thirdly, when after arrival of accused persons at drain, labourers left the site of drain, this unlawful assembly without attaining its object defuses. However, all the accused persons remained there and Hardev, in the heat of passion started cutting roots of his own trees, while all other accused persons started putting mud in the drain in an

attempt to fill it. It is to be recalled at this stage that till now the deceased Ambika Prasad had even not emerged in the picture. So there could not be a common object of the unlawful assembly to kill him and this could not either be common object, which may be termed as the object likely to be achieved. It can not be in the contemplation of any of the member of this unlawful assembly that murder of someone or to say of Ambika may be committed or is likely to be committed.

60. It is also evident and established from the evidence on record and also an admitted case of the prosecution that the deceased and accused persons were not having any previous enmity of any kind. Therefore what transpires from the evidence on record is that at the stage of arriving of accused persons at the site of drain and till the departure of labourers, the object of this unlawful assembly was only to prevent the labourers from further digging the drain and also to cause them hurt or at the most the offence of causing grievous hurt may likely be committed. In the facts and circumstances of the case, the object of this assembly was never to murder some one, specially Ambika Prasad, who had not even emerged at the scene, till then.

61. Perusal of the evidence on record would further reveal that when Ambika Prasad arrived at the site of drain along with Mahaveer and Shatrohan and there were some hot exchanges, the initial unlawful object of the assembly, which was temporarily suspended for some time, revived and in order to achieve this object of causing hurt of any kind, all accused persons who were members of this unlawful assembly, assaulted Ambika Prasad with Lathis and also chased him. Ambika Prasad in the process of being assaulted, fell down in the paddy field of Kallu. It is further established and proved on record that the accused Ram Kishan and Jagannath dragged Ambika Prasad from his legs and at this time injured Shatrohan and Chhotakau tried to stop them but they were also assaulted by Ramadhar, Shri Ram, Janki and Babu with Lathis. Thereafter Ambika Prasad was placed in a Nali, across the drain. It was at this time when all accused persons were standing silently towards the west side of the field of Hardev and incident was over, accused Hardev, after commanding others to murder Ambika, gave 3-4 blows of Kudal on his head, neck and chest, whereby Ambika Prasad instantly died. It is other thing that none of the accused persons, in response to the command given by Hardev, joined him in assaulting Ambika. This clearly shows that other accused persons conspicuously disassociated themselves from the individual and isolated intention of Hardev to kill Ambika. This instant and isolated act of accused-appellant Hardev of assaulting Ambika Prasad with Kudal, when the occurrence was over, was certainly not the common or likely object of the unlawful assembly, as it is also apparent that accused-appellant, Hardev intentionally chose those parts of the body of the deceased Ambika Prasad for assault, which suggests only one inference that he assaulted the deceased with the intention of causing his death.

62. The initial common or likely object of the unlawful assembly was evidently not to cause the death of any person is also evident from the proved facts as narrated by the three eye witnesses, P.W.1- Ram Raj, P.W.2- Shatrohan and P.W.4- Sant Ram that all

other accused persons except Hardev who participated in the assault and were carrying lathis with them, did not target any vital part of the body of the deceased or of the body of the injured witnesses, namely, Shatrohan and Chhotakan. Injuries sustained by Chhotakau and Shatrohan are simple 2-3 injuries on the non vital parts of the body. So far as the injuries found on the person of the deceased is concerned, injuries no. 6,7,10 and 12, which are contusions, are stated to have been caused by Lathi(stick). These injuries have been found on Right Arm, right side of chest and abdomen, on left fore arm and on back, respectively. None of these injuries has been found to be fatal and only injuries sustained from Kudal were found to be the reason of his death. So far as the accused Ram Kishan and Jagannath are concerned they only dragged the deceased - Ambika Prasad from his legs and thereafter put him in a Nali. The role of surviving appellants no. 3,5 and 6 namely Janaki, Babu and Ram Adhar is of initially assaulting the deceased with lathi and also to two injured persons i.e. shatrohan and Chuttakan. It is also established, and all three eye witnesses are consistent on this point, that when deceased was put in a Nali, thereafter accused Hardev said that he will not leave Ambika Prasad and commanded others to kill him but thereafter no other accused, though present there, assaulted Ambika and it was only and only Hardev, who assaulted Ambika Prasad with a Kudal which he was carrying in his hands. Therefore, it is clear from the established facts and circumstances of the case that accused-appellant Hardev certainly exceeded the common object of the unlawful assembly which was only to cause hurt or likely to cause grievous hurt, in order to restrain any one from digging the drain. Hence keeping in view the proved facts and circumstances of the case, other accused persons could not infer or contemplate that any offence of the like of murder may be committed by the accused- appellant-Hardev. Therefore other accused persons could not be held liable vicariously for the independent and isolated act of appellant Hardev, which was neither committed in furtherance of original common object of the unlawful assembly nor it was a possible or likely object which may come in the contemplation of any of the members of unlawful assembly, either at the time of initial formation of the unlawful assembly or even during the course of the incident.

63. Hon'ble Supreme Court in **Bhimrao and Ors. vs. State of Maharashtra, MANU/SC/0081/2003** while dealing with a similar matter of exceeding common object of the assembly by some members held as under :-

"The High Court after considering the material on record came to specific conclusion that the common object of unlawful assembly when it proceeded towards the house of Prabhakar was only to assault the said Prabhakar. It also gave a finding that those accused who entered the house of Prabhakar had developed a different common object after entering the house of Prabhakar and with that intention the members of the said group had assaulted Prabhakar, while the members of the original unlawful assembly who did not enter the house and who are now appellants before us did not share the subsequent common object of the group which attacked Prabhakar. It is in this

context of the finding of the High Court, the learned counsel for the appellants had contended that if the original common object of the unlawful assembly was only to assault Prabhakar there was no material before the High Court to have attributed the common object of causing grievous hurt to Prabhakar to these appellants. We find substantial force in the contention of the learned counsel appearing for the appellants. Having perused the material on record, we are inclined to hold that the High Court having rightly given a specific finding that the original common object of the assembly was only to assault deceased Prabhakar and also having given a finding that the said common object got changed only in regard to those members of the unlawful assembly who entered the house, we are unable to accept the later finding of the High Court that the appellants herein though they did not share the later common object of those accused who entered the house, will still be liable for conviction under Section 326 read with 149 IPC. In the absence of any material to the contrary, it should be presumed that those members of the original unlawful assembly who only shared the common object of assaulting deceased Prabhakar cannot be attributed with the subsequent change in the common object of some of the members of the assembly who entered the house of Prabhakar and caused grievous injuries to him. So far as the present appellants are concerned, who stood outside the house of the deceased and who could not have known what actually transpired inside the house, the act of those members of the original unlawful assembly who entered the house, cannot be attributed, hence, as contended by the learned counsel for the appellants at the most these appellants will be liable to be punished for sharing the original common object which is only to assault the deceased, therefore, they can be held guilty of an offence punishable under Section 352 read with Section 149 only."

(Emphasis Ours)

64. Therefore in the peculiar facts and circumstances of the case, we are of the considered opinion that the appellants before us deserve to be convicted with regard to the common object of the unlawful assembly of causing grievous hurt to which they concurred i.e. under Section 326 read with Section 149 of the I.P.C. instead of Section 302 read with Section 149 of the IPC, as such the appeal of the appellants is **partly allowed.**

65 We accordingly convict appellant no.3- Janki, appellant no.5- Babu and appellant no. 6- Ramadhar for committing the offence under section 326 read with 149 of the IPC instead of offence under section 302 read with 149 of the IPC. In the facts and circumstances of the case rigorous imprisonment for **five years** would meet the ends of justice. Therefore we sentence **appellant no.3- Janki, appellant no.5- Babu and appellant no. 6- Ramadhar** for committing the offence under section **326 read with 149 of the IPC** for rigorous imprisonment of five years and with fine of Rs. 20000/- each, in default of which they will have to further undergo rigorous imprisonment for three months. Eighty percent of the fine so deposited shall be paid to the legal heirs of the deceased Ambika. The judgment of the trial Court is affirmed so far as conviction and sentencing of above appellants in other penal sections is concerned. The impugned judgment and

order of the trial Court is modified accordingly.

66. The appellants No. 3- Janki, No.5- Babu and No.6- Ramadhar are reported to be in jail, they will serve out the sentence as modified by this Court.

67. So far as appeal pertaining to appellant no.1 Ram Kishan, appellant no.2 Jagannath, appellant no.4- Shri Ram and appellant no.7- Hardev is concerned the same has already been abated, vide order dated 9.8.2019 of this Court, on account of their death during pendency of this appeal.

68. The record of the subordinate Court be transmitted to the Trial Court along with a copy of this judgment for compliance, at the earliest.

(2019)10ILR A 318

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.08.2019

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No.762 of 2019

Ramzan & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Kailash Nath Mishra.

Counsel for the. Respondents:
Govt. Advocate, Sri Rajeev Kumar Mishra Rudra.

A. The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 - Section 14-A (1) -Appeal against the summon to accused under of SC/ST Act.

B. Criminal Procedure Code, 1973 - Section 204- Sufficient ground for issue of process.

At the stage of summoning the court is not required to evaluate the evidence and its merits. (Para 21)

In the case of police report at the stage of issuing summons to the accused, the Magistrate is not required to any reason. But in the case when charge sheet is barred or rejected or lacks of jurisdiction or when the charge sheet is rejected then it is required to record his reasons for rejection to the charge sheet. (Para 20)

In the case, F.I.R. corroborated by the informant and other witness Section 161 Cr.P.C. and also injury report so summoning order is affirmed.

Criminal Appeal dismissed (E-2)

List of Cases Cited: -

1. C.H.C.L. Employees Stock Option Trust Vs India Infalin Ltd. (2013) 4 SCC 505,

2. M/s Pepsi Food Ltd. & anr. Vs Special Judicial Magistrate & ors. AIR 1998 S.C. 128

3. AIR 2012 SC 1747 Bhushan Kumar & anr Vs St. (NCT of Delhi) & Anr.

4. AIR 197SC 1947 Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors.

5. AIR 2015 SC 923 Sunil Bharti Mittal Vs C.B.I. (Three Judge Bench)

6. St. of Guj. Vs Afroz Mohammed Hasanfatta 2019 SCC online SC 13

7. Rajendra Kumar Agrawal Vs. St. of U.P. 1999 CRLJ 4101

8. Mehmood ul Rehman Vs. Khazir Mohammad Tunda (2015) 12 SCC 420

9.Amrawati & anr. Vs St. of U.P. (2004) 57 ALR 290

10. Lal Kamlendra Pratap Singh Vs. St. of U.P. (2009) 3 ADJ 332 (SC),

11. Hussain & ors. Vs Union of India (UOI) & ors. MANU/SC/0274/2017,

12. Brahm Singh & ors. Vs St. of U.P. & ors.

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

1. Short counter affidavit filed on behalf of the Opposite party No.2 and 3, the same is taken on record.

2. Heard learned counsel for the appellants as well as Shri Vishnu Deo Shukla, learned AGA for the State, learned counsel for the respondent No.2 & 3, and perused the record.

3. This Criminal Appeal under Section 14-A (1) of SC/ST (Prevention of Atrocities) Act, 1989 has been filed by the appellants -**Ramzan, Khaliq and Gulam Haider** against the order dated 08.03.2019 passed by the IInd Additional Session Judge/Special Judge SC/ST Act, Gonda in Special Session Trial No. 46/2019, 'State vs. Ramzan & others", arising out of Case Crime No. 879/2018, under Sections 323, 504, 506, 452, 379 I.P.C. & 3(1) (Da)(Dha) of SC/ST Act, Police Station Kotwali City, District Gonda, whereby the appellants have been summoned to ace trial.

4. Brief facts necessary for disposal of this appeal are that, an application under Section 156 (3) Cr.P.C. was moved by the complainant/respondent No.2-Smt. Gudiya wife of Raju in the Court of Special Judge, SC/ST Act, Gonda against Appellant No.1-Ramzan and two unknown persons stating that, she belongs to a Scheduled Caste (Kori) and her husband Raju is "Block Pramukh", Development Division Jhanjhari, District Gonda and she is living at Gonda in connection with education of her children. It is further stated that, her husband complained to C.D.O., Gonda about some mischief and embezzlement of Government money committed by appellant No.1/Ramzan. It is further alleged that he has committed financial illegalities and have misappropriated Government money by using name of one Ramzan Ali son of Peer Mohammad. An FIR, in the matter i.e. Case Crime No. 741/2017, under Sections 420, 468 I.P.C. was lodged at P.S. Kotwali Nagar, District Gonda, which was lodged by the C.D.O. Gonda and the appellant Ramzan had to remain in Jail in lieu of that and after a long time, he was released on bail.

5. It is further submitted that, due to the aforesaid enmity, on 08.09.2018 at about 11:00 am, accused/appellant Ramzan along with his two companions came to her house and hurled filthy abuses and also addressed her with Castiest remarks. Accused Ramzan and his companions also physically assaulted her after entering her house. In the meantime, her husband came and accused persons also assaulted him. They uprooted the whole household material and also looted some money and ornaments, which was kept in a box. She went to the police station, however, her report was not lodged.

6. On the basis of the aforesaid application, on an order made by the Magistrate concerned, an FIR was lodged as Case Crime No. 879 of 2018, under Sections 323, 504, 506, 452, 379 I.P.C. &

3(1) (Da)(Dha) of SC/ST Act against appellant-Ramzan and two unknown persons.

7. On the basis of the aforesaid FIR, an investigation initiated and the Investigating Officer after investigation submitted a charge-sheet against the appellants, under Sections 323, 504, 506, 452, 379 I.P.C. & 3(1) (Da)(Dha) of SC/ST Act. The Special Judge on the basis of the police report/charge-sheet took cognizance of the offence and issued process against the appellants on 08.03.2019, under Sections 323, 504, 506, 452, 379 I.P.C. & 3(1) (Da)(Dha) of SC/ST Act. Aggrieved by the order of the Special Judge dated 08.03.2019, whereby the appellants have been summoned to face trial in the penal sections mentioned herein-before, they preferred this appeal.

8. Learned counsel for the appellants while referring to the summoning order passed by the Court below submits that, the Court below without considering the material transmitted with the charge-sheet has acted as a mouthpiece of the prosecution and without sufficient material, summoned the appellants to face trial.

9. It is further submitted that, it was not mentioned in the FIR or in the statement of the witnesses that the victim belongs to a Scheduled Caste, so there was no question of the applicability of SC/ST Act. It is further stated that, the informant's husband is a "Block Pramukh" and he made a complaint before prescribed authority/Labour Commissioner, Devipatan, Gonda, pertaining to non-payment of his wages and in Para No. 9 and 10 of that complaint, he had written that on 30.08.2018, he had left the job of appellants, as the appellant No.1 had not paid his wages.

10. Highlighting the above factual matrix, learned counsel for the appellants submits that, in the First Information Report, the incident has been alleged to have happened on 08.09.2018. It is overwhelmingly submitted that, only on the basis of old enmity, this false case has been cooked-up. The injury report, pertaining to the informant as well as her husband are false, as the medical examination of the alleged injuries has not been done in police custody, therefore, the continuation of the proceedings pending before the Court below are nothing, but an abuse of the process of law and, therefore, the same be set-aside.

11. Learned counsel for the respondent No.2 and 3 submits that, on the basis of previous enmity with the husband of the informant, who made a complaint against appellant No.1 namely Ramzan, pertaining to misdeeds and financial illegalities and misappropriation of money committed by him, when he was granted bail, he came to the house of the informant with his brother Khaliq and one Gulam Haider on a motorcycle and physically assaulted the informant and her husband and also addressed them with castiest remarks, apart from threatening and intimidating them.

12. It is further submitted that, the informant as well as her husband has sustained injuries, who have been examined at Government Hospital, Gonda on 08.09.2018 at 4:20 pm. & 4:30 pm., respectively. The police after investigation of the First Information Report has submitted a charge-sheet and

the court below after applying its judicial mind has taken the cognizance of the offences and have summoned the accused persons to face trial, therefore, there is no illegality, so far as the summoning of the accused persons are concerned.

13. Learned A.G.A., also opposes the contention of learned counsel for the appellants on the ground that, the court below keeping in view the charge-sheet and material submitted therewith, after applying its judicial mind and finding sufficient material on record, have summoned the appellants to face trial and, therefore, there is nothing illegal, so far as the order of summoning is concerned.

14. Having heard learned counsel for the parties and having perused the record, it is apparent that, specific allegations, pertaining to the castiest remarks addressed in public view by the appellants as well as threatening and intimidating them as also of physical assault by Appellant No.1 Ramzan and his two companions have been made in the FIR. In the statement of the informant as well as her husband recorded under Section 161 of the Cr.P.C., it has categorically been stated that, on the basis of old enmity, appellant Ramzan with his companions after being bailed out in a criminal case took the revenge on the fateful day by entering into her house and has also made physical assault on her and her husband.

15. The Investigating Officer after investigation has submitted the charge-sheet, the injury reports of the informant as well as of her husband have also been placed on record. The injury report, pertaining to the husband of the informant namely Raju reveals that, he has sustained 05 injuries on different parts of his body. While the informant namely Gudiya has sustained about 04 injuries on different parts of her body. The injuries of both the injured persons have been found fresh by the Doctor and also caused by hard and blunt object. Perusal of these injuries, prima facie shows that, these injuries may not be the result of self-infliction. Therefore, in the considered opinion of this Court, there was sufficient material available before the Court below to take cognizance of the offence and to issue process against the appellants. In a criminal matter, the cognizance of an offence, as provided under Section 190(1)(b) of the Cr.P.C. hereinafter called the "Code" is taken for the purpose of issuing process to the person, who has committed the wrong. No doubt in the process of taking judicial notice of certain acts which constitute an offence, there has to be application of mind by the Magistrate or Special Judge, with regard to the material collected by the Investigating Officer, pertaining to the fact, as the whether same is sufficient to proceed further and to call a person to appear before a Criminal Court to face trial. There cannot be two views that this discretion puts higher amount of responsibility on Magistrate to act judicially, keeping in view the facts and circumstances of the particular case and also keeping in view the law on the subject. There cannot be any doubt that this is not a stage, where the Magistrate must explicitly state the reasons for issuance of process, if the order clearly states that, in the opinion of a Magistrate or a Judge taking cognizance, there is sufficient ground to proceed further, the summons may be issued. Undoubtedly, the Magistrate will have to form an opinion, as to whether there exist

sufficient grounds or not. There are many cases propounded by the Hon'ble Supreme Court, which provide guidelines to the Magistrate or Special Judge, as the case may be, with regard to taking of cognizance and issuance of process pertaining to the complaint cases.

16. In **"G.H.C.L.Employees Stock Option Trust VS. India Infalin Ltd. 2013(4) SCC 505",** It was reminded by the Hon'ble Supreme Court that the criminal law could not be set into motion as a matter of course and the order of summoning must reflect application of mind as well as the satisfaction of the Magistrate. In " **M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others, AIR 1998 S. C . 128** " it was emphasized that, summoning of an accused in a criminal case is a serious matter and it should not be, that complainant has to bring only 02 witnesses to support the allegations and to get the process issued. The Magistrate will have to carefully scrutinize the evidence brought on record. In "AIR 2012 SUPREME COURT 1747, Bhushan Kumar and Anr v. State (NCT of Delhi) and Anr", a necessity was shown to record reasons for issuance of summons. In "**AIR 1976 SUPREME COURT 1947, Smt. Nagawwa v/s Veeranna Shivalingappa Konjalgi & others**", detail guidelines were issued, pertaining to the issuance of summonses in complaint cases, after taking into consideration, the inherent probabilities/improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of his allegations. In **"AIR 2015 SUPREME COURT 923,Sunil Bharti Mittal v. Central Bureau of Investigation (Three Judges Bench)",** it was emphasized that, a wide discretion has been given to the Magistrate for grant or refusal of issuance of process and it was reminded that, it must be a judicial exercise and also that a person should not be dragged into the Court, merely because a complaint has been filed against him and also that, an opinion has to be formed by the Magistrate in the facts and circumstances of the case as to whether there is sufficient grounds to proceed further..

17. Honble Supreme Court in a recent decision **"State of Gujrat Vs Afroz Mohammed Hasanfatta reported in 2019 SCC online SC 13",** while considering the obligation of Magistrate at the time of issuance of summons to the accused persons, while taking cognizance of offences on a police report, under Section 190 (1)(b) of the Cr.P.C. formulated a point, as to whether the Court has to record reasons for its satisfaction of sufficient grounds for issuance of summon, while taking cognizance of an offence under Section 190 (1)(b) of the Cr.P.C. Answering this question, Hon'ble Supreme Court held that, it is well-settled at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or with the evidence let in support of the same.

18. It is further stipulated that, the summons is a process issued by the Court calling upon a person to appear before the Magistrate notifying him to appear before the Magistrate, as a response to violation of law.

19. It is further highlighted by the Hon'ble Supreme Court that, Section 204 of the Cr.P.C. does not mandate the

Magistrate to explicitly state the reasons for issuance of summons. It clearly states that, if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued.

20. While referring to the many cases, pertaining to the taking of cognizance under Section 190 (1)(a) of the Cr.P.C. (on a complaint), it is stated that, at this juncture, the Magistrate is having only a complaint before him, with regard to Section 190(1)(b), the Hon'ble Court cites a Single Judge decision of this Court in ***"Rajendra Kumar Agrawal Vs. State of U.P. reported in 1999 CRLJ 4101"***, wherein it is held that the reasons are required to be recorded, while the complaint is being dismissed under Section 203 of the Cr.P.C., while the same are not required under Section 204 of the Cr.P.C. and also referring to the decision of "**Mehmood ul Rehman Vs. Khazir Mohammad Tunda (2015) 12 SCC 420"** the Court held as under:-

"20. In para (21) of Mehmood Ali Rehman, this Court has made a fine distinction between taking cognizance based upon charge sheet filed by the police under Section 190(1)(b) Cr.P.C. and a private complaint under Section 190(1)(a) Cr.P.C. and held as under:-

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected."

21 . In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 Cr.P.C. is not the same at the time of framing the charge. For issuance of summons under Section 204 Cr.P.C., the expression used is "there is sufficient ground for proceeding?.."; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is "there is ground for presuming 16 that the accused has committed an offence?..". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 Cr.P.C., detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 Cr.P.C.

22. In so far as taking cognizance based on the police report, the Magistrate has the advantage of the charge sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating Officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure

Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the Investigating Officer and thereafter, charge sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190 (1)(b) Cr.P.C., where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason. In case, if the charge sheet is barred by law or where there is lack of jurisdiction or when the charge sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge sheet and for not taking on file."(Emphasis Mine).

21. It is apparent from the above mentioned Case Laws specifically the decision of the Supreme Court passed in **Afroz Mohammad's case (supra)** that after investigation of the case, if the police has filed a charge-sheet along with the materials there on may be considered as sufficient ground for proceeding, for issuance of summon under Section 204 of the Cr.P.C., keeping in view the facts and circumstances of particular case. In case instituted on a police report, the Magistrate is required to pass an order of issuing summons on the basis of his subjective satisfaction arrived after consideration of the police report and other documents sent with it, after satisfying itself that there are sufficient grounds for proceeding further. In the facts and circumstances of instant case, the allegations of the FIR has been corroborated by the informant as well as her husband in their statement recorded under Section 161 of the Cr.P.C. The allegations of the FIR are further corroborated with the injury reports of both i.e. informant and her husband Raju. Therefore, it could not be said that, there was no sufficient material before the Special Judge for taking cognizance and issue summons against the appellants, so far as the arguments, pertaining to the fact that, it has not been anywhere stated by the informant that, she belongs to a scheduled caste, the same is negatived when we peruse the FIR, wherein it has been specifically mentioned that, informant is a lady and belongs to a Scheduled Caste (Kori).

22. Keeping in view the above mentioned settled legal position as well as the factual matrix, I do not find any substance in the appeal preferred by the appellants. There appears no illegality in the impugned summoning order dated 08.03.2019 of the Court below, where by the appellants have been summoned to face trial.

23. In this view of the matter, the appeal appears to be devoid of merits and is ***dismissed*** and order dated 08.03.2019, whereby the appellants have been summoned to face trial is passed by the IInd Additional Session Judge/Special Judge SC/ST Act, Gonda is hereby ***affirmed.***

24. At this stage it is submitted by Ld. Counsel for the Appellants that it is apprehended that the moment appellants will surrender before the trial Court they will be sent to prison and disposal of their bail Application may take time. Therefore a suitable direction be issued to decide their bail application in a time bound manner. Needless to say that disposal of bail Applications in any case is the prerogative and discretion of the Court concerned and the same can not be circumcised by passing any order in this regard. Suffice is to say that since appellant is willing to participate in the trial, it is directed that in case the appellants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail may be considered and decided expeditiously in view of law laid by this Court in the case of ***Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290*** as approved by Hon'ble Apex Court in ***"Lal Kamlendra Pratap Singh Vs. State of U.P., 2009 (3) ADJ 332 (SC)*** as well as the guidelines issued in ***Hussain and Ors. Vs. Union of India (UOI) and Ors. reported in MANU/SC/0274/2017 and Brahm Singh and others Vs. State of U.P & others in (Criminal Misc. Writ Petition No. 15609 of 2016 decided on 08.07.2016)".***

25. For a period of 30 days form today or till the surrender of appellants before trial court, whichever is earlier, no coercive steps shall be taken against the appellants in the above mentioned case. It is stated that this period of 30 days shall not be further extended in any case.

(2019)10ILR A 325

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 56 of 1989

Jagdish & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri N.I. Jafri, Sri Mohd. Asif

Counsel for the Opposite Party:
A.G.A., Sri Amit Sinha.

A. Indian Penal Code, 1860 - Section 302 - Appeal against conviction.

Exception 4 of 300 IPC can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without offenders having taken undue advantage, (d) accused had not acted in a cruel or unusual manner. (Para 21)

Doctrine of grave and sudden provocation depends on the facts of each case; it cannot be universally applied. (Para 23)

It cannot be laid down as a rule of universal application that whenever death occurs on account of single blow, section 302 IPC is ruled out. It is the totality of established facts and circumstances, events preceding the incident which will determine whether an act is culpable homicide or murder. (Para 24)

Criminal Appeal partly allowed (E-2)

List of cases cited: -

1. State of A.P. Vs Rayavarapu Punnayya & anr. (1976) 4 SCC 382.

2. Budhi Singh Vs St. of H. P. (2012) 13 SCC 663.

3. Kikar Singh Vs St. of Raj. (1993) 4 SCC 238.

4. Surain Singh Vs St. of Panj. (criminal appel no. 2284 of 2009 decided by 10.04.2017)

5. Ankush Shivaji Gaikwad Vs St. of Mah. (2013) 6 SCC 770.

6. Kumaran Vs St. of Kerala and anr. (2017) 7 SCC 471.

(Delivered by Hon'ble Printinker Diwaker, J.)

1. This appeal arises out of the impugned judgement and order dated 09.01.1989 passed by IInd Additional Sessions Judge, Bulandshahr in Sessions Trial No. 781 of 1987 (State Vs. Jagdish and Others), convicting the accused-appellant no. 1 Jagdish under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. In the present case, name of the deceased is Jaipal Singh. The appellant Jagdish and deceased Jaipal Singh were having adjacent agricultural fields and there was some dispute between them regarding the bund/boundary of the same. It is further not disputed that in the village in question, there were number of blue bulls and quite often they used to damage the standing crops of the agriculturists. On 20.08.1987 at about 07.00 am, when the complainant party including Jaipal Singh were working in their agricultural field, accused-appellant Jagdish and other accused persons namely Dharampal Giri, Murti Giri, Mantoori Giri, Vinod Giri and Govind Giri reached there. There was some hot talks between them and accused-appellant Jagdish levelled allegations against the complainant-party that they have removed the fencing of the field as a result of which blue bulls have damaged his field. Both the parties abused each other and it was objected by the deceased Jaipal Singh and it is said that during this, accused-appellant Jagdish gave a blow of spear near the neck of the deceased. The other accused persons also assaulted the complainant party by a club. Number of villagers reached there and then it was noticed that after sustaining injury, Jaipal Singh had expired. On 20.08.1987 itself, at 10.35 am, on the basis of written report Ex.Ka.3, lodged by Kanchhid Singh (nephew of the deceased, not examined), FIR, Ex.Ka.4 was registered against the accused-persons under Sections 147, 148, 302, 307 of I.P.C. Injured Gopichand (PW-3) was medically examined vide Ex.Ka.2 on 20.08.1987 by Dr. Jagpal Singh (PW-5) and the following two injuries were found on his body:

"(i) stab wound elliptical 2 x .3 cm x 1.5 cm deep on face right side with the parallel of jaw of mandible 4 cm right of centre of chin. Margins of the wound sharp.

(ii) stab wound with sharp margins over right side of neck 4 cm above from nose. Size .5 x .3 cm x 1.5 cm deep elliptical. Traumatic swelling over neck right side 10 x 8 cm."

3. Inquest on the dead body of the deceased was conducted vide Ex.Ka.6 on 20.08.1987 and the body was sent for

postmortem, which was conducted by Dr. R.K. Lal vide Ex.Ka.1 on 21.08.1987.

4. Autopsy Surgeon has found following single injury on the body of the deceased:

"1. Punctured wound (incised) on neck Rt. side 1 cm x ½ cm direction towards left and back 1 cm above right clavicle medial end, depth 3 cm transverse"

5. The cause of death of the deceased was due to shock and haemorrhage as a result of antemortem injury.

6. While framing charge, the trial Judge has framed charge against the accused-appellant Jagdish under Sections 148, 302, 307/149, 323/149 of I.P.C., against accused Dharampal, charge was framed under Section 148, 302/149, 307/149, whereas against rest of the accused persons, charges were framed under Sections 147, 302/149, 307/149, 323/149 of I.P.C.

7. So as to hold the accused-persons guilty, prosecution has examined seven witnesses. Statements of the accused-persons were also recorded under Section 313 Cr.P.C. in which, they pleaded their innocence and false implication.

8. By the impugned judgment, the trial Judge has convicted accused-appellant Jagdish as mentioned in paragraph no. 1 of this judgment, whereas accused Dharampal was convicted under Section 307 of I.P.C. The other accused-persons have been acquitted by the trial judge. During the pendency of present appeal, accused Dharampal has expired and, therefore, appeal in his respect is dismissed as having become abated. The present appeal confines only in respect of accused-appellant Jagdish.

9. Learned counsel for the appellant submits:

(i) that FIR is ante timed.

(ii) that FIR has not been proved by the prosecution and the Investigating Officer has not been examined.

(iii) that there are material contradictions in the statements of Sohan Singh (PW-1), Dayachand (PW-2) and Gopichand (PW-3).

(iv) that first informant Kanchhid Singh has not been examined by the prosecution to prove the FIR.

(v) that even if the entire prosecution case is taken as it is, under no circumstances, the appellant can be convicted for committing the murder of the deceased as his act would not fall within the definition of murder. It has been argued that at best, the appellant is liable to be convicted under Section 304 Part I or 304 Part II of IPC.

10. Supporting the impugned judgment, it has been argued by the State counsel:

(i) that even if Investigating Officer has not been examined by the prosecution, no prejudice has been caused to the defence. He submits that the FIR has been proved by adducing secondary evidence. He further submits that scribe of the FIR Momraj (PW-6) has duly proved the FIR.

(ii) that non-examination of first informant Kanchhid Singh has also not caused any prejudice to the defence as the FIR has been proved by Momraj (PW-6).

(iii) that there are as many as three eye witnesses including injured Gopichand and all the three eye witnesses have duly supported the prosecution case.

(iv) that the trial court was justified in convicting the appellant under Section 302 of IPC.

11. We have heard counsel for the parties and perused the record.

12. Sohan Singh (PW-1) is a father of first informant Kanchhid Singh. He is also the uncle of Gopichand (PW-3), injured eye witness. He states that first informant Kanchhid Singh is missing since February-March and his whereabouts is not known. The field of accused-appellant Jagdish and other accused persons were adjacent and on the date of incident at about 6:00 am when he was working in his field along with deceased Jaipal Singh, Gopichand (PW-3) and other persons, the accused persons reached there and started abusing them. He states that they were making allegation against them that on account of removing/damaging the fencing of the field, blue bulls have damaged the field of accused appellant Jagdish. Both the parties started abusing each other and then accused Jagdish, who was carrying spear with him caused injury to Jaipal Singh, whereas the other accused persons, who were having clubs, have also caused injury to Gopichand and others. He states that after sustaining injury, Jaipal Singh died at the place of incident itself. In the lengthy cross-examination, this witness remained firm and has reiterated as to the manner in which the incident occurred.

13. Dayachand (PW-2) is another eye witness to the incident. His statement is almost identical to that of Sohan Singh (PW-1). He too has categorically stated as to the manner in which the incident occurred and appellant Jagdish caused spear injury to the deceased. He has also admitted the fact that blue bulls used to damage the field of agriculturists and the accused appellant made allegation against the complainant party that his field has been damaged by the blue bulls on account of removing of fencing by the complainant party.

14. Gopichand (PW-3) is an injured eye witness to the incident. His statement is somehow similar to Sohan Singh (PW-1) and Dayachand (PW-2) and he has also supported the prosecution case. In the cross-examination, this witness also remained firm and nothing could be elicited from him.

15. Dr. R.K. Lal (PW-4) conducted post-mortem on the body of the deceased and found injury near the neck of the deceased as mentioned in paragraph no. 4 of this judgement.

16. Dr. Jagpal Singh (PW-5) medically examined injured Gopichand.

17. Momraj (PW-6), scribe of the FIR, has stated that the report was prepared as was dictated to him by Kanchhid Singh. He states that written report Ex.Ka.3 was prepared by him. Bhan Singh (PW-7), is a police constable, investigated the matter and also proved the signature of Investigating Officer. He has also proved the GD entry and the FIR.

18. Close scrutiny of evidence makes it clear that the Investigating Officer has not been examined and likewise the informant Kanchhid Singh has also not been produced in the court as a witness. The evidence reflects that Kanchhid Singh was missing during the time of evidence and, therefore, he could not come in the court. Non-examination of these two persons would not damage the case of prosecution in any manner. It is a settled proposition of law that the basic purpose of lodging FIR is to set the criminal law into motion and the FIR is not substantive piece of evidence. It is not disputed that the incident occurred at 07:00 am on 20.08.1987 and at 10:30 am, FIR was lodged. The distance between police station and place of occurrence is about 9 kms., thus, for all practical purposes, it can be said that a very prompt FIR was lodged. The FIR has been duly proved by its scribe Momraj (PW-6), who has stated that whatever was dictated to him by the informant Kanchhid Singh, was mentioned in the written report, which was given to the police. The same has been further proved by Bhan Singh (PW-7), who has authenticated the G.D. entry about the registration of the FIR and the chik report and other documents prepared by the Investigating Officer. He has also proved hand writing of the Investigating Officer. Thus, non-examination of Investigating Officer or informant will not give any benefit to the defence as no prejudice has been caused to the defence. Three eye witnesses to the incident i.e. Sohan Singh (PW-1), Dayachand (PW-2) and the injured eye witness Gopichand (PW-3) have duly supported the prosecution case and have categorically stated as to the manner in which the deceased was killed by the accused persons. Their statements found due support from the post-mortem report of the deceased and considering all these aspects of the case, complicity of the appellant in commission of offence has been duly proved by the prosecution.

19. The next question, which arises for consideration of this Court, is as to whether the act of the appellant would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'.

20. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:

"**300. Murder.** - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. - **When culpable homicide is not murder.** - Culpable

homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos:-

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

21. Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of

self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

22. The Apex Court in **State of A.P. vs. Rayavarapu Punnayya and Another; (1976) 4 SCC 382** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"**12.** In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under

the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

23. In **Budhi Singh vs. State of Himachal Pradesh; (2012) 13 SCC 663**, the Supreme Court held as under:

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with

the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

24. In **Kikar Singh vs. State of Rajasthan; (1993) 4 SCC 238**, the Apex Court held as under:

"8. The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

25. All the above three cases were considered by the Apex Court in **Surain Singh v The State of Punjab;** Criminal Appeal No.2284 of 2009, decided on April 10, 2017 and ultimately, it has been held by the Apex Court in that particular case, that the accused was liable to be convicted under Section 304 Part II of IPC and not under Section 302 of IPC.

26. If we apply the above principle of law in the present case, what emerges from the evidence, is that there was no

premeditation on the part of the accused persons to commit the offence and it started when the standing crop of the accused appellant was damaged by the blue bulls and he made allegation against the deceased and the complainant party that on account of removing fencing by them, his crop is being damaged. The evidence also reflects that both the parties had altercation with each other. They abused each other and thus, it can safely be held that it was a sudden fight and in the heat of passion upon a sudden quarrel single injury was caused to the deceased resulting his death. Appellant has not taken any undue advantage or acted in a cruel or unusual manner while committing the offence. Case of the appellant would, thus, fall under Exception 4 of Section 300 of IPC and it can be safely held that the appellant is liable to be convicted for committing 'culpable homicide not amounting to murder'.

27. Taking the cumulative effect of the evidence and the nature of injury, we are of the view that the appellant is liable to be convicted under Section 304 Part II of IPC.

28. Now the another important question is as to what would be the appropriate sentence to be imposed upon the appellant.

29. Learned counsel for the appellant submits that appellant is willing to pay suitable compensation to the deceased family and, therefore, minimum jail sentence be imposed upon him.

30. Considering the cumulative effect of the evidence and the fact that the incident occurred about 32 years back and at present the appellant is aged about 65 years, we are of the view that jail sentence of 5 years would meet the ends of justice. Order accordingly.

31. Further considering the provisions of Section 357 of Cr.PC and the judgment of the Supreme Court in **Ankush Shivaji Gaikwad v State of Maharashtra; (2013) 6 SCC 770,** it is directed that the appellant shall also be liable to pay compensation of Rs. 2,00,000/- (two lakhs) to the wife of the deceased. He is directed to deposit the said amount within two years before the trial court. In the eventuality of depositing the said amount by the appellant before the trial Court, it would be the duty of the trial Court to disburse the said amount in favour of wife of the deceased. In case, the appellant fails to deposit the said amount, he shall further undergo Jail sentence of one year and the court below shall proceed against him in the light of judgment of the Apex Court in **Kumaran Vs. State of Kerala and another; (2017) 7 SCC 471.**

32. The appellant is reported to be on bail. He be taken into custody forthwith to serve the remaining sentence.

33. The appeal is **partly allowed.**

34. A copy of this order be transmitted to the court concerned for necessary compliance.

(2019)10ILR A 334

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2018
BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 3189 of 2014

Mansa Ram @ Mansa Lal @ Sonoo
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Harendra Prakash Dwivedi, Sri Vikas Singh.

Counsel for the Opposite Party:
A.G.A., Sri R.A. Misra, Sri Siddarth Misra.

A. The detention period alone cannot serve as a legitimate basis to release accused on bail in a matter where the allegation pertains to killing wife by setting her ablaze particularly when evidence is sufficient, and unimpeachable dying declaration is on record. Onus to prove circumstances of death lies entirely on accused. (Para 5)

(Order in criminal Misc short term bail (Parole) application no- 34208 of 2015). (Para 6)

Bail application rejected (E-2)

(Delivered by Hon'ble Karuna Nand Bajpayee, J. &
Hon'ble Ajit Singh, J.)

(Order in Criminal Misc. Bail Application No.276258 of 2014)

1. List has been revised. Learned counsel for appellant is present. None has appeared on behalf of complainant despite repeated calls. Learned A.G.A. is present.

2. This bail application has been moved in aforesaid appeal on behalf of appellant Mansha Ram @ Mansha Lal @ Sonoo seeking his release on bail, who has been convicted and sentenced for offences u/s 302 I.P.C. in Session Trial No.550 of 2011 (State vs. Mansha Ram @ Mansha Lal @ Sonoo) arising out of Case Crime No.32 of 2011, Police Station-Tharwai, District-Allahabad.

3. Heard learned counsel for appellant-applicant and learned A.G.A. and also perused the record.

4. Submission of counsel for appellant is that though there is a dying declaration recorded by the Magistrate but the doctor who has given the certificate of fitness before recording of dying declaration has gone to state during the course of his deposition that he cannot vouchsafe about the conscious condition of the deceased at the time when she was brought in the hospital. Further submission is that with this kind of statement made in the court it cannot be said for certain that when the dying declaration was recorded the patient had actually gained consciousness. That would go to render the dying declaration suspect, and therefore, the accused should be released on bail. The period of detention was also pointed out. It has been also submitted that the deceased incurred injuries during the course of cooking accidentally and nobody can be blamed for that.

5. Learned A.G.A. has opposed the prayer for bail and it has been pointed out that this is a case in which the death of the deceased took place as a result of bodily burns within three years of marriage and there are clear allegations made against the appellant for having not only demanded the dowry but also for having committed cruelty upon her consistently. She was beaten up time and again and attempts to cause her death were made ever earlier. In fact record also shows the allegation that before the incident the appellant had gone to the house of the

parents of deceased where she was at that time and came back with the deceased only when Rs.50,000/- were given to him. Emphasis was laid by learned A.G.A. on the dying declaration of the deceased which has been recorded by the Magistrate who has been produced as P.W.-3 in the court and who has duly proved the dying declaration as was given by the deceased. The doctor who had given the fitness certificate has also been examined in the court as P.W.-6. Both these witnesses are of independent source and no reason has been shown as to why they would go to depose falsely in the court. The dying declaration made by the deceased is also unambiguously categorical, according to which on the fateful day it was appellant who had set the deceased ablaze after having physically assaulted her on a trifling issue. It has also been argued that the state of consciousness at the time of admission and the state of consciousness at the time when the dying declaration was recorded should not necessarily be the same and when the doctor, who gave the fitness certificate at the time of recording of the dying declaration, was asked the question about the mental condition of the deceased regarding the time when she was brought in the hospital, the only answer which a honest witness could give was in negative as he was not a witness of that fact and was not in a position to depose about the same, and therefore, the argument of the defence in this regard is specious and untenable both. It was also submitted that in fact the line of defence as has been adopted on behalf of the accused is also mutually inconsistent and contradictory. At one point of time it appears that the accused had tried to plead that the deceased died after incurring accidental burns during the course of cooking but the defence witnesses, as have been produced on behalf of accused in the court, have tried to show that when they reached the spot the room where the incident took place was found bolted from inside and had to be broken open before anybody could enter into it. This shows that the line of defence adopted appears to be that of commission of suicide by the deceased. Submission is that the accused-appellant being the husband of the deceased had the first responsibility to ensure welfare of his wife but instead of proving to be the protector he has proved himself to be the eliminator of his wife, as is amply borne out and shown by the dying declaration, to disbelieve which there is no good reason available on record at this stage. The submissions that have been raised on behalf of accused relate to detailed intricacies of appreciation of evidence and can be heard or appreciated only at the time of final hearing. At this stage there is conclusive, categorical and incriminating evidence available on record and the impugned judgment cannot be castigated on any valid ground and the accused has simply failed to establish even a prima facie case in his favour. Submission is that in a matter like this where the husband has killed his wife by setting her ablaze, the detention period alone cannot serve as a legitimate basis to release him on bail on that ground alone, especially in the wake of sufficiency of evidence which include the unimpeachable dying declaration available on record. It has also been submitted that in matters like this the onus to prove the circumstances of the death was entirely upon the accused who alone could have shed light in this regard as the incident took place within the precincts of his own house within three years of

marriage. But instead of coming out with clean hands, mutually incompatible lines of defence have been pleaded at different stages which only go to explode the falsity of the defence and can be read even as an additional circumstance against the accused. Learned A.G.A. contends that the Court therefore for these reasons should not take liberal view in the matter.

6. Looking to the nature of offence, its gravity and the evidence in support of it and the overall circumstances of this case, this Court is of the view that the appellant has not made out a case for bail. Therefore, the prayer for bail of the appellant is rejected.

7. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

8. The court is open and is feeling inclined to hear the appeal finally. If the appellant or his counsel has any inclination to argue the case finally, he can always take steps to expedite the hearing of the appeal.

(Order in Criminal Misc. Short Term Bail (Parole) Application No.34208 of 2015)

9. We have already heard the regular bail application of the appellant and did not find it a fit case where the accused could be released on bail, and therefore, we rejected the same. We also do not find any good ground to release of the appellant on parole, and therefore, same also stands rejected.

(2019)10ILR A 337

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH. J.

Criminal Appeal No. 1431 of 1987

Bhagwan Deen ...Appellant (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellant:
Sri Vinay Saran, Sri P.K. Mishra.

Counsel for the Opposite Party:
Sri Amit Sinha, A.G.A.

A. The FIR is vital and valuable price of evidence. If there is delay in lodging FIR, advantage of spontaity is lost and danger of coloured version/concocted story as a result of consultations/deliberations creeps in. A promptly lodged FIR reflects the firsthand account of the actual incident and the accused. An inference as to whether a FIR is ante timed can be drawn only on basis the proper cross examination of complainant and the police officer who recorded the FIR. (Para 16)

Criminal Appeal dismissed (E-2)

List of cases cited: -

1. Jai Prakash Singh Vs St. of Bihar (2012) 4 SCC 379

2. Madru Singh Vs St. of M. P. & Ram Sanjiwan Singh Vs St. of Bihar

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgment and order dated 29.4.1987 passed by VII Additional District & Sessions Judge, Kanpur Dehat

in Sessions Trial No.384 of 1983, convicting the appellant under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. In the present case, name of the deceased is Ram Dayal and as per prosecution case, on 29.9.1983 at about 2:00 am (in the mid-night) he was killed by appellant Bhagwan Deen by causing him number of incised wounds by a *Tabbal*. Further case of the prosecution is that about 8-10 days prior to the incident, Nirmala Devi, wife of Bechey Lal (brother of the appellant) was teased by the deceased and at that time, the appellant made efforts to get the deceased, but he could not succeed. Getting the opportunity, on 29.9.1983, the appellant entered the house of the deceased and caused him several injuries by a *Tabbal*, when he was sleeping in his *Varandah.* After hearing the cries of the deceased, (PW-1) Ram Gopal (nephew of the deceased), (PW-2) Kishuna Devi (wife of the deceased) and (PW-3) Chhotey Lal reached to the place of occurrence and, in the natural moon light and in the light of torch, saw the appellant causing injuries to the deceased. When these eye-witnesses have challenged the appellant, he fled away from the spot. On the next morning, at 8:30 am, on the basis of written report Ex.Ka.1 lodged by (PW-1) Ram Gopal, FIR Ex.Ka.3 was registered against the appellant under Section 302 of IPC.

3. Inquest on the dead body of the deceased was conducted vide Ex. Ka.5 on 29.9.1983 and the body was sent for postmortem which was conducted on 30.9.1983 vide Ex. Ka.17 by (PW-7) Dr S N Srivastava.

As per Autopsy Surgeon, following four injuries were noticed on the body of the deceased:

"(1) Incised wound on face Rt side extending from 3 cm away and lateral from Rt Ear extending obliquely downward Right angle of mouth Rt side with clear margin and tapering end. Injury measures 5 cm x 1 1/2 cm x bone cut.

(2) Incised wound in the center of nose bridge extending upwards obliquely Rt side of forehead with clear margin measuring 2 1/2 cm x 3/4 cm x bone deep.

(3) Incised wound on face Lt side extending from tragus of Lt ear obliquely upwards to Rt side across the Rt eye and puncturing Lt eye ball center with margin and tapering end on Lt side, wound measuring 11 cm x 2 1/2 cm x bone cut.

(4) Incised wound on neck Rt side after root of neck placed horizontally and measuring 11 cm x 3 cm x bone and cavity deep 3 cm away tabere Rt collar bone with clear margins and tapering end and wound cut cervical vertebrae of Rt side. Wound is at root of neck and extending out surface and neck in front."

Cause of death of the deceased was due to shock and hemorrhage as a result of injuries (Ante Mortem).

4. While framing charge, the trial Judge has framed charge against the appellant under Section 302 of IPC.

5. So as to hold accused appellant guilty, prosecution has examined seven witnesses. Statement of accused appellant was recorded under Section 313 of Cr PC in which, he pleaded his innocence and false implication.

6. By the impugned judgment and order, the trial Judge has convicted the accused appellant under Section 302 of IPC and sentenced him as mentioned in paragraph-1 of this judgment. Hence, this appeal.

7. Counsel for the appellant submits:-

(i) that the FIR is ante-timed and there is delay in lodging the same.

(ii) that three eye-witnesses, i.e. (PW-1) Ram Gopal, (PW-2) Kishuna Devi and (PW-3) Chotey Lal, are not reliable and trustworthy. It has been argued that there are material contradictions in their statements.

(iii) that the incident occurred in the mid-night and the witnesses were sleeping and, thus, question of seeing the incident by them does not arise at all.

(iv) that there was no sufficient source of light at the place of occurrence.

8. On the other hand, supporting the impugned judgment and order, it has been argued by learned State Counsel:

(i) that the conviction of the appellant is in accordance with law and there is no infirmity in the same.

(ii) that a very prompt report was lodged by (PW-1) Ram Gopal. He, however, submits that the incident occurred at 2:00 am (in the mid-night) whereas at 8:30 am, the report was lodged and the distance between the place of occurrence and that of Police Station is about 8 kms.

(iii) that the statements of eye-witnesses have been duly supported by the postmortem report of the deceased and the Autopsy Surgeon has also duly proved the same.

(iv) that on the date of incident, there was sufficient light at the place of occurrence. It has been argued that as per moon chart available on internet, it was 54% visibility on the date of incident. It has further been argued that even otherwise, (PW-1) and (PW-3) were carrying torch with them and in the torch light as well as in the moon light, they saw the appellant causing injuries to the deceased.

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

10. (PW-1) Ram Gopal, is the first informant and an eye-witness to the incident. While supporting the prosecution case, he has stated that about 8-10 days prior to the incident, wife of Bechey Lal, namely, Nirmala Devi was teased by the deceased and despite efforts being made by the appellant, he could not get deceased Ram Dayal. He has further stated that in the night intervening 28/29.9.1983, the appellant entered the house of the deceased who was sleeping in his Varandah and caused several injuries to him by a Tabbal. Upon hearing the cries of the deceased, (PW-2) Kishuna Devi and (PW-3) Chotey Lal reached to the spot carrying torch with them and then they saw the appellant causing several injuries by a Tabbal, resulting his death at the spot. He further states that the appellant was challenged by them, but he fled away from the spot.

In the cross-examination, this witness remained very firm and has reiterated as to the manner in which the

deceased was done to death by the appellant.

11. (PW-2) Kishuna Devi, is also an eye-witness to the incident. She is the wife of the deceased. She states that on the date of incident, she was sleeping in an adjacent room to her Varandah, whereas her husband was sleeping in the Varandah and upon hearing his cries, when she came out from the room, she saw the appellant causing injuries to her husbanfd by a Tabbal. She has categorically stated that on the date of incident, it was half moon light and in the said light, she could see the appellant properly.

12. (PW-3) Chotey Lal, is another eye-witness to the incident and he too has categorically stated that, on the date of incident, it was half moon light and he saw the appellant, causing injuries to the deceased by a Tabbal. He has further stated that he was carrying a torch and there was sufficient moon light as well.

13. (PW-4) Sri Krishna, recorded chik FIR. (PW-5) Surendra Pratap Singh, took the body of the deceased for postmortem. (PW-6) Surendra Pal Singh, is the Investigating Officer, has duly supported the prosecution case. (PW-7) Dr S N Srivastava, conducted the postmortem of the deceased.

14. Close scrutiny of the evidence makes it clear that on account of previous enmity, on 29.9.1983 at about 2:00 am, the appellant entered the house of the deceased and caused him several injuries by a Tabbal. Upon hearing the cries of the deceased, (PW-1) Ram Gopal and (PW-3) Chotey Lal, reached to the place of occurrence carrying torch with them and saw the appellant assaulting the deceased. That apart, when (PW-2) Kishuna Devi, who was sleeping in a room adjacent to her Varandah, after hearing the cries of the deceased came out from the room, saw the appellant causing injuries to the deceased. When the appellant was challenged by these eye-witnesses, he fled away from the spot. In view of this, we have no reason to disbelieve the statements of these three eye-witnesses, who are very firm and have candidly stated as to the manner in which the deceased was done to death by the appellant.

15. We find no substance in the argument of the defence that there was no source of sufficient light at the place of occurrence. As per moon chart available on internet, on the date of incident, the visibility was 54%. Even otherwise, (PW-1) and (PW-3) were carrying torch with them and in the torch light as well as in the moon light, they saw the appellant causing injuries to the deceased.

16. We further find no substance in the argument of the defence that the FIR is ante-timed. The incident occurred at 2:00 am, whereas at 8:30 am, the report was lodged and the distance between the place of occurrence and that of Police Station is about 8 kms. Considering the fact that the deceased died at the spot; it was mid-night and (PW-1) Ram Gopal might have taken sometime to adjust himself and then rushed to the police station for lodging the FIR, we are of the view that there was no time for (PW-1) to concoct the story or fabricate the evidence in any manner. Therefore, it cannot be said that the report is ante-timed. Even otherwise, there is no evidence to show as to in what manner this entire story has

been cooked up by (PW-1). In absence of any such evidence, it cannot be presumed that the FIR is ante-timed. Law in this respect is very clear.

In **Jai Prakash Singh v State of Bihar** the Supreme Court observed as under:

12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: Thulia Kali v. State of T.N. (1972) 3 SCC 393, State of Punjab v. Surja Ram, 1995 Supp. (3) SCC 419, Girish Yadav v. State of MP, (1996) 8 SCC 186 and Takdir Samsuddin Sheikh v. State of Gujarat (2011) 10 SCC 158."

The Supreme Court in **Madru Singh vs. State of Madhya Pradesh** and **Ram Sanjiwan Singh Vs. State of Bihar,** answered the similar question in 'negative'. In the said decisions, it has been held by the Supreme Court that from the cross-examination of prosecution witnesses, circumstances have to be elicited which would show that the FIR was ante-timed and then alone, an inference can be drawn that the FIR was ante-timed.

It is further settled position of law that FIR can be proved ante-timed or ante-dated by adducing proper evidence. The lodger of FIR should be subjected to proper cross-examination as to on what basis defence pleads the FIR to be ante-timed or ante-dated. Likewise, the police officer, who has recorded the FIR, is also required to be properly cross-examined as to on what basis defence pleads the FIR to be ante-dated or ante-timed. If no such requirement of law is completed and no such proper cross-examination of the witnesses is being done, it cannot be presumed that the FIR is ante-dated or ante-timed.

17. We further find no substance in the argument of the defence that three eye-witnesses, i.e. (PW-1) Ram Gopal, (PW-2) Kishuna Devi and (PW-3) Chotey Lal are not reliable and trustworthy. No such contrary evidence is available on record to presume this fact as well. All these three eye-witnesses appear to be the natural witnesses who had seen the occurrence.

18. Considering all these aspects of the case, we are of the considered view that the trial Court was fully justified in convicting the appellant. The appeal has no substance and the same is, accordingly, **dismissed.**

19. Since the appellant is on bail, he be taken into custody forthwith for serving remaining sentence.

20. Let a copy of this judgment be sent to the concerned trial Court for compliance.

(2019)10ILR A 342

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH J.

Criminal Appeal No. 535 of 1987

Ram Shankar & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.K. Dubey, Sri S.N. Singh, Sri Anurag Shukla, Sri S.K. Mishra.

Counsel for the Opposite Party:
Sri Amit Sinha, A.G.A.

A. Indian Penal Code, 1860 - Section 300 IPC, Exception 4, can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without offenders having taken undue advantage, (d) accused had not acted in a cruel or unusual manner. (Para 21)

Doctrine of grave and sudden provocation depends on the facts of each case; it cannot be universally applied. (Para 21)

It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case (Exception 4 of section 300 IPC). (Para 21)

Criminal Appeal partly allowed (E-2)

List of cases cited: -

1. St. of A.P. Vs Rayavarapu Punnayya & anr. 1977 AIR 45 1976 SCC (4) 382

2. Budhi Singh Vs St. of H. P. (2012) 13 SCC 663

3. Kikar Singh Vs St. of Raj. 1993 SCC (4) 238

4. Surain Singh Vs St. of Panj. (Criminal appel decided by 10.04.2017)

5. Ranjitham Vs Basavaraj (2012) 1 SCC 414

6. Ankush Shivaji Gaikwad Vs St. of Mah. (2013) 6 SCC 770

7. Kumaran Vs St. of Ker. & anr. (criminal appel decided by 05.05.2017)

(Delivered by Hon'ble Pritinker Diwatker, J.)

1. This appeal arises out of impugned judgment and order dated 17.2.1987 passed by Vth Additional Sessions Judge, Basti in Sessions Trial No.222 of 1984, convicting accused no.5-Tirath, accused no.6-Laxmi, accused no.7-Ashok, accused no.8-Ram Bhabhuti, accused no.9-Bhadeshwar and accused no.10-Parmatma under Sections 147, 323 read with Section 149 and Section 302 read with Section 149 of IPC and sentencing them to undergo one month's RI; three months' RI and imprisonment for life respectively. Further, accused no.1-Ram Shankar, accused no.2-Onkar, accused no.3-Mahadeo and accused no.4-Rajeshwar have been convicted under Sections 148, 323 read with Section 149 and Section 302 read with Section 149 of IPC and sentenced to undergo one year's RI, three months' RI and imprisonment for life respectively.

2. As per prosecution case, there were two groups in the village, one was of *'Pandit'* community, whereas the other

group was of *'Harijan'* community. As the later group had stopped working for the first group, there was a dispute between the two and the proceedings under Section 107 of Cr PC were initiated against both the groups. Another outfall of the said dispute was that the second group was not allowed to move freely in the village by the first group nor they were permitted to fetch water from the Well. It is said that on 29.9.1982, deceased Shiv Raj, who belonged to second group, was making some arrangement to have separate Hand Pump and while doing so, he had gone to the well of accused Ram Shankar and there some verbal exchange had taken place. Soon thereafter, accused persons reached to opposite group carrying different weapons with them and upon exhortation being made by first accused Ram Shankar, they caused injuries to Shiv Raj. When Piyare (PW-2) and Hanuman (PW-3) tried to intervene in the matter, they were also subjected to injuries. In the said incident, accused Laxmi and Ashok also suffered minor injuries. After sustaining injuries, Shiv Raj expired at the place of occurrence itself.

3. On the basis of written report Ex.Ka.1 lodged by (PW-1) Ram Dawan, brother of the deceased, on 29.9.1982 FIR Ex.Ka.2 was registered at 9:15 am against ten accused persons, namely, Ram Shankar, Onkar, Mahadeo, Rajeshwar, Tirath, Laxmi, Ashok, Parmatma, Bhadeshwar and Ram Bhabhuti under Sections 147, 148, 149, 323, 324, 504 and 302 of IPC.

4. Injured Hanuman (PW-3) was medically examined vide Ex.Ka.8 and the following injuries were noticed by the Doctor:

"(i) Lacerated wound - 5.52 x 1 cm x bone deep on the left side of Head, vertically placed 9 cm above left ear. Bleeding present.

(ii) LW - 4 cm x 0.4 cm x muscle deep on the Rt. side of Head, 5 cm above Rt eyebrow. Bleeding present.

(iii) Contusion swelling - 6 cm x 4 cm on the Rt. side of face, just below the lower eyelid, Below canthus."

Other injured Piyare (PW-2) was also medically examined, vide Ex.Ka.9 and the following injuries were noticed by the Doctor:

"(i) LW - 5.52 x 0.52 cm x muscle deep, on the left side of Head, 9 cm above eyelid. Bleeding present.

(ii) Traumatic Swelling - 12 cm x all round Rt. forearm, 4 cm below the elbow.

(iii) Traumatic Swelling - 10 cm x all around Rt. forearm, 11 cm below injury no.(ii)."

5. Inquest on the dead body of the deceased was conducted vide Ex.Ka.6 on 29.9.1982 and the body was sent for postmortem which was conducted on 30.9.1982, vide Ex.Ka.7 by (PW-5) Dr A K Mehrotra.

As per Autopsy Surgeon, following injuries were noticed on the body of the deceased:

1. Lacerated wound 5 cm x 1.5 cm x bone deep on back of skull 2 cm front of site of choti (pksVh). Obliquely present.

2. Lacerated wound 5.5 cm x 1.5 cm x bone deep on Rt parieto temporal region of skull 6 cm above right ear. Obliquely present.

3. Incised wound with clear cut margins (as seen with lens) on right side

front of skull extending to forehead - size 5 cm x 1 cm x bone deep. Flesh of skull bone is seen cut through the wound.

4. Lacerated wound - 3.5 cm x 0.6 cm x bone deep on dorsum of the middle finger of left hand.

5. Contusion 9 cm x 2.5 cm outer front of right shoulder.

6. Multiple contusion on area of 15 cm x 12 cm on back of lower half of the side of chest area. Biggest size of contusion is 9 cm x 2.4 cm and smallest of size 6 cm x 1.6 cm.

7. Contusion - 12 cm x 2.5 cm on back of upper inner part of right thigh.

8. Contusion - 7.8 cm x 2 cm on back of left shoulder.

9. Contusion 9 cm x 2.2 cm on the back of middle 1/3 of left leg."

Cause of death of the deceased was shock, haemorrhage and coma as a result of ante-mortem injuries.

6. While framing charge, the trial Judge has framed charge against accused Tirath, Laxmi, Ashok, Parmatma, Bhadeshwar and Ram Bhabhuti under Sections 147, 302/149 and 323/149 of IPC, whereas against accused Ram Shankar, Onkar, Mahadeo and Rajeshwar charge was framed under Sections 148, 302/149 and 323/149 of IPC.

7. So as to hold accused persons guilty, the prosecution has examined eight witnesses, whereas one defence witness has also been examined. Statements of accused persons were also recorded under Section 313 of Cr PC in which, they pleaded their innocence and false implication.

8. By the impugned judgment, the trial Judge has convicted and sentenced the accused persons as mentioned in para 1 of this judgment. During pendency of the present appeal, accused no.7-Ashok has been declared juvenile, whereas accused no.3-Mahadeo, accused no.5-Tirath, accused no.8-Ram Bhabhuti and accused no.10-Parmatma have expired and the appeal in their respect has already been abated. At present, this appeal is confined in respect of accused no.1-Ram Shankar, accused no.2-Onkar, accused no.4-Rajeshwar, accused no.6-Laxmi, accused no.7-Ashok and accused no.9-Bhadeshwar.

9. Counsel for the appellants submits:

(i) that the FIR is ante-dated.

(ii) that motive part has not been proved by the prosecution.

(iii) that (PW-1) Ram Dawan, (PW-2) Piyare and (PW-3) Hanuman are not the reliable witnesses.

(iv) that it is the victim party who was aggressor and, therefore, the accused persons had every right to save themselves from the marpeet started by the victim party. Learned counsel submits that the accused persons have caused injury in their self-defence and thus, they cannot be convicted.

(v) that under no stretch of imagination, offence under Section 302 of IPC is made out against the accused persons and, at best, they are liable to be convicted under Section 304 Part II of IPC. It has been argued that the incident occurred in the year 1982, i.e. 37 years back, some of the accused have already expired, remaining accused persons are

willing to compensate the victim's family and, therefore, a lenient view be taken while awarding sentence to them.

10. On the other hand, supporting the impugned judgment and order, it has been argued by the State Counsel that the conviction of the accused persons is in accordance with law and there is no infirmity in the same. He submits that (PW-2) Piyare and (PW-3) Hanuman are the injured eye-witnesses and they have duly supported the prosecution case. The prosecution case has been further proved by the medical report of (PW-2) Piyare and (PW-3) Hanuman and likewise, postmortem report of the deceased. State counsel further submits that complainant party was not aggressor and in the evidence, it has come that it is the accused persons who were aggressor. He submits that right of private defence of a person or property is not available to the accused persons once the eye-witnesses have stated that it is they who caused injury first. He submits that even otherwise, the accused persons have exceeded their right and, therefore, it cannot be said that they are not liable to be convicted for any offence.

11. We have heard learned counsel for the parties and perused the record.

12. (PW-1) Ram Dawan, is a brother of the deceased and lodger of FIR, Ex. Ka.2. While supporting the prosecution case, he has stated that on the date of incident at about 8:00 am, deceased had gone to fetch water from the well of accused no.1 Ram Shankar. However, he was not allowed to do so and was abused by Ram Shankar. He states that deceased Shiv Raj returned to his place after abusing the other group. He further states that soon thereafter, all the accused persons reached there carrying different weapons with them and upon being exhorted by accused no.1 Ram Shankar and accused no.8-Ram Bhabhuti, other accused persons chased the deceased Shiv Raj and after surrounding him, caused number of injuries to him. To save Shiv Raj, (PW-2) Piyare and (PW-3) Hanuman and other persons rushed to him, however, they too had suffered injuries. After sustaining injury, Shiv Raj expired at the place of occurrence itself. In paragraph no.3, he has stated that there were two groups in the village, one belongs to the appellants party, whereas the other was of Harijan group and that there was tension in the village over payment of wages to the second group after which, proceedings under Section 107 Cr PC were also initiated. In the lengthy cross-examination, this witness has remained firm and has reiterated as to the manner in which the incident occurred.

13. (PW-2) Piyare, is an injured witness to the incident, has duly supported the prosecution case and his statement is almost similar to that of (PW-1) Ram Dawan. He states that in the local body election, one Jagdev, from the side of accused persons, defeated one Ram Sahai Chaudhary. He has further stated that on the date of incident when the accused persons were cutting their crops, it is his group who made assault and from the side of accused, Laxami and Ashok suffered injuries and when the accused persons were trying to save themselves, from the side of complainant some persons suffered injuries. He further states that in a cross case, he has also been joined as an accused.

14. (PW-3) Hanuman, is the other injured eye-witness to the incident, has also duly supported the prosecution case.

15. (PW-4) Wakar Husain, is the Investigating Officer, has duly supported the prosecution case.

16. (PW-5) Dr. A.K. Mehrotra, did the postmortem of the deceased vide Ex. Ka. 7.

17. (PW-6) Lal Bahadur Singh and (PW-7) Gomti Prasad assisted during investigation.

18. (PW-8) Dr. G.P. Agarwal, did MLC of (PW-2) Piyare and (PW-3) Hanuman, vide Ex. Ka. 8 and 9 respectively. He further states that accused Laxmi and Ashok had also suffered minor injuries.

19. According to (DW-1) Dr. S.K. Srivastava, accused Laxmi has suffered fracture of metacarpel.

20. Close scrutiny of the evidence makes it clear that there were two groups in the village, Chapiya Majhariya, one headed by the accused persons and the other was of Harijans, of which deceased Shiv Raj was a member. There was a dispute in the village over payment of wages to the second group and the legal proceedings were also initiated against both the parties. On the date of incident, deceased Shiv Raj had gone to fetch water from the well of accused no.1-Ram Shankar and they abused each other. Soon thereafter, accused persons apprehended Shiv Raj and there was an incident of marpeet between two groups. In the incident, from the second group, Shiv Raj (deceased), Piyare (PW-2) and Hanuman (PW-3) suffered injuries, whereas from the side of accused persons, accused Laxmi and Ashok also suffered injuries. The incident has been witnessed by (PW-1) Ram Dawan, (PW-2) Piyare and (PW-3) Hanuman and all three witnesses have duly supported the prosecution case and we have no reason to disbelieve their statements. Likewise, injured Laxmi and Ashok had also suffered injuries and their injuries have also been admitted by the doctor who treated them.

Considering the statements of witnesses, complicity of the accused persons in commission of offence has been duly proved and thus, they are liable to be convicted for the murder of Shiv Raj and injuries to Hanuman and Piyare.

21. The next question which arises for consideration of this Court is as to whether the act of accused persons would fall within the definition of 'murder' or it would be 'culpable homicide not amounting to murder'. Before proceeding further, it is relevant to refer to the provisions of Section 300 of IPC, which read as under:

"**300. Murder.** - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly. - If the person committing the act knows that it is so

imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1. - **When culpable homicide is not murder. -**

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above Exception is subject to the following provisos:-

First. - That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2. - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3. - Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. - It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. - Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

Exception 4 to Section 300 of the IPC applies in the absence of any premeditation. This is very clear from the wordings of the Exception itself. The exception contemplates that the sudden

fight shall start upon the heat of passion on a sudden quarrel. The fourth exception to Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of provocation not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds mens' sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

22. The Apex Court in **State of A.P. vs. Rayavarapu Punnayya and Another** while drawing a distinction between Section 302 and Section 304 of IPC held as under:

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to

murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code."

In **Budhi Singh vs. State of Himachal Pradesh,** the Supreme Court held as under:

18. The doctrine of sudden and grave provocation is incapable of rigid construction leading to or stating any principle of universal application. This will always have to depend on the facts of a given case. While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide, and as per the facts, was not a culpable homicide amounting to murder. An offence resulting from grave and sudden provocation would normally mean that a person placed in such circumstances could lose self-control but only temporarily and that too, in proximity to the time of provocation. The provocation could be an act or series of acts done by the deceased to the accused resulting in inflicting of injury.

19. Another test that is applied more often than not is that the behaviour

of the assailant was that of a reasonable person. A fine distinction has to be kept in mind between sudden and grave provocation resulting in sudden and temporary loss of self-control and the one which inspires an actual intention to kill. Such act should have been done during the continuation of the state of mind and the time for such person to kill and reasons to regain the dominion over the mind. Once there is premeditated act with the intention to kill, it will obviously fall beyond the scope of culpable homicide not amounting to murder....."

In **Kikar Singh vs. State of Rajasthan** the Apex Court held as under:

"**8.** The counsel attempted to bring the case within Exception 4. For its application all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat or exchanging blows on each other. And however slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood is already heated or warms up at every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight i.e. mutual combat and not one side track. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to Exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying Exception 4. When the deceased was not armed but the accused was and caused injuries to the deceased with fatal results, the Exception 4 engrafted to Section 300 is excepted and the offences committed would be one of murder.

9. The occasion for sudden quarrel must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least at the onset. This is specially so where the attack is made with dangerous weapons. Where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted fatal blows on the deceased, Exception 4 is not attracted and commission must be one of murder punishable under Section 302. Equally for attracting Exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner of retaliation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under Exception 4...."

23. All the above three cases were considered by the Apex Court i**n Surain Singh v The State of Punjab** and

ultimately, it has been held by the Apex Court in that particular case, that the accused was liable to be convicted under Section 304 Part II of IPC and not under Section 302 of IPC.

24. In **Ranjitham v Basavaraj**., the Supreme Court, while dealing with the similar issue, observed in paragraphs 28, 29, 30 and 31 as under:

"**28**. In *Hari Ram vs. State of Haryana, (1983) 1 SCC 193*, there was an altercation between the appellant and the deceased. The appellant had remarked that the deceased must be beaten to make him behave. He thereafter ran inside the house, brought out a jelly and thrust it into the chest of the deceased. This Court observed that in the heat of altercation between the deceased on the one hand, and the appellant and his comrades on the other, the appellant seized a jelly and thrust it into the chest of the deceased. This was preceded by his remark that the deceased must be beaten to make him behave. Therefore, it does not appear that there was any intention to kill the deceased. This Court, therefore, set aside the conviction of the appellant under Section 302 IPC and instead convicted him under Section 304 Part II IPC and sentenced him to suffer rigorous imprisonment for five years.

29. In *Jagtar Singh vs. State of Punjab, (1983) 2 SCC 342*, in a trivial quarrel the appellant wielded a weapon like a knife and landed a blow on the chest of the deceased. This Court observed that the quarrel had taken place on the spur of the moment. There was exchange of abuses. At that time, the appellant gave a blow with a knife which landed on the chest of the deceased and therefore, it was permissible to draw an inference that the appellant could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death but since there was no premeditation, no intention could be imputed to him to cause death. This Court, therefore, convicted the appellant under Section 304 Part II IPC instead of Section 302 IPC and sentenced him to suffer rigorous imprisonment for five years.

30. In *Hem Raj v. The State (Delhi Administration)*, 1990 Supp. SCC 291, the appellant and the deceased had suddenly grappled with each other and the entire occurrence was over within a minute. During the course of the sudden quarrel, the appellant dealt a single stab which unfortunately landed on the chest of the deceased resulting in his death. This Court observed that (SCC p. 295, para 14) as the totality of the established facts and circumstances show that the occurrence had happened most unexpectedly, in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary injury to the deceased, he could not be imputed with the intention to cause death of the deceased, though knowledge that he was likely to cause an injury which is likely to cause death could be imputed to him. This Court, therefore, set aside the conviction under Section 302 IPC and convicted the appellant under Section 304 Part II IPC and sentenced him to undergo rigorous imprisonment for seven years.

31. In *V. Subramani, (2*005) 10 SCC 358, there was some dispute over grazing of buffaloes. Thereafter, there was altercation between the accused and the deceased. The accused dealt a single

blow with a wooden yoke on the deceased. Altering the conviction from Section 302 IPC to Section 304 Part II IPC, this Court clarified that it cannot be laid down as a rule of universal application that whenever death occurs on account of a single blow, Section 302 IPC is ruled out. The fact situation has to be considered in each case. Thus, the part of the body on which the blow was dealt, the nature of the injury and the type of the weapon used will not always be determinative as to whether an accused is guilty of murder or culpable homicide not amounting to murder. The events which precede the incident will also have a bearing on the issue whether the act by which death was caused was done with an intention of causing death or knowledge that it is likely to cause death but without intention to cause death. It is the totality of circumstances which will decide the nature of the offence."

25. Applying the above principle of law in the present case, it is apparent that the offence has been committed without there being any premeditation in a sudden fight in the heat of passion upon a sudden quarrel. Facts also disclose that the accused persons have not taken any undue advantage or acted in a cruel or unusual manner. Thus, the case of the accused persons would fall under Exception 4 of Section 300 of IPC, i.e.'culpable homicide not amounting to murder'.

26. The next question, which arises for consideration of this Court, is as to whether the accused persons are liable to be convicted under Section 304 Part-I or Part-II of IPC.

Considering the fact that at the spur of moment, the incident occurred and as a result thereof, injuries have been caused to the deceased as well as the injured and further considering the statements of three eye-witnesses, it can safely be held that the accused persons are liable to be convicted under Section 304 Part-II of IPC.

27. Another question, which arises for consideration of this Court, is as to what would be the appropriate sentence to be imposed upon the accused appellants.

Having considered the facts that the incident occurred 37 years back; out of 10 accused persons, four have already expired and one has been declared juvenile and the accused appellants are willing to compensate the family of the deceased, we are of the considered view that, in the peculiar facts and circumstances of the case, ends of justice would be served, if the accused appellants, except accused no.7-Ashok, are sentenced to five years rigorous imprisonment. Order accordingly.

However, looking to the provisions of Section 357 of Cr PC and the judgment of the Apex Court in **Ankush Shivaji Gaikwad v State of Maharashtra,** we are of the view that the accused-appellants are liable to compensate the victim's family by paying a total compensation of Rs.1,50,000/- (One Lakh Fifty Thousand Only) under Section 357 of Cr PC. Accordingly, accused-appellants, Ram Shankar, Onkar, Rajeshwar, Laxmi and Bhadeshwar are directed to pay monetary compensation of Rs. 30,000/- each to the victim's family.

Let this amount be deposited before the concerned Court below within two years from today. After depositing the

aforesaid amount before the concerned Court below, it shall be paid to the wife of deceased Shiv Raj, if surviving, or to his legal heirs. In case, the accused appellants fail to deposit the said amount of compensation within the aforesaid time, they shall undergo additional jail sentence of one year and the Court below shall proceed to recover the amount of compensation in the light of judgment of the Apex Court reported in **Kumaran Vs State of Kerala and another**.

28. So far as the question of sentence to be imposed upon accused no.7-Ashok is concerned, his case is referred to the concerned Juvenile Justice Board to pass appropriate orders, as he has already been declared a juvenile by the Board.

29. Since the accused-appellants are reported to be on bail, they be taken into custody forthwith for serving remaining sentence in terms of this judgment.

30. Let a copy of this judgment be sent to the concerned trial Court forthwith for compliance.

31. The appeal is **partly allowed.**

(2019)10ILR A 353

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 870 of 1987

Lal Bahadur & Ors. ...Appellants (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Gulab Chand, Sri Surendra Singh, Sri Raj Kumar Sharma.

Counsel for the Opposite Party:
A.G.A., Sri Amit, Sri Ravindra Kumar, Sri Raman Babu.

A. Indian Penal Code, 1860 -Sections 302 - Appeal against conviction.

B. Evidencery value of relatives-A close relative cannot be categorized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. (Para 23)

The deceased died after six days of the incident, no fracture of head was found, appeal would fall under Section 326 of IPC and not under section 302 of IPC. (Para 26).

Criminal Appeal partly allowed (E-2)

List of Cases Cited: -

1. Anil Rai Vs St. of U.P. & Bihar (2001) 7 SCC 318

2. St. of U.P. Vs Jagdeo Singh (2003) 1 SCC 456

3. Bhagalool Lodh & anr. Vs St. of U.P. (2011) 13 SCC 206

4. Dahari & ors. Vs St. of U.P. (2012) 10 SCC 256

5. Raju @ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

6. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2011) 15 SCC 298 Jodhan vs. St. of M.P. (2015) 22 SCC 52

7. Bur Singh & anr. Vs St. of Punj. (2208) 16 SCC 65

8. Sudhakar Vs St. AIR 2018 SC 1372

9. Ganapathi Vs St. of T.N. AIR 2018 SC 1635

10. Harbans Kaur & anr. Vs St. of Har. 2005 AIR SCW 2074

11. Namdeo Vs St. of Mah. 2007 AIR SCW 1835

12. Sonelal Vs St. of M.P. 2008 AIR SCW 7988

13. Dharnidhar Vs St. of U.P. & ors. connected appeals (2010) 7 SCC 759

14. Ankush Shivaji Gaidwad Vs St. of Mah. (2013) 6 SCC 770

15. Kumaran Vs St. of Ker. & anr. (2017) 7 SCC 471

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of impugned judgement and order dated 24.3.1987 passed by Sessions Judge, Etawah in Sessions Trial No. 4 of 1985 convicting the accused persons, namely, Lal Bahadur, Sher Singh and Shashtri under Section 302 read with Section 34 of IPC and accused Jai Dutt under Section 302 of IPC and sentencing them to undergo life imprisonment.

2. As per prosecution case, complainant Bhojraj hired a tractor of one Sharma for ploughing his agricultural field. There was some dispute regarding payment to the owner of said tractor and a complaint was made by the owner of the tractor to Pulandar Singh who allegedly abused the deceased. After about 4-5 days of the above incident when the deceased was working in his agricultural field, all the four accused reached there and started abusing him. It is further alleged that Ram Autar (decease) was beaten by the accused persons. Accused Jai Dutt was having 'Moosal' (pestle) with him, accused Lal Bahadur was having spear, whereas the remaining two accused Sher Singh and Shashtri were having clubs with them. The incident of 'marpeet' was witnessed by PW-1, Bhoj Raj and PW-2 Sone Lal. The incident occurred on 20.12.1983 at 7:00 A.M. and the matter was reported to the police at 10:15 A.M. by PW-1, Bhoj Raj against all the accused persons. Based on this report, offence under Sections 323, 504, 506 of IPC was registered against all the accused persons. Injured Ram Autar was immediately shifted to a hospital at Lucknow where, he succumbed to his injuries on 26.12.1983 at about 9:45 p.m.

3. Inquest on the dead body of the deceased was conducted on 27.12.1983 vide Ex. Ka.1 and body was sent for postmortem which was conducted on the same day vide Ex. Ka. 12 by PW-8, Dr. P.R Mishra.

4. As per postmortem report, following injuries were found on the body of the deceased:

(I) Scabbed abraded contusion 8 cm x 6 cm on the left side of head 5 cm above in left eye brow.

(II) Scabbed abraded contusion 9 cm x 5 cm on the left scapula region.

(III) Scabbed abraded contusion 6 cm x 5 cm on the left side of buttock.

(IV) Abraded contusion 4 cm x 9 cm on the 5th lumber spine.

(V) Infected wound 1.5 cm x 0.5 cm muscle deep on the frond & mid of left leg.

(VI) Multiple scabbed abraded contusion in an area 18 cm x 2 cm on the upper half of left leg.

(VII) Scabbed abrasion on an area of 22 cm x 2 cm on the front of right leg.

The cause of death of the deceased was due to comma as a result of head injury.

5. Initially charge was framed against all the accused persons under Section 302/34 of IPC but later amended charge was framed against accused Jai Dutt, under Section 302 of IPC and against the remaining accused persons, it was framed under Section 302/34 of IPC.

6. So as to hold accused persons guilty, prosecution has examined nine witnesses. Statements of the accused-appellants were also recorded under Section 313 of Cr.P.C. in which, they pleaded their innocence and false implication.

7. By the impugned judgment, the trial Judge has convicted all the four accused persons under Section 302/34 and 302 of IPC and sentenced them as mentioned in paragraph no. 1 of this judgment. Hence this appeal.

8. During pendency of present appeal, accused-appellant Lal Bahadur has expired and, therefore, appeal in his respect is abated. Appeal in respect of accused-appellant Sher Singh has already been abated on account of his death. The present appeal now confines only in respect of accused Jai Dutt and Shashtri.

9. Learned counsel for the appellants submits:

(I) that PW-1, Bhoj Raj and PW-2, Sone Lal have not seen the actual occurrence, they are not eye-witnesses to the incident and are planted witnesses.

(II) that both PW-1 and PW-2 are interested witnesses and, therefore, they have falsely implicated the appellants.

(III) that prosecution is not sure about the place of occurrence and three different places have been shown as place of occurrence.

(IV) that the deceased died because of injury no.1 sustained by him on his head but no fracture on the head was noticed by the autopsy surgeon.

(V) that only fracture of fibula bone has been found by the radiologist PW-7, Dr. R.K. Chaudhary vide Ex. Ka-11.

(VI) that deceased died after six days of the incident and, therefore, considering the injuries sustained by him, even if the entire prosecution case is taken as it is, at best, offence under Section 326 of IPC is made out against the accused persons.

10. On the other hand, supporting the impugned judgment, it has been argued by the State Counsel that the conviction of the appellants is in accordance with law and there is no infirmity in the same. It has been further argued that when the incident occurred in the presence of family members alone, question of examining any independent witness does not arise and no fault can be attributed to the prosecution.

11. We have heard learned counsel for the parties and perused the record.

12. PW-1, Bhoj Raj is the informant and father of the deceased. While supporting the prosecution case, he has stated that he had taken the services of one Sharma for ploughing his agricultural field with his tractor and there was some dispute in payment. He states that brother of accused-appellant Sher Singh, namely, Pulandar intervened in the matter and had threatened his son Ram Autar and on the date of incident, all the accused persons carrying weapons in their hands reached to the place of occurrence and caused injuries to Ram Autar. He has clarified that accused Lal Bahadur was having spear, Jai Dutt was having Moosal (pestle), whereas Sher Singh and Shashtri were carrying clubs in their hands. In the cross-examination, this witness remained firm and nothing could be elicited from him to doubt his credibility.

13. PW-2, Sone Lal is the other eye-witness to the incident and his statement is almost identical to that of PW-1, Bhoj Raj. He too has categorically stated that all the accused persons caused injuries to Ram Autar and Ram Autar was taken to a hospital at Lucknow where after about six days, he succumbed to his injuries.

14. PW-3, Kshetra Pal Singh (Head Constable), recorded the FIR.

15. PW-4, Dr. P.C. Dubey, has proved the admission of injured ram Autar in a hospital at Lucknow.

16. PW-5, S.I., Kashi Ram Gupta, conducted inquest.

17. PW-6, Dr. B.L. Katiyar, did MLC of injured Ram Autar vide Ex. Ka.10 at PHC Bidhuna and has noticed following nine injuries:

(I) Lacerated wound 1.5 cm x 0.2 cm x 0.2 cm on the left side of head 7 cm above the left ear, margins irregular, direction oblique & downwards.

(II) Red contusion 8 cm x 6 cm on the back of upper arm, 10 cm above the elbow joint.

(III) Red contusion 4 cm x 2 cm on the back of left forearm, 8 cm below the elbow joint.

(IV) Red contusion 6 cm x 6 cm on the dorsal aspect of left hand 4 cm below the wrist joint.

(V) Abrasion 3 cm x 1.5 cm on the back of right elbow joint.

(VI) An incised wound 1 cm x 0.2 cm x 0.3 cm on the front of left leg, 23 cm below the knee joint, margins clean cut, direction oblique & downwards, blood clotted.

(VII) An incised wound 2 cm x 0.5 cm x 0.2 cm on the left leg front side, 5 cm below the injury no. 6, margins clean cut, direction oblique & downwards, blood clotted.

(VIII) A traumatic swelling 16 cm x 10 cm on the left ankle joint, deformity & tenderness present, movement restricted, advised X-ray A P & L view.

(IX) An incised wound 1 cm x 0.2 cm x 0.2 cm on the front of right leg 4 cm below the knee joint, margins clean cut, direction oblique & downwards, blood clotted.

18. PW-7, Dr. R.K. Chaudhary, is a radiologist who proved the report Ex. Ka.

11 and a fracture of fibula bone was found by him.

19. PW-8, Dr. P.R. Mishra, conducted postmortem on the body of the deceased. According to him except injury no.1, none of the injury was found on the vital part of the body of deceased. He further states that he has not found any fracture on the head of the deceased.

20. PW-9, S.I. Govind Singh, is an Investigating Officer, has duly supported the prosecution case.

21. Close scrutiny of the evidence makes it clear that on 20.12.1983 in the evening, four accused persons have entered the field of the complainant and started abusing deceased Ram Autar. All the accused persons were having different weapons with them, as mentioned above in their evidence. All of them started beating the deceased resulting number of injuries on his body. Ram Autar was immediately taken to a hospital and later considering his serious condition, he was taken to hospital at Lucknow where, after about six days, he succumbed to his injuries on 26.12.1983. In the postmortem, only one head injury has been found by the autopsy surgeon but there was no fracture on his head. The incident has been witnessed by PW-1, Bhoj Raj and PW-2, Sone Lal and both these witnesses have duly supported the prosecution case.

22. We find no force in the argument of the defence that only interested witnesses have been examined. Law in this respect is very clear.

It is well settled principle of law that the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. All that the Courts required as a rule of prudence, not as a rule of law, was that the evidence of such witness should be scrutinized with a little care. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house when the only witnesses who could see the occurrence may be the family members. In such cases, it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness was scrutinized with a little care and the Court was satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. **(See Anil Rai vs. State of Bihar (2001) 7 SCC 318; State of U.P. vs. Jagdeo Singh (2003) 1 SCC 456; Bhagalool Lodh & Anr. vs. State of U.P. (2011) 13 SCC 206; Dahari & Ors. vs. State of U.P. (2012) 10 SCC 256; Raju @ Balachandran & Ors. vs. State of Tamil Nadu (2012) 12 SCC 701; Gangabhavani vs. Rayapati Venkat Reddy & Ors. (2013) 15 SCC 298; Jodhan vs. State of M.P. (2015) 11 SCC 52).**

23. The Supreme Court in the matter of **Bur Singh and Anr. vs. State of**

Punjab, (2008) 16 SCC 65 has held that merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Further, the Supreme Court in the matter of **Sudhakar vs. State, AIR 2018 SC 1372 and Ganapathi vs. State of Tamil Nadu, AIR 2018 SC 1635** relying in its earlier judgments held as under:

"18. Then, next comes the question 'what is the difference between a related witness and an interested witness?. The plea of "interested witness", "related witness" has been succinctly explained by this Court that "related" is not equivalent to "interested". The witness may be called "interested" only when he or she derives some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. In this case at hand PW 1 and 5 were not only related witness, but also 'interested witness' as they had pecuniary interest in getting the accused petitioner punished. [refer State of U.P. v. Kishanpal and Ors., (2008) 16 SCC 73] : (2008 AIR SCW 6322). As the prosecution has relied upon the evidence of interested witnesses, it would be prudent in the facts and circumstances of this case to be cautious while analyzing such evidence. It may be noted that other than these witnesses, there are no independent witnesses available to support the case of the prosecution."

Relationship is not a factor to affect credibility of a witness. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. A witness who is a relative of deceased or victim of the crime cannot be characterized as 'interested'. The term 'interested' postulates that the witness has some direct or indirect 'interest' in having the accused somehow or other convicted due to animus or for some other oblique motive. A close relative cannot be characterized as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole testimony of such witness. **(See- Harbans Kaur and another vs. State of Haryana, 2005 AIR SCW 2074; Namdeo vs. State of Maharashtra, 2007 AIR SCW 1835; Sonelal vs. State of M.P., 2008 AIR SCW 7988; and Dharnidhar vs. State of Uttar Pradesh and Others & other connected appeals, (2010) 7 SCC 759).**

24. PW-1, Bhoj Raj and PW-2, Sone Lal appear to be wholly trustworthy and we have no reason to disbelieve their statements. Considering their statements, which has been duly supported by the medical and postmortem report of the deceased, complicity of the appellants in commission of offence has been duly proved by the prosecution.

25. The next question which arises for the consideration of this Court is as to what offence has been committed by the accused persons. Both the accused-appellants Jai Dutt and Shashtri have

actively participated in the 'marpeet' and caused injuries to the deceased.

26. Considering all the aspects of the case, in particular, the fact that the deceased died after six days of the incident, no fracture of head was found, we are of the considered view that the act of the appellants would fall under Section 326 of IPC and not under Section 302/34 of IPC or 302 of IPC. Accordingly, we hold that appellants Jai Dutt and Shahstri are liable to be convicted under Section 326 of IPC.

27. The next question which arises for consideration of this Court is as to what would be appropriate sentence to be imposed upon the accused-appellants. The incident occurred about 36 years back and therefore, we are of the view that jail sentence of two years would be sufficient to meet the ends of justice and we order accordingly. In addition accused-appellants Jai Dutt and Shashtri are directed to pay monetary compensation of Rs. 1 lakh each to the objector Raman Babu.

28. Taking cumulative effect of the evidence and the facts, and further considering the judgment of the Apex Court in ***Ankush Shivaji Gaikwad vs. State of Maharashtra, (2013) 6 SCC 770,*** we are of the view that accused-appellants Jai Dutt and Shashtri are liable to compensate to objector, Raman Babu by paying a compensation of Rs. 2,00,000/- under Section 357 of Cr.P.C. Accordingly, during this period of two years, accused-appellants Jai Dutt and Shashtri are directed to deposit Rs. 2,00,000/- before the trial court and, in turn, the trial court shall disburse the said amount to the objector, Raman Babu. In case, accused-appellants fail to deposit the compensation within stipulated time, they shall undergo the additional jail sentence of one year and the court below shall proceed against them in the light of judgment of the Apex Court reported in Kumaran Vs State of Kerala and another (2017) 7 SCC 471.

29. Accused-appellants Jai Dutt and Shashtri are reported to be on bail. Their bail bonds stand cancelled and they be taken into custody immediately for serving the remaining sentence.

30. The appeal is partly allowed.

(2019)10ILR A 359

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 309 of 1999

Rajjan @ Yogesh Kumar
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ravindra Singh, Sri Akhilesh Singh, Sri Dinesh Kumar Maurya, Sri Shivam Yadav.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 302 and 201 - Appeal against conviction- There should not be any snap in the chain of circumstances if the conviction

is to be based on circumstantial evidence solely. (Para 26)

The doctrine of last seen together shifts the burden of proof on the accused as per section 106 IEA. (Para 28)

An offence based on circumstantial evidence as motive is a link to complete the chain. (Para 40)

The time gap between the point of time when the accused were seen last alive and the deceased is found dead must be so small that possibility of any person other than accused being the author of the crime becomes impossible. (Para 43)

Criminal Appeal allowed (E-2)

List of cases cited: -

1. St. of Raj. Vs Kherej Ram (2003) 8 SCC 224,

2. Vilas Pandurang Patil Vs St. of Mah. (2004) 6 SCC 158,

3. Arun Bhanudas Pawar Vs St. of Mah. (2008) 61 ACC 32 (SC)

4. Vthal Eknath Adlinge Vs St. of Mah. AIR 2009 SC 2067

5. Vijay Kumar Vs St. of Raj. (2014) 3 SCC 412

6. Bhim Singh Vs St. of U.K. (2015) 4 SCC 281

7. Rohtas Kumar Vs St. of Hr. 2013 (82) ACC 401 (SC)

8. Prithipal Singh Vs St. of PB. (2012) 1 SCC 10

9. Ashok Vs St. of Mah. (2015) 4 SCC 393

10. St. of Goa Vs Pandurang AIR 2009 SC 1066

11. St. of U.P. Vs Satish (2005) 3 SCC 114

12. Sardar khan Vs St. of Kar. (2004) 2 SCC 442

13. Niranjan Panja Vs St. of W.B. (2010) 6 SCC 525

14. Ravi Vs St. of Kar. AIR 2018 SC 2744

15. Mohibur Rahman Vs St. of Assam (2002) 6 SCC 715

16. Malleshappa Vs St. of Kar. (2007) 13 SCC 399.

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Sri Akhilesh Singh, learned counsel for the appellant and learned A.G.A. for the State. Perused the record.

2. This criminal appeal has been preferred against the impugned order dated 12.02.1999, passed by 3rd Additional District & Sessions Judge, Farrukhabad, in Sessions Trial No. 407 of 1987 (State vs. Rajjan and another), Case Crime No. 244 of 1984, under Sections 302 and 201 I.P.C., Police Station Chhibramau. District Farrukhabad by which the accused-appellant Rajjan @ Yogesh Kumar has been convicted and sentenced under Section 302 I.P.C. for life imprisonment along with fine of Rs. 5000/- and in default one year additional rigorous imprisonment and under Section 201 I.P.C. for five years rigorous imprisonment along with fine of Rs. 3000/- and in default six months additional rigorous imprisonment. It has further been directed that both the sentences shall run concurrently. However, in the absence of sufficient evidences, other accused Vivek Kumar was acquitted from the charges leveled under Section 302/201 IPC.

3. As per prosecution version from the morning of 07.07.1984 to 08.07.1984 (exact time is not known) on Saurikh Road, Police Station Chhibramau, Farrukhabad, the accused persons namely

Rajjan @ Yogesh and Vivek Kumar in furtherance of their common intention, caused the death of Smt. Ram Nandini by causing stab injuries by knife. The dead body was thrown in a well so that the dead body may be destroyed and this they did in order to wash the evidence against them.

4. The report was lodged with regard to recovery of the dead body by Chowkidar, Police Station Chhibramau on 08.07.1984 orally that a dead body is lying in the dry well. The whereabouts of the dead woman could not be known. The woman is young. This oral report was entered into the GD on the same day and the police took the dead body into possession and the recovered blood stained bricks, plain bricks, slippers and piceces of broken bangles were also taken into possession from the spot and which were separately sealed. The inquest report was prepared. At the time of inquest, injuries caused by the knife were found on the body of the deceased. No incriminating material was found around the well due to which it appeared that she was killed somewhere else and her body was thrown in the well. Thereafter, the case was registered under Sections 302 and 201 IPC.

5. The case was investigated and during investigation some local persons sent a letter in which it was mentioned that the woman was killed by accused Rajjan @ Yogesh Kumar and his friend. The husband of the deceased when came from the field on 06.07.1984, was informed by his elder sister-in-law (Bhabhi) that his wife has gone to her parents Rajjan @ Yogesh Kumar. She gave her the key of the house. The husband continued searching his wife for 6 to 7 days but did not find her either on her parental house or on the house of the sister of Rajjan @ Yogesh Kumar. On 25.07.1984, the husband lodged a first information report against Rajjan @ Yogesh Kumar for the offence under Section 498 IPC and continued searching her and Rajjan @ Yogesh Kumar. Later on, he came to know that a dead body has been recovered in Village Chhibramau in the previous month. He went to the police station and on the basis of her clothes, slippers and photo of the dead body, he recognized to be of his wife Ram Nandini. His statement and the statements of Dhaniram and Munna Lal was recorded by the Investigating Officer and the Investigating Officer came to a conclusion that Ram Nandini was killed by Rajjan @ Yogesh Kumar and his friend Vivek Kumar by causing injuries by knife and after taking her ornaments, they threw her dead body in the well. Regarding motive for the commission of the offence, it was also found during investigation that accused Rajjan @ Yogesh Kumar is the brother of the brother-in-law (Saarhu) of the husband of deceased Ram Nandini. He is aged about 24-25 years and the deceased was also of similar age and he used to come to her and was having illicit relationship with the deceased. The people knew her to be his keep. On 06.07.1984, wearing her ornaments, she went with Rajjan @ Yogesh Kumar and because she was insisting him to solemnize court marriage with her, the accused persons killed her.

6. After finding sufficient evidence against the accused persons, charge sheet was submitted by the Investigating Officer under the aforesaid sections.

7. The learned trial court framed charges against the accused persons for

the offences under Sections 302 and 201 IPC. The accused persons denied the charges and claimed trial.

8. The prosecution examined PW-1 Munshi, PW-2 Lala Ram, PW-3 Munna Lal, PW-4 Dhani Ram. PW-5 Khannu Singh, PW-6 Chandrabhan Singh, PW-7 Harvansh Singh, PW-8 Dr. K.K. Jagatyyani, PW-9 Suresh, PW-10 Ram Sewak Gupta and PW-11 Ram Awatar, who have stated about the incident and proved the documentary evidence.

9. The statement of accused persons were recorded under Section 313 Cr.P.C., wherein they have stated that they have been falsely implicated in the present case due to enmity with Munna Lal who is brother-in-law (Saarhu) of the husband of the deceased.

10. After hearing counsel for both the sides, the learned trial court has acquitted co-accused Vivek Kumar and convicted and sentenced the present accused-appellant Rajjan @ Yogesh Kumar for the offences under Section 302 and 201 I.P.C.

11. Feeling aggrieved by the impugned judgment, the convicted appellant has filed the present criminal appeal stating that the impugned conviction and sentence is against the weight of evidence on record and is contrary to law and the sentences awarded is too severe. The impugned judgment is liable to be set aside and the appellant is entitled for acquittal.

12. Learned counsel for the appellant has submitted that there is no eye witness who might have seen the occurrence nor anybody saw the accused causing injuries to the deceased and throwing her dead body in the well. Moreover, there was no reason for the accused-appellant to kill the deceased if he was having illicit relationship with her. There is no evidence on record to link the appellant with the commission of offence. Moreover, the co-accused has been acquitted on the basis of same evidence by the impugned order.

13. On the other hand, learned A.G.A. has argued that the chain of circumstances proved by the prosecution has established the guilt beyond any shadow of doubt against the appellant and on the basis of evidence on record, the learned trial court has rightly convicted and sentenced him.

14. PW-1 Munshi is the witness who saw the people gathered around the well in which the dead body of the deceased was lying and he gave information in the police station and during statement he signed over the G.D. Ext. Ka-1.

15. PW-2 Lala Ram is the husband of the deceased who has stated that the deceased was his wife and was aged about 22-24 years who was healthy and of fair complexion. The accused Rajjan took her from his house when he was on his field. He came to know about it, when he came back and did not find his wife and the door of the house was closed. His Sister-in-law (Bhabhi) informed him that his wife has gone to her parents with Rajjan, leaving behind his elder son Sonu. He has stated that his wife used to go and come back to her parents but when she did not come back in 10-12 days, he went to her parents' house and when he told that she did not come there, he went to her sister but she also told that she did not come there. He

inquired about Rajjan and found that his tea shop which is situated at road ways bus stand was closed. He was told by local persons that Rajjan is not coming from 10-15 days and the shop is closed. Then he filed a report against Rajjan which he filed before the court at the time of statement and proved the same as Ext. Ka-1. He has further stated that he continued searching his wife and after about a month, he went to Chhibramau market. He found the people talking about the dead body of a woman recovered from the well. He consulted his family members and after 12-13 days, he went to Police Station Chhibramau and on inquiry he was shown the clothes after breaking the seal and by the clothes, he recognized that the same was of his wife as she used to wear that clothes in the house. The recovered clothes, broken bangles and slippers have been proved by him in his examination as Material Exts. 1 to 5. Rajjan used to come to his house and he was in his relation and he believes that he must have killed his wife. She went with Rajjan wearing ornaments of about Rs. 10,000/-.

16. PW-3 Munnal Lal has stated that he knows Rajjan who is relative of Lala Ram and he used to come to the house of Lal Ram. He saw the deceased coming with Rajjan on 06.08.1984 at 10 A.M. and both went to Chhibramau on a bus. At that time, he was sitting on a pulia where the bus used to stop and witness Dhani Ram was also present there, who also saw the deceased coming with Rajjan. Both PW-3 and Dhani Ram were grazing their buffalos. He has sated that since then he never saw the deceased. Lala Ram had gone to search out his wife and when he came back, he informed him about it.

17. PW-4 Dhani Ram has also stated that when he and Munna Lal were grazing their buffalos. From the road side *pulia* they saw the deceased going with accused Rajjan on a bus to Chhibramau. Thereafter, he never saw the deceased.

18. PW-5 Khunnu Singh has not stated anything in support of prosecution version, hence he has been declared hostile.

19. PW-6 S.I. Chandrabhan Singh has stated that he got the investigation of the case on 11.08.1984 and prior to him, the case was being investigated by S.I. Harvansh Singh and SI V.K. Gupta. After recording the statements of the witnesses and completing the investigation, he submitted charge sheet against both the accused persons which is Ext. Ka-2.

20. PW-7 S.I. Harvansh Singh has stated that he recovered the dead body of the deceased from the well along with other articles. He prepared the inquest report which is Ext. Ka-2, photo lash Ext. Ka-3, letter to CMO Ext. Ka-4, Challan dead body Ext. Ka-5, recovery memo of slipper and broken bangles Ext. Ka-6, memo of blood stained bricks and plain bricks Ext. Ka-7 and sight map Ext. Ka-8.

21. PW-8 Dr. K.K. Jagatyani has conducted post-mortem of the dead body on 09.07.1984 which was brought by Constable Raj Narayan Singh and Constable Kailash Singh of Police Station Chhibramau in sealed condition along with relevant papers and they also identified the dead body of the deceased. The postmortem report has been proved by this witness as Ext. Ka-9. According to doctor, the deceased must have died about 1 and 1 ½ days ago. In the external examination it was found that the rigor mortis was passed from the upper portion of the body and was present in the lower limb. The following ante-mortem injuries

were found on the dead body of the deceased :-

External Examination :-

(i) Incised would 8 cm. X 8.5 cm. X scull deep in the right side of the head.

(ii) Incised wound 3 cm. X 0.5 cm. X bone deep above the left eye.

(iii) Incised wound 2.5 cm. X 0.5 cm. X bond deep on the left side of the lower jaw.

(iv) Multiple incised wounds, seven in number in the area of 11 cm. X 7 cm. on the front portion of the neck.

(v) Multiple stabbed injuries in the abdomen area of 22 cm. X 20 cm. Smallest injury was 0.5 cm. X 0.5 cm. and the deepest injury was 4 cm. X 1 cm. with clean cut.

Internal Examination :-

Both lungs and its membranes were found in decomposed conditions. Cuttings were found in the pharynx and esophagus. Liver was found incised and empty. Small and large intestines were found incised at several places and liver was also found incised. In the abdomen cavity of liver, two liters of blood and liquid stool were found in mixed condition.

According to doctor, the deceased was died due to ante-mortem injuries, shock, hemorrhage and heavy bleeding. All the injuries found on the body of the deceased were possible to have been caused by knife and were sufficient to cause death. The death was possible on 07.07.1984 in between 08:00 to 08:30 PM.

22. PW-9 Suresh Chandra has been declared hostile, who has not supported the prosecution version.

23. PW-10 Ram Sewak Gupta has also been declared hostile.

24. PW-11 Ram Awatar has stated that Lala Ram is his younger brother and his wife was Ram Nandini. Both have two children. Ram Nandini used to come and go to her parents' house. His brother Lala Ram has lodged a missing report in police station about his wife. The dead body was recovered from the well. When she went from her house, she was wearing ornaments. He did not see when the dead body was recovered from the well. He identified the clothes of the deceased after 12-13 days. On recovery of the dead body, accused Rajjan fled away and was not on his shop and the shop remained closed.

25. There is no evidence of any witness who might have seen the accused causing death of the deceased and the prosecution case is based on circumstantial evidence of "last seen together" and two witnesses have been examined to prove this fact. In ***State of Rajasthan Vs. Kheraj Ram, (2003) 8 SCC 224, Vilas Pandurang Patil Vs. State of Maharashtra, (2004) 6 SCC 158, Arun Bhanudas Pawar Vs. State of Maharashtra, 2008 (61) ACC 32 (SC) Vithal Eknath Adlinge Vs. State of Maharashtra, AIR 2009 SC 2067 and Vijay Kumar Vs. State of Rajasthan, (2014) 3 SCC 412***, the Supreme Court has laid down that circumstantial evidence, in

order to be relied on, must satisfy the following tests :

1. Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

2. Those circumstances must be of a definite tendency unerringly pointing towards guilt of the accused.

3. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from conclusion that within all human probability the crime was committed by the accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused but should be inconsistent with his innocence- in other words, the circumstances should exclude every possible hypothesis except the one to be proved.

26. In ***Bhimsingh Vs. State of Uttarakhand, (2015) 4 SCC 281,*** it was laid down that when the conviction is to be based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused in entitled to benefit of doubt. If some of the circumstances in the chain can be explained by any other reasonable hypothesis, then also the accused is entitled to the benefit of doubt. But in assessing the evidence, imaginary possibilities have no place. The court considers ordinary human probabilities.

27. In ***Rohtas Kumar Vs. State of Haryana, 2013 (82) ACC 401 (SC), Prithipal Singh Vs. State of Punjab, (2012) 1 SCC 10***, it has been further laid down that The doctrine of "last seen together" shifts the burden of proof on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

28. Further, in ***Ashok Vs. State of Maharashtra, (2015) 4 SCC 393***, it was explained by the Supreme Court that initial burden of proof is on prosecution to adduce sufficient evidence pointing towards guilt of accused. However, in case it is established that accused was last seen together with the deceased, prosecution is exempted to prove exact happening of incident as accused himself would have special knowledge of incident and thus would have burden of proof as per Section 106, Evidence Act. But last seen together itself is not conclusive proof but along with other circumstances surrounding the incident like relations between accused and deceased, enmity between them, previous history of hostility, recovery of weapon from accused, etc. non-explanation of death of deceased, etc.etc. may lead to a presumption of guilt of accused.

29. In this case the dead body of a woman (the deceased) was seen by the village Choukidar lying in a dry well and he reported the same on 8.7.1984 at 2.30 P.M. to the P.S. Chhibramau of which an entry was made by police in the corresponding G.D. The police took the dead body in possession. It was found by the inspection of the dead body that multiple incised, stabbed and cut wounds were present on her body. Inquest was prepared on the same day and after completing the formalities, the dead body was sent for postmortem to the District

Hospital. The police also registered an offence under section 302,201 I.P.C. against unknown person as Crime No.244 of 1984.

30. The postmortem was conducted by PW-8 Dr. K. K. Jagatyani on 9.7.1984 at 2.15 P.M. and he has stated that multiple ante-mortem incised, stabbed and cut wounds were found on the body of deceased caused by knife on all over the body from abdomen to face and head. According to doctor, the deceased was died due to ante-mortem injuries, shock, hemorrhage and heavy bleeding. All the injuries found on the body of the deceased were possible to have been caused by knife and were sufficient to cause death. The death was possible on 07.07.1984 in between 08:00 to 08:30 P.M. and it appears that after causing death, the dead body was thrown into the well. It is pertinent to mention that by the time of postmortem, the deceased was not identified nor the reason of killing and the assailant had come to light.

31. The learned trial court has taken the reference of letters sent by some unknown persons to police attached in the file as paper no. 11A to 11A-2 and 11A-3 stating the persons involved in the murder of deceased and one of the name finds mention of accused Rajjan and his companions. In other letter the deceased has been identified to be Veena Pathak. But in none of the letters, the deceased has been identified to be Smt. Ramnandini w/o Lalaram (PW-2). It is not understandable why the learned trial court took reference of those letters which were not authenticated by any evidence nor it appears how the police used those letters for the purpose of this case. It appears that in none of the statement of witnesses, particularly formal witnesses/I.O., it has not been clarified when and on what date the dead body was identified and by whom for the first time.

32. It is pertinent to mention that the C.D. (case dairy) is not attached in the lower court record nor it was provided to us by the learned A.G.A. even though we asked during arguments. But unfortunately, we could not get a positive answer and it was said that it is a very old case and it will be very difficult to get it searched and made available. So we do not have help of C.D. which might become helpful in appreciating the sequence of investigation and exact date of discovery of particular fact and the facts narrated by the learned trial court. It is why we have to narrate the prosecution version in the way the same has been narrated by the learned trial court in the impugned judgment. In fact, we have almost reproduce the same without getting those facts verified by C.D., since there is no F.I.R. in this case. Therefore, we have to understand that sequence by the statement of witnesses.

33. The incident took place on 8.7.1984 when the dead body was for the first time seen by the village Choukidar. On 19.8.1984, the statement of Lalaram (husband of deceased) and his brother Ramautar have been examined by I.O. PW-6, as he has stated in his statement. It means that after 40 days from the discovery of dead body, the two close relatives of the deceased have been examined. In all possibility, the deceased must have been identified thereafter by them as the I.O. has stated that on 20.8.1984, he got informed about the deceased.

34. To begin with the analysis of the statement of PW-11 Ramautar who is the elder brother of Lalaram. He has stated that he does not know whether the accused took the deceased a day before her dead body was discovered. He has however stated that accused Rajjan used to come to the house of Lalaram as he was his relative being younger brother of his brother in law (husband of deceased sister). He has stated that after 12-13 days from the date of discovery of the dead body, he identified her dress as he had seen the deceased wearing that dress earlier. It was black petticoat and blouse and sari printed with black flower. He gave his statement to I.O. after 12-13 days. He has denied that he ever gave statement to I.O. that one day before, she went with Rajjan locking her house and delivering the key to the wife of his brother Ramkishan. One more thing this witness has stated that Lalaram had lodged a missing report about his wife.

35. PW-2 is Lalaram and the correctness of the statements of both the witnesses needs to be compared and tested on the basis of evidence of each other. He has stated that his bhabhi (wife of elder brother) told him that his wife (deceased) has gone to her parents with Rajjan leaving his elder son Sonu and key of his house with her. Bhabhi has not been examined nor she is a witness in charge sheet who could have been the best witness of this fact. He has stated that his wife used to go to her parents and come back and therefore, for 10-12 days he waited for her. When she did not come back, he went to her parents and was informed that she did not come to them. He did not even find her to her sister in law in Atrouli (Rajjans' house). He went to Rajjan's shop at Bus Station and found that shop is closed and Rajjan is missing from the last 10-15 days. Then he lodged a F.I.R. against Rajjan and the copy of F.I.R. was filed by the witness which is Ext. Ka-2. From the perusal of Ext Ka-2, it appears that in PS Talgram, the witness lodged N.C.R. against Rajjan on 25.7.1984 for the offence under section 498 I.P.C. with allegation that Rajjan has eloped with his wife Rajnandini on 6.7.1984 with ornaments gold, valuable and cash with her. The witness in the F.I.R. are Dhani Ram And Munna Lal who have been examined as PW-3 and PW-4 in this case. After that he continued searching her for some times. He started searching her after 10-12 days, continued searching for next 17-18 days. Thereafter, when he went to Chhibramau market, he heard some people talking that identity of the dead body of the woman recovered from well is yet not known. Then, after 12-13 days, with due consultation with family members, he went to Police Station, Chhibaramau where S.O. showed him dresses of the dead body which were sealed and he recognized them to be of her wife. He has also identified and proved the wearings while giving statement on oath in court.

36. It appears from the statement of both witnesses that none of them are witness of any relevant fact nor they saw deceased going from house with accused. Except that they identified wearings of deceased, there is nothing important in their statement. PW-6 IO has stated that the deceased house situated at Bamrouli and from there, PS Chhibaramau is at the distance of 10-12 km. It appears strange that a person whose wife was missing since long, could not know about the discovery of dead body earlier which must have become talk of the town

looking to her young age and in the brutal way she was caused to death, particularly when his brother Ramautar examined as PW-11 has stated that he identified the wearings after 12-13 days from the date of recovery of dead body.

37. PW-3 Munnalal and PW-4 Dhani Ram are the star witnesses of circumstance of "last seen together" and both have stated that they saw both Rajjan and Rajnandini on 6.7.1984 at about 10 A.M. getting the bus and going to Chhibaramau. At that time they were grazing their buffalo sitting on a pulia. The time of death as ascertained by postmortem report is on 7.7.1984 at about 8-8.30 P.M. It means there is gap of about 34 hours between last seen together by two witnesses and death of deceased. Both the witnesses are of same village and their residence is at the distant of less than 100 yards from the house of deceased. Both have stated that they informed about it to Lalaram after 17-18 days. The statement of both these witnesses was taken by IO after about two and half months.

38. Three more witnesses have been examined by prosecution but they did not support prosecution version nor proved any other circumstance showing involvement of accused-appellant in the murder of deceased. PW-5 is Khunnu Singh who has stated that he did not see accused killing some woman and this he has said twice- in examination-in-chief and after being declared hostile, when cross-examined by the prosecutor. He has further stated that he does not know if such statement was written by police. PW-9 Suresh Chand, though has stated that he knew accused as while going to Kanpur in relation to business, he used to take tea on his shop. He has stated that he never saw the deceased on his shop nor he saw her going with Rajjan on Rickshaw in the night of the date of incident. Although, he has nowhere stated the deceased to be keep of accused, in his statement the word 'keep' has occurred more than once, probably for the reason that while putting questions this word was used by the prosecution with a view to indicate that the deceased was his 'keep.' Similar statement has been given by PW-10 Ramsewak Gupta. All these three witnesses have been declared hostile.

39. Since C.D. is not provided, it is not clear what statement all these three witnesses had given to I.O. from which the prosecution derived support and made them witness. But, from the overall statements of these witnesses, a rough idea is possible in this regard. PW-5 has been examined as a witness who allegedly saw accused committing murder to which he denied. It means that the only witness who was supposed to give direct evidence in support of prosecution has not not supported the prosecution. It also means that the prosecution case was based on direct as well as circumstantial evidence. This option is not open to prosecution to shift the case from direct evidence to circumstantial evidence. PW-9 was a witness who saw the deceased and accused going on rickshaw in the night of the date of incident, a fact to which he has denied. PW-10 was examined to show the conduct of accused that on 7.7.1984 in the night, accused came very disturbed and asked scooter from painter and the witness has denied to this statement. It also goes to indicate that the prosecution case based on the "last seen together" evidence of PW-3 and PW-4, is not correct as subsequent to them, allegedly,

she was seen by above mentioned witnesses whose support was necessary for the prosecution.

40. In a case based on circumstantial evidence, it is always important to allege and prove strong motive for the commission of offence as motive provides a link to complete the chain. Except that the deceased went with accused no motive appears to have been alleged by prosecution. The learned trial court has narrated in the impugned judgment that regarding motive for the commission of the offence, it was also found during investigation that accused Rajjan @ Yogesh Kumar is the brother of the brother-in-law (Saarhu) of the husband of deceased Ram Nandini. He is aged about 24-25 years and the deceased was also of similar age. The accused used to come to her and was having illicit relationship with the deceased. The people knew her to be his keep. On 06.07.1984, wearing her ornaments, she went with Rajjan @ Yogesh Kumar and because she was insisting him to solemnize court marriage with her, the accused persons killed her. For attributing this motive, the learned trial court has taken a reference of police report which was submitted by police on bail application of accused and with the help of same, has given a finding that both had developed illicit relation and the deceased was insisting for marriage, and therefore, the accused committed murder. None of the prosecution witness has stated this motive in on oath statement. PW-2 who is the husband of the deceased and PW-11, his elder brother, have simply stated that the accused was relative and he used to come to their house. In the statement of PW-9 Suresh Chandra and PW-10 Ramsewak Gupta have been examined, but they have nowhere stated the deceased to be keep of the accused. No witness has been examined to prove that the deceased ever insisted the accused for court marriage. In reading the police report in evidence and thereby imputing motive on that basis and giving finding regarding existence of motive is perverse and illegal. We are firmly of the view that in absence of any admissible evidence, such finding could not be given by the learned trial court. Secondly, if the accused was in relation with the deceased, he was in a beneficial situation and there is no evidence to show that because of some very annoying reason which occurred subsequently, he decided to remove her. In such situation, absence of any motive casts shadow of doubts on prosecution case.

41. A joint study of several judgments of the Supreme Court regarding presence of motive in cases based on circumstantial evidence such as ***Babu Vs. State of Kerala, (2010) 9 SCC 189, Ravinder Kumar Vs. State of Punjab, 2001(2) JIC 981 (SC), State of H.P. Vs. Jeet Singh, (1999) 4 SCC 370, Nathuni Yadav Vs. State of Bihar, (1998) 9 SCC 238, Sakha Ram Vs. State of M.P., 1992 CrLJ 861 (SC), Jagdish Vs. State of M.P., 2009 (67) ACC 295 (SC) and G. Parshwanath Vs. State of Karnataka, AIR 2010 SC 2914***, it is clear that the law is two fold depending upon the conclusiveness of the circumstances proved in a particular case. Normally, prosecution should prove motive in a case based on circumstantial evidence. But, absence of motive in a case based on circumstantial evidence is not of much consequence when proved circumstances is so conclusive that it completes the chain in itself raising the only hypothesis that is the guilt of the accused.

42. In ***State of Goa Vs. Pandurang Mohite, AIR 2009 SC 1066, State of U.P. Vs. Satish, 2005 (3) SCC 114 and Sardar Khan Vs. State of Karnataka, (2004) 2 SCC 442***, it has been remarked that circumstances of "last seen together" do not by themselves and necessarily lead to the inference that it was accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. The time gap between last seen alive and the recovery of dead body must be so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

43. In ***Niranjan Panja Vs. State of W.B,(2010) 6 SCC 525 and State of U.P. Vs. Satish, (2005) 3 SCC 114,*** it has been further affirmed by the Supreme Court that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists.

44. Recently, in ***Ravi vs State of Karnataka, AIR 2018 SC 2744***, reversing the conviction based on "last seen together" where there was a time gap of four days between last seen and recovery of dead body and as per postmortem report the death must have occurred 30 hours ago, the Supreme Court held that the time gap was considerably large and no corroboration was forthcoming, and therefore, in absence of any other circumstance which could connect the accused with crime, reasonable doubt as to involvement of accused is created and in such situation, the burden would not shift under section 106 of the Evidence Act. Following the judgment in ***Mohibur Rahman vs State of Assam, (2002) 6 SCC 715*** and ***Malleshappa vs State of Karnataka, (2007) 13 SCC 399,*** the court held:

> "'Last seen together' is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, the time lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time lag is considerably large,....., it would be safer for the court to look for corroboration."

45. Now, considering the law laid down and factual situation in Ravi (supra), and comparing to the fact situation of this instant case, we find that time gap between the fact of "last seen together" and death of deceased is about 34 hours. The two witnesses who have proved the circumstance of "last seen together" are not the persons who last saw the two together and the prosecution proposed to prove the prosecution version by even direct evidence by a witness who saw the accused killing the deceased and by evidence of witness who also allegedly saw them together subsequently, but these witnesses turned hostile. "Last seen together" may be a conclusive circumstance depending upon the facts of a particular case. For instance, if two persons were last seen staying together in

the night in a hotel room and next morning one was found to have been killed, the circumstance of last seen is enough conclusive and the burden to prove otherwise will certainly shift on the other person and in such case, unless otherwise is proved, the presence or absence of motive becomes insignificant. But if those two persons were seen traveling in a public transport and after more than 24 hours the other is found dead, the time gap will become relevant and some more incriminating evidence shall be required to corroborate the circumstance of last seen to complete the chain and prove the guilt. There is no evidence further corroborating such as recovery of any incriminating article such as knife used for causing death or any other evidence of like nature.

46. In view of above discussion, we find that the learned trial court has committed error in holding that the chain of circumstances was complete to reach a finding of guilt against accused-appellant. The impugned judgment is perverse, illegal and not sustainable under law and is liable to be set aside.

47. Therefore, the appeal is **allowed**. The impugned judgment dated 12.02.1999, passed by 3rd Additional District & Sessions Judge, Farrukhabad, in Sessions Trial No. 407 of 1987 (State vs. Rajjan and another), Case Crime No. 244 of 1984, under Sections 302 and 201 I.P.C., Police Station Chhibramau. District Farrukhabad convicting and sentencing the accused-appellant is set aside. Consequently, the accused-appellant Rajjan @ Yogesh Kumar is acquitted.

48. If the accused-appellant Rajjan @ Yogesh Kumar is in jail, he shall be released forthwith.

49. The office is directed to transmit back the lower court record to the learned trial court immediately along with a copy of this judgment for information and compliance.

(2019)10ILR A 371

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.7.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 3458 of 2013

Nand Lal Chaubey @ Chintamani Chaubey ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Abhay Kumar Singh, Dr. D.K. Tiwari, Sri Sita Ram Sharma (A.C.)

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 302 and 307 - Appeal against conviction.

In a case based solely on circumstantial evidence, the circumstances from which conclusion of guilt is to be drawn "must or should be" and not merely "may be" fully established. The facts established should be consistent only with the guilt of the accused. They should not be explicable through any other hypothesis except that the accused was guilty. The circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show in all human probability that the offence was committed by the accused. (Para 38)

In a case based on circumstantial evidence, the onus is on prosecution to prove that chain is complete. (Para 41)

Jail Appeal dismissed (E-2)

List of cases cited: -

1. Hanumant Govind Nargundhar & anr. Vs St. of M.P. AIR 1952 SC 343

2. Sharad Birdhichand Sarda Vs St. of Mah. AIR 1984 SC 1622

3. Ashok Kumar Chatterjee Vs St. of M. P. AIR 1989 SC 1890

4. C. Chenga Reddy and ors. Vs St. of A. P. (1996) 10 SCC 193

5. Both Raj @ Botha and ors. Vs St. of J&K 2002(8) SCC 45

6. Shivu & anr. Vs Ragistrar General H.C. of Kar. & anr. 2007(4) SCC 713

7. Tamaso Bruno Vs St. of U.P. (2015) 7 SCC 178

8. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

9. Sham Sunder Vs Puran (1990) 4 SCC 731, M.P. vs Saleem (2005) 5 SCC 554

10. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This jail appeal under Section 383 Cr.P.C. has been filed by accused-appellant Nand Lal Chaubey @ Chintamani Chaubey through Senior Superintendent, Central Jail, Varanasi against judgment and order dated 27.08.2011 passed by Sri J.P. Yadav, Special Judge (E.C. Act), Mirzapur in Sessions Trial No.237 of 2007, under Sections 302 and 307 IPC. By the impugned judgment, accused-appellant has been convicted under Section 302 and 307 IPC. Under Section 302 IPC, he has been sentenced to undergo life imprisonment along-with fine of Rs.2,000/-, In the event of default of payment of fine, he has to undergo further one year's additional Rigorous Imprisonment (hereinafter referred to as "RI"). He has been sentenced to undergo seven years RI, under Section 307 IPC and also with a fine of Rs.2,000/-. In case of default in payment of fine, one year's additional RI has to be suffered by him. Both the sentences have been directed to run concurrently.

2. The facts emanating from Fist Information Report (hereinafter referred to as "FIR") and the material available on record may briefly be stated as under, for adjudication of this appeal:-

3. It appears that on 28.01.2007, an application Ex.Ka-15 was allegedly given at Police Station Ahiraura, District Mirzapur by PW-7 Arif written by accused-appellant Nand Lal Chaubey @ Chintamani Chaubey, stating that at 08:00 AM, he had gone to Robertsganj and when he came back to his house, he saw that his wife Monika, Sharad, Johny, Baby, Manisha and other two children Kavita and Ajit having taken their meal were planning to sleep. He was asked by his wife Monika to take meal but he did not take. He was offered cake which had been received from Duddhi but as soon as he wanted to eat the cake, his elder son Johny fell down and become unconscious. Accused-appellant became nervous and called his neighbors for help and asked for vehicle but no vehicle could be arranged. Thereafter he went to hospital and from there he arranged for the vehicle and took them to hospital.

4. PW-5, Dr. C.M. Tiwari, District Hospital Robertsganj, Mirzapur was posted on emergency duty on 27.01.2007 when Monika, her daughter-in-law Baby (wife of Johny) and her son Tony, Manisha wife of Ramesh and Johny were admitted in hospital for treatment. All were brought by Smt. I. Soloman and Nand Lal Chaubey @ Chintamani Chaubey, accused-appellant. It was told to the Doctor that they had consumed poisonous substance. Information of incident was sent by PW-5 Dr. C.M. Tiwari to In-charge Inspector, Robertsganj, District Mirzapur, which is Ex.Ka-8 on record. Doctor found that Baby, Monika and Tony were already dead. During course of inspection, remaining two patients Johny and Manisha were found in unconscious state and admitted for treatment in hospital. Doctors at Robertsganj Hospital had administered treatment on Johny and Manisha for reducing effect of poison. On 28.01.2007 at 02:30 PM, both were referred to Banaras Hindu University (hereinafter referred to as "BHU") for treatment. On 28.01.2007 the said Doctor PW-5 was also assigned duty for conducting autopsy on the dead bodies of the aforesaid three persons. Dead bodies were sealed by Constable Kaushal Kumar and Vinod Kumar. Inquest and other police documents were prepared and dead bodies were sent for postmortem.

5. PW-5 Dr. C.M. Tiwari conducted autopsy on the dead body of Baby (wife of Johny Maseeh) on 28.01.2007 at 02:30 PM. According to him, deceased was aged about 20 years and about ¾ day had passed since her death. No ante mortem injury was found on her body. Cause of death could not be ascertained. Visecra was preserved for chemical examination. Postmortem report (Ex.Ka-11) was prepared by PW-5, who also conducted autopsy on the dead body of deceased Monika Chaubey on 28.01.2007 at 03:00 PM. According to him deceased was aged about 40 years and about ¾ days had passed since his death. No ante mortem injury was found on her person. Cause of death could not be ascertained. Viscera was preserved for chemical examination. Autopsy report in respect of Monika prepared by doctor is Ex.Ka-12 on record. Similarly postmortem of Tony was conducted by the same Doctor on 28.01.2007 at 03:30 PM. He was found to be aged about 18-19 years and about ¾ day had passed since his death. In his case also, no ante mortem injury was found on her person. Cause of death could not be ascertained and viscera was preserved for chemical examination. Doctor prepared postmortem report Ex.ka-13 in respect of deceased Tony.

6. After getting information from District Hospital that three persons had died and two others were in unconscious state having consumed poison, PW-9, S.O. Shaturghan Prasad Chaudhary, Police Chauki Sukrit, Police Station Ahiraura, District Mirzapur visited the spot and collected food remains and vomit, sealed them in separate five packs for the purposes of forensic examination. He prepared recovery memos, Ex.Ka-24 to 26.

7. On receiving information of death of three deceased, namely, Monika, Tony and Baby @ Gudiya at District Hospital Robertsganj, PW-12, S.O. Prem Lal, visited District Hospital Robertsganj and prepared panchayatnama, (Ex.Ka-40 to Ka-42), in respect of the three deceased.

8. PW-16, SI Anil Kumar Gupta, had sealed the bitch and four puppies

lying death on the spot after consuming poisonous food and sent the same to Veterinary Hospital for postmortem. He also made certain queries from the complainant PW-1 about the incident.

9. Postmortem on the dead bodies of bitch and puppies was conducted by Veterinary Dr. Dilip Kumar Pandey, PW-8, posted at Rajgarh Veterinary Hospital, District Mirzapur. He had prepared reports Ex.Ka-17, 18, 19 and 20 in respect of four puppies and Ex.Ka-21 in respect of bitch. Since no ante mortem injury was found on the person of bitch and puppies, the case of death could not be ascertained by the Doctor and he preserved viscera for forensic examination.

10. From the record, it appears that on 02.02.2007, Complainant, PW-1, had given an application at Chauki Sukrit, Police Station Ahiraura, District Mirzapur, mentioning the details of incident and praying for investigation into the matter. Since no investigation was done, she made application to Higher Police Authorities also, but they did not investigate the matter. When Police took no interest in the matter, PW-1, I. Soloman complainant made an application, (Ex.Ka-4), under Section 156(3) Cr.P.C. on 16.03.2007 before Chief Judicial Magistrate (hereafter referred to as "CJM"), Mirzapur with the allegation that accused-appellant Nand Lal Chaubey @ Chintamani Chaubey is a cheater and clever person who enticed her daughter Monika and got an agreement of marriage executed before Sub Registrar, Varanasi on 13.11.1999 and started living as husband and wife at Madhupur, Chauki Sukrit, Police Station Ahiraura, District Mirzapur. Out of their wed-lock three children Johny, Tony and Manisha @ Guddan were born. It is stated in the application that about six years ago from the date of filing of application under Section 156(3) Cr.P.C., accused-appellant abandoned Informant's daughter Monika and her children, and after accepting Islam religion, changed his name as Mohd. Iqbal. Thereafter he married a girl named Jamila Khatoon. On 27.01.2007 at 09:13 PM, accused-appellant come to the house of Informant and asked to hurry up for going to hospital as all had taken poisonous food and died. He also asked to keep quiet and not to make any noise. Thereafter Informant, PW-1, went to Hospital along-with accused-appellant, where she found that her daughter Monika aged about 45 years, Monika's son Tony aged about 22 years and Monika's daughter-in-law Gudiya @ Baby aged about 17 years had died of consuming poison. Two other children of Monika, namely, Johny and Manisha could be saved with great efforts of doctors. It is stated that accused-appellant is a mischievous person and acts as broker in hospital. Informant was of the firm opinion that accused-appellant had killed her daughter Monika, Monika's son Tony and her daughter-in-law Gudiya @ Baby by administering poison on them. He is trying to hush up the matter in connivance with Hospital and Police personnel. Two children who fortunately are alive and under treatment have also disclosed that poison was mixed by the aforesaid accused-appellant in vegetable and since they had not consumed vegetable, they could escape the death but others consumed all the food, and dead. It is asserted in the application that a complaint of the incident was given at Chauki Sukrit, Police Station Ahiraura, District Mirzapur but no action was taken. Accused-appellant was pressurizing PW-

1, Complainant and threatening her to life. Complainant had also sent applications to Superintendent of Police (hereinafter referred to as "SP"), Mirzapur , Deputy Inspector General of Police (hereinafter referred to as "DIG") Vindhyachal Division, Mirzapur and Station Officer (hereinafter referred to as "SO"), Ahiraura, Mirzapur praying for chemical examination of vegetable (sabzi), vomit and also bitch and puppies who died on consuming poisonous food and also for investigation of the case by Police after registering FIR. Since police authorities failed to take any action against accused-appellant, Complainant, PW-1, filed aforesaid application under Section 156(3) Cr.P.C. with a prayer for lodging an FIR and investigation into the matter by Police.

11. On the aforesaid application, learned CJM prima-facie found that a cognizable offence was made out and sufficient ground existed for investigation into the matter. Accordingly, vide order dated 03.04.2007, he directed Police Station Ahiraura, District Mirzapur for registering the case and investigate the matter.

12. Pursuant to order of Magistrate dated 03.04.2007, PW-4 Head Constable Lalta Prasad Yadav lodged FIR and prepared chik report Ex.ka-5 on 25.06.2007 at 12:50 hours. He also made corresponding General Diary (hereinafter referred to as "GD") entry at report no.27 at 12:50 hours (Ex.Ka-7).

13. Consequent upon registration of FIR as case crime no.01 of 2007, SI Ajay Kumar Rai, PW-14, undertook investigation on 25.06.2007. He made entries of relevant documents in the GD and recorded statements of Head Constable PW-4, Complainant, PW-1, and other witnesses; inspected spot, prepared site plan Ex.Ka-46. He made entry of Forensic report regarding viscra sent for chemical examination to Forensic Science Laboratory in respect of deceased Monika, Tony and Baby. According to Forensic report, poison of 'aluminum phosphide' was found therein. Viscra report is Ex.Ka-47 to 49 on record. Thereafter on 29.06.2007, accused-appellant was arrested and relevant entry was made in the case diary (hereinafter referred to as "CD").

14. Forensic report in respect of five sealed packs of vomit and remaining food material etc. was received on 05.06.2007, reference whereof is also noted in the CD. After transfer of PW-14, Ajai Kumar Rai, investigation was continued by PW-15, SO, Lallu, who after receipt of viscra report from Forensic Science Laboratory, Lucknow in respect of food remains collected from spot as well as viscra of Bitch and Puppies, recorded the same in CD. The reports mentioned that viscra and vomit and food remains contained 'aluminum phosphide' poison Viscra report is Ex.Ka-15.

15. After conclusion of investigation, PW-15, SI, Lallu Ram Bhasker, submitted charge-sheet (Ex.Ka-50) against accused-appellant in the Court of CJM, Mirzapur.

16. It is pertinent to mention here that according to viscera reports, (Ex.Ka-47 to 49), received from Forensic Science Laboratory, U.P. Lucknow in respect of Baby, Monika and Tony respectively, the aforesaid viscera of all the persons contained poison, 'aluminum phosphide'.

Likewise viscera report, (Ex.Ka-51), in respect of bitch and puppies also, finding was that it contained 'aluminum phosphide' poison. Ex.Ka-51 also stated that the articles, namely, vomit, food material etc. recovered from the spot also contained same poison.

17. CJM, Mirzapur took cognizance of the offences against accused-appellant on 26.09.2007.

18. Case, being exclusively triable by Court of Sessions, was committed to Sessions Court on 24.10.2007, and registered as Sessions Trial No.237 of 2007. Subsequently Sessions Trial was transferred to the Court of Special Judge (E.C. Act), Mirzapur who framed charges against accused-appellant on 11.01.2008, as under:-

"मैं, बी0डी0 वर्मा, विशेष न्यायाधीश ई0 सी0 एक्ट, मिर्जापुर एतद्द्वारा आप अभियुक्त नन्द लाल चौबे उर्फ चिन्तामणि चौबे को निम्न आरोपो से आरोपित करता हूँ।

प्रथम– दिनांक 27.1.2007 को समय करीब 9.00 बजे रात बहद ग्राम मधुपुर थाना अहरौरा जिला मिर्जापुर में अ ***आपने वादिनी मुकदमा श्रीमती आई.सोलोमन की लड़की मोनिका व मोनिका पुत्र टोनी व लड़की बहु गुड़िया उर्फ बेबी को जहर देकर मार डाला।*** *इस प्रकार आपने जान बूझकर भा0 दं0 सं0 की धारा 302 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

द्वितीय– यह कि उक्त तिथि समय व स्थान पर ***आपने मृतका मोनिका के बच्चे जानी व मनीष को इस आशय ज्ञान व ऐसी परिस्थिति में खाने में जहर दिया यदि उससे उन लोगों की मृत्यु हो जाती तो आप हत्या की कोटि में आने वाले अपराध के दोषी होते। इस प्रकार आपने जान बूझकर भा0 दं0 सं0 की धारा 307 के अन्तर्गत दण्डनीय अपराध किया*** *जो इस न्यायालय के प्रसंज्ञान में है।*

एतद्द्वारा मैं निर्देशित करता हूँ कि उपरोक्त आरोप में आपका परीक्षण इसी न्यायालय द्वारा किया जाएगा।"

"I, B.D. Sharma, Special Judge (E.C. Act), Mirzapur hereby charge you, accused Nand Lal Chaubey @ Chintamani Chaubey with the following charges: -

Firstly - That on 27.01.2007 at about 09:00 PM within Village Madhupur, Police Station Ahiraura, District Mirzapur, you killed Monika D/o complainant I. Soloman and her son Tony and daughter-in-law Gudiya @ Baby by administering poison on them. Thus you have intentionally committed an offence punishable under Section 302 IPC which is within the cognizance of this court.

Secondly - That on the aforesaid date, time and place, you, mixed poison in the food of Johny, Manisha children of deceased Monika deliberately and intentionally knowing that had they died by your aforesaid act, you would have been guilty of murder and thus you have committed an offence punishable under Section 307 IPC which is within the cognizance of this Court.

Hence, I hereby direct that you be tried by this court for the aforesaid charges."

(English Translation by Court) (Emphasis added)

19. Accused-appellant pleaded not guilty and claimed trial.

20. In order to prove the guilt of accused, prosecution examined as many as sixteen witnesses out of whom PWs 1, 2, 3, 7 and 13 are witnesses of fact. Rest are formal witnesses including Doctors and Police personnel.

21. PW-1, Smt. I. Soloman, is the Complainant and mother of deceased Monika. PW-2 Gudiya (wife of Arif) is the daughter of Complainant, PW-1, and sister of deceased Monika. PW-3, Manisha, is daughter of deceased Monika and grand daughter of Complainant, PW-1. PW-7, Arif, is husband of PW-2, Gudiya (daughter of PW-1), and has deposed that he had taken the application dated 28.01.2007 written by accused-appellant to the Police Station and has proved the same as Ex.ka-15. PW-13 Johny Masih is the son of deceased Monika. All the prosecution witnesses have supported prosecution version in material particulars.

22. PW-4 Head Moharrir Lalta Prasad Yadav had registered FIR pursuant to direction of CJM on application under Section 156(3) Cr.P.C. and proved Chik FIR Ex.Ka-5 and 6. He has also proved copy of GD entry, Ex.Ka-47. PW-5 is Dr. C.M. Tiwari who was present at the Hospital at Robertsganj, at the time of admission of patients after consuming poison and had conducted postmortem. He has also proved Ex.Ka-8, information sent to In-charge Inspector Robertsganj regarding consuming poison by Baby, Monika, Tony, Manisha and Johny. He has also proved Bed Head Tickets of Manisha and Johny, Ex.Ka-9 and 10, in respect of treatment administered for reducing the effect of poison. He has also proved postmortem reports of Baby, wife of Johny; Monika; and Monika's son Tony, Ex.Ka-11 to 13, respectively. PW-6 Head Constable Bhupendra Narayan Singh has appeared to depose that on the application dated 28.01.2007 signed by accused-appellant Nand Lal Chaubey @ Chintamani Chaubey sent through Arif, he had made entry in the GD and proved a copy of the same, Ex.Ka-14. PW-8 Dr. Dilip Kumar Pandey, Veterinary Doctor at Rajgarh Veterinary Hospital, District Mirzapur, had conducted autopsy on the dead bodies of one bitch and four puppies and proved postmortem reports, Ex.Ka-17 to 20, pertaining to four puppies, and Ex.Ka-21 in respect of bitch. He had also sent viscera of aforesaid puppies to Police Chauki, Sukrit, after sealing in five separate packs . He has proved Ex.Ka-23, the letter written by him to Indian Institute of Toxicology Research, Lucknow who had refused the same and sent back, whereafter the same was sent by him to Forensic Science Laboratory, Lucknow. PW-9, SO, Shaturghan Prasad Chaudhary, has proved recovery memo in respect of food remains and vomit collected from the house of the deceased. He had first visited the place of occurrence on getting information of occurrence. PW-10 Constable Sujeet Kumar Singh had carried viscera of deceased Baby, Monka and Tony along-with relevant documents and letter of SP Mirzapur, marked as Ex.ka-27 to 32. He has also proved acknowledgment of sealed packets as well as Ex.Ka-22, viscera of bitch and puppies along-with original dockets which he had deposited in Forensic Science Laboratory for examination. PW-11 Dr. Subodh Rath of Jeevant Jyoti Christian Hospital, Reobertsganj, Sonbhadra, (an Eye surgeon) has proved admission and Bed Head Ticket of Manisha as Ex.Ka-34 and 35 and her discharge Ex.Ka-36 as also

Bed Head Ticket and discharge in respect of Johny, Ex.Ka-37, 38 and Ex,Ka-39.

23. PW-12, SO, Prem Lal, on receiving information on 28.01.2007 about death of three deceased had gone to Hospital and prepared panchayatnama (inquest), Ex.Ka-40 to 42, in respect of three deceased Monikas, Baby and Tony. He has also proved necessary documents, i.e. request for postmortem, namely Ex.Ka-43 to 45.

24. PW-14 Ajay Kumar Rai is first Investigating Officer (hereinafter referred to as 'I.O.') who initiated investigation on 25.06.2007 after registration of FIR, pursuant to order of Magistrate on the application of Complainant, PW-1, under Section 156(3) Cr.P.C. He had gone to the spot and prepared site plan, Ex.Ka-44, and proved viscera report received from Forensic Science Laboratory in respect of Monika, Tony and Baby, Ex.Ka-47 to 49.

25. PW-15, SI Lallu Ram Bhasker, is second I.O. after transfer of PW-1 Ajay Kumar Rai and had taken over investigation on 25.08.2007. He recorded statements of witnesses and has also proved viscera report in respect of bitch and four puppies, Ex.Ka-51. He has proved charge-sheet, Ex.Ka-50. PW-16, SI Anil Kumar Gupta, had sealed the bitch and four puppies and sent to Veterinary Hospital for postmortem. He had also some made interrogation on the application of PW-1 complainant and toled that accused-appellant was not present at the time of taking meal along-with his family.

26. After evidence of prosecution concluded, accused-appellant Nand Lal Chaubey @ Chintamani Chaubey was examined under Section 313 Cr.P.C. He has stated that he has been falsely implicated; Monika had married with him of her own sweet will; charges levelled against him are false; and, witnesses are deposing falsely. He has stated that in 2001, he had come to know that complainant PW-1 and Ramesh Chandra Pandey had got Monika married with one Shyam Bihari Rai, just 26 days prior to the marriage of accused-appellant with Monika. In this respect, accused-appellant extended threat to Complainant PW-1 and Ramesh Chandra Pandey warning for taking legal action against them and for that reason, their relations had broken and he has been falsely implicated.

27. After hearing learned Counsel for parties and scrutinizing evidence available on record, Trial Court has recorded verdict of conviction and sentenced accused-appellant, Nand Lal Chaubey @ Chintamani Chaubey, in the manner stated in paragraph-1 of this judgment. Trial Court has come to the conclusion of guilt of accused-appellant recording its findings as under :-

(I) Accused-appellant married Monika on 13.11.1997 executed a marriage agreement registered in the Office of Sub-Registrar, Varanasi and started residing in the house of Baliram near Madhupur Chawki, Police Station Ahiraura.

(II) For earning livelihood, Monika opened Grocery / General Merchant shop.

(III) Monika came to know that accused-appellant was already married after adopting Islam and his another wife was residing at Sajaur. She became

annoyed and left the house of Baliram and starting to live in the house of Amar Nath Patel at Madhupur by hiring it and left company of Nand Lal Chaubey.

(IV) Accused-appellant made attempts to reconcile with Monika and with the help of complainant, the relations became normal for a short time.

(V) On 26th January, 2007, at 11.30 in the night, Nand Lal Chaubey phoned Complainant from the house of Monika asking her to come earlier since Toni had consume poison. Complainant accompanied by her daughter Gudiya and his husband Arif immediately came to Madhupur and found that Toni was continuously conversing, Gudiya immediately suggested accused-appellant to take Toni to some doctor, but he said that he has given salted water and everything would get normal.

(VI) On 27.1.2007, accused-appellant, around 9:30 PM, reached the house of complainant by a vehicle (Marshal) and informed her that every body has taken poison and he has brought them in the vehicle and they are dying. He also said that they tried to administer poison to him but themselves have taken and dying. He suggested to move to the hospital without any noise, whereafter, complainant along with all five persons, who had consumed poison, came to Robartsganj hospital where Monika, Toni and Gudiya @ Baby were declared dead. Manisha and Johny after treatment, at District Hospital and thereat BHU, recovered.

(VII) PW-1, complainant stated that accused-appellant visited the house of Monika at 6:00 in the evening on 27.1.2007 and thereafter incident occurred. All other had taken food but despite request accused-appellant did not eat anything. This shows that poison was administered by accused-appellant and that is why he did not take any food.

(VIII) PW-2 sister of Monika and daughter of complainant PW-1 also supported statement of PW-1 regarding disturbed marital affairs between accused-appellant and Monika and cruel behaviour of accused-appellant towards Monika. Firstly on 26.1.2007, in the night at 11:00 PM, she received telephonic call from complainant stating that accused-appellant has informed on phone that Toni has consumed poison, whereupon she accompanied by her husband Arif reached Madhupur and saw that accused-appellant had given salted water to Toni. PW-2 and her husband suggested to take Toni to Hospital but accused-appellant said that he has given salted water and Toni will be recovered. Around 3:00 p.m. in the night, Toni was considerably recovered and when asked, he told that around 8:00 or 9:00 PM in the evening, he has taken food, and thereafter fell ill. On the next day, Complainant, husband of PW-2 and Monika took Toni to Hospital.

(IX) Around 9:30 PM in the night of 27.1.2007, Nand Lal Chaubey reached the house of complainant, PW-1, at Primary Health Centre, Kakrahi through Marshal Jeep and told her that all have consumed poison and dying and they should be taken to Hospital quickly. In the Jeep all five were lying unconscious. They were taken to District Hospital where three out of five i.e. Monika, Gudiya @ Baby and Tony were declared dead.

(X) Johny and Manisha, who recovered, told subsequently that they had

taken pulse and rice in the evening, immediately, after cooking of food by Manisha and had not taken vegetable. After cooking food, Manisha and Gudiya @ Baby went for natural call and Tony went to collect a cassette. Accused-appellant came around 6:00 PM and prepared his bed at the same place where cooked food was kept. When all other came back and took food, Monika, sister of PW-2 requested accused-appellant also to take food but he refused. After taking food by family members, food was also taken by Bitch and Puppies, who died.

(XI) PW-2 said that she is confident that poison was mixed by accused-appellant.

(XII) PW-3 Manisha is the daughter of accused-appellant and deceased Monika. She also fell ill in the same incident and was present in the house. She categorically stated that at 6:30 PM, in the evening on 27.1.2007, when food was being cooked by PW-3 and his sister-in-law Gudiya @ Baby, at that time accused-appellant came and lay down after preparing bed at the place where food was being cooked. After preparation of food, rice and pulse was given to the children. PW-3 and her mother Monika went to attend natural call and Toni went out for collecting a cassette. PW-3 and her mother returned after half an hour when accused-appellant was lying at the same place. Food was served to all family members at around 8:30 in the night but accused-appellant refused to take food. After taking food, both brothers, sister-in-law and mother of PW-3 fell down, when PW-3 asked accused-appellant to see what is happening, whereupon he replied that she will also fell down quickly since he has given poison in the vegetable and since children had already taken food, otherwise they would have also met the same fate. PW-3 also feeling unconsciousness, ran and reached the Hotel of father of Dheeraj and told him that something has happened to his mother and thereafter she gained unconscious. She became consciousness at Rabartsganj Hospital.

(XIII) The motive was that Monika earlier married to one Heera Maseeh and Johny, Toni and Manisha were born, out of said wedlock. Nand Lal Chaubey married Monika when she had above three children. He subsequently, also contracted another marriage with Zamila Khatoon.

(XIV) The factum that death of three has occurred due to poison is proved by medical and viscera report.

(XV) PW-5 said that all five persons, who have consumed poison reached Hospital at around 10:00 PM in the night and accompanied by complainant Smt. I. Soloman and accused-appellant, Nand Lal Chaubey. Three of them had already died before reaching Hospital and Manisha and Johny were unconscious. The two persons accompanying patients informed that poison has been consumed whereupon information was given to Police by PW-5 in writing at 11:00 p.m. in the night. Statement of Manisha was recorded by Magistrate on 28.1.2007. In viscera report 'aluminium phosphide' poison was found.

(XVI) PW-7, Arif besides other, said that Johny and Manisha, after getting well, told that poison was mixed in the food by accused-appellant. He was

requested to take food but refused. He also stated that out of wedlock of Monika and Nand Lal Chaubey, there was no issue.

(XVII) Death of Bitch and Puppies, who consumed remaining food, due to poison of aluminium phosphide has been proved by PW-8, who conducted post-mortem of Bitch and puppies.

(XVIII) PW-13, who also fell ill due to poison but survived has also supported and fortified version of PW-3, Manisha (his sister) and has proved that for some time when all other family members were not present in the house after preparation of food, Nand Lal Chaubey alone was present there.

(XIX) Trial Court, therefore, said that Nand Lal Chaubey was present at the time when incident took place. He had motive. He was the only person who could have mixed poison in the food and It is fortified by the fact that, all other family members when took food, though it was also served to him but he did not eat. Therefore, prosecution has proved its case beyond reasonable doubt and held him guilty.

28. Aggrieved by this judgement, present appeal has been filed.

29. We have heard Sri Abhay Kumar Singh, learned Counsel for appellant and Sri Rishi Chaddha, learned A.G.A for State-respondent at length and gone through the record carefully with the valuable assistance of learned Counsel for parties.

30. Learned counsel for accused-appellant, assailing the judgement, contended :-

(i) There is no eye witness to prove that accused-appellant mixed poison in the food.

(ii) No body has seen accused-appellant when came to the house, carried with him any poison and mixed the same.

(iii) The mere fact that accused-appellant did not take food when other family members took food, is a co-incident and for that reason alone, it cannot be said that the accused-appellant is guilty of mixing poison in the food, to cause death of three family members including his wife Monika.

(iv) Accused-appellant himself took all the ailing persons to Hospital by hiring a Jeep. He first rushed to the place of complainant, who was a Supervisor in Primary Health Centre and could have given a better advice in the matter. He himself sent an application informing about the incident to police which has been proved by husband of PW-3.

(v) It has not been proved as to which food item contains poison.

(vi) The entire prosecution story implicating accused-appellant is founded on conjunctures and surmises.

(vii) There was no reason for the accused-appellant, who was continuously trying to have cordial relations with Monika and her children, to make any attempt for their death and the alleged motive is nothing but a sheer conjuncture on the part of complainant and other witnesses having no substance.

(viii) F.I.R. has been lodged with a long delay which shows that the

incident has subsequently been manipulated and is an after thought and with due consultation and advice.

(ix) The alleged second marriage of accused-appellant has not been proved by adducing any evidence.

(x) PW-5 said that kind of poison found in the food smell so much, that if mixed in food, one may not take the food due to smell. An otherwise view expressed by another witness has been accepted by Court below without giving any reason for rejecting opinion of PW-5.

(xi) No forensic expert in this regard has been examined.

(x) Prosecution is not based on any ocular version but it is a case of circumstantial evidence having no complete chain but there are much gaps, therefore, conviction of appellant is bad in law.

(xi) Cake was brought by Johny. It was also recovered from the place of incident vide Ex.Ka-24. It has not been examined, whether said food item (Cake) which was consumed by all family members except accused-appellant, was itself poisonous or not. Therefore, there was every possibility that poison may have been in the cake which was consumed by all family members and resulted into death of three family members.

31. Learned AGA on the contrary submitted that accused-appellant was present on the spot. Admittedly when food was being cooked, kept after cooking and other family members went out side the house, accused-appellant continued to remain thereof. All family members took food except appellant though it was served to him which shows that food item(s) contained poison to the knowledge of accused-appellant, hence, he did not eat. This shows his complicity. His relation with Monika were strain since out of first marriage she had three children of substantial age and as per PW-3, he did not like those children. Death of three persons has been proved due to poison and there was none else except accused-appellant, who could have committed the crime, therefore, chain of circumstantial evidence is complete and he has been rightly convicted by Court below.

32. In the light of rival submissions, we have to examine, "whether it can be said that accused-appellant has committed murder of three of his family members and injured two others by administering poison and chain of circumstantial evidence proved by prosecution is complete so as to lead an interference of guilt against accused-appellant only and none-else, and prosecution has successfully proved its case beyond reasonable doubt."

33. Some facts which are not disputed before us, and learned counsel for the appellant has also not raised any serious objection thereto, are :-

(i) Food items, all or some of them or any one of them contained poison, 'aluminium phosphide'.

(ii) The food was taken by five members of family, three of them died and two became seriously ill but subsequently, recovered.

(iii) Food remains were eaten by bitch and puppies, present in the house, and they also died of the aforesaid poison.

(iv) The sample of vomit collected by police shows presence of same poison i.e. aluminium phosphide.

(v) Three persons, namely, Monika, Gudiya @ Beby and Toni died before reaching hospital because of poison.

(vi) When family members were taken food, accused-appellant was present in the house but had not taken meals.

34. Therefore, the place at which offence was committed, i.e. poison was mixed, was the house, where food was cooked and kept and death took place due to intake of poison through meals, in the manner as stated by prosecution in the F.I.R. as also stated by PWs-1, 3 and 13. This fact is duly proved and virtually there is no substantive argument to challenge the said fact.

35. The actual attempt of learned counsel for appellant is that accused-appellant has not mixed poison in the food and there is no evidence to prove this fact, hence, the very basis on which accused-appellant has been held guilty, being no-nest, the entire prosecution story falls and judgement in question is liable to be set aside.

36. It is no doubt true that here is not a case where anybody has seen accused-appellant mixing poison in the food item(s). In case in hand there is no eye witness of occurrence. Case of prosecution rests on circumstantial evidence and extra-judicial confession.

37. It is well settled that conviction on circumstantial evidences is sustainable; though degree of proof is slightly higher and circumstances have to be examined with due caution.

38. The circumstances from which conclusion of guilt is to be drawn must or "should be" and not merely "may be", fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

39. ***Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343***, is the basic judgment on appreciation of evidence, when the case depends only on circumstantial evidence, which has been consistently relied in later judgments. In this case as long back as in 1952, Hon'ble Mahajan, J, expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

"... circumstances should be of a conclusive nature *and tendency and they should be* ***such as to exclude every hypothesis but the one proposed to be proved..... i****t must be such as to show that* ***within all human probability the act must have been done by the accused."***

40. In ***Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063***, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are

found to be incompatible with innocence of accused or guilt of any other person.

41. In ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,*** Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The ***circumstances concerned 'must or should' and not 'may be' established.***

(2) the facts so established should be consistent only with the ***hypothesis of the guilt of the accused,*** *that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency

(4) they should exclude every possible hypothesis except the one to be proved, and

*(5) there must be a c****hain of evidence so complete as not to leave any reasonable ground*** *for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (emphasis added)*

42. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

the ***circumstances*** *from which an inference of guilt is sought to be drawn,* ***must be cogently and firmly established;***

(2) those circumstances should be of a ***definite tendency unerringly pointing towards guilt of the accused;***

*(3) the circumstances, taken cumulatively; should form a c****hain so complete that there is no escape from the conclusion that within all human probability*** *the crime was committed by the accused and none else; and,*

(4) the ***circumstantial evidence*** *in order to sustain conviction must be* ***complete and incapable of explanation*** *of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

(emphasis added)

43. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,** Court said:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the ***conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature****. Moreover, all the* ***circumstances should be complete*** *and there should be* ***no gap left*** *in the chain of evidence. Further, the proved* ***circumstances must be consistent only***

with the hypothesis of the guilt of the accused *and totally inconsistent with his innocence. " (emphasis added)*

44. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgement said:

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,** upon any other reasonable hypothesis than that of his guilt,*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

45. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in S***hivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.***

46. When we analyses the evidence available in this case, in the light of above exposition of law, we find that Complainant PW-1, Smt. I. Soloman, at the time of incident was around 61 years of age and mother of deceased Monika and mother-in-law of accused-appellant. She was married to one M.J. Soloman in 1960 begot five children, comprising four daughters and one son. The son who was eldest, had already died. The second eldest daughter was Shalini married to one Anirudh Singh residing at Jangiganj, PS. Gopiganj, District Sant Ravi Das Nagar. Monika was third child, who was married to one Heera Maseeh and from that wedlock had one daughter Manisha and two sons, Toni and Johny. Gudiya (PW-2) is the fourth child i.e. third daughter and younger to Monika. she was married with Arif and residing at Babhnauli, P.S. Rabartsganj, District Sonbhadra. At the time of incident, she (PW-2) was present with her mother i.e. PW-1. The fifth child i.e. forth daughter, Guddo Maseeh, was married and residing at Bahraich. Monika separated from her earlier husband, Heera Maseeh due to matrimonial disputes, after about 15-16 years of marriage, and came to reside with PW-1. Johny, after some time went to reside with his father Heera Maseeh at Duddhi. Monika initially joined service in an Oil company and thereafter became teacher in Saraswati Gyan Mandir. During this time, she developed relations with Nand Lal Chaubey, accused-appellant and a contract marriage was solemnized by them by getting an agreement registered in the Office of Sub-Registrar, Varanasi on 13.11.1997. Monika went to live with accused appellant but subsequently, came

to know that he has another wife, then left him and started living separately.

47. It is evident from record that accused-appellant used to visit her though she was residing separately. PW-1 (Complainant) has also clarified that she also married twice and from the first husband, Maris Jhon Soloman, who was working in Malaria department, she had two daughters and one son i.e. Anil Soloman, Shalini Soloman and Monika Soloman. Her husband died in 1969, whereafter, she contacted second marriage with one Arshad Alam Khan, who also later died but from second marriage, she had two daughters. Manisha (PW-3) was around 24 years old at the time of death in 2007 and was married to one Ramesh Pandey, had two children Amit and Kavita, who were residing with their maternal grand mother i.e. deceased Monika.

48. On 27.1.2007, when incident took place, PW-3 Manisha and PW-13 Johny, both were present in the house. Their evidence is crucial to appreciate as to what had happened in the matter. Prior to a day from the date of incident i.e. on 26.1.2007, Tony fell ill, after taking food. At that time also accused-appellant was present, who gave salted water to Toni which caused some relief. Ultimately, on the next day, Tony was examined in the hospital and returned there from at around 2:00 P.M. on 27.1.2007.

49. In the evening, Gudiya @ Baby (deceased) and Manisha, PW-3 cooked food. While food was in preparation, around 6:00 P.M., Nand Lal Chaubdy reached the house and placed his bed where food was being cooked and lied there. After preparing rice and pulse, two minor children of PW-3 Manisha namely, Amit and Kavita, who were also present in the house, were given food and after eating, minor children went to sleep. Vegetable was under preparation at that time. After some time, Monika went to pay some dues to a shop keeper; Tony went to the market and Manisha (PW-3) and Gudiya @ Baby (deceased) went to attend their natural call. Johny Maseeh (PW-13) also went to market to collect a cassette. Nand Lal Chaubey remained alone in the house. The family members returned after some time and took dinner around 8:00 P.M. Monika requested accused-appellant also to take dinner but he said that he has come after taking meals and does not want to eat anything. After some time of taking meals, first Johny felt uneasiness and simultaneously, Gudiya @ Baby and Manisha also started vomiting. Johny at that time, fell unconscious.

50. Manisha (PW-3) has categorically said that after taking food when her both brothers and mother fell down, she asked accused-appellant to see what is happening whereupon accused appellant replied that you (Manisha) would also fall just now since he has given poison in vegetable and if children of PW-3 would not have taken food earlier, they would also have suffered the same consequences. Statement of Manisha (PW-3) is very categorical and reads as under :-

चौबे ने खाना नहीं खाया था मैंने भी खाना खाया था। खाना खाने के बाद मेरे दोनों भाई गिर पड़े, उसके बाद मम्मी गिर पड़ी तो मैंने कहा कि चौबे अंकल जी देखिए ये क्या हो रहा है? तो ***चौबे ने कहा कि अभी तुम भी गिरोगी, क्योंकि मैंने सबको सब्जी में जहर दे दिया है*** *ठीक हुआ कि तुम्हारे बच्चे पहले ही खा लिए नहीं तो उन लोगो का भी वहीं हाल होता।*

Chaube had not taken food. I too had taken food. After taking their

meals, both my brothers fell down; thereafter, my mother fell too. On this, I stated to Chaube uncle, "Look, what is happening?" Chaube replied, "You will fall too, because I have poisoned the sabji (cooked vegetables). It is good, your children have taken their meals earlier, otherwise they might have met the same fate."

(English Translation by Court)
(Emphasis added)

51. We do not find anything in cross-examination extracted on this aspect from the statement of PW-3 to discredit her. In fact there is not even a suggestion that this statement of PW-3 is incorrect or she is making this statement to falsely implicate accused-appellant. PW-3 has admitted that she has not seen Nand Lal Chaubey mixing poison in the food but she is very categorically where said that not only he was present but despite request did not take food and when poison starts showing its effect resulting in that two brothers and mother fell down, Manisha requested accused-appellant to see what is happening, probably for help, then he replied in the manner as aforesaid. This is an extra-judicial confession which has been made before a person who himself has suffered in the same incident. Even otherwise, being a member of family, she has no reason to make a false statement against Nand Lal Chaubey, accused-appellant.

52. PW-13, who is another person, who has also consumed poison and fell ill, though subsequently, recovered. His statement regarding preparation of food, its service and the fact that Nand Lal Chaubey did not take food, though requested, corroborate PW-3.

53. Record show that at the time when family was taking dinner in the night, six members were present. Three of them have died. One is accused-appellant himself and two are PW-3 and 13, who have deposed against accused-appellant and supported prosecution version. There is not even a suggestion by accused-appellant that poison could have been mixed in the food by anyone else. It is he who was present in the house. Further, as per statement of PW-3 and 13, present in the house, for a short time, after preparation of food, and before taking meals, all family members except accused-appellant went out of the house, hence it is accused-appellant only who had and could have mixed poison in the food.

54. Accused-appellant in his statement has admitted that he immediately sought to arrange a vehicle to carry all the family members to hospital and at around 9:30 reached the house of PW-1 at Primary Health Centre, Kakrahi. This also shows that he was present in the house when incident took place. That being so, onus lies upon him to prove that poison was mixed by some one else and not by him and here presumption under Section 106 of Evidence Act will stand attracted which has to be discharged by accused-appellant but he has adduced in evidence at all.

55. We are also satisfied that there was enough motive available to accused-appellant to commit offence inasmuch as Manisha, Johny, Toni, three eldest children, were born from the wedlock of first marriage of deceased Monika. Manisha (PW-3) was even already married in July, 1997, when accused-appellant contacted registered marriage with Monika in 1999. She (PW-3) has said that accused-appellant did not like

her and her brothers and always said that they should go back to their father, Heera Maseeh. Her statement, in examination-in-chief, reads as under :-

नन्दलाल चौबे मुझे और मेरे भाई को पसन्द नहीं करता था *कहता कि तुम लोग अपने बाप हीरामसीह के पास चले जाओ। जॉनी कुछ दिन के बाद हीरा मसीह के पास चला गया था।*

Nandlal Chaube did not like me and my brother. He used to say, "You should return to your baap (father) Heera Masih". After some days, Johnny returned to Heera Masih.

(English Translation by Court)

56. On this aspect also virtually there is no cross-examination and we find nothing to contradict the said statement or to disbelieve it.

57. Even PW-13 in his examination-in-chief, has said that after marriage with Monika (deceased), accused-appellant sent him (Johny PW-13) to Duddhi and there he started living with his father. Relevant extract of his statement reads as under :-

*नन्दलाल चौबे मेरी मम्मी मोनिका व हम लोगों को साथ लेकर मधुपुर में आकर रहने लगे। **मुझे नन्दलाल चौबे ने बस में बैठा कर दुद्धी भेज दिया था। दुद्धी में मैं अपने पापा के साथ रहने लगा।***

Nandlal Chaube having taken my mother Monika and us, came to Madhupur and started living there. Nandlal Chaube having made me sit in a bus sent me off to Duddhi. I started living with my father in Duddhi.

(English Translation by Court)

(Emphasis added)

58. It shows that what has been said by PW-3 stand corroborated by PW-13 that it is the accused-appellant who sent Johny PW-13 to stay to go Duddhi and stay with his biological father i.e. Heera Maseeh. This support to the statement of PW-3 that accused-appellant dislike them.

59. A suggestion has been made that Johny (PW-13) brought the cake which was also taken by other family members and the same was recovered vide Fard Memo (Ex.Ka-4) but that has not been examined.

60. However, we find difficult to accept it for the reason that PW-13 has stated that cake has been taken by all the family members at around 2:00 PM in the day and incident has taken place after taking dinner in the night. Therefore, cake has not resulted in anything but it is the food which was taken by three deceased, PW-3 and 13 which caused their illness wherein three of them died. Relevant statement of PW-13 with regard to cake reads as under : -

जो केक मैं लेकर आया था, परिवार के सभी लोग खाये थे, नन्दलाल नहीं खाए थे। परिवार के सभी लोग 2 बजे के आस पास केक खाए थे।

All family members except Nandlal had eaten the cake which I had brought along with me. All family members had taken cake at around 2:00 O'clock.

(English Translation by Court)

61. The collection of vomit food, items and viscera testing, all relevant

documents have been proved and chemical examination has also proved. Presence of poison i.e. 'aluminum phosphide' in Forensic report is also proved. On this aspects, nothing has been said by learned counsel for the appellant and he has not disputed these facts.

62. In this backdrop, we find that chain of circumstances is complete to prove that it is only accused-appellant, who can be said to be guilty in the matter and none else. Accused-appellant came to the house of deceased Monika and other family members on 27.1.2007 at around 6:00 PM. He prepared his bed in the kitchen / place where food was being cooked and lied down thereat. At that time vegetable was being cooked. After cooking the food, other family members went outside the house for one or the other reason. Accused-appellant alone remained at the place where cooked food was kept. After sometime, around 8:00 PM, all the family members, namely, Monika, Tony, Gudiya @ Baby, (all deceased); Manisha and Johny (PWs-3 and 13) had dinner. Accused-appellant was also requested to take food but he denied and did not take meals. Five persons, who took meals, three of them fell down and remaining two also started getting uneasy and unconscious. PW-3, who was at that point of time, lesser ill than others, asked accused-appellant as to what is happening whereupon he replied that he has mixed poison in the vegetable and very soon she (PW-3) will also fell down. He went further to say that two miner children of PW-3, if already had not taken food, would have met the same fate. This statement of PW-3 which can be taken note as extra-judicial confession of accused-appellant also proves that the poison was mixed by accused-appellant when he was present in the house. Two minor children ate only pulse and rice, since vegetable was not ready at that time. After cooking food subsequently five family members went out of house. Two minor children were sleeping. Accused-appellant alone was present in house. After dinner, out of five, three of them died before reaching hospital and PWs-3 and 13 remain seriously ill. PW-13 regained his conscious after about 4-5 days.

63. The defence of accused-appellant that he had taken all the five persons to his mother-in-law and thereafter they were taken to hospital, is only a *alibi* inasmuch as all the five had already fallen unconscious. The accused-appellant thought that all have died and this is what he told to complainant when reached her house, but to his misfortune, in the hospital he found that only three have died and two subsequently recovered.

64. We asked learned counsel for appellant as to when the facility of telephone was available in the house, why accused-appellant immediately did not inform police or call for an Ambulance or even the Complainant, when family members started to have adverse effect of poison; and why he lost / consumed time, spending more than 1 -1/2 hours, by taking them first to residence of his mother-in-law, to which we did not receive any reply. It is no doubt true that non-availability of defence to accused-appellant will not absolve prosecution from its responsibility to prove the guilt beyond reasonable doubt but in the present case, in the backdrop of facts already discussed, we are examine conduct of appellant also which gives no

confidence upon his defence that he has not done anything and instead attempted to save all the family members.

65. In fact in his statement under Section 313 Cr.P.C., he has taken a defence that he has made a complaint against complainant in 2006 on account whereof she has falsely implicated him. Further that he came to know that before his marriage with deceased, Monika, about 20 years earlier, was married with one Shyam Bihari and on account thereof he separated from Monika which has caused enmity with Informant but to prove this fact that Monika was married to some Shyam Bihari, no evidence has been brought on record. The statement under Section 313 Cr.P.C. is nothing but virtually a denial on every aspect, except question no. 1 where he has admitted marriage with deceased Monika. He has denied even question 13 that he brought all the ailing persons to the residence of Informant on 27.1.2007 at around 9:00 PM, telling that they have consumed poison voluntarily and are dying and thereafter when they were taken to hospital three of them were declared dead.

66. We find an independent witness, PW-5, doctor who was posted on emergency duty at District Hospital Rabartsganj, was said that all five persons were brought for treatment by Smt. I. Soloman and Nand Lal Chaubey and they told that they have consume poisonus substance. Thereafter, he (PW-5) sent information to In-charge Inspector Rabartsganj vide Ex.Ka-8 and then examined patients brought for treatment, out of whom three were already died and two were admitted in unconscious stage but late referred to Banaras Hindu University on 28.1.2007 for further treatment. This shows that accused-appellant was present in the house. He had taken all the five members first to the residence of PW-1 and thereafter accompanied PW-1 to hospital but even this fact he has denied while answering question 13 which shows an otherwise conduct of appellant and supports prosecution version that it is the accused-appellant, who, when found opportunity in the house when he was alone, and cooked food kept thereat, mixed poison and thereafter admitted this fact when five members of family after taking food started feeling effect of poison and PW-3 sought help of accused-appellant, since he knew that food contained poison, he did not consume it.

67. Much stress has been laid by learned counsel for accused-appellant that he himself sent an application on 28.1.2007 (Ex.Ka-15) to Police Station Ahiraura, District Mirzapur which was taken by PW-7 Arif and has been proved by him. If accused-appellant would have committed crime, he would not have informed police on his own and this is a very important aspect to show that accused-appellant has not committed any crime. Instead, the poison has been taken by family members either due to mistake on their part or in some other manner.

68. At first flush, the argument appears to be quite attractive but on a serious consideration, we find apparent shallowness and an attempt on the part of accused-appellant to cover up the matter. Incident took place on 27.1.2007, at about 8:00 or 8:30 PM as above discussed, accused-appellant under the impression that all five family members have died or dying took them to the place of informant i.e. his mother-in-law (PW-1) and told

that five family members have consumed poison and are dying. Thereafter, both of them carried ill fated five family members to District Hospital and reached thereat around 10:00 PM. PW-5, Doctor, who was on emergency duty in District Hospital, has clearly said that he, after receiving five persons having consumed poison, out of whom three had already died, sent information to police in writing at 11:00 PM, in the night, and thereafter, statement of Manisha, PW-3, who also had consumed poison, but survived, was recorded by Magistrate on 28.1.2007. Thus, police was already informed of the incident by PW-5 in the night of 27.1.2007 and therefore, alleged information given by accused-appellant on 28.1.2007 is nothing but an afterthought and to create an alibi to cover up the issue.

69. Moreover, even a perusal of application (Ex.Ka-15) shows that appellant mentioned therein that family members when taking meal, they offered the same to accused-appellant which he refused but then he was offered cake, he wanted to eat but at the same time elder son Johny fell down and became unconscious, hence accused-appellant became nerves, called for help of neighbour, and after arranging a vehicle brought poison affected family members to the hospital.

70. The fact stated in the application neither have been proved by accused-appellant by adducing any evidence and contrary evidence is available on record demonstrating falsity of the contents of said application.

71. PW-13 i.e. Johny himself has stated that he brought cake in the afternoon and all the family members ate cake at 2:00 PM and it was not eaten by accused-appellant. PW-3 has also said that in the evening when family members started taking meal, accused-appellant was offered meal which he refused. His (accused-appellant) story that the cake was offered to him which he could not eat sicne in the meantime, Johny fell down, is clearly an attempt on his part to shift suspicion that probably cake contained poison and not evening meals i.e. vegetable prepared in the evening.

72. Moreover, remains of vegetable has already been examined forensically and poison has been found therein, therefore, also the otherwise stand sought to be taken by accused-appellant is clearly incorrect. He has also not stated in the application sent on the next date i.e. 28.1.2007 that he brought ill fated family members affected by poison firstly to the place of Informant, PW-1, and thereafter, they went to hospital. In the application, he has said that he went to hospital which is again not correct. Therefore, this application, in our view, does not support the stand taken by accused-appellant particularly the facts stated therein are inconsistent to the abundance of otherwise evidence available on record. Accused-appellant on his own has not made any attempt by adducing any evidence to prove the facts stated in said application. Said application was made on his part to create an alibi for himself but we find that in the light of ocular version and clear and categorical statements of PWs-3 and 13 i.e., two poison affected family members, the stand of the accused-appellant is wholly untrustworthy.

73. So far as argument with regard to delay in lodging FIR, it is already on

record that complainant sought to lodge report in police but it was not registered whereafter she approached higher authorities, then filed application under Section 156(3) Cr.P.C. and only with the intervention of Court, F.I.R. was lodged and investigation was conducted. It shows that there is no delay and in any case, it stands explained satisfactorily and therefore, has no otherwise effect on entire prosecution case.

74. In view of the above discussions, we are clearly of the view that prosecution has successfully proved its case beyond reasonable doubt and therefore, Trial Court has rightly held accused-appellant guilty and convicted for the offences under Sections 302 I.P.C. for committing murder of Monika, Tony, Gudiya @ Baby (deceased) and under Section 307 I.P.C. for attempting to cause murder of PW-3 and 13.

75. Coming to the question of sentence, it is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: ***Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].***

76. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellant-Nand Lal Chaubey by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

77. In view of above discussion, the appeal lacks merit and is **dismissed.** Impugned judgement and order dated 27.08.2011 passed by Special Judge (E.C. Act), Mirzapur in Sessions Trial No.237 of 2007, under Sections 302 and 307 IPC., Police Station Ahiraura, District Mirzapur, is maintained and confirmed.

78. Lower Court record along with the copy of this judgment be sent immediately to Court and Jail Superintendent concerned for necessary

compliance and to apprise the accused forthwith. Compliance report be also submitted to this Court.

(2019)10ILR A 393

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Jail Appeal No. 4228 of 2013

Yogendra @ Teetu ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Anand Kumar Mishra, Sri Jitendra Kumar, Sri Maqsood Ahmd. Beg (A.C.), Sri Rajiv Kumar Mishra, Sri Yogendra Kumar Sonkar

Counsel for the Opposite Party:
A.G.A.

A. Indian Evidence Act, 1872 - Sections 118 and 134 - Neither number of witness required to prove a fact nor evidence of a witness can be rejected only on the ground of her relationship with the victim. The whole prosecution case can be proved by a single witness if evidence is natural and trustworthy.

That even a singly testimony, which is unimpeachable, proves case beyond doubt. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence, as has been provided, under Section 134 of Evidence Act. Testimony of prosecutrix corroborated with unimpeachable testimony of informant is cogent, credible and trustworthy, having ring of acceptance. (Para 22)

Regarding Section 376 I.P.C., the minimum sentence provided for offence of rape is seven years and in case of punishment, less than seven years, Court is required to write reasons being adequate and special reasons to be mentioned in the judgment for imposing a sentence of imprisonment for a term less than seven years. (Para 24)

Jail Appeal partly allowed (E-2)

List of Cases Cited: -

1. Thakorlal D. Vadgama Vs St. of Guj. AIR 1973 SC 2313

2. St. of Har. Vs Raja Ram AIR 1973 SC 819

3. Kunwar Singh Vs St. of U.P. (1993) 3 AWC 1305

4. State of Karnataka Vs. Batra Sudhakar @ Suttham and Ors. (2008) 11 SCC 8

5. Shahnawaz Vs. St. of U.P. 2011 (2) DNR 626

6. Ramesh Vs. St. of Mah. AIR 1962 SC 1908

7. Narbada Prasad Vs Chhagan Lal & ors. AIR 1969 SC 393

8. Kali Ram Vs St. of H.P. AIR 1973 SC 2773

9. Partap Vs St. of U.P. AIR 1976 SC 966

10. Shankarlal Gyarasilal Dixit Vs St. of Mah. AIR 1981 SC 765

11. Veer Singh & anr. Vs. St. of U.P. (2014) 84 ACC 681

12. Gopal Singh Vs St. of U.K. (2013) 3 SCC (Cri) 608

13. St. of U.P. Vs Babu Lal AIR 2008 SC 582

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal under Section 374(2) read with Section 383 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') has been filed against the

judgment of conviction and sentence made therein by Court of Additional Sessions judge, Ex-cadre, Court No. 1, Ghaziabad, in Sessions Trial No. 1338 of 2012, arising out of Case Crime No. 148 of 2012, under Sections 363, 366 and 376 of I.P.C., Police Station Murad Nagar, District Ghaziabad, wherein convict-appellant Yogendra @ Tittu has been convicted for offence punishable under Section 363, 366 and 376 I.P.C. and thereby he has been sentenced with three years rigorous imprisonment and fine of Rs. 3,000/- and in default of making payment of fine, rigorous imprisonment of six months under Section 363 of I.P.C., five years rigorous imprisonment with fine of Rs. 5,000/-, and in default one years additional rigorous imprisonment for offence punishable under Section 366 of I.P.C., ten years rigorous imprisonment and fine of Rs. 10,000/-, and in default two years additional rigorous imprisonment under Section 376 I.P.C., with a direction for concurrent running of sentences and adjustment of previous imprisonment, if any, in this very case crime number as per Section 428 of Cr.P.C.

2. Memo of appeal contends that trial Court failed to appreciate facts and law placed upon record. There was no proof of rape with victim nor it was medically corroborated. First Information Report was delayed and no reason for this delay, was given. Prosecutrix was major, thereby, capable to understand her wellness. It was a consensual fleeing. She was pregnant for four months. Offence of rape was not proved. Rather, prosecutrix, upon her own volition, had gone to convict-appellant while being in company of her own friend. Convict-appellant had no fault nor it was rape by him. The sentence was not commensurate to offence. It was highly excessive, hence, this appeal for setting aside impugned judgment of conviction, sentence made therein, for awarding acquittal of charges, leveled against convict-appellant.

3. From the very perusal of record of lower Court, it is apparent that First Information Report Ex.Ka-8, was got lodged at Police Station Murad Nagar, Ghaziabad, on 3.3.2012 at 11:30 A.M. for an occurrence of 17.12.2011 at 9:00 A.M. upon the report of Roop Singh son of Genda Lal against Teetu, resident of Village Rajapur, Police Station Kavi Nagar, District Ghaziabad, for offence punishable under Section 363 and 366 I.P.C., with this contention that Roop Singh's daughter, prosecutrix, having date of birth 7.5.1995, student of Class XI, at Sir Chhotu Ram Girls High School, Duhai, went for her school at 9:00 A.M. On 17.12.2011. But she did not turn up. When enquired from school, it came to notice that she had not gone to school on that day. Rather Teetu and Mukesh had taken her in a white van from Murad Nagar Bus Stand, which was witnessed by Ashok son of Sri Ram. Son of 'Bua' of 'Teetu' was also in company of them. Teetu was residing as tenant in the house of Udesh Pal and was involved in the work as T.V. Mechanic at a shop situated beside school at Murad Nagar. Prosecutrix may be murdered by them. This information was sent to S.S.P., Ghaziabad, but of no avail. Hence, an application under Section 156(3) of Cr.P.C. was filed before the Court of VIth Additional Chief Judicial Magistrate, Ghaziabad, with a prayer for direction to Station Office of Police Station, Murad Nagar, for registering a case of kidnapping of a minor girl against Teetu

and Mukesh. This application was allowed by Magistrate and this report was got lodged. Investigation resulted recording of statement of prosecturix under Section 164 of Cr.P.C. Ex.Ka-11, her medical examination and report being Ex. Ka-5, pathological report being Ex. Ka-6, spot map Ex. Ka-9 and final submission of charge-sheet Ex. Ka-10, against accused Yogendra @ Teetu for offence punishable under Section 363, 366 and 376 of I.P.C. Ex. Ka-11 was Certificate-cum-Mark-sheet of High School Examination- 2011, wherein, date of birth of prosecutrix was written to be 7.5.1995. As offence, punishable under Sections 363, 366 and 376 I.P.C. was exclusively triable by Court of Session, hence, learned Magistrate, vide order dated 18.8.2012, committed file to Court of Session. Session Judge made over case to Court No. 14 of Additional Session Judge, Ghaziabad wherein learned counsel for the State and for defence, were heard and vide order dated 25.9.2012, charges for offence punishable under Section 363, 366 and 376 I.P.C. were framed against convict-appellant Yogendra @ Teetu. The same is being written in its English translation by Court itself, the vernacular part is not being reproduced.

I, Gajendra Kumar, Additional District and Session Judge, Court No. 14, do hereby, charge you, Yogendra:

"(1) That on 17.12.2011 while informant's daughter prosecutrix, who was student of Class XIth at Chhoturam Girls College, Duhai, under Police Station Murad Nagar, Ghaziabad, was on her way to school made enticing her thereby took out of the guardianship of her legal guardian. Thereby you committed offence of kidnapping punishable under Section 363 of I.P.C. within the cognizance of above Court.

(2) That on above date, time and place, you did kidnapping of minor Km. Lalita; daughter of informant Kamal Singh, from his legal guardianship with intent that she will be compelled to marry or likely to marry or likely that she will be forced or seduced to illicit intercourse, thereby committed offence punishable under Section 366 of I.P.C. within the cognizance of above Court.

(3) That on above date, time and place, you enticed and thereby kidnapped minor prosecutrix daughter of informant and took her somewhere else where you committed rape against her wishes. Thereby, committed offence punishable under Section 376 of I.P.C. within the cognizance of this Court."

------*Sd*-------

4. Charges were read over to accused, who pleaded not guilty and claimed for trial. Prosecution examined PW-1 prosecutrix daughter of Roop Singh, PW-2 Roop Singh son of Genda Lal-informant, PW-3 Dr. Surbhi Sinha Senior consultant, PW-4 Constable-2282 Mukesh Dabas, PW-5 Sub-Inspector Vijay Kumar Verma.

5. With a view to obtain explanation, if any, and version of accused person, his statement was got recorded under Section 313 of Cr.P.C. wherein accused Yogendra @ Teetu answered in a general way in answer of every question till question No. 17 that it is incorrect and in answer to question No. 18, this was said to be a false implication and in answer to question No. 19, he

replied that father of prosecutrix was under debt of Rs. 10,000/-, taken from accused and when it was called back, this false case was got registered. He is innocent. He has been falsely implicated.

6. No evidence in defence was there.

7. After hearing learned Additional District Government Counsel and learned counsel for the defence, the impugned judgment of conviction and sentence made therein, written as above, was passed.

8. Heard Sri Rajiv Kumar Mishra, learned counsel for the appellant and Sri Ravi Prakash, learned AGA for the State. Perused the record.

9. Learned counsel for the appellant argued that charge was made for offence of kidnapping of minor girl of informant with name of prosecutrix, who had been examined as PW-1 whereas charge No. 2 has been leveled for offence punishable under Section 366 of I.P.C. with offence of abduction of Kumri Lalita, daughter of Kamal Singh, with a view to marry and have sexual intercourse with her. Again, charge No. 3 has been leveled for offence of rape with prosecutrix, minor daughter of informant of this case. But nowhere name of Kumari Lalita or informant Kamal Singh is there on record. This application under Section 156(3) Cr.P.C. was filed by Roop Singh, son of Genda Lal, R/o Care of Udesh Pal, Mohalla Purani Mandi, Police Station Murad Nagar, District Ghaziabad and no person as informant Kamal Singh is there nor any prosecutrix or victim Kumari Lalita is there. Hence, this charge itself was defective and convict-appellant has been convicted for offence punishable under Section 366 I.P.C. for which there was no evidence at all, even then, he has been sentenced for it. Prosecutrix, for whom offence under Section 363 of I.P.C. was leveled, was a major and for offence punishable under Section 363 of I.P.C., whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, that is the offence of kidnapping from lawful guardianship, penalized by this section, is the offence, which is defined by Section 361 I.P.C. which provides: "whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. The person against whom the offence is committed must be under the age of 16, if male, and under the age of 18, if female." The quintessence of offence under Section 363 of I.P.C. is criminal intention. In the present case, prosecutrix was major, hence, this offence was not made. The offence punishable under Section 376 I.P.c. was also not made out because prosecutrix being major went to accused upon her own volition. She lived with him and was pregnant with four months. It was a consensual relationship. Even then Court has punished with such a deterrent punishment. There was no proof beyond doubt. PW-2 was not eye-witness account and the witness, who was said to have seen prosecutrix in company of accused, has not been examined. Hence, there remained single testimony of prosecutrix

that too, with major contradiction. Convict-appellant is in jail since 17.5.2012. He suffered more than 7 years as against maximum ten years sentence awarded to him. Hence, he be punished with sentence undergone.

10. Learned AGA has vehemently opposed the argument by saying that as per High School Certificate-cum-Mark-sheet Ex. Ka-11, prosecutrix was minor on the date of incident. She has said about offence committed by appellant. There was no exaggeration, embellishment or contradiction, in her testimony. This was corroborated by medical testimony. Formal witnesses have supported prosecution case. Hence, trial Court has rightly convicted and sentenced under impugned judgment. Appeal be rejected.

11. Section 363 I.P.C. provides:- "whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." Kidnapping from lawful guardianship has been defined under Section 361 I.P.C. that "whoever takes or entices any minor under sixteen years of age, if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship, i.e. for punishment of offence under Section 363 I.P.C." Section 361 I.P.C. and its ingredients are to be proved, which requires taking or enticing of a minor under 16 if male and under 18 if female, from lawful guardianship or a person of unsound mind of any age, without consent of that guardian. Apex Court in **Thakorlal D. Vadgama vs The State Of Gujarat AIR 1973 SC 2313**, has propounded the words "whoever takes or entices any minor" under Section 361 I.P.C. and observed as to what actually means. According to the Supreme Court, the word "takes", does not necessarily connote taking by force and does not confined to use of force, actual or constructive. These words merely mean "to cause to woke", "to support" or "to get into possession". The gravamen of this offence under Section 361 I.P.C. lies in the taking or enticing of a minor, specified in this section out of the keeping of the lawful guardianship without the consent of such guardian.

12. On a plain reading of this Section, the consent of the minor, who is taken or enticed, is wholly immaterial, it is only the guardian's consent which takes the case within its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of minor to be taken out of the keeping of the lawful guardianship would be sufficient to attract this Section 361 I.P.C., as has been held by Apex Court in **State of Haryana Vs. Raja Ram AIR 1973 SC 819**. Prosecutrix, in her statement, recorded under Section 164 Cr.P.C. Ex. Ka-1, has said that while she was on her way to her school, where she was student of Class XI, on 17.12.2011, Teetu and Mukesh both persuaded her that they will get her employed in a job and upon their enticing, she was taken by them in an unknown village, where she was being beaten and threatened. Teetu committed rape on each day against her wishes, thereby, she became pregnant.

She, in her testimony, as PW-1 has said that Teetu @ Yogendra was residing in the same mohalla of prosecutrix, in house of Udesh Pal and on 17.12.2011 while she was on her way to her school Sir Chhoturam Girls College, Duhai, he came to her and took her under his persuasion of getting job for her. She, under his persuasion, went with him in a white colour car. She was taken in a village of Ghaziabad and thenafter was threatened. She was being beaten and subjected to repeated rape by him, resulting her pregnancy. She was with date of birth 7.5.1995. There was one other who was driving that car and while she was being taken to Delhi by train on 17.5.2011, she was apprehended at Railway Station, Murad Nagar by police. Her statement Ex. Ka-1, was recorded before Magistrate and she was medically examined by Medical Officer. In cross-examination, she has said about her school but no question about her date of birth has been asked. Hence, this date of birth recorded in High School as of 7.5.1995 is unrebutted fact.

13 . This Court in a Division Bench Judgment in **Kunwar Singh Vs. State of U.P. 1993 (3) AWC 1305** has propounded the effect of non cross-examination of witness on a fact appearing in Examination-in-Chief under Section 137 of Evidence Act and held that if some fact has been averred in Examination-in-Chief of testimony of a witness and same is not being cross examined in examination-in-cross, truthfulness of that uncontroverted part of a fact shall be accepted. In the present case, it was specifically said by this witness, in her Examination-in-Chief that she was minor, having date of birth 7.5.1995 and this fact was not cross-examined by learned counsel for the defence. Hence, this portion of fact is full truth and is to be accepted. Moreso, this is with corroboration of Certificate-cum-Mark-sheet of High School Ex. Ka-11, filed and proved on record, having date of birth of prosecutrix recorded as 7.5.1995 and this occurrence was of 17.12.2011 i.e. prosecutrix was below 18 years on above date and as per her testimony, she was enticed and taken by convict-appellant by way of persuasion for getting her engaged in a job. This was with no consent of lawful guardian, informant i.e. Roop Singh. Hence, ingredients of offence under Section 361 I.P.C. punishable under Section 363 of I.P.C. was fully proved by testimony of prosecutrix PW-1. This has further been corroborated by testimony of PW-2 Roop Singh-informant that her daughter was at her school but she did not turn up and ultimately she was apprehended by police and her date of birth was 7.5.1995, who was minor. Convict-appellant took her out of his legal guardianship without his consent and he got this case registered by presenting an application Ex. Ka-4 supported with affidavit Ex. Ka-2, 3, before the Court of Additional Chief Judicial Magistrate, Ghaziabad, under Section 156(3) Cr.P.C., which was allowed and then after this case crime number was got registered at above police station, Murad Nagar for offence of kidnapping and rape against accused persons. This witness has formally proved Ex.Ka-2, Ex. Ka-3 and Ex. Ka-4. In cross-examination, question about the siblings of this witness and difference of age amongst them have been asked but no cross-examination about date of birth of prosecutrix, said by this witness in his Examination-in-Chief, has been made by learned counsel for the defence. Thereby, this fact is unrebutted in cross-examination and a suggestive

question has been put to this witness that there had been a love affair amongst prosecutrix and accused, as a result of which, she had gone with accused and this question has been answered in negative. Meaning thereby, by this suggestive question itself, learned counsel for the defence has said that prosecutrix was taken by convict-appellant because of love affairs between them. This taking from lawful possession has been proved by this witness. Though this witness is not eye-witness account of taking, but prosecutrix, while being in company of this convict-appellant, was recovered and she had proved this taking. Hence, by factual evidence of these two witnesses, offence punishable under Section 363 I.P.C. was fully proved.

14. In medical age determination, Chief Medical Officer, Ghaziabad has held on 19.5.2012, the age of prosecutrix about 18 years. But this report was not proved before Court and as per law of Apex Court in **State of Karnataka Vs. Batra Sudhakar @ Suttham and others (2008) 11 SCC 8**, as has been quoted in the judgment of trial Court that two years on upper side for determining age of minor was not held to be proper, rather as per law of Apex Court in **Shahnawaz Vs. State of U.P. 2011 (2) DNR 626,** the age determination on the basis of High School Certificate was held to be proper, provided the same was duly proved and admissible. In the present case, the condition of proof was fulfilled by prosecution. Beside it, the testimony, of prosecutrix PW-1 as well as PW-2 informant is of this fact that date of birth of prosecutrix was 7.5.1995 and no cross-examination on this point is there. Hence, it was unrebutted testimony to be accepted as such, hence, argument of learned counsel for the appellant regarding offence punishable under Section 363 I.P.C. is not sustainable.

15. Offence punishable under Section 366 I.P.C. requires three principal ingredients (I) kidnapping or abduction to any women (II) such kidnapping or abduction must be (i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or (ii) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illegal intercourse, or (iii) by means of criminal intimidation or otherwise by enticing any women to any place with intent that she may be or knowing that she will be forced or seduced to illicit intercourse. It is immaterial whether the women kidnapped is married women or not. To bring him an offence punishable under Section 366 I.P.C., the prosecution is to prove (a) that the accused kidnapped has understood Section 360 or 361 I.P.C. or abducted the victim has understood Section 362 I.P.C.; (b) that the victim of the aforesaid kidnapping or abduction was a female; (c) that the accused during the kidnapping or abduction had intention or knew it likely that (1) such women might or would be forced to marry a person against her will, or (2) that she might or would be forced or seduced to illicit intercourse, or (3) by means of criminal intimidation or otherwise by enticing a women to go from any place with intent that she may be or knowing that she will be forced or seduced to illicit intercourse. As in the present case, prosecutrix was said to be minor, hence, regarding minor for such offence punishable under Section 366A I.P.C. As per the Apex Court in **Ramesh Vs. State of Maharashtra AIR 1962 SC**

1908, three principal ingredients are to be proved by prosecution for charge under Section 366A I.P.C. (a) that a minor girl below the age of 18 years is induced by the accused, (b) that she is induced to go from any place or to do any act, and (c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. In the present case, charge was framed for enticing and seducing minor Kumari Lalita daughter of informant Kamal Singh. Whereas neither prosecutrix is Kumari Lalita nor the informant of this case is Kamal Singh. Where from these two names came in the charge, framed? And how it is proved? is not there on record. Case crime number was lodged with regard to kidnapping of prosecutrix, a minor girl of informant Roop Singh-PW-2 and offfence of rape was committed by accused Yogendra @ Teetu with prosecutrix minor daughter of informant Roop Singh. But the charge of offence punishable under Section 366 of I.P.C. was leveled for kidnapping of minor girl Lalita daughter of Kamal Singh informant of the case, for which there is no evidence on record. Hence, finding of trial Court was apparently erroneous and regarding conviction and sentence for offence punishable under Section 366 I.P.C. for which this appeal in part is to be allowed.

16. Regarding charge No. 3 i.e. offence of rape, punishable under Section 376 I.P.C., Section 375 of I.P.C. provides "A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

(Firstly) -- Against her will.

(Secondly) --Without her consent.

(Thirdly) -- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) --With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

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

(Sixthly) -- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) --Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

17. Section 376 I.P.C. provides for punishment of rape that - (1) "Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be

for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

18. In the present case, prosecutrix as PW-1, in her testimony in Examination-in-Chief has, specifically said that she was subjected to repeated rape by accused against her wishes by use of force and threat resulting her conception of two months. She was prohibited to communicate with any other and regarding this statement, given in fact, there is no contradiction or exaggeration in Examination-in-Cross. Rather, a suggestive question has been given to PW-2 and has been argued by learned counsel for the appellant that prosecutrix was under love affair with convict-appellant and it was a consensual living and she used to have visit to convict-appellant. This defence shows that having physical relation is not being disputed rather the same is being said to be under consensual affairs. Whereas prosecutrix, by her unimpeachable testimony, has proved about forceful rape with her and this was having medical corroboration of testimony of PW-3 Dr. Surbhi Sinha, who had medically examined prosecutrix and has held her height 141 cm, her weight 41 kg. and teeth 14/14 with fetus of 16 to 18 months. Though, she was having no injury over her private part but she was subjected to physical relationship. Ex. Ka-5 and Ka-6, has been formally proved by this witness.

19. PW-4 Constable Mukesh Dabas is the formal witness, who has proved registration of this case crime number and this G.D. Entry and chick F.I.R. as Ex. Ka-7 and Ka-8, for which there is no contradiction or embellishment.

20. PW-5, is the Investigating Officer, Vijay Kumar Verma, who has proved his formal investigation of this case crime number and preparation of site map upon the pointing of witness, proved and exhibited as Ex. Ka-9, on record. Date of birth of prosecutrix to be of 7.5.1995 and she being recovered while being in possession of convict-appellant and thereby on the basis of statement recorded under Section 164 Cr.P.C. offence of rape punishable under Section 376 I.P.C. was added by G.D. Entry No. 46 on 19.5.2012. Thenafter, prosecutrix was given in possession of her mother, in accordance with order of Magistrate and investigation resulted submission of charge-sheet Ex. Ka-10, under handwriting and signature of this witness. In cross-examination dispute regarding date of birth, has not been put except that original certificate of High School was not taken on record. Convict-appellant was apprehended from Railway Station Murad Nagar on 17.5.2012 on 17:00 P.M. while he was with possession of prosecutrix. There is no embellishment, contradiction or exaggeration in testimony of this witness. He has formally proved the case of prosecution.

21. Apex Court in **Narbada Prasad vs Chhagan Lal And Ors AIR 1969 SC 393**, has held that in an appeal the burden is on the appellant to prove how the judgment under appeal is wrong? He must show

where the assessment has gone wrong? In criminal trial Apex Court in **Kali Ram vs State Of Himachal Pradesh AIR 1973 SC 2773**, has propounded that the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. In Partap vs **The State of U.P. AIR 1976 SC 966,** Apex Court has held that prosecution has to prove case beyond all reasonable doubt whereas accused is to prove only establishing preponderance of probabilities. Though Apex Court in **Shankarlal Gyarasilal Dixit vs State Of Maharashtra AIR 1981 SC 765** has propounded that feasibility of defence does not shape prosecution case and suspicion how so strong cannot take place of proof.

22. In present case, prosecution has proved its case. The argument of learned counsel for the appellant that it was single testimony of prosecutrix on the basis of which this judgment of conviction has been passed, is not of any weight because repeatedly this Court as well as Apex Court has propounded that even a singly testimony, which is unimpeachable, proves case beyond doubt, case of prosecution is not to be thrown out. Apex Court **Veer Singh and another Vs. State of U.P., 2014 (84) ACC 681** at para 17 has propounded - "Legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is not the number of witnesses, but, quality of their evidence which is important, as there is no requirement under the law of evidence, that any particular number of witness is to be examined to prove/disapprove a fact. Evidence must be weighed and not counted. It is quality and not quantity which determines the adequacy of evidence, as has been provided, under Section 134 of Evidence Act. As a general rule, Court can and may act on the testimony of a single witness provided he is wholly reliable". In this case, itself Court has propounded "testimony of a witness cogent, credible and trustworthy, having ring of truth, deserve its acceptance." In the present case, testimony of prosecutrix corroborated with unimpeachable testimony of PW-2 informant is cogent, credible and trustworthy, having ring of acceptance. Accordingly, judgment of conviction is fully based on evidence placed on record. There was no illegality or irregularity in passing of judgment of conviction regarding charge leveled for offence punishable under Sections 363 and 376 of I.P.C. Regarding Section 366 I.P.C., charge was not proved.

23. Learned counsel for convict-appellant vehemently argued about sentence, being highly excessive and not in commensurate with degree of offence. Regarding, Section 363 I.P.C., the punishment provided is up to seven years whereas trial Court has awarded sentence of three years, which is well commensurate to offence. It is neither excessive nor unwarranted.

24. Regarding Section 376 I.P.C., the minimum sentence provided for offence of rape is seven years and in case of punishment, less than seven years, Court is required to write reasons being adequate and special reasons to be mentioned in the judgment for imposing a sentence of imprisonment for a term less than seven years.

25. Apex Court in **Gopal Singh vs State Of Uttarakhand (2013) 3 SCC (Cri) 608** has propounded:-

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost

in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, etc. etc."

26 . Though in a case of rape, when an adult commits rape on a girl of tender age, deterrent punishment is called for, taking a lenient view is out of question. Once a person is convicted for offence of rape, he should be treated with heavy hands and undeserved indulgence or liberal attitude in not awarding adequate sentence is improper. As per law laid down by Apex Court in **State of U.P. vs. Babu Lal, AIR 2008 SC 582**, the adequate and proper sentencing is to be made. In the present case, convict-appellant has been sentenced with ten years rigorous imprisonment whereas award of eight years and fine of Rs. 10,000/-, and in default two years rigorous imprisonment will proved to be adequate sentence under Section 376 of I.P.C.

27. Accordingly, this appeal is to be **partly allowed** regarding conviction for setting aside conviction and sentence for offence punishable under Section 366 I.P.C., hence, the conviction and sentence awarded by trial Court is being amended as follows:-

Order

(1) Convict-appellant Yogendra @ Teetu is being convicted for offence punishable under Section 363 and 376 I.P.C. He is being sentenced with three years rigorous imprisonment and fine of Rs. 3,000/-, and in default six months additional rigorous imprisonment for offence punishable under Section 363 I.P.C. He is further being sentenced with rigorous imprisonment of eight years and fine of Rs. 10,000/-, and in default two years rigorous imprisonment for offence punishable under Section 376 I.P.C.

(2) Both of above sentences shall run concurrently and convict-appellant will be benefited with adjustment of previous imprisonment in this case crime number under Section 428 of I.P.C. He is being acquitted of the charge leveled for offence punishable under Section 366 of I.P.C.

(3) Copy of the judgment along with lower Court record be transmitted to trial Court for amendment of warrant of conviction and sentence as per above conviction and sentence and for follow up action.

(2019)10ILR A 404

APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4573 of 2011

Ram Naresh, Rajesh @ Baniya Dinesh @ Tunnu Gaur ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Noor Mohammad

Counsel for the Opposite Party:
Sri M.C. Dixit (A.G.A.)

A. Indian Penal Code, 1860 - Section 302/34, 394, 411 - Appeal is against conviction.

There is no eye witness. None has seen the accused-appellants murdering deceased. The witness of fact failed to establish last seen theory. There is no complete chain of circumstances to indicate that accused-appellants are the only person who murdered deceased. (Para 32)

Trial Court has not marshalled entire evidence on record with care and caution and is not correct in convicting appellants are entitled to benefit of doubt. (Para 33)

Jail Appeal allowed (E-2)

List of Cases Cited: -

1. Hanumant Govind Nargundkar & anr. Vs St. of M.P. AIR 1952 SC 343

2. Hukam Singh Vs St. of Raj. AIR 1977 SC 1063

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR 1984 SC 1622

4. Ashok Kumar Chatterjee Vs St. of M. P. AIR 1989 SC 1890,

5. C. Chenga Reddy & ors. Vs St. of A. P. 1996 (10) SCC 193,

6. Bodh Raj @ Bodha & ors. Vs St. of J.& K. 2002(8) SCC 45,

7. Shivu & anr. Vs Registrar General H. C. of Kar. & anr. (2007) 4 SCC 713

8. Tomaso Bruno Vs St. of U.P. (2015) 17 SCC 178

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. This Jail Appeal has been filed by accused-appellant-Ram Naresh alias Chunnu Gaur, Dinesh alias Tunnu Gaur and Baniya alias Rajesh through Jail Superintendent, Bijnor against judgement and order dated 08.07.2011 passed by Additional Sessions Judge / Special Judge, Bijnor, in Sessions Trial No. 987 of 2010 (State v. Ram Naresh alias Chunnu Gaur and Others, Case Crime No. 97 of 2010) under Sections 302/34, 394, 411 IPC, Police Station Nangal, District Bijnor convicting all three accused-appellants under Sections 302/34, 394, 411 IPC and sentenced them under Section 302/34 IPC to undergo for life imprisonment and Rs. 10,000/-. In default of fine, they shall further undergo six months' imprisonment; under Section 394 IPC for R.I. of five years and fine of Rs. 2,000/-; in default of fine, they shall further undergo two months R.I.; and under Section 411 IPC for R.I. of two years and fine of Rs. 1000/- and in default of fine, they shall further undergo one month.

2. Prosecution story, in brief, is that on 22.09.2010, PW-1 Katar Singh made a written Tehrir Ex. Ka-1 in the Police Station concerned stating that a dead body

of one young unknown person was seen, lying in the Sugarcane field near tube-well of PW-1. Its head was bleeding. There was a stone nearby the body. PW-1 suspected that he was killed by someone.

3. On the basis of Written Tehrir Ex Ka-1, chick FIR, Ex. Ka-19 was registered in Police Station concerned by Constable Clerk as Case Crime No. 97 of 2010, under Section 302 IPC against unknown accused person, entry whereof was made in General Diary, copy whereof is Ex. Ka-20 on record.

4. PW-7 commenced investigation, proceeded to spot, visited the same and prepared Site Plan Ex.Ka-13, collected blood stained and simple earth, prepared memo Ex.Ka-15. After completing entire formalities of investigation, he submitted charge-sheet Ex. Ka-17 against accused persons.

5. PW-6, under the dictation of PW-7, held inquest over dead body of unknown person, later on identified as Ajay, and prepared inquest report Ex.Ka-6 and other relevant papers thereto, body was duly sealed and sent for postmortem.

6. PW-5 Dr. Anil Kumar Agarwal conducted autopsy of dead body of Ajay, aged about 24 years, son of Ramlal Jaiswal and prepared postmortem report Ex. Ka-2, expressing his opinion that death was possible at about 1-2 days prior to postmortem due to coma and hemorrhage on account of ante-mortem injuries, Doctor found following ante-mortem injuries on the body of deceased, which read as under :-

i. Lacerated wound 2cm x 1cm on the right eyebrow.

ii. Lacerated wound 3cm x 1cm on the right side of the head above 6 cm right ear.

iii. Lacerated wound 6cm x 2cm on the ocipital region.

iv. Lacerated wound 3 cm x1 cm on the left side of face on the mandible region.

7. Case, being exclusively triable by Court of Sessions, was committed to Sessions Judge. After making compliance under Section 207 Cr.P.C. by Chief Judicial Magistrate concerned, case was committed to Sessions Judge, Bijnor.

8. Trial Court framed charges on 29.01.2011 against accused Ramnaresh and Baniya alias Rajesh under Sections 302/34 and 394 IPC and accused-Dinesh under Sections 302/34, 394 and 411 IPC respectively, which reads as under :-

(A) *"I, S.C. Batra, Sessions Judge, Bijnor, do hereby charge you Ramnaresh @ Chunnu Gaur, and Baniya @ Rajesh @ Mohan @ Babu as follows :*

Firstly*-That both of you along with co-accused Dinesh @ Dunnu Gaur on the intervening night of 21/22.9.2010 at some unknown time in the sugarcane field of one Katar Singh of Jangal village Jeetpur Khas, P.S. Nangal, District Bijnor in furtherance of your common intention knowingly in intentionally did commit murder by causing the death of Ajay and thereby you committed an offence punishable under Section 302 read with Section 34 I.P.C. and within the cognizance of this Court.*

Secondly*- That both of you along co-accused Dinesh @ Dunnu Gaur*

on the aforesaid date, time and place committed loot of mobile phone (Nokia), and Rs. 1000/- cash from Ajay in committed murder of said Ajay and thereby you committed an offence punishable under Section 394 I.P.C. and within the cognizance of this Court.

And I hereby direct that you be tried on the said charge."

(B) *I, S.C. Batra, Sessions Judge, Bijnor, do hereby charge you Dinesh @ Dunu Gaur as follows :*

Firstly*-That you along with co-accused Ramnaresh @ Chuunu Gaur and Baniya @ Rajesh @ Mohan @ Babu on the intervening night of 21/22.9.2010 at some unknown time in the sugarcane field of one Katar Singh of Jangal village Jeetpur Khas, P.S. Nangal, District Bijnor in furtherance of your common intention knowingly and intentionally did commit murder by causing the death of Ajay and thereby you committed an offence punishable under Section 302 read with Section 34 I.P.C. and within the cognizance of this Court.*

Secondly*-That you along co-accused Ramnaresh @ Chunnu Gaur and Baniya @ Rajesh @ Mohan @ Babu on the aforesaid date, time and place committed loot of mobile phone (Nokia), and Rs. 1000/- cash from Ajay and committed murder of said Ajay and thereby you committed an offence punishable under Section 394 I.P.C. and within the cognizance of this Court.*

Thirdly-*That on 27.9.2010 at about 8:00 a.m at platform of Railway Station Najibabad, P.S. Najibabad, District Bijnor you dishonestly retained stolen property viz Rs. 440/- and mobile phone (Nokia-1209) belonging to Ajay (deceased), knowing the same, to have been transferred in commission of loot and thereby you committed an offence punishable under Section 411 I.P.C. and within the cognizance of the is Court.*

And I hereby direct that you be tried on the said charge."

9. Accused-appellants pleaded not guilty and claimed trial.

10. In order to substantiate its case, prosecution examined as many as seven witnesses in the following manner :-

Sr. No.	Name of PW	Nature of witness	Paper proved
1	Katar Singh	Formal	Ex.Ka-1
2	Babu Lal Jaiswal	Fact	-
3	Amit Kumar Jaiswal	Fact	-
4	Chandra Prakash	Formal	Panchnama
5	Dr. Anil Kumar Agarwal	Formal	Ex.Ka-2
6	Madan Pal Singh	Formal	Ex. Ka-6
7	Nanak Chand	Formal	-

11. In the statement under Section 313 recorded by Trial Court, explaining entire evidence and other incriminating circumstances, accused -appellants denied prosecution story in toto. Entire story is said to be wrong, they claimed false

implication but did not choose to lead any defence evidence.

12. Ultimately, case came to be heard and decided by Additional Sessions Judge / Special Judge, Bijnor, who after hearing learned counsel for parties and analysing entire evidence (oral and documentary) led by prosecution, found accused-appellants guilty, convicted and sentenced, as stated above.

13. We have heard Sri Noor Mohammad, learned Advocate for appellant 1-Ram Naresh and learned Amicus Curiae for appellants 2 and 3, and Sri M.C. Dixit, learned AGA for State and traveled through record with valuable assistance of learned counsel for parties.

14. Learned counsel for accused-appellants assailed order of conviction and sentence, took us through the record and advanced following submissions :-

i. There is no eye witness of occurrence. Case rests upon the circumstantial evidence i.e. last seen theory and recovery of Mobile.

ii. Accused-appellants have been implicated in the present crime on the basis of disclosure statement of co-accused and recovery of one Mobile allegedly belong to deceased.

iii. There is no motive of incident to accused-appellants to commit present crime.

iv. Prosecution failed to establish the recovery of Mobile allegedly belong to deceased.

v. There are several contradictions in the statements of prosecution witness, which may dent prosecution case.

vi. Prosecution has failed to establish its case beyond reasonable doubt against accused-appellants and they are entitled to get benefit of doubt.

15. Learned A.G.A. vehemently opposed submissions made by learned counsel for accused-appellants, submitted that prosecution case rests upon the circumstantial evidence based on last seen theory and recovery of one Mobile allegedly belong to deceased; there is no reason to witnesses PW-2 and PW-3 to connect accused-appellants falsely in the present case, This is a case of circumstantial evidence, in which, Ajay was assaulted and assassinated by accused-appellants, thus prosecution proved its case beyond all shadow of reasonable doubt and appeal is liable to be dismissed.

16. Although place, time and date of occurrence, nature of injuries found on body of deceased, have not been disputed from the side of accused-appellants but according to learned Advocate they are not responsible for murder of Ajay. Even otherwise from evidence of PW-1, 4, 5, 6 and 7, it is established that Ajay was assassinated at the time, date, place and in the manner, as stated by prosecution.

17. Thus the only question remains for consideration is "whether accused-appellants committed murder of Ajay and Trial Court rightly convicted them or not?"

18. We may now briefly consider evidence led by prosecution. PW-1 is not witness of incident. He deposed that on

22.09.2010 at about 2-2:30 p.m. he went to his tube-well where he saw a dead body of young unknown person in Sugarcane field near Tube-well with a blood stained Danda, one blood stained stone and head was bleeding. He suspected that he was killed by someone with stone, which was lying there. He wrote a Tehrir Ex. Ka-1 and presented in Police Station concerned for information. PW-2 Babulal Jaiswal happens to be Uncle of deceased Ajay, deposed that on 19.09.2010, his nephew Ajay went along with accused Ramnaresh, Dinesh and Baniya to work as labour. Amit told him that on 22.09.2010, Ajay informed him that he along with three accused arrived at Najibabad. Later on, Amit was informed by Police that dead body of Ajay was kept in the district hospital Bijnor. Thereafter, he along with PW-3 and one Kailash came to District Hospital Bijnor and identified the dead body as Ajay and received it. Witness withstood cross-examination in which he admitted that he did not see anybody assaulting Ajay. He did not have any receipt of Mobile, which is alleged to be of Ajay.

19. PW-3, Amit Jaiswal, happens to be younger brother of deceased Ajay, deposed that on 19.09.2010 his brother (victim) came to Chandela from his house along with accused Ramnaresh, Dinesh and Baniya. Thereafter, they came to Najibabad. At that time victim was having Rs. 3,000/-, one Mobile Nokia Type-1269, No. 9977563773. He received the information by Police regarding murder of his brother through telephone on 21.09.2010 whereupon, he along with his uncle Babulal, PW-2, and one Kailash reached in the intervening night of 23/24.09.2010 at District Hospital, Bijnor through Max (a four wheeler vehicle). In District Hospital, he and his uncle identified dead body as that of Ajay. This witness withstood cross-examination in which, he stated that accused Ramnaresh, Dinesh and Baniya took Ajay from his house on 19.09.2010 at about 6:00 a.m. when there was nobody in his house. He did not leave his brother at Railway Station. Nobody has assaulted his brother Ajay before him.

20. According to Advocate for defence, PW-2 and 3 did not see victim Ajay in the association of accused-appellants. PW-2 and 3 are only the witnesses of last seen but they did not clearly state that accused-appellant took victim in their presence or they have last seen victim in the association of accused persons.

21. We are also of the view that both the witnesses PW-2 and 3 did not see Ajay in the company of accused-appellants last time. There is no other evidence to establish the theory of last seen.

22. PW-6 deposed that on 22.09.2010, he was posted in Police Station Nangal. On that day, at about 4:00 p.m., he under the direction of PW-7 held inquest over the dead body of one unknown person, prepared inquest report Ex. Ka-6, handed over dead body to Constable Vijendra and Jaiveer for postmortem. At the time of inquest, two railway tickets, from Allahabad to Najibabad dated 20.09.2010, along with one plain paper containing Mobile No. 9685731879 belonged to PW-3, Amit Jaiswal, were recovered from the right pocket of Pant of deceased. Mobile number was contacted through the Mobile number of S.O., PW-7, and found it

belonged to Amit Jaiswal. He was informed whereabouts of deceased who was identified as Ajay. Amit told that victim had gone to Haridwar with Dinesh and his two other colleague for doing service, 3-4 days ago. Thereafter, he along with other Police Officials on the information of Informer, arrived at Najibabad Railway Station and arrested accused-Dinesh and on his search, recovered one Nokia-1209 of black-cocacola colour allegedly belong to deceased without any SIM from right pocket of his Pant. It is further deposed by PW-6 that accused-Dinesh confessed his guilt admitting assassination of Ajay by him along with other two accused-appellants. In cross-examination, witness admitted that during the course of inquest, Amit was contacted by PW-7 and that kind of Mobile can easily be available in market.

23. According to Advocate for defence, Mobile recovered from possession of accused-Dinesh could not be got identified by any witness or any family member of deceased. There is no cogent evidence that Mobile which is said to be recovered from the possession of accused belonged to deceased-Ajay. Witness of recovery of Mobile have also not been produced in the Court, therefore, recovery could not be established by prosecution. We find substance in the submission of learned counsel for accused-appellants for the reasons that Mobile could not be got identified by any of the witness led by prosecution so as to prove that it belong to Ajay. Witness of recovery could be produced by prosecution but not.

24. In case in hand there is no eye witness of occurrence. Case of prosecution rests on circumstantial evidence. There cannot be any dispute as to the well settled proposition that the circumstances from which the conclusion of guilt is to be drawn must or "should be" and not merely "may be" fully established. The facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explicable through any other hypothesis except that the accused was guilty. Moreover, the circumstances should be conclusive in nature. There must be a chain of evidence so complete so as to not leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must show that in all human probability, the offence was committed by the accused.

25. In ***Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343,*** a basic judgment of Supreme Court on appreciation of evidence, when a case depends only on circumstantial evidence, where Court said:

*"... c**ircumstances should be of a conclusive nature** and tendency and they should be s**uch as to exclude every hypothesis but the one proposed to be proved**..... it must be such as to show that **within all human probability the act must have been done by the accused."***

26. In ***Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063***, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

27. In ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,*** Court, while dealing with a case

based on circumstantial evidence, held that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The ***circumstances concerned 'must or should' and not 'may be' established***

(2) the facts so established should be consistent only with the ***hypothesis of the guilt*** *of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a ***chain of evidence so complete as not to leave any reasonable ground*** *for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (emphasis added)*

28. In ***Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,*** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and,

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(emphasis added)

29. In ***C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193,*** Court said:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused *and totally inconsistent with his innocence." (emphasis added)*

30. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court said :

*"(1) the **facts** alleged as the b**asis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the b**urden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence** must be adduced which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation,** upon any other reasonable hypothesis than that of his guilt,*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

31. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in ***Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.***

32. In the present case, there is no eye witness. None has seen the accused-appellants murdering deceased-Ajay. PW-2 and 3 failed to establish last seen theory. Mobile recovered could not be got proved to be of deceased-Ajay. There is no other evidence on record to connect accused-appellants with the present crime. Hence it can be said that crime could have been committed by somebody else. There is no complete chain of circumstances to indicate that accused-appellants are the only person who murdered Ajay.

33. Looking into entirety of facts and circumstances of the case, as discussed above, we are of the view that Trial Court has not marshalled entire evidence on record with care and caution and is not correct in convicting accused-appellants, solely relying on last seen theory and recovery of Mobile, as stated by prosecution, that too not supported by any other witnesses, overlooking other major contradictions in their evidence and missing chain of circumstantial evidence. In our view, accused-appellants are entitled to benefit of doubt and it cannot be said that prosecution has been successful in proving guilt of accused-appellants beyond reasonable doubt.

34. In the result, **appeal succeeds and is allowed.** Impugned judgment and order dated 08.07.2011 passed by Additional Sessions Judge / Special Judge, Bijnor, in Sessions Trial No. 987 of 2010 is hereby set aside. Accused-appellants are acquitted of charges leveled against them. They are in jail and shall be released forthwith, if not wanted in any other case.

35. Keeping in view provisions of Section 437-A Cr.P.C., accused-appellants are directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellants on receipt of notice thereof shall appear before Hon'ble Supreme Court.

36. Lower Court record along with a copy of this judgment be sent immediately to District Court concerned for compliance and further necessary action.

37. Before parting, we provide that Sri Noor Mohammad, Advocate, who has appeared as Amicus Curiae for appellants 2 and 3 in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)10ILR A 412

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAM KRISHNA GAUTAM, J.

Jail Appeal No. 2314 of 2013

Mubarak Ali ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Araf Khan, Sri Brijesh Chand Kaushik, Sri Lihazur Rahman Khan, Sri Noor Mohammad

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 -Sections 302, 504 and 506 - Appeal against conviction - Ocular testimony of the injury caused by the appellant upon informant cannot be said to be incorrect are discredit worthy and on the other hand entire evidence is consistent and duly corroborated the FIR version.

B. Indian Evidence Act, 1872 – Section 27 - How much information received from accused may be proved Section 27- Sections 25 and 26 provide that no confession made to the police officer whether in custody or not can be proved against the accused. Section 27, is proviso to above Sections and statement even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against accused in the circumstances stated in Section 27.

It is settled law that not the number of witnesses, but their quality which is material. Non examination of one or more witnesses will not help an accused if the evidence adduced by prosecution is sufficient to prove the charge leveled against the accused. (Para 35)

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Delhi Administration Vs Bal Krishan & ors. 1972(4) SCC 659

2. Mohmed Inayatullah Vs The St. of Mah. 1976 (1) SCC 828

3. Bodh Raj @ Bodha & ors. Vs St. of J&K 2002(8) SCC 45

4. Criminal Appeal No. 1333 of 2009 Raju Manjhi Vs St. of Bihar

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This Jail Appeal under Section 383 Cr.P.C. has been preferred by accused-appellant Mubarak Ali through Jail Superintendent, Aligarh against judgment and order dated 23.10.2012 passed by Sri Vinod Kumar-II, Additional Session

Judge, Court No. 3, Hathras. By the impugned judgment, accused-appellant has been convicted under Sections 302, 504 and 506 I.P.C. He has been sentenced to undergo life imprisonment under Section 302 Cr.P.C. with a fine of Rs. 5,000/- and in default of payment of fine, he has to further undergo three months additional imprisonment. Further, under Sections 504 and 506 I.P.C. he has been sentenced to undergo 2 years and 7 years Rigorous Imprisonment (hereinafter referred to as "R.I.") respectively. All the sentences were ordered to run concurrently.

2. Prosecution story as evident from First Information Report (hereinafter referred to as "FIR") as well as material available on record are as follows.

3. A written report (Ex.Ka-1) was presented in P.S. Sadabad, District Mahamaya Nagar by PW-1, Sugriva Singh Rawat, on 12.01.2008 stating that he is resident of Nai Basti, Eidgah. Some unsocial elements used to visit the house of his neighbor Mubarak Ali to which Informant, PW-1 had been objecting and on account thereof accused Mubarak Ali bore enmity with Informant's family. On the fateful evening, i.e., 12.01.2008, at about 6.00 PM Informant's son, Manveer Singh, had gone to the shop of Lala for purchasing certain commodities. Accused-appellant Mubarak Ali, resident of Nai Basti, Eidgah, owing to aforesaid enmity, lay in ambush in the way and assaulted his son with knife with intention to kill him. His son raised an alarm, whereupon Informant, his another son, PW-2 Rajveer Singh, Informant's wife, Smt. Phoolwati, PW-3 Bhagwan Das, son of Ram Vilas, resident of village Sarauth, Dilip Sharma, son of Satish Chandra Sharma and several other persons, who were present nearby the place of occurrence, rushed to the spot. Seeing witnesses reaching the spot, accused-appellant inflicted several knife blows and saying that though he (Manveer Singh) escaped that day but would not be saved in future, fled away. PW-1 Informant along with family members and neighbor took injured Manveer Singh to Sadabad Government Hospital in a serious condition. Condition of injured being precarious, he was referred to Agra. Informant then went to Police Station for lodging FIR. On the same day another application (Ex.Ka-2) was also given at Police Station Sadabad to the effect that while carrying injured to Agra for treatment, he succumbed to his injuries at about 8.30 PM near Bhagwan Talkies, Agra.

4. On the basis of written report (Ex.Ka-1), PW-6 Constable Shivpal Singh registered a case at Case Crime No. 16 of 2008 under Sections 504, 506 I.P.C. and prepared chik FIR (Ex.Ka-10). He also made entry of the case in General Diary, a copy of which has been filed in Court as Ex.Ka-11. Immediately on registration of the case, investigation was undertaken by PW-5, S.S.I. Satish Chandra, who proceeded to place of occurrence and, prepared site-plan (Ex.Ka-5). He also took sample of blood and simple earth,packed in separate packs, sealed them and prepared recovery memo (Ex.Ka-3). He prepared inquest report (Ex.Ka-6) on 13.01.2008 in Tehsil Campus, Sadabad. In the opinion of Investigating Officer as well as witnesses of inquest, death had occurred due to injuries sustained by deceased. Thereafter he sealed dead body and sent the same to District Hospital for post mortem after

necessary documentation, through Constable Ashok Kumar and Jitendra Kumar.

5. Autopsy on the dead body of deceased Manveer was conducted by PW-4, Dr. A.K. Paliwal on 13.02.2008 at about 1.00 PM. According to Doctor, the deceased was of average body built and aged about 15 years; rigor mortis was present all over the body and about half a day had passed since his death. He found following ante mortem injuries on the person of deceased:

(1) ***Punctured wound*** *3.5X2 cm, cavity* ***deep on front of right side of chest,*** *8 cm below right nipple at 5'O clock position.*

(2) ***Incised would*** *4x1 cm, muscle deep on front of* ***left palm, medial side***

(3) abrasion 1 x ½ cm on back of right hand.

6. On internal examination, membranes were found pale. Right pleura was found punctured and clotted blood were present; right lung (lower lobe) punctured; heart was empty; abdominal peritoneum was punctured; abdominal cavity contained clotted blood; teeth 15x15; stomach contained 150 gram pasty food material; lever was punctured; gall bladder was half full; spleen and both kidneys were pale and urinary bladder was empty. In the opinion of Doctor, death was caused due to shock and hemorrhage on account of ante mortem injuries. He prepared post-mortem report (Ex.Ka-4) and after sealing the dead body as well as clothes of deceased (10 in number), he handed over the same to the Constables who had brought the dead body.

7. Subsequently, PW-5, S.I. Satish Chandra was transferred and investigation was undertaken by PW-8 Rakesh Chandra Sharma. He recorded statements of witnesses, arrested the accused and after conclusion of investigation submitted Charge-Sheet No. 18 of 2008 (Ex.Ka-15) in the Court of Chief Judicial Magistrate, Hathras who took cognizance of the offence on 04.03.2008.

8. The case being triable by Court of Sessions, was committed to Sessions Court on 04.04.2008. Learned Sessions Judge, Hathras framed charges against accused-appellant on 26.05.2008 as under:

''मैं, अनन्त कुमार, सत्र न्यायाधीश, हाथरस आप अभियुक्त को निम्न आरोपों से आरोपित करता हूँः–

प्रथम– यह कि दिनांक 12–01–2008 को समय करीब 6.00 बजे शाम स्थान लाला की दुकान स्थित नई बस्ती, ईदगाह, कस्बा सादाबाद जिला हाथरस में आपने साशय व जानबूझकर वादी के पुत्र मनवीर सिंह को छुरा भोंक कर, चोट पहुँचाकर गम्भीर रूप से घायल कर दिया जिसके कारण इलाज के दौरान उसकी मृत्यु हो गयी। इस प्रकार आपने ऐसा मानव वध किया जो हत्या की परिधि में आता है। अतः आपने धारा–302 भा.द.सं. के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में हैं।

द्वितीय– यह कि उपरोक्त दिनांक, समय व स्थान पर आपने वादी के लड़के मनवीर सिंह को गाली गलौज करके इस आशय से अपमानित किया कि वह प्रकोपित होकर लोक शान्ति भंग करता। इस प्रकार आपने धारा–504 भा.द.सं. के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

तृतीय– यह कि उक्त दिनांक, समय व स्थान पर आपने मनवीर सिंह को भविष्य में जान से मारने की धमकी देकर आपराधिक संत्रास कारित किया। इस प्रकार आपने धारा–506 भा.द.

सं. के अन्तर्गत दण्डनीय अपराध कारित किया जो इस न्यायालय के प्रसंज्ञान में है।

एतद्द्वारा आपको निर्देशित किया जाता है कि उक्त आरोप के तहत आपका विचारण इस न्यायालय द्वारा किया जाएगा।''

"I, Anant Kumar, Sessions Judge, Hathras charge you accused Mubarak Ali with the following charges:

Firstly, that you on 12.01.2008 at about 6.00 PM at the Shop of Lala situated in Nai Basti Eidgah, Quasba Sadabad, District Hathras intentionally and deliberately inflicted grievous injuries to Manveer Singh, son of informant by stabbing knife on him, on account of which, during course of treatment, he died. Thereby, you committed homicide which falls within the category of murder and, therefore, you have committed an offence punishable under Section 302 I.P.C. which is within the cognizance of this Court;

Secondly, on the aforesaid date, place and time you intentionally insulted informant's son Manveer Singh knowing that it might have provoked him to break the public peace. Thereby, you have committed an offence punishable under Section 504 I.P.C. and within the cognizance of this Court.

Thirdly on the aforesaid date, place and time, by threatening Manveer to kill him in future, you committed criminal intimidation. Thereby you have committed an offence punishable under Section 506 I.P.C. and within the cognizance of this Court.

I hereby direct you be tried by this Court for the aforesaid charges." (English Translation by Court)

9. The accused-appellant pleaded not guilty and claimed to be tried. In support of his case, prosecution examined in all 8 witnesses, out of which PW-1, Sugriva Singh, PW-2 Rajveer Rawat, PW-3 Bhagwan Das and PW-7 Sanjay Singh alias Sanju are witness of fact. Rest are formal witnesses. PW-4 is Dr. A.K. Paliwal, who had conducted autopsy over the dead body of deceased Manveer and has proved Post-mortem report (Ex.Ka-4). PW-5, S.S.I., Satish Chandra is first Investigating Officer, who has proved site plan (Ex.Ka-5), recovery memo (Ex.Ka-3) in respect of blood stained and simple earth' inquest (Ex.Ka-6) and other documents prepared by him. He has also proved material Exhibits before the Court including clothes of the deceased. PW-6 Constable Shivpal Singh had registered FIR at Case Crime No. 16 of 2008 on presentation of written report (Ex.Ka-1) by Informant PW-1 and had prepared chik report and made entry of the crime in General Diary. He has proved copy of chik FIR (Ex.Ka-10) as well as G.D. (Ex.Ka-11). PW-8 Rakesh Chandra Sharma is second Investigating Officer who had arrested the accused-appellant and after conclusion of investigation, submitted charge-sheet (Ex.Ka-15) in Court.

10. After closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded. He stated to have been falsely implicated in the case and that prosecution witnesses in connivance with Informant are deposing falsely. He is not aware of the injuries sustained by the deceased. He did not adduce any oral evidence in support of defence.

11. After hearing counsel for parties, Trial Court recorded verdict of conviction against accused-appellant and sentenced him as stated above.

12. Trial Court relied on ocular version of PW-1, PW-2 and PW-3 that

incident took place before them and they are witnesses of incident of accused-appellant causing injuries to Manveer which ultimately proved fatal causing his death while he was on the way for Hospital. It has also observed that minor inconsistencies and contradictions were not material and substantial so as to discredit ocular version of aforesaid three witnesses. Witnesses proved that on 12.01.2008 Manveer had gone to the shop of Lala for some purchases at about 6.00 PM when Mubarak Ali caught him and attacked with knife. First attack was taken by Manveer on his hand resulting injury on his hand and second attempt was on his chest. This evidence of PW-1 and PW-2 is duly corroborated by medical evidence also. The mere fact that PW-1 is father and PW-2 is brother of deceased per se is not sufficient to reject oral and ocular testimony of PW-1 and PW-2, in absence of further material to show that any of the aforesaid witnesses has any reason to give false statement and implicate accused-appellant falsely. The above oral evidence is consistent with FIR version. It has also observed that though there is no evidence of availability of light at place of incident, but time of incident being around 6.00 PM in the evening and it is true that some darkness followed in winter season at that point of time but accused-appellant is neighbor of Informant, PW-1 Sugriv Singh, and such person could have been easily recognized even if there is some darkness since person is well known. This fact is not sufficient to discredit the ocular version of witnesses. PW-2 being son of PW-1 was well acquainted with Manveer and, therefore, could have easily identify him even when incident took place in the late evening in winter season, i.e., around 6.00 PM. Site plan also shows that shop of Lala was near the place of incident. It has also relied on discovery of weapon, i.e., knife on the information given by accused-appellant in custody and said knife in forensic examination was found to have stains of human blood.

13. Though in case of eye-witness motive loses its importance but when motive is shown, it has to be proved. PW-1 has clearly said that accused-appellant had a suspicion that his wife used to talk with deceased Manveer Singh and had some illicit relations with him; accused-appellant also had nexus with unsocial elements who use to visit his residence regularly. On this aspect, Court below not find anything otherwise extracted by defence in cross-examination. A person may show a criminal behavior for various reasons and it cannot be said that a particular fact will not cause any reason of enmity or motive to commit a crime. Therefore, Trial Court held that motive was also proved by prosecution witnesses. Though incident took place around 6.00 PM, but Manveer Singh died at around 8.30 when he was being taken to Hospital at Agra. Nature of injuries shows that there was intention of accused-appellant to kill the deceased. Therefore, on the basis of ocular version of PW-1, PW-2 and PW-3; discovery of weapon of crime, i.e., knife on the information given by accused-appellant while in custody and forensic report proving that weapon had human blood on it, Trial Court held that prosecution has successfully proved case beyond reasonable doubt. Accused-appellant in the statement under Section 313 Cr.P.C. though denied entire incident and claimed that he was falsely implicated but could give no such reason as to why he was falsely implicated and also did not produce any evidence in defence, hence prosecution case remained un-rebutted.

14. Feeling dissatisfied, accused-appellant has approached this Court through Jail Superintendent by means of this Jail Appeal.

15. Heard Sri Araf Khan, Advocate, assisted by Sri Lihazur Rahman Khan, Advocate, for appellant and Sri Syed Ali Murtaza, learned A.G.A. for State.

16. L earned counsel appearing for appellant argued that Court below has erred in fact and law in convicting and sentencing appellant inasmuch prosecution miserably failed to prove its case beyond doubt; there was no eye witness; evidence of the alleged eye-witnesses has been misread by Court below and there is no evidence to show that appellant attacked the deceased and caused his death. He submitted that FIR is ante time; incident is said to have occurred at 6.00 PM and FIR was lodged at 7.00 PM.; the deceased's father and brother both claimed that they were busy in taking the deceased for Hospital for treatment and this shows that FIR has been lodged subsequently.

17. Learned A.G.A. on the contrary submitted that incident was seen by deceased's father, brother and other witnesses, who deposed in the Court below and no material inconsistency has been found in their statements and coupled with the fact that weapon of crime was recovered by Police on the information given by accused-appellant when in custody clearly prove that it is only the accused-appellant who has committed crime and, therefore, prosecution has successfully proved its case beyond reasonable doubt which has been accepted by Trial Court and looking to the nature of offence, not even adequate but minimum punishment has been awarded, hence, appeal is liable to be dismissed. He further submitted that for the threat caused by appellant to the deceased openly in the market area, he has rightly been convicted under Section 504 and 506 I.P.C.

18. In order to consider the rival submissions, we have to first examine whether PW-1, PW-2 and PW-3's statement can be said to be an ocular testimony of the incident in question.

19. In the FIR, PW-1 said that Manveer went to make some purchases from shop of Lala at around 6.00 PM on 12.01.2008. The accused-appellant lay in ambush and attacked Manveer Singh with knife with an intention to kill him. FIR version further said that Manveer when assaulted by accused-appellant raised alarm and hearing it, Informant, his son Rajveer Singh, wife Smt. Phoolwati and Bhagwan Das and other persons near him ran towards the place of incident. When accused-appellant saw these persons coming, he quickly inflicted knife injuries to Manveer Singh and said that today he was saved but in future he will not and then ran away. This FIR version shows that Informant, his son Rajveer Singh and wife Smt. Phoolwati were not present near shop of Lala or where accused-appellant was hiding and waiting for Manveer. These persons ran towards place of incident when they heard alarm raised by deceased. However, Informant said that when they ran towards Manveer Singh saw accused-appellant inflicting knife injuries on the body of deceased and saying that though he (Manveer Singh) has saved that day but would not be saved in future, fled away. This part of incident was seen by Informant and others.

Informant himself is PW-1 and in cross examination he has said that he was not present at his house when incident took place. His statement in this regard reads as under:

''जिस समय घटना हुई मैं घर पर नहीं था।''

"When the incident took place, I was not at home."

(English Translation by Court)

20. He further submitted that Mubarak Ali was laying in ambush was told to PW-1 by some persons but who those persons are, has not been stated. Therefore, this statement is hearse as details of any such person giving this information has not been disclosed. However, PW-1 has clarified that in his Gali there are only two houses, one of himself and another of Om Prakash. On hearing alarm he ran towards place of incident and accused-appellant inflicted injuries by knife before him and he saw it. He clearly said that two knife injuries were caused upon deceased by appellant. There is not much cross examination on this aspect. Therefore, statement of PW-1 that injuries caused by knife on the body of the deceased which were seen by him remained uncontroverted which also prove FIR version even if other part of statement of PW-1 is not accepted.

21. PW-2 is brother of deceased. He has also stated that hearing alarm raised by Manveer Singh, Informant, Smt. Phoolwati, mother of PW-2; Dilip Sharma and Bhagwan Das ran to the place of incident and saw two knife injuries inflicted by Mubarak Ali, accused-appellant on the body of Manveer Singh, who fell near the shop of Lala after sustaining aforesaid injuries. Appellant, thereafter ran away and could not be caught. PW-2 brought Manveer Singh to Government Hospital, Sadabad where looking to his precarious condition Doctor referred him to Agra and while he was on the way to Hospital at Agra, Manveer Singh succumbed to injuries near Bhagwan Talkies, Agra. Death, therefore, obviously caused due to injuries sustained by Manveer Singh. In the cross-examination, PW-2 said that when he reached place of incident, Manveer Singh had got two injuries, one on the hand and another on the chest, and lot of blood was oozing out. It is argued that PW-2, therefore, is not a witness to the alleged infliction of knife by Mubarak Ali upon Manveer Singh. On the contrary PW-2 only saw Manveer Singh in injured condition when reached the place of incident. Here we find that reply in cross examination is obviously in the context of question asked from witness. The witness in the examination-in-chief said that on hearing alarm he ran towards place of incident from his house. There is a 20 paces distance from house of Informant to place of incident. It is a straight road as is evident from site plan. In the examination-in-chief witness said that when he was running towards deceased after coming out from house he saw accused-appellant inflicting knife injuries upon Manveer Singh and executing a threat that in future he will not be saved, accused-appellant fled away. This evidence is in the time factor when witness was running from his house to the place of incident. In the cross-examination what he said is that when he reached place of incident after covering 20 paces, there he found Manveer Singh in injured condition since by that time

accused-appellant had already fled away. If we read this statement of PW-2 in entirety and also in the light of site-plan showing that there is about 20 paces distance from the house to the place of incident, we do not find any inconsistency or material contradiction that PW-2 is not an eye-witness of the injuries caused by accused-appellant on the person of deceased. PW-2 being real brother of Manveer Singh, his conduct was natural in carrying him to Hospital at Sadabad and when Doctor referred injured person to District Hospital, Agra, PW-2 carried him to Hospital at Agra but in the mid way injured died. In our view, ocular testimony of PW-2 of injuries caused by appellant upon Manveer Singh cannot be said to be incorrect or discreditworthy and on the other hand entire evidence is consistent and duly corroborated the FIR version as well as statement of PW-1. Both witness are consistent on the fact that accused-appellant stabbed deceased twice and this is duly corroborated by medical evidence.

22. PW-3, Bhagwan Das, has also given a similar statement and he is also an eye-witness of the incident. He also came to the place of incident and this fact has been corroborated by PW-1 and PW-2 both. His ocular version prove the incident of stabbing by Mubarak Ali. The manner in which two injuries were inflicted by Mubarak Ali has also been stated by PW-3 which is consistent with ocular version of PW-1 and PW-2. The threat extended by Mubarak Ali before running away and the words uttered by him are also corroborated by ocular testimony of PW-1 and PW-2. In the cross-examination though an attempt has been made to prove that he was a chance witness. To this extent we also find that he has come to the residence of Sua Pahalwan for some work which he did not state clearly as to what for he has come though he was resident of another Village Sarauth and Sua Pahalwan was resident of village Karaiya. Even Village Karaiya is about 2 miles from place of incident. While going to Village Karaiya, he followed the way from Sadabad and in between witnessed the said incident. At one place of cross-examination he said that he heard alarm raised by Manveer Singh when he was near water tank and then he reached the place of incident where 10-15 people were present and injured was bleeding. Then he also accompanied injured to Hospital where they reached around 7.00 PM. This part of cross examination of PW-3 shows that he had no occasion to see accused-appellant inflicting injuries by stabbing with knife and on the contrary after hearing alarm when he reached the site 10-15 people were already present. In the light of these facts, we find it difficult to accept testimony of PW-3 as an ocular testimony to the incident of stabbing by knife on Manveer Singh by Mubarak Ali and it appears that PW-3 reached the site after Manveer Singh had fled away and in cross-examination this statement has been given by PW-3 on the information he received but he himself is not an eye witness to this fact. He only saw Manveer Singh in an injured condition and thereafter took him to Hospital wherefrom he was referred to Agra and while in the way Manveer Singh died. Even if this part of statement of PW-3 that he saw Mubarak Ali inflicting knife injuries upon Manveer Singh is excluded still we find that oral testimony of PW-1 and PW-2 on this aspect is very clear and there is no material contradiction to discredit their testimony, and subsequent part is corroborated by PW-3.

23. Then there is another relevant aspect, i.e., discovery of knife used in the crime on the information given by accused-appellant. This fact has been proved by PW-7, Sanjay Singh, who is witness to the recovery memo. An attempt was made to argue that PW-7 was an interesting witness and relative of deceased but this fact has been clearly denied by PW-7.

24. PW-8, Investigating Officer, Rakesh Chandra Sharma, has also proved arrest of appellant on 17.01.2005. When statement of accused was recorded, he gave information and thereafter caused discovery of knife used in the crime. On this aspect we do not find anything extracted by defence in cross examination to discredit the above witness.

25. This part of evidence that weapon used in the crime in question was recovered on the information given by accused-appellant is admissible in evidence under Section 27 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872"). Section 27 of Act, 1872 provides for how much of information received from accused who is in custody of police may be proved. It reads as under:

"27. How much of information received from accused may be proved.-- *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

26. Aforesaid provision is by way of proviso to Sections 25 and 26 of Act, 1872. An statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused.

27. In **Delhi Administration vs. Bal Krishan and Ors., 1972(4) SCC 659** Court said that Section 27 permits proof of so much of information which is given by persons accused of an offence when in custody of a Police Officer as relates distinctly to the fact thereby discovered, irrespective of whether such information amounts to a confession or not. Sections 25 and 26 of Act, 1872 provides that no confession made to a Police Officer whether in custody or not can be proved as against the accused. Section 27, therefore, is proviso to above Sections and statement even by way of confession, which distinctly relates to the fact discovered is admissible as evidence against accused in the circumstances stated in Section 27.

28. In **Mohmed Inayatullah vs. The State of Maharashtra, 1976 (1) SCC 828** Court observed that though interpretation and scope of Section 27 has been subject of consideration in several authoritative pronouncement but its application to concrete cases is not always free from difficulty. In order to make its application swift and convenient Court considered the provision again and said:

"12. The expression "Provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be seen that the first

condition necessary for bringing this section in to operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered."

29. Idea behind Section 27 has been explained by Court in para 20 of judgment in **Bodh Raj @ Bodha and Ors. vs. State of Jammu and Kashmir, 2002(8) SCC 45** as under:

"20. If all that is required to lift the ban be the inclusion in the confession information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, ***the information must come from any accused in custody of the police.*** *The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer.* ***The statement which is admissible under Section 27 is the one which is the information leading to discovery.*** *Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words,* ***the exact information given by the accused while in custody which led to recovery of the articles has to be proved.*** *It is, therefore, necessary for the benefit of both the accused and prosecution that*

*information given should be recorded and proved and if not so recorded, t**he exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events**. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, **such a discovery is a guarantee that the information supplied by the prisoner is true.** The information might be confessional or non-exculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor AIR 1947 PC 67 is the most quoted authority for supporting the interpretation that the "**fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (**see State of Maharashtra v. Danu Gopinath Shirde and Ors. 2000 CriLJ 2301). No doubt, the information permitted to be admitted in evidence **is confined to that portion of the information which "distinctly relates to the fact thereby discovered".** But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." (emphasis added)*

30. Similar issue has been considered in a recent judgment of Supreme Court in **Criminal Appeal No. 1333 of 2009, Raju Manjhi vs. State of Bihar,** decided on 02.08.2018. Therein Court held that Act, 1872 provides that even when an accused being in the custody of police makes a statement that reveals some information leading to the recovery of incriminating material or discovery of any fact concerning to the alleged offence, such statement can be proved against him. Court held that recoveries of used polythene pouches of wine, money, clothes, chains and bangle were all made at the disclosure by the accused which corroborates his confessional statement and proves his guilt and such confessional statement stands and satisfies the test of Section 27 of Act, 1872.

31. In the case in hand, witness has proved the fact that on the information given by accused in custody, weapon of crime was recovered and, therefore, in our view, this fact is admissible in evidence and Court below has rightly taken the same as a relevant admissible evidence.

32. Accused-appellant was given due opportunity of defence but he chose not to give any evidence and under Section 313 Cr.P.C. his reply is evasive.

33. In these entire facts and circumstances, we are clearly of the view that Court below has rightly held that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant.

34. Learned counsel for appellant, however, argued that Smt. Phoolwati, wife of Sugriv Singh, Informant was not examined though PW-1 and PW-2 both claim that she also reached with them at the site of incident simultaneously.

Besides, Dilip Sharma was also not examined.

35. We find no substance in the above argument for the reason that it is not the number of witnesses, but their quality which is material. Non examination of one or more witnesses will not help an accused if the evidence adduced by prosecution is sufficient to prove the charge leveled against accused-appellant and, therefore, non examination of any witness per se will not be of any assistance to accused-appellant.

36. With regard to ante-timing of FIR, we find that initially Manveer Singh sustained serious injuries and he was taken to Hospital at Sadabad where, as per PW-3, they reached at about 7.00 PM when Doctor did not administer any treatment and looking to severity of injuries immediately referred them to Agra. Brother of Manveer, by a private vehicle, proceeded for Agra. In the meantime, father of deceased, PW-1, initially lodged report at Sadabad Police Station at around 7.00 PM. When distance of Police Station is about one kilometer it cannot be said that FIR is ante time. Time is mentioned approximately and when such an incident has occurred, it is not expected that every person will be taking steps by noticing exact time with a close observation of watch. Initially, report is that of an injury and that is why it was registered under Section 307, 504 and 506 I.P.C. but when Manveer Singh died at around 8.30 on the same day and his brother communicated this fact by phone to Informant, he gave this information to Police on the same day by Ex.Ka-2 and thereafter case was registered under Section 302, 504 and 506 I.P.C.

37. Looking into the evidence as discussed above there can be no doubt that it is only appellant who has committed crime in question.

38. No argument has been advanced on conviction and sentence under Section 504 and 506 I.P.C. but we have examined this aspect also. Evidence of PW-1 and PW-2, which we have already discussed above, conviction of accused-appellant under Section 504 and 506 I.P.C. also is duly proved by evidence and Trial Court has rightly given a verdict of conviction.

39. Now coming to the question of sentence, it is a matter of common knowledge that punishment should be adequate and in this regard various factors need be considered. In the present case, accused-appellant has been found guilty of murder and has committed a crime under Section 302 I.P.C. where minimum punishment is life imprisonment, therefore, punishment awarded to accused-appellant under Section 302 I.P.C. cannot be said to be illegal, erroneous or excessive. The punishment imposed upon accused-appellant under Section 504 and 506 I.P.C. also cannot be said to be excessive or unjust considering the entire evidence, as we have already discussed above. Impugned judgment and order passed by Trial Court, therefore, deserves to be affirmed.

40. In view of above discussion, the appeal is dismissed. Impugned judgment and order dated 23.10.2012 passed by Additional Sessions Judge, Court No. 3, Hathras in Session Trial No. 162 of 2008 (State Vs. Mubarak Ali) relating to Case Crime No. 16 of 2008, under Sections 302, 504, 506 I.P.C., Police Station Sadabad, District Hathras awarding sentence of imprisonment for life with a fine of Rs. 5,000-/ to accused-appellant

for the offence under Section 302 I.P.C., 2 years rigorous imprisonment for the offence under Section 504 I.P.C. and 7 years rigorous imprisonment for the offence under Section 506 I.P.C. is hereby maintained and confirmed.

41. Lower Court record alongwith a copy of this judgment be sent back immediately to Court concerned for necessary compliance. Copy of judgment be also sent to accused-appellant through the Jail Superintendent concerned for intimation forthwith.

(2019)10ILR A 424

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 1338 of 2012

Sewak ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Radheshyam Yadav (A.C.)

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 304 - Appeal against conviction.

Prosecution has brought this case before Court, as a case of direct evidence, but Trial Court, on the failure of prosecution case as direct evidence, turned it as a case of circumstantial evidence and considering the case of circumstantial evidence and convicted and sentenced accused-appellant on the basis of surmises flouting all judicial principles. (Para 30)

Neither formal witnesses nor eye witnesses supported prosecution case. There is no iota of evidence against accused-appellant to connect him with present crime or holding him guilty. (Para 29)

Jail Appeal allowed (E-2)

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellant stood for trial in Sessions Trial No. 27 of 2009 (State v. Sewak, Case Crime No. 320 of 2008), under Section 304 IPC, Police Station Shivpur, District Varanasi, in the Court of Additional District and Sessions Judge, Court No.5, Varanasi and came to be convicted by said Court, vide judgment and order dated 07.12.2011, sentencing him under Section 304 IPC to undergo imprisonment for life and fine of Rs. 50,000/-. In default of payment of fine, he shall further undergo six months' additional imprisonment. Appellant sought interference of this Court by filing this Jail Appeal from Jail through Jail Superintendent concerned.

2. Prosecution story, in brief, as came out from First Information Report (hereinafter referred to as 'FIR') and factual matrix of the case is that accused-appellant and victim-Raja Ram were detained in Central Jail, Varansi in respective cases. On 14/15.09.2008 at about 1:00 am (mid-night), prisoner-Sewak attacked victim-Rajaram with brick. Resultantly, victim sustained serious injuries on his nose and head. He was admitted in Jail Hospital but no improvement shown, hence, on

15.09.2008, he was referred to Pandit Deen Dayal Upadhyay Hospital for better treatment. On the same day, he was further referred to Shiv Prasad Gupt, Regional Hospital, Varanasi. During treatment, on 16-17.09.2008 at about 12:20 (midnight) victim-Rajaram succumbed to injuries.

3. PW-1 submitted typed written report Ex.Ka-1 through Kundan Singh (not examined) to Station House Officer, Police Station Shivpur to lodge FIR against accused-appellant. Deceased was undergoing imprisonment under Section 302 IPC in Central Jail Varanasi. PW-1, on 17.09.2008, sent another typed communication Ex.Ka-2 to Additional City Magistrate, Varanasi requesting him to conduct inquest over the dead body deceased. Both communications were also sent to Senior Officers concerned.

4. On the basis of written report Ex.Ka-1, chick FIR, Ex.Ka-4 was registered by Constable of Police Station concerned, as Case Crime No. 320 of 2008, under Section 304, IPC against accused-appellant. Entry of case was made in General Diary. Copy whereof is Ex. Ka-5.

5. PW-8, Indrasan Singh, Additional City Magistrate held inquest on the dead body of Raja Ram, got prepared inquest report Ex Ka-2 and other papers relating thereto, and sent body for postmortem.

6. PW-10, Dr. Manoj Kumar Pathak along with Dr. S.D. Verma (not examined) conducted autopsy over dead body of prisoner Rajram and prepared postmortem report Ex. Ka-11, expressing his opinion that death was possible at about 27 hours prior to postmortem due to coma and brain hemorrhage on account of serious head injuries. Doctor found following ante-mortem injuries :-

i. Lacerated wound 1cm x 3/4cm x scalp deep on the right side of forehead 2cm above right eyebrow and 4cm outer to midline.

ii. Stitch wound 3cm long on the right side of forehead 1cm above right eyebrow and 4cm outer to midline.

iii. Stitch wound 1cm in length present on left side of nose.

iv. Contusion 20cm x 11cm on the right side of face and forehead.

7 . PW-9, SI Chandra Kant Singh, commenced investigation, proceeded to spot, recorded statement of witnesses, visited place of incident, prepared site plan, Ex. Ka-9, and collected blood stained and simple earth from spot. Thereafter, he was transferred and further investigation was undertaken by SI R.N. Pandey who recorded statement of witnesses of inquest and statement of accused-appellant and after completing entire formalities of investigation, submitted charge-sheet, Ex.Ka-10, against the accused-appellant.

8. Case, being exclusively triable by Court of Sessions, was committed to Sessions Judge, wherefrom, it was transferred to Additional District and Sessions Judge, Court No.5, Varanasi for disposal in accordance with law.

9. Trial Court framed charge on 16.04.2011 against accused-appellant under Section 304 IPC, which reads as under :-

"आरोप

मैं नरेन्द्र देव मिश्र, अपर सत्र न्यायाधीश, न्यायालय संख्या–5, वाराणसी अभियुक्त सेवक पर निम्नांकित आरोप लगाता हूँ:–

यह कि दिनांक 14/15–9–2008 को समय रात्रि 1:00 बजे स्थान केन्द्रीय कारागार वाराणसी चक्र सं0 4 बैरक सं0 1 थाना शिवपुर जिला वाराणसी में आपने सामान्य उद्देश्य कि पूर्ति में सिद्धदोश बन्दी राजाराम को जान से मारने की नियत से ईंट से उसके सिर पर वार कर

प्राणघातक चोटें पहुंचाये जिसके परिणाम स्वरूप ईलाज के दौरान उपरोक्त राजाराम की मृत्यु हो गयी। इस प्रकार आपने ऐसा अपराध कारित किया जो धारा 304 भारतीय दण्ड संहिता के अन्तर्गत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

अतएव एतद्द्वारा आपको निर्देशित किया जाता है कि उपरोक्त आरोप के लिये आपका विचारण इस न्यायालय द्वारा किया जाये।

"I, Narendra Dev Mishra, Additional Sessions Judge, Court Number-5, Varanasi charge accused Sewak with following charges :-

That at 1.00 o'clock in the night of 14/15-9-2008, in Barrack No.-1, Chakra No.-4 of Central Jail, Varanasi under Police Station- Shivpur, District- Varanasi, you, in prosecution of your common object, attacked on the head of convicted prisoner Rajaram by brick with an intention to kill him and caused fatal injuries; in consequence whereof aforesaid Rajaram died during treatment. Thus you have committed such offence which is an offence punishable under Section 304 of Indian Penal Code and it is in the cognizance of this court.

Therefore it is hereby directed that you be tried by this court for aforesaid charge."

(English Translation by Court)

10. Accused-appellant pleaded not guilty and claimed trial.

11. In order to substantiate its case, prosecution examined as many as ten witnesses, out of whom PW-1, 2, 8, 9, and 10 are formal in nature and PW-3, 4, 5, 6 and 7 are witness of fact.

Sr. No.	Name of PWs	Nature of witness	Paper proved
1	Suresh Chandra	Formal	Ex. Ka-1 and 2
2	S.N. Dwivedi	Formal	Nil
3	Ramayan Giri	Fact	Nil
4	Shyam Deo	Fact	Nil
5	Putti Lal	Fact	Nil
6	Angad Dhobi	Fact	Nil
7	Sri Prakash Rai	Fact	Nil
8	Indrasan Singh	Formal	Ex.Ka-2,3,4,5,6,7 and 8
9	SI Chandra Kant Singh	Formal	Ex.Ka-9 and 10
10	Dr. Manoj Kumar Pathak	Formal	Ex.Ka-11

12. Statement, under Section 313, was recorded by Trial Court explaining entire evidence and other incriminating circumstances. Accused -appellant denied prosecution story in toto. Entire story is said to be wrong, he claimed false implication in the case and produced DW-1 and DW-2 in defence evidence.

13. unsel for parties and analysing entire evidence (oral and documentary) led by prosecution, found accused guilty, convicted and sentenced him, as stated above.

14. Sri Radhey Shyam Yadav, learned Amicus Curiae assailed impugned order of conviction and sentence, advancing following submissions :-

i. Evidently, incident took place in the mid-night in Central Jail Varnasi, where a number prisnors were detained but no one has come forward to support the prosecution case.

ii. PW-1 and 2 are not the witnesses of fact. As per prosecution story, they were not present on the spot at the time of incident.

iii. PW-3 to 6 are said to be witnesses of fact but they have not supported prosecution case and turned hostile.

iv. PW-8, 9 and 10 are formal witnesses.

v. DW-1 and 2 have not been considered properly by Trial Court. It has convicted accused-appellant on the basis of surmises. Trial Court did not appreciate evidence on record in right perspective and without application of mind convicted the accused-appellant wrongly.

vi. Impugned judgment is based on no evidence and liable to be set aside.

15. Learned AGA opposed submissions advanced by learned Amicus Curiae and submitted that accused-appellant is named in FIR. Admittedly, accused and deceased were detained in the same Barack and quarrel started between them, which resulted in death of victim. It is further submitted by him that Trial Court has rightly convicted accused-appellant.

16. Although time, date, place, nature of injuries found on the person of deceased and caused death, as stated by prosecution, could not be disputed from the side of accused but according to learned counsel for accused-appellant, he is not responsible for causing death of victim-Raja Ram. Even otherwise, from the evidence of prosecution, time, date place and death of victim stood established.

17. In the present case, only question remains for consideration is "Whether accused-appellant-Sewak is responsible for causing death of victim-Raja Ram or not?" and " Whenter Trial Court rightly convicted him or not?"

18. Now, we proceed to consider evidence of prosecution.

19. PW-1 Suresh Chandra, Senior Superintendent of Central Jail, Varanasi deposed that in the mid-night of 14/15.09.2008, accused-appellant-Sewak assaulted Raja Ram with brick, due to which, he sustained injureis on his nose and head. Victim was admitted in Jail Hospital, where from, he was referred to Deen Dayal Upadhyay Hospital for better

treatment. On the same date, victim was further referred to Shiv Prasad Gupt, Regional Hospital, Varanasi, where he underwent treatment. During treatment, victim-Raja Ram breathed last in the intervening night of 16/17.09.2008. He further deposed that on receiving information about death of victim, he submitted a written report Ex.Ka-1 through Kundan Singh, Deputy Jailer to Police Station concerned. He further deposed that deceased Raja Ram, a convict under Section 302 IPC was transferred from District Jail, Gonda. In cross examination, at page No. 23 of Paper-book, witness admitted that he had received telephonic information of incident, through Kundan Singh, Deputy Jailer at 1:45 am. When he received information, he visited spot and saw that there was injury on neck and forehead of victim and it was bleeding. Witness further deposed that after death of Raja Ram, during investigation, accused-appellant told him that Raja Ram used to abuse him continuously, therefore, he attacked him with brick. This statement of PW-1 appears to be a development because it has come into light about three years after incident and it finds no place in Ex.Ka-1.

20. PW-2, S.N. Dwivedi, deposed that in 2008, he was posted as Jailer in Central Jail, Varanasi. He was on leave on the day of incident. When he returned from leave, he came to know about incident.

21. PW-3, Ramayan Giri, deposed that on the fateful day, he was detained in Central Jail. He was sleeping on his bed No. 58 in the night of incident. At about 1:00 am, he woke up on hearing noise and saw that victim-Raja Ram was lying in injured position and many persons of Barack were present. He did not see accused-appellant-Sewak assaulting victim-Raja Ram. Witness was declared hostile on the request of prosecution and he has been cross-examined by State but nothing material could be brought so as to disbelieve his statement upon oath in examination-in-chief.

22. PW-4, Shyam Deo, deposed that he was sleeping on his bed No. 52 in the intervening night of 14/15.09.2008 and detained since 2006. In same Barack, accused-Sewak and victim-Raja Ram (both convict) were also present. At 1:00 am in night, he woke up on hearing noise and saw that there was a crowed in Barrack and victim-Raja Ram was injured. He did not see anybody attacking him. Witness was declared hostile on the request of prosecution and cross-examined by State but nothing material could be brought so as to disbelieve his statement upon oath in examination-in-chief.

23. PW-5, Putti Lal, deposed that he was in Central Jail since 2005. Accused-Sewak and victim-Raja Ram were detained in same Barrack. At about 1:00 pm, in intervening night of 14/15.09.2008, he was sleeping in Barrack. On hearing noise, he saw there were many persons in Barrack and victim-Raja Ram was lying in injured position. He did not see anybody attacking Raja Ram. He did not know how Raja Ram was injured. Witness was declared hostile on the request of prosecution and cross-examined by State but nothing material could be brought so as to disbelieve his statement upon oath in examination-in-chief.

24. PW-6, Angad Dhobi, deposed that in the intervening night of

14/15.09.2008, he was deputed to supervise circle No.4. He was also a convict in Jail. At about 1:00 am, in the intervening night, he went toilet, when he heard noise. He came from toilet and saw that victim-Raja Ram was injured and mouth was bleeding. He did not see anybody assaulting him. Witness was declared hostile on the request of prosecution and cross-examined by State but nothing material could be brought so as to disbelieve his statement upon oath in examination-in-chief.

25. PW-7, Prakash Rai, deposed that he was detained as convict in Central Jail, Varanasi in September 2008 and deputed as Chaukidar as convict. He did not see anybody assaulting victim-Raja Ram who has been injured in incident. Witness was declared hostile on the request of prosecution and cross-examined by State but nothing material could be brought so as to disbelieve his statement upon oath in examination-in-chief.

26. PW-8, Indrasan Singh, Additional City Magistrate, is an officer who held inquest over dead body of deceased-Raja Ram. Witness prepared inquest report Ex.Ka-2 and relevant papers relating thereto.

27. PW-9, SI Chandra Kant Singh, Investigating Officer of case conducted investigation and proved charge-sheet. PW-10, Dr. Manoj Kumar Pathak, conducted autopsy of dead body of deceased-Raja Ram and prepared postmortem report, Ex.Ka-11.

28. DW-1, Loha Singh, and DW-2, Sahab Patel, both convict and detained in Central Jail, Varanasi, at the time of incident, established that victim-Raja Ram and accused-appellant-Sewak were good friends. They had good relations among them. They further deposed that, at about 1:00 am, in the intervening night, they woke up on hearing noise and saw that some bricks fell down from damaged roof, where Raja Ram slept and he sustained injuries on his nose, head and mouth. These witnesses withstood lengthy cross-examination but unblemished.

29. PW-1 and PW-2, although, officers of Jail, did not speak anything against accused-appellant in their deposition. They were not present on the spot, at the time of incident. PW-8 to 10 are formal witnesses. PW-3 to 7, who were said to be present on the spot, as eye witnesses but none of them supported prosecution case. They did not say single word in their deposition against accused-appellant to implicate him. DW-1 and 2 disclosed a separate story that due to dilapidated condition of Barrack, incident happened. There is nothing on record so as to disbelieve their statements. There is no iota of evidence against accused-appellant to connect him with present crime or holding him guilty.

30. Prosecution has brought this case before Court, as a case of direct evidence, but Trial Court, on the failure of prosecution case as direct evidence, turned it as a case of circumstantial evidence and considering the case of circumstantial evidence and ignoring all principles laid down by Hon'ble Courts convicted and sentenced accused-appellant on the basis of surmises flouting all judicial principles.

31. We have deeply considered entire evidence available on file to connect accused-appellant with present

crime but find no iota of evidence to hold accused-appellant guilty.

32. We are surprised as to how without any incriminating circumstances and evidence, Trial Court has sentenced accused-appellant in a serious offence. Sentencing of accused-appellant in this manner erodes a public faith on judicial system.

33. Considering the entire facts and circumstances and evidence led by the prosecution, in entirety, we do not find any cogent and convincing evidence against accused-appellant to connect him with present crime and, in our considered opinion, accused-appellant is entitled to be acquitted.

34. Appeal is, accordingly, **allowed**. Impugned judgment and order dated 07.12.2011 passed, in Sessions Trial No. 27 of 2009 (State v. Sewak, Case Crime No. 320 of 2008), under Section 304 IPC, Police Station Shivpur, District Varanasi, is hereby set aside. Appellant is acquitted of charges levelled against him. He is in jail and shall be released forthwith, if not wanted in any other case.

35. Keeping in view provisions of Section 437-A Cr.P.C., appellant is directed to furnish a personal bond and two sureties before Trial Court to its satisfaction, which shall be effective for a period of six months, along with an undertaking that in event of filing of Special Leave Petition against instant judgment or for grant of leave, appellant on receipt of notice thereof shall appear before Hon'ble Supreme Court.

36. Lower Court record along with a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action.

37. Before parting, we provide that Sri Radhey Shyam Yadav, Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)10ILR A 430

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 5871 of 2003
&
Criminal Appeal No. 5422 of 2003

Devendra Kumar ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Mohd. Afzal (A.C.)

Counsel for the Opposite Party:
A.G.A., Sri Rishi Chadha

A. Indian Evidence Act, 1872 - Sections 118 and 134 - Neither number of witness required to prove a fact nor evidence of a witness can be rejected only on the ground of his relationship with the victim. The whole prosecution case can

be proved by a single witness if evidence is natural and trustworthy.

It is a general rule that Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise. Witnesses are closed relatives of victim, their testimonies cannot be discarded. (Para 31 & 41)

B. Indian Evidence Act, 1872 - Section 118 - Marginal variations in the statement of a witness cannot be dubbed as improvements as the same may be elaborations of the statements made earlier. Natural, minor contradictions and discrepancies in comparison to the statement recorded during examination-in-chief which do not go to the root of case, to be overlooked.

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Namdeo Vs St. of Mah. (2007) 14 SCC 150

2. Kunju @ Balachandran Vs St. of T.N. AIR 2008 SC 1381

3. Jagdish Prasad Vs St. of M.P. AIR 1994 SC 1251

4. Vadivelu Thevar Vs St. of Mad. AIR 1957 SC 614

5. Yakub Ismailbhai Patel Vs St. of Guj. (2004) 12 SCC 229

6. State of Haryana Vs Inder Singh & ors. (2002) 9 SCC 537

7. Dalip Singh Vs St. of Punj. AIR 1953 SC 364

8. Dharnidhar Vs St. of U.P. (2010) 7 SCC 759

9. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

10. Sampath Kumar Vs Insp. of Police, Krishnagiri (2012) 4 SCC 124

11. Sachin Kumar Singhraha Vs St. of M.P. (2019) 8 SCC 371

12. Smt. Shamim Vs St. of (NCT of Delhi) (2018) 10 SCC 509

13. St. Represented by Insp. of Police Vs Saravanan & anr. AIR 2009 SC 152

14. Arumugam Vs St. AIR 2009 SC 331

15. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

16. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Mah. JT 2010 (12) SC 287

17. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

18. Sham Sunder Vs Puran (1990) 4 SCC 731

19. M.P. Vs Saleem (2005) 5 SCC 554

20. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Both the aforesaid appeals arise out of a common judgement and order dated 01.10.2003 passed by Sri Rang Nath Pandey, Additional Sessions Judge, F.T.C. No.3, Muzaffar Nagar in Session Trial No.30 of 2003 (State versus Devendra and Rajpal), Police Station Bhaurakala, District Muzaffar Nagar convicting accused persons under Sections 364-A/34 and sentencing them to undergo rigorous imprisonment for life and also to pay a fine of Rs.1000/- each. In the event of default of payment of fine, they have to undergo three months additional rigorous imprisonment. Therefore, both these appeals are being decided by this common judgement.

2. From record, it appears that initially Jail Appeal No. 5871 of 2003 was filed through Superintendent, District Jail, Muzaffar Nagar on behalf of accused Devendra and the same was admitted on 18.11.2003. Thereafter on 29.10.2003, Criminal Appeal No.5422 of 2003 was filed by Advocate Nasiruzzaman on

behalf of same accused Devendra, which was admitted by this Court on 30.10.2003 and in this criminal appeal accused-appellant Devendra has been granted bail vide order dated 18.12.2003.

3. It is also relevant to mention here that co-accused Rajpal has filed Criminal Appeal No.5057 of 2003. During pendency of appeal Rajpal died, therefore, his appeal has abated vide order dated 12.02.2019 by this Court.

4 . Brief facts giving rise to the present appeal may be stated as under:-

5. A written report Ex.Ka-1 dated 02.10.2002 was presented by PW-1 Virendra Kumar Sharma at Police Station Bhaurakala, District Muzaffar Nagar, stating that his servant Devendra Kumar was living in his house for one and half months. Accused-appellant and one Rajpal son of Munshi Kumhar, at about 08:00 AM on 02.10.2002, had kidnapped his grand-daughter Mini (daughter of Sanjeev Kumar), aged about one and half years for ransom. Karan Sing and Jagendra of the same village witnessed them with Mini, boarding in the bus. Thereafter at about 09:00 AM, accused-appellant Devendra made a phone to Shahdeen at his PCO Phone No.58081 and told that he was leaving service and his shirt is hung in his Baithak, in the pocket whereof, there is a letter. On being intimated by Shahdeen, Informant took out the letter from his shirt and read it, wherein Rs.2,00,000/- was demanded.

6. On the basis of said written report Ex.ka-1; chick FIR Ex.Ka-13 was prepared by Constable Clerk Satyaveer Tyagi and registered the case as Case Crime No.88 of 2002, under Section 364-A IPC; entry of the case was made in General Diary (hereinafter referred to as "GD") by the same Clerk, copy whereof is Ex.Ka-14.

7. Abducted victim (Mini) was recovered from the possession of accused Devendra by PW-4 Sushil Kumar at Old Delhi, Railway Station.

8. Immediately after registration of case, investigation was undertaken by PW-5 SI M.M. Chaudhary who commenced investigation, took necessary papers; recorded statements of witnesses; went to spot and prepared site plan Ex.Ka-3; recorded statement of accused-appellant who was taken to Police Station by complainant himself; thereafter took letter written by Devendra in his custody, prepared fard thereof Ex.Ka-4; recorded statement of Sushil Sharma, Shardar Amar Jeet Singh, Chandralal, Neeraj, Shahdeen, Sanjay @ Sanjeev and Neetu @ Neeraj; sent letter written by accused Devendra, his specimen writing to FSL, Agra for examination.

9. After completing entire formalities of investigation, PW-5 SI M.M. Chaudhary submitted charge sheet, Ex.Ka-12, in the Court of Magistrate against Rajpal and accused-appellant Devendra under Section 364-A IPC.

10. Cognizance of the offence was taken by Magistrate concerned. After making compliance of Section 207 Cr.P.C., Magistrate committed the case of accused persons to Sessions Judge, Muzaffar Nagar for trial, who framed charge against the accused persons, namely, Devendra and Rjpal on 31.01.2003 as under:

"I S.P. Verma, Sessions Judge, Muzaffar Nagar do hereby charge you 1. Devendra S/o Sohan Prasad Teli, 2. Rajpal S/o Munshi Kumhar as follows:

That you on 02.10.2002 at about 8.00 AM from the house of complainant Virendra Kumar S/o Hukamchand situated in Village Adampur, Police Station Bhora Kalan, District Muzaffar Nagar in furtherance of common intention kidnapped Mini (aged about one and a half years) daughter of Sanjeev Kumar in order that said Mini might be murdered or might be so disposed of as to be put in danger of being murdered for ransom and thereby committed an offence punishable under Section 364-A/34 of the IPC and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge."

11. The accused-appellant denied the charge levelled against him, pleaded not guilty of charge and claimed trial.

12. To substantiate its case, prosecution examined as many as five witnesses, out of whom PWs-1 to 4 are witnesses of fact and PW-5 is formal witnesses of Police i.e. Investigating Officer. PW-1 Vinok Kumar Sharma is Informant who presented Ex.Ka-1 in the Police Station concerned; PW-2 Jagendra who has seen the accused-appellant taking the victim in his lap; PW-3 Intimated Informant about the phone made by accused-appellant and PW-4 Sushil Kumar who caught hold accused-appellant at Old Delhi, Railway Station with victim and recovered her from the possession of accused-appellant.

13 . Subsequent to closure of prosecution witnesses, statements of accused-appellant under Section 313 Cr.PC. was recorded by Trial Court, explaining entire evidence and incriminating circumstances. In the statement accused-appellant denied prosecution story in toto as usual. In response of question no.9, accused-appellant admitted that he was taken to Police Station and further he stated that he was falsely implicated in the present case. Accused-appellant examined DW-1, Dr. K.D. Sanwaliya, Medical Officer of District Hospital, Muzaffar Nagar who conducted medico examination of accused and found seven blunt object injuries on his person, prepared medical report Ex.Kha-1. Doctor found all the injuries of simple nature except injury no.7 which was kept under observation.

14. On appraisal of evidence on record and after hearing learned State counsel and counsel for accused, learned Trial Judge recorded verdict of conviction and sentence against the accused-appellant, as stated above.

15. Feeling aggrieved with the impugned judgment and order dated 01.10.2003, accused-appellant is before this Court through Jail appeal No. 5871 of 2003 and Criminal appeal No. 5422 of 2003, challenging his conviction and sentence.

16. We have heard Sri Mohd. Afzal, learned Amicus Curiae for appellant and Sri Rishi Chhadha, learned AGA for State at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

17. Learned Counsel appearing for appellant has challenged conviction and sentence of accused-appellant, advancing his submissions, in the following manners :-

i. Entire evidence has not been produced from the side of prosecution, witnesses present at the time of arrest has not been produced, therefore, presumption under Section 114(g) of the Indian Evidence Act, 1872 goes against prosecution.

ii. Prosecution story is doubtful, not worthy to credence; Prosecution had not produced independent witness; PWs 1 to 4 are interested witnesses and they cannot be termed as independent.

iii. There are many contradiction in the statement of witnesses rendering prosecution story doubtful.

iv. Accused-appellant has falsely been implicated by Informant to exploit him, being resident of Jharkhand.

v. Trial Court did not appreciate the evidence available on file in right perspective as per law. Accused-appellant is liable to be acquitted.

18. Per contra, learned AGA opposed submissions and urged that applicant is named in FIR; FIR is prompt; accused-appellant was seen with victim by PW-2 at Bus stop of the village; he has been apprehended with victim by PW-4 and his friends at Old Delhi, Railway Station on the very same day; and accused-appellant was taken to Police Station by PWs 1 to 4; there are sufficient evidence to connect accused-appellant with

19. Although time, date and place of occurrence could not be disputed from the side of defence but according to Advocate, he is not responsible for kidnapping of victim. Even otherwise from the evidence of PWs 1 to 4 time, date and place stand established.

20. Only question remains for consideration is "whether accused-appellant kidnapped victim or not and Trial Court has rightly convicted the accused-appellant or not?"

21. We now proceed to consider rival submissions on merit. It will be appropriate to briefly consider the evidence of prosecution as well as defence available on record and some important decisions on the point.

22. PW-1 Virendra Kumar Sharma deposed that accused-appellant Devendra Kumar was his servant who came to him one and half month prior to incident and accused Rajpal was resident of Adampur, Police Station Bhaurakala, District Muzaffar Nagar. At about 08:30 AM on 02.10.2002, both the accused persons kidnapped his grand-daughter Mini, aged about one and half years for ransom. Karan Singh and Jagender, resident of same village, noticed them taking his grand-daughter to Shamli by Mini Bus. Accused-appellant Devendra made a phone to him through STD of Shahdeen that he was going, leaving animals, and told that his shirt was hung in the Baithak and read the letter which is in the pocket. He took out the letter from the pocket of shirt and read over, by which an amount of Rs.2,00,000/- was demanded. The said

letter recited that if information was given to Police, his grand-daughter would have been killed. He traced out his daughter every where i.e. Shamli Railway Station and Bus Stop but found no where. He phoned his son who was residing in Delhi at that time telling about the incident and submited written report Ex.Ka-1 in Police Station Bhaurakala. That day his son Sushil Kumar and his friends apprehended accused Devendra with victim Mini on Old Delhi, Railway Station and took accused-appellant to village. He further deposed that Police got signature of accused Devendra for comparison of ransom letter before him. Later on victim was handed over to him by Police after completion of legal formalities.

23. PW-2 Jagendra deposed that on the fateful day at about 08:30 PM, he went to Bus Stop of his village for shaving, Rajpal was standing there. After 10 -15 minutes, accused Devendra reached there with a girl aged about one and half years in his lap. Both whispered and boarded the bus leading to Shamli. He came back to his house after shaving. When at about 09:30 AM there was a noise in the village that grand-daughter of Virendra has been kidnapped, he went to house of Informant and told him that accused Devendra and Rajpal proceeded towards Shamli by Bus taking child.

24. PW-3 Shahdeen deposed that on the fateful day at about 09:15 AM, he received a telephone at his PCO No.58081 by which he was told from other hand that he was the servant of Sanjay Sharma and his Kurta was hung in his Baithak, in pocket thereof, there was a letter which should be read by them. He further deposed that he told this fact to father of Sanjay and came back to his PCO. He did not know what was written in the letter.

25. PW-4 Sushil Kumar, uncle of victim, deposed that incident was of 02.10.2002. At the time of incident, he was in his house situated at Delhi, he received a phone of his father that Devendra had gone with Mini and tried to search him. He along-with his younger brother and his friends; first, went to Bus Stop, later on Old Delhi Railway Station. At about 01:30 PM when a train reached at Station, after some moment, he saw Devendra boarding the stairs with Mini. He apprehended him with the help of his friends. First of all, he took his niece in his lap. He informed his father that we are coming with Mini and proceeded at 05:30 PM to Village from Delhi and reached the village at about quarter to ten along-with his friends by Maruti Van of his friend Amarjeet.

26. All four witnesses PWs 1 to 4 have been examined at length by defence but nothing adverse material have come, so as to disbelieve statements of witnesses on oath, on the relevant points. Certainly some minor contradictions and infirmities occurred in their statements but they are not of such nature which could dent or render the prosecution doubtful.

27. Statement of PW-2 established that accused was seen going with victim Mini and boarding the bus leading to Shamli. PW-3 proved that accused Devendra made a call at his PCO intimating that his shirt was hung in the Baithak of Informant PW-1 and to see the letter written by him kept in its pocket. He informed about message to informant PW-1. On the information of Shahdeen,

PW-1 lodged an FIR against the accused appellant about the kidnapping of his grand-daughter. PW-4 on receiving the information of kidnapping of his niece Mini from his father, thereafter, made a search for girl at Bus Stop and Railway Stations along-with his friends and younger brother. He further proved that he saw the accused Devendra with Mini boarding stairs and apprehended with the help of his friends and took Mini from accused Devendra. Thereafter he went to his village by Maruti Van of his friend with Mini and accused Devendra.

28. From the statements of PWs 1 to 4, it is fully established that accused-appellant Devendra kidnapped victim Mini, grand-daughter of Informant PW-1, for ransom at the relevant time and date as stated by prosecution and he was apprehended with victim at the Railway Station of Old Delhi, on the same day.

29. Learned Amicus Curiae appearing for accused-appellant, argued that it has come in the evidence of PW-4 that accused-appellant was captured by him with the help of his friends and they came to village by Maruti Van of Amarjeet Singh but non of his friends have come forward to support prosecution story, therefore, presumption under Section 114(g) of the Indian Evidence Act, 1872 goes against him.

30. So far as the argument of learned Counsel for appellant regarding non-examination of friends of PW-4 is concerned, we are of the view that this submission is thoroughly misconceived for the reasons that prosecution is not obliged to adduce witnesses as mentioned in FIR or charge-sheet, in view of Section 134 of Indian Evidence Act,1872 (hereinafter referred to as 'Act,1872'). Section 134 of Act, 1872, reads as under:-

"134. Number of witnesses.--No particular number of witnesses shall in any case be required for the proof of any fact."

31. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872. But if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

32. In **Namdeo v. State of Maharashtra (2007) 14 SCC 150**, Court re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

33. In **Kunju @ Balachandran vs. State of Tamil Nadu, AIR 2008 SC 1381** a similar view has been taken placing reliance on earlier judgments including

Jagdish Prasad vs. State of M.P., AIR 1994 SC 1251; and Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614.

34. In **Yakub Ismailbhai Patel Vs. State of Gunjrat reported in (2004) 12 SCC 229**, Court held that :-

"The legal position in respect of the testimony of a solitay eyewitness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it."

35. In ***State of Haryana v. Inder Singh and Ors. reported in (2002) 9 SCC 537,*** Court held that it is not the quantity but the quality of the witnesses which matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

36. Learned Counsel for appellant next contended that no independent witness has been produced by prosecution. PWs 1 to 4 are interested and relative to victim, therefore, there evidence could not be termed as reliable.

37. So far as the question of relative witness and non-examination of any independent witness is concerned, we are not impressed with the submissions of learned Counsel for appellant for the reasons that it is often seen that in heinous offences like murder, dacoity, kidnapping etc., no villagers or independent witness come forward to give evidence in support of prosecution against accused-appellant due to fear of evil.

38. So far as relative witness is concerned, in **Dalip Singh v. State of Punjab, AIR,1953, SC 364**, Court has held :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

39. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true

witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

40. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308)."

41. It is settled that merely because witnesses are closed relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence.

42. Learned Counsel for appellant further contended that there are many contradictions in the statements of witnesses which rendered prosecution doubtful and accused-appellant is entitled to benefit of doubt and deserves acquittal.

43. , we have analysed entire evidence in consonance with the submissions raised by learned counsel's. All the witnesses, PWs 1 to 4 have supported prosecution case. All the four witnesses withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve their statements. There is nothing in cross-examination which may render their statements doubtful. Naturally some minor contradictions and discrepancies have occurred in their examination-in-chief but they do not go to the root of case.

44. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

45 . In **Sachin Kumar Singhraha v. State of Madhya Pradesh** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature

of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

46 . We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi**), decided on 19.09.2018.

47. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

48. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan &**

Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].

49. ore, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant and Trial Court has rightly convicted him for having committed an offence under Section 364-A read with 34 IPC.

50. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

51. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

52. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence, weapon used in commission of murder and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

53. In view of above discussion, **both the appeals lack merit and are dismissed.**

54. Accused-appellant is on bail, he shall be taken in custody forthwith to serve out the sentence awarded by learned Trial Court.

55. Lower Court record alongwith a copy of this judgment be sent back

immediately to District Court concerned for compliance and further necessary action and to apprise the accused-appellant through Jail Authority.

56. Before parting, we provide that Mohd. Afzal, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)10ILR A 441

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

Jail Appeal No.2623 of 2015

Sita Ram Sharma ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Vinay Saran (A.C.,)

Counsel for the Opposite Party:
A.G.A.

A. Indian Evidence Act, 1872 - F.I.R. is not a substantive piece of evidence.

B. Criminal Penal Code, 1973 - Section 154 - There is no time limit to lodge a F.I.R - But, if it is lodged after a long unexplained delay and after counseling and consultation, it demolishes the plinth of prosecution's castle.

In this case, F.I.R. has been lodged after seven years of the alleged occurrence. Victim has not lodged F.I.R. at Police Station. She had made a complaint to C.W.C., Varanasi only and that complaint was forwarded to police. (Para 32)

C. Criminal Procedure Code, 1973 - Section 177 & 178 - Place of Trial - Every offence must be tried by a Court within whose local jurisdiction it was committed - If a court has no jurisdiction to take cognizance and proceed with trial, whole proceeding of such trial is a nullity (para 40) If jurisdiction is not conferred by any Statute/Act, Court cannot acquire jurisdiction, suo moto or on the application of the victim or any party dealing with the case. (Para 42 & 43)

The appellant is resident of Village Nimiyatar, P.S. Dugariya, District Gaya (Bihar), he prosecuted at Varanasi. Neither investigation was conducted in place of occurrence nor evidence was produced regarding place of occurrence which shows that serious prejudice has been caused to appellant.

Jail Appeal allowed (E-2)

List of Cases Cited: -

1. Thulia Kali Vs St. of T.N. (1972) SCC (Cri.) 543

2. Manoj Kumar Sharma Vs St. of CG. (2016) 3 SCC (Crl.) 407.

3. Shri Rajendra Ramchandra Kavalekar Vs St. of Mah. & anr. AIR 2009 SC 1792

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. T he present jail appeal, under Section 383 Code of Criminal Procedure, 1973 *(hereinafter referred to as "Code')* has been filed by accused-appellant Sita

Ram Sharma (hereinafter referred to as "appellant') through Superintendent of District Jail, Varanasi, against judgment and order dated 22.5.2015 passed by Additional Session Judge (Fast Track Court, Varanasi) in Session Trial No. 181 of 2013, (State vs. Sita Ram Sharma), Police Station (hereinafter referred to as "P.S.') Cantt, District Varanasi, under Section 323/376 I.P.C., whereby, he has been acquitted for an offence under Section 323 I.P.C. and convicted and sentenced for offence under Section 376 I.P.C. for life imprisonment and fine of Rs. 20,000/-. In default of payment of fine, he has further been directed to under go for one year simple imprisonment.

2. The brief facts of prosecution case are that PW-1, victim *(name of the prosecutrix is not being disclosed in this judgment, she is being shown as "PW-1, victim')* is daughter of appellant, who is resident of Village Nimiyatar, P.S. Dugariya, District Gaya (Bihar). PW-1, victim appeared, on 29.5.2013 at 6:30 p.m., at P.S. Cantt, District Varanasi, with Sister Manju (PW-5), Director of DARE Organization (N.G.O.) 2656 C.I.M. Colony, Sikrol P.S. Cantt, and lodged First Information Report (Ex.Ka.1) *(hereinafter referred to as "F.I.R.')* addressed to Child Welfare Committee (hereinafter referred to as "C.W.C"), alleging that she had left her house in 2006 because appellant, her father, used to commit rape with her and also beat her. He also used to commit rape with her elder sister and when her elder sister happened to pregnant, he got her pregnancy aborted. In F.I.R. it has also been stated that her father, appellant used to beat her mother to such extent that her mother got mentally sick. In view of above fact, she wanted to lodge her father in jail because she did not know that her father had committed how many such offences. It was also been stated that she became so fed up with his father that she fled away, leaving her house, and is away from her house since eight years. She hates her father and wish to get her father punished with severe punishment. Upon such information, Chik F.I.R. (Ex.Ka.6) was prepared by PW-7 Const. Rajesh Kumar and the said information was entered in General Diary (Ex.ka.7). Victim was sent for medical examination and investigation was under taken by PW-4 S.I. Dhakeshwar Singh.

3 . PW1-Victim was examined by PW-6, Dr. Krishna Yadav. According to him, secondary sexual character of victim were fully developed. No injury was found either on her body or on her private part; her hymen was torn; vagina admits two fingers easily. She had prepared vaginal smear slides of victim and sent it to pathologist for examination of spermatozoa. According to her, in pathological and radiological test, no dead or alive spermatozoa were found; and as per report of Child Medical Officer (hereinafter referred to as "C.M.O"), Varanasi, victim was aged about 19 years. She prepared Medico Legal Examination Report (Ex.Ka.4/1) and its supplementary report (Ex.Ka.5) but no definite opinion regarding rape could be given.

4. During investigation, S.I. PW-4, Dhakeshwar Singh (I.O.) recorded statement of PW-1-Victim, her sister, Director NGO (PW-5) and statement of appellant-Sita Ram Sharma. Meanwhile, he was transferred and further investigation was handed over to PW-3 S.I. Shivanand Mishra who perused medical report of victim and copied it in

case diary. He produced the victim before Judicial Magistrate (ACJM-II), Varanasi, where her statement was recorded under Section 164 of Code. Meanwhile, he was also transferred and investigation was handed over to PW-2 S.I. Triveni Lal who recorded statement and asked the victim for inspection of the place of occurrence but victim did not give her consent. She was not ready to go to her village. On the request of victim, he did not transfer investigation to State of Bihar. Upon conclusion of investigation, he filed charge-sheet (Ex.Ka.4), under Section 376, 323 IPC and Sections 4/6/10 POCSO Act, 2012 before Session Judge, Varanasi, who took cognizance of the offence and transferred trial before ASJ, Court No. 9.

5. Charges were framed against appellant under Section 376, 323 IPC which read as under:-

मैं डी0डी0 ओझा, अपर सेशन न्यायाधीश, न्यायालय सं0 09, वाराणसी एतदद्वारा आप–

सीताराम शर्मा पुत्र पाण्डे शर्मा, पर निम्न आरोप विरचित करता हूँ :–

यह कि आप अभियुक्त ने आपकी पुत्री पीड़िता जो आपके साथ आपके घर ग्राम निमिया डीह, थाना डुमरिया, जिला गया (बिहार) में रहती थी, के साथ वर्ष 2006 में उसके घर छोड़कर भागने के पूर्व समय समयर यह जानते हुए कि वह उस समय 12 वर्ष से कम आयु की अवयस्क थी, के साथ बलात्कार किया करते थे। आपका यह कृत्य धारा 376 भा0द0सं0 के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

यह कि उपरोक्त अवधि में आपने अपनी अवयस्क पुत्री के साथ बलात्कार करने के लिए उसके एतराज करने पर उसे मारते पीटते थे और स्वेच्छया उपहति कारित करते थे। एतद्वारा आपका यह कृत्य धारा 323 भा0द0सं0 के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

आरोप पढ़कर अभियुक्त को सुनाया व समझाया गया, जिससे अभियुक्त ने इनकार किया और विचारण की मांग की।

एतद्वारा आपको निर्देशित किया जाता है कि उक्त आरोप में आपका विचारण इस न्यायालय द्वारा किया जायगा।

I, D.D. Ojha, Additional Session Judge, Court No. 9 Varanasi hereby charge you Sita Ram Sharma, son of Pandey Sharma as follows:-

First, That you accused in the year 2006 used to commit rape with your daughter (victim) when she resides with you in your house at Village Nimiyatar, P.S. Dungariya, District Gaya (Bihar) before her rendering away from her house, knowing that she was below the age of 12 years, and thereby committed an offence which is punishable under Section 376 I.P.C., and comes within the cognizance of this Court.

Secondly. That during aforesaid period ,in order to commit rape with your daughter, you use to beat and voluntarily causes hurt on her objection, committed such act which is punishable under Section 323 I.P.C., and is within the cognizance of this Court.

Charges were read over and explained to the accused-appellant who pleaded not guilty and claimed to be tried.

You are hereby directed to be tried for the aforesaid charges. (Translated by Court)

6. In order to prove its case, total seven witnesses were produced by prosecution. PW-1-victim, is a witness of fact whereas PW-2, S.I. Triveni Lal Singh

(I.O.); PW-3 S.I. Shivanand Mishra (I.O.); PW-4 Dharkeshwar Singh (I.O.); PW-5 Sister Manju, Incharge, DARE Institution, Varanasi; PW-6 Dr. Krishna Yadav and PW-7 Const. Rajesh Kumar are formal witnesses.

7. Upon conclusion of prosecution evidence, statement of appellant was recorded under Section 313 of Code. He denied evidence produced by prosecution and stated that he had been called from his house for a meeting with his daughter (victim) and had been implicated in false case; his daughter had fled away from his house in 2006; he made best effort to search his daughter, but could not searched her out; and now after eight years, all of sudden she had been recovered but due to mistake and conspiracy, a false case was lodged against him.

8. Pursuant to opportunity given by Trial Court to appellant, he produced DW-1 Sanju Devi and DW-2 Prabha Devi who are his daughters.

9. Upon conclusion of trial, and after hearing arguments of both the parties, appellant was convicted and sentenced as above. Aggrieved by the aforesaid impugned judgment and order, appellant has preferred this appeal.

10. Heard, Sri Vinay Saran (Amicus Curiae), Advocate appearing for appellant and learned A.G.A. for State.

11. Learned Amicus Curiae for appellant submits that F.I.R. has been lodged after eight years and no explanation has been given for such inordinate delay; sole testimony of victim is neither trustworthy nor reliable; Trial Judge has no jurisdiction to try this case and pass impugned judgment and order as the offence was caused in exclusive jurisdiction of Session Division, Gaya, State of Bihar; and no offence was committed within the jurisdiction of Session Division, Varanasi, Uttar Pradesh; ocular evidence is not supported by medical evidence; Trial Judge without discussing any merit or demerit of the case has passed the impugned judgment and order in a very cursory manner; appellant is innocent and has been falsely implicated; hence impugned judgment and order is illegal and liable to be set aside.

12. Per-contra, learned A.G.A. vehemently opposing the submission of learned Amicus Curiae, has submitted that the sole testimony of victim is sufficient for proving the case of prosecution; no further corroboration is required; though there is inordinate delay in lodging F.I.R. but it is self explained and justifiable in the facts and circumstances of this case; irregularity or jurisdictional error in conducting trial will not affect prosecution evidence; prosecution has succeeded to prove its case beyond reasonable doubt against the appellant, hence appeal is liable to the dismissed.

13. We have considered rival submissions of learned counsel for both the parties and have gone through the entire record.

14. At the very outset, it is pertinent to point out that according to prosecution case, PW1-victim is resident of village-Nimiyatar, P.S. Dungariya, District Gaya, State of Bihar. She has stated that it had been around 8-10 years, since she had left her house; behaviour of her father with

her was not good; she used to sleep at night along with her brother Pankaj and her father, appellant, together; when they fell asleep, her father appellant used to commit rape with her; she understood the meaning of rape; she had told her mother about her being raped by father; since her father would beat her mother, she (her mother) could not protest; she had been raped 3-4 times at night for several days and getting fed up, she ran away from her house and reached the house of one Muslim family in Gaya District; there she stayed for 3-4 months; their behaviour was also not good, and they also tried to rape her, hence she ran away from there also, to Barh (District of Bihar); she came across, a boy Munna who brought her to his maternal aunt's house, that aunt used to send her to collect garbage along with her own children, but when she refused, she (aunt) drove her away from her house; thereafter she went to Delhi, and stayed there with one Umar Raza; in Barh, she had lived with one Aftaab Alam also; there Aftab Alam's sister rang her and called her to Delhi; after 5 years, she came from Delhi to Allahabad; in Allahabad, police nabbed her; police wanted to sent her to Aashram (Nari Niketan) but she refused, as she came to know that there also rape was being committed; then she was sent to Child Line and from there she was sent to Banaras Child Line Sikrol. According to her, she gave an application (Ex.Ka.1) in her own handwriting and signature to C.W.C., on the basis of whereof, case was lodged. She has further stated that she had also given an application (Ex.Ka.2) in her own handwriting that her criminal case be tried in Banaras. She was medically examined and her statement was recorded under Section 164 of Code (Ex.Ka.3).

15. PW-5, Sister Manju, Director of N.G.O. named DARE, has stated that victim did reside at Allahabad in the house of lady named Treesha George, who called her on phone stating that victim needs her help, as some wrong has happened to her. On her call, victim was brought at her institution at Varanasi on 6.5.2013; she had a counselling with her, whereupon, victim told that her father committed rape with her at the time when her age was 8-9 years; therefore, she had fled away to Delhi from her house and joined a job of maid servant; after 3-4 years, she again fled away from there, but caught by officials of Child Line Centre and thereafter she started a job of maid servant in the house of Tresha George (Allahabad). After counselling to victim, she traced out victim's house and informed to C.W.C., Varanasi along with victim on 20.5.2013. On the direction of C.W.C, F.I.R. was lodged. She also handed over victim's father (appellant) to police; victim was medically examined; and she had gone with victim to police station and victim was returned into her custody.

16. PW-6, Dr. Krishna Yadav, Medical Officer, District Woman Hospital, Varanasi has stated that on 29.5.2013 at 10:45 p.m., she had examined victim (PW-1) who had been brought before her by a lady Constable, C.P. No. 361, Pooja Rai *(details of examination report has already been noted in para 3 of this judgment).*

17. PW-4, S.I. Dhakeshwar Singh, (1st I.O.) of the case has stated that he was posted as Senior Sub-Inspector (S.S.I.) at P.S. Cantt on 29.5.2013 and undertook investigation of the case. During investigation, he had recorded

statements of victim (PW-1), Smt. Manju (PW-5) and also of appellant.

18. S.S.I. Dhakeshwar Singh (PW-4), has stated that during investigation, he had perused and copied medico legal and pathological report of victim; he had produced victim before Court for getting her statement recorded under Section 164 of Code and copied her statement in case diary.

19. PW-2, S.I. Triveni Lal (3rd I.O.) who had undertaken investigation after transfer of PW-3, has stated that he had recorded supplementary statement of victim during investigation. According to him, victim had stated that she was not willing to return back to her parental house and had given an application that trial be not transferred to Bihar. According to him, on the application of victim, investigation of the case was not transferred to concerned police station of Bihar, instead he had submitted charge-sheet (Ex.Ka.4) under section 376 (2), 323 I.P.C. and 4/6/10 of POCSO Act, 2012 before Court.

20. PW-7, Constable Rajesh Kumar has proved Chick F.I.R. (Ex.Ka.6), and copy of G.D. (Ex.Ka.7), prepared by Constable Satya Pratap Singh, posted on 29.5.2013 with this witness.

21. To controvert the allegations made by prosecution, appellant has produced in defence his own two daughters DW-1 Sanju Devi and DW-2 Prabha Devi.

22. 15. DW-1, Sanju Devi, aged about 32 years, stated that the appellant is her father; PW1-victim is her youngest sister who was lost, about 9-10 years back when she (PW1-victim) was aged about 8-7 years. She has specifically stated that her father is innocent, all the charges levelled against him are false; her father had made herculean efforts to search the victim but failed.

23. DW-2 Prabha Devi has also stated in same way as D.W.-1 Sanju Devi had. She has stated that the charges levelled against her father by victim regarding rape with her and victim are false; her father is very innocent; he brought up and maintained her very well and to each siblings; and she and her sisters Sanju Devi are very happy in their matrimonial life.

24. In this case, serious allegations have been made by a daughter against her own father for rape. It is settled principle of law that if evidence of victim of rape is natural, trustworthy and reliable, no further corroboration is required. Thus it has to be seen whether statement of victim inspires confidence of the Court or not.

25. The prosecution case is based on sole testimony of victim. F.I.R. (Ex.Ka.1) has been lodged on 29.5.2013, wherein, it has been mentioned that victim had left her house in 2006 because her father (appellant) used to commit rape upon her. It is clear that F.I.R. has been lodged after 7 years of the incident. PW-1, Victim has stated that after leaving her house in 2006, she had resided in a Muslim family in Gaya District where she stayed for 3-4 months and then left that Muslim's family house and fled away, as an attempt for rape with her was also made there. Thereafter, she had gone to Barh District and then came back to Patna. According to her in Patna, she came into contact with one Munna who led her to his aunt's house and on the direction and

supervision of that aunt, she used to collect garbage along with her (aunt's) children and one day when she refused to do so, she (aunt) drove her away from her house. Thereafter, she left for Delhi and stayed with one Umar Raza and again with Aftab Alam for five years. Thereafter, she came back to Allahabad from Delhi. According to her, Allahabad police nabbed her and wanted to keep her in an Aashram (Nari Niketan) but she refused to do so because she knew that in Aashram, rape was being committed. Then she was sent to Child Line Center and from there, she was again sent to Banaras Child Line, Sikrol.

26. In cross-examination, she has stated that when her father committed rape, for the first time, penetrated his penis into her vagina, but no blood had come out and she did not suffer any pain. In cross-examination she made allegations against her own brother Prahlad and stated that at Barh, where she used to reside with her mother, her brother Prahlad had committed rape with her when was aged about 6-7 years. According to her, when her brother Prahlad had committed rape, first time with her, neither she felt any pain nor any blood came out. She has also stated that her father (appellant) used to commit rape with her elder sister Prabha Devi (DW-2). She stated that she did not know whether any pain or bleeding would happen with any girl at the time of rape committed for the first time. She has also stated that she had not made any allegation in F.I.R. against her brother because she knew that her brother was young at the time of occurrence; newly married; had two children and on that very account she did not intend to disturb his family.

27. In addition to above, in cross-examination, she has also admitted that she had not disclosed anything regarding rape committed by her father to any person during this period. In cross-examination, she had stated, when she met to a Maulana nearby a Masjid, upon query made by him, she said that her father used to beat her but she did not disclose anything regarding rape. Her statement, in this regard, as under:-

''घर छोडने के बाद मै पैदल दिन भर चलती रही रात हो गयी तो एक मस्जिद के पास मै बैठ गई थी उसके बाद एक मौलाना द्वारा यह पूछने परकि मे अकेले यहॉ क्या कर रही हूँ मे रोने लगी। उसके द्वारा पूछने पर मेने बताया कि निमिया टाड से आयी हूँ। उसने मुझसे पूछा कि क्यों आयी हो तो मैने बताया कि पापा मुझे मारते थे मैने मारने की ही बात बतायी बलात्कार की बात नही बतायी थी।

28. From perusal of her statement, it appears that she was also caught by Police (GRP), interrogated and sent to Child Line. According to her, she was medically examined. She has also stated that officials of Child Line wanted to send her in Balika Grah, but she refused to go. One Father Deepak took her away from father of Child Line and got her admitted in class 10th (private). She did not go to school and studied at the house of Father Deepak. Accoding to her, after sometime she had fallen ill. Father Deepak got her medically treated and thereafter sent her to a nurse (aunty Diza George), where she resided for 6-7 months and worked as maid servant. Thereafter she was taken to Sister Manju (PW-5).

29. Thus it is clear that during these 7-8 years years, the victim met so many people, worked for so many people, in so many houses, she was also caught by police but she never disclosed to any one

regarding offence of rape committed by her father.

30. In these peculiar facts and circumstances of this case, the statement of victim that rape was committed by her brother when she was at age of 5-6 years and also by his father (appellant) on several times, when she was 7-8 years old, but neither she felt pain nor any blood came out and also non disclosure of such incident to any person for 7-8 years, does not inspire our confidence and it is not safe to hold that prosecution has succeeded to prove its case beyond reasonable doubt.

31. PW-6 Dr. Krishna Yadav has clearly stated that she could not say, whether, any rape was committed against victim or not.

32. F.I.R., although is not a substantive piece of evidence, but generally, if it is free from any infirmity, forms basis of prosecution case. It is settled principle of law that there is no time limit for lodging F.I.R., but if it is lodged after huge and unexplained delay and after counselling and consultation, it demolish the plinth of prosecution's castle. In **Thulia Kali vs. State of Tamil Nadu 1972 SCC (Cri.) 543,** where delay in lodging F.I.R., was of 20 hours without any proper justification, Court, setting aside conviction of appellant, held:-

"The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced the trial. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as, the names of eye witnesses present at there scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a Creature of after thought. It is therefore essential that the delay in lodging the report should be satisfactorily explained."

33. In **Manoj Kumar Sharma vs. State of Chhattisgarh (2016) 3 SCC (Crl.) 407,** Court in case where F.I.R. was lodged after 5 years, quashed criminal proceeding, and held:-

"Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. In our opinion, such extraordinary delay in lodging the FIR raises grave doubt about the truthfulness of allegations made by Respondent 2 herein against the appellants, which are, in any case, general in nature. We have no doubt that by making such reckless and vague allegations, Respondent 2 herein has tried to rope the appellants in criminal proceedings. We are of the confirmed opinion that continuation of the criminal proceedings against the appellants pursuant to this FIR is an abuse of the process of law. Therefore, in the interest of justice, the FIR deserves to be quashed".

34. In this case too, F.I.R. has been lodged after seven years of the alleged occurrence. Non disclosure of offence to any person or authority for seven years has made the conduct and behaviour of victim unnatural which render prosecution

version doubtful. Record shows that victim has not lodged F.I.R. at Police Station Cantt. She had made a complaint to C.W.C., Varanasi only and that complaint was forwarded to police. Information to police was also not given to any police station when victim (PW-1) narrated story of rape either to Madam Treesa George, where victim was working as maid servant or when it came into knowledge of PW-5, Sister Manju on 6.5.2013 or into cognizance of C.W.C. on 20.5.2013. It was lodged on 29.5.2013 when her father, appellant, came and insisted her (victim) to return back to home but she refused to return. PW-5, Sister Manju has also stated that F.I.R. had been lodged on direction of C.W.C. In cross-examination, she said that she had gone with victim at police station for lodging F.I.R. It is also apparent from statement of PW1-victim and PW-5, Sister Manju that prior to lodging F.I.R., PW-1, victim was instigated, counselled and assisted by a team of N.G.O. including PW-5. Record further shows that appellant, poor father of the victim, upon information had come to victim and wanted to get her returned to home and as soon as he expressed his willingness, F.I.R. was lodged against him. In such situation, we are of the opinion that delay in lodging F.I.R., without any explanation, has created a serious doubt on the genuineness of prosecution case.

35. In addition to above, there is another serious lacuna in the prosecution case. As per prosecution case, victim and appellant are residents of Village Nimiyatar, P.S. Dugariya, District Bihar. This offence of rape, for which appellant has been prosecuted, had been committed prior to 7-8 years from lodging F.I.R. at village Nimiyatar, P.S. Dungariya, Session Division (District) Gaya, Bihar. It is not a case of prosecution that any offence of rape has been committed by appellant at any place in Session Division, Varanasi or in even at any place in Uttar Pradesh. Record shows that at very early stage of investigation, PW-4, S.I. Dhakeshwar Singh had learnt that the offence was not committed within the jurisdiction of P.S. Cantt, Varanasi. In cross-examination, he has specifically stated that he had made entry in case diary that the offence was not related with jurisdiction of P.S. Cantt, District Varanasi and he had referred the case for legal opinion of higher officers. PW-2, another I.O., S.I. Triveni Lal Sen has also stated that he had tried to take the victim (PW-1) to the place of occurrence for its inspection, whereupon, she started weeping and insisted not to take her to her home. According to him, she did not agree to go to the place of occurrence and made an application that her case should not be transferred to Bihar and she would pursue her case here (in Uttar Pradesh) and get her father convicted. This witness (PW-2) has also stated that on the request of PW-1 (victim), he had not transferred investigation to Bihar and filed a charge-sheet against appellant.

36. PW-3 S.I. Shivanand Mishra, in his cross-examination, has stated that he had neither visited the place of occurrence nor had gone to village Nimiyatar, District Gaya (State of Bihar). When he learnt that place of occurrnce belongs to District Gaya (Bihar), he had not felt the necessity of transfer investigation. Thus Investigating Officers (I.O.) of the case had not made any attempt either to visit the place of occurrence or to prepare any site plan.

37. Trial Judge, without making any attempt to peruse the record, to find out whether, offence was committed within Jurisdiction of Session Division, Varanasi (Uttar Pradesh) or not, took cognizance of offence and also framed charge, wherein, it has been specifically mentioned that offence was committed at Village Nimiyatar, Dugariya, District Gaya (Bihar).

38. Chapter XIII of the Code contains the provision regarding jurisdiction of Criminal Courts in inquiry and trials. Section 177 and Section 178 of this Chapter are relevant in this matter which are as under:-

Section 177. Ordinary place of inquiry and trial : Every offence *shall ordinarily be inquired into and* ***tried by a Court within whose local jurisdiction it was committed.***

Section 178. Place of inquiry or trial : *(a) When it is uncertain in which of several local areas an offence was committed, or*

(b) Where an offence is committed partly in one local area and partly in another, or

(c) Where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) Where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

(Emphasis added)

39. The aforesaid provision clearly provides that it is a general rule that every offence **shall** ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed, whereas, if there is uncertainty of place of occurrence; or offence was committed partly in one area and partly in another; or offence is continuing one and continues to be committed in more local areas than one; or such offence consist of several acts done in different local areas; in such cases it **may** be inquired or tried by any Court having jurisdiction over any such **local** areas.

40. The word **shall** in Section 177 and the word **may** in Section 178 of the Code signifies that general rule regarding jurisdiction of criminal trial and enquires is that every offence must be tried or inquired by a Court within whose local jurisdiction it was committed. In some cases, covered by Section 178 of the Code, trial or inquiry may be conducted by another Court with aid of this Section. In such cases, if any Court, whose jurisdiction, is not covered by Section 177 of the Code takes cognizance and tries the offence in view of Section 178 of the Code, it must be shown and established by prosecution from record that such offence is covered by Section 178 of Code. In this matter, it is not a case of prosecution / State that any offence of rape was committed at any place in Uttar Pradesh or this matter comes within the purview of Section 178 of the Code, whereas, fact of prosecution case as well as the charge dated 7.10.2013 framed by Trial Court specifically shows that the offence was committed at Village Nimiyatar P.S. Dungariya, District (Session Divison) Gaya (State of Bihar).

41. Plea of jurisdiction was raised by appellant before Trial Court, but rejected on the ground that there was a direction of

High Court for conclusion of Trial within four months and no prejudice had been caused to appellant. Jurisdiction empowers an authority to a court to proceed with trial. If a court has no jurisdiction to take cognizance and proceed with trial, whole proceeding of such trial is a nullity. Although Section 462 of the Code protects some jurisdictional irregularity whereby no prejudice is caused to accused but this case is not covered by Section 462 of the Code. In this case, no Court of Session Division of State of Uttar Pradesh is empowered to take cognizance because offence was committed in State of Bihar and no offence either directly or indirectly has been committed within the jurisdiction of Uttar Pradesh.

42. In addition to above, it is also pertinent to mention at this juncture that object and purpose of the Code is that trial and investigation be conducted fairly. Accused-appellant is resident of District Gaya, Bihar; he was prosecuted at Varanasi, in another State, where appellant neither used to resides nor has any resources to defend himself. Victim (PW-1) was being assisted by PW-5, Sister Manju, Director DARE (N.G.O.). Neither investigation was conducted in relation to place of occurrence nor evidence was produced regarding place of occurrence and appellant was deprived of cross-examine to prosecution witnesses regarding place of occurrence which shows that serious prejudice has been caused to appellant.

43. It is settled principle of law that a Court, if has not been conferred jurisdiction by any Statutes or Act, it cannot acquire jurisdiction suo moto or on the application of the victim or any party dealing with the case. In S**hri Rajendra Ramchandra kavalekar vs. State of Maharashtra and Anr. AIR 2009 SC 1792**, Court has held:-

"The territorial jurisdiction of a court with regard to criminal offence would be decided on the basis of place of occurrence of the incident and not on the basis of where the complaint was filed and the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another court. The venue of enquiry or trial is primarily to be determined by the averments contained in the complaint or charge sheet. Section 177 of Criminal Procedure Code provides that every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed."

(Emphasis added)

44. Supreme Court, in **Manoj Kumar Sharma's case (supra**) where deceased had died in her matrimonial house within the jurisdiction of Mallana, District Ambala (Punjab) and upon inquiry, it was found that no offence had made out. F.I.R. was lodged for same offence after 5 years at Bhilai Nagar, District Durg (Chhattisgarh), while quashing F.I.R. on the ground of lack of territorial jurisdiction, has held as under:-

27. *"The territorial jurisdiction of a court with regard to a criminal offence would be decided on the basis of the place of occurrence of the incident. In the instant case, the suicide was committed at Ambala. Ambala Police closed the case after fulfilling the requirements of Section 174 of the Code*

holding that there was no foul play in the incident and also there was no requirement of lodging FIR under Section 154 as none of the family members of the deceased raised any suspicion over the death even though the death was committed within seven years of marriage. Also, there is no evidence of it being a continuing offence. Hence, the offence alleged cannot be said to have been committed wholly or partly within the local jurisdiction of the Magistrate's Court at Durg. Prima facie, none of the ingredients constituting the offence can be said to have occurred within the local jurisdiction of that Court".

***28**. In the case on hand, as per the materials on record, in Crime No. 194 of 2005, charge-sheet has been filed and the Judicial Magistrate First Class, Durg has taken cognizance of the proceedings. In the present fact situation, we are of the considered opinion that the court at Durg has no territorial jurisdiction to try the case and the proceedings are liable to be quashed on the ground of lack of territorial jurisdiction since the entire cause of action for the alleged offence had purportedly arisen in the city of Ambala."*

45 . It is also pertinent to mention that PW-1, victim has not only made allegations against her father and brother regarding rape committed with her, she has also made a false allegation regarding rape committed by her father (appellant) with her own sister. DW-1 Sanju Devi and DW-2, Prabha Devi are real sisters of victim. They have categorically stated that her younger sister (victim) had fled away at the age of 7-8 years about 9-10 years ago. They have also stated that the allegation of rape committed by her father, upon victim and her sister (DW-2) are false. According to them, their father (appellant) had made herculean efforts to trace out their sister (victim) and when he could not succeed, became hopeless.

46. From perusal of impugned judgment and order dated 22.5.2015 passed by learned Trial Judge, it transpires that learned Judge has neither discussed the evidence available on record nor properly discussed the submission made by defence counsel, particularly regarding jurisdiction, delay in lodging F.I.R. and also on trustworthiness of statement of PW-1 victim, or has appreciated the same correctly.

47. Thus, in view of the above discussion, we are of considered view that prosecution has miserably failed to prove its case beyond reasonable doubt against appellant-Sita Ram Sharma. Besides, the trial itself was without territorial jurisdiction. He is entitled to be acquitted against charge levelled against him. The judgment and order passed by Additional Session Judge / Fast Track Court, Varanasi in Session Trial No. 181 of 2013 is hereby set aside. Consequently, the appeal is **allowed.**

48. The appellant is in jail. He, if not wanted in any other case, shall be released forthwith.

49. Keeping in view provisions of Section 437-A of Code, appellant Sita Ram Sharma is hereby directed to forthwith furnish a personal bond of the sum of Rs. 10,000/- and two reliable

sureties of the like amount, before the Trial Court, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against judgment or for grant of leave, appellant on receipt of notice thereof, shall appear before Supreme Court.

50. A copy of this judgment be sent to Trial court and concerned Superintendent of Jail by FAX for immediate compliance. Compliance report whereof be submitted within one month.

51. Lower court's record be also sent back along with a copy of this judgment.

52. Sri Vinay Saran, learned Amicus Curiae has assisted the Court very diligently. We provide that he shall be paid counsel's fee as Rs. 15,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad, to Sri Vinay Saran, Amicus Curiae, without any delay and, in any case, within 15 days from the date of receipt of a copy of this judgment.

(2019)10ILR A 453

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 4239 of 2013

Bindhyavasini Gond ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Anil Pratap Singh, Sri Lokesh Kumar Dwivedi, Sri Santosh Dwivedi.

Counsel for the Opposite Party:
Sri Ratan Singh (A.G.A.)

A. Indian Evidence Act, 1872 - Section 106 - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Dead body found inside the house of accused. Room was evidently found locked from out-side. The accused disappeared for a long time until he was arrested. Fleeing from the spot is an additional link to the evidence against him. Only accused could explain circumstances in which the deceased died. (Para 36)

B. Indian Evidence Act, 1872 - Sections 118 - Evidence of witnesses cannot be rejected only on the ground of their relationship with the victim. The prosecution case can be proved by such witness if their evidence is natural and trustworthy.

The witnesses of fact, are the relatives of deceased, so their testimony cannot be said to be unreliable or not trustworthy. (Para 40, 41 & 43)

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Hanumant Govind Nargundkar & anr. Vs St. of M.P. AIR 1952 SC 343

2. Hukam Singh Vs St. of Raj. AIR 1977 SC 1063

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR 1984 SC 1622

4. Ashok Kumar Chatterjee Vs St. of M.P. AIR 1989 SC 1890

5. C. Chenga Reddy & ors. Vs St. of A.P. (1996) 1 SCC 193

6. Bodh Raj @ Bodha & ors. Vs St. of J & K (2002) 8 SCC 45

7. Shivu & anr. Vs Registrar General, H.C. of Kar. & anr. (2007) 4 SCC 713

8. Tomaso Bruno Vs St. of U.P. (2015) 7 SCC 178

9. St. of Punj. Vs Karnail Singh (2003) 11 SCC 27

10. Trimukh Maroti Kirkan Vs St. of Mah. (2006) 10 SCC 681

11. Nika Ram Vs St. of H.P. AIR 1972 SC 2077

12. Ganeshlal Vs St. of Mah. (1992) 3 SCC 106

13. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

14. Sampath Kumar Vs Insp. of Police, Krishnagiri (2012) 4 SCC 124

15. Smt. Shamim Vs St. of (NCT of Delhi) (2018) 10 SCC 509

16. Namdeo Vs St. of Mah. (2007) 14 SCC 150

17. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

18. Sham Sunder Vs Puran (1990) 4 SCC 731

19. M.P. Vs Saleem (2005) 5 SCC 554

20. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Against judgment and order dated 31.07.2013 passed by Additional Sessions Judge, Court No. 7, Varanasi in Sessions Trial No.62 of 2013, Crime No.231 of 2012, under Sections 302 and 201 IPC, Police Station Rohaniya, District Varanasi, accused-appellant has preferred present jail appeal under Section 383 Cr.P.C. from Jail through Superintendent District Jail, Varanasi. By impugned judgement, appellant has been convicted under Section 302 I.P.C. and sentenced to undergo rigorous imprisonment for life with fine of Rs. 25,000/- and in default of payment of fine, one year additional rigorous imprisonment and further he has been convicted under Section 201 I.P.C. and sentenced to undergo five years rigorous imprisonment with fine Rs. 5000/- and in default of payment of fine, six-month additional rigorous imprisonment.

2. Factual matrix of case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. P.W.-1 Shyam Lal submitted a written report Ex.Ka-1 in Police Station Rohaniya, District Varanasi stating that on 2.6.2011, his daughter Anju was married with Bindyavasini Gond son of Lalji Gond village Vishokhar Lathiya, Police Station Rohaniya, District Varanasi. After marriage PW-1 brought her daughter from her matrimonial house in Chauthi ceremony. Thereafter, his son-in-law Bindhyavasini Gond (accused-appellant) never visited his house to bring his daughter (Anju). It was further stated that character of son-in-law was not good. He was angry with his family. Many times Bindhyavasini Gond threatened his son (Rajesh Gond) to kill him. On 18.8.2012, Rajesh Gond went to the house of his elder daughter Manju Devi, village Amra, Police Station Rohaniya, and stayed for two days there. On 20.8.2012 victim Rajesh Gond left for Vidapur but did not reach his house. On 25.8.2012 at about 8:00 AM, PW-1 was informed by his daughter Manju Devi that dead body of Rajesh Gond, wrapped in blanket, was lying in the room of Bindhyavasani Gond

(accused). PW-1 along with his daughter Manju Devi, PW-3, visited house of accused-appellant and identified dead body of Rajesh Gond who was murdered by Bindhyavasani Gond. Accused-appellant ran away after locking the room.

4. On the basis of written report Ex.Ka-1, Chick F.I.R. Ex.Ka-4 was registered by PW-5 Babu Ram Yadav as Case Crime No.231 of 2012 against the accused-appellant under Section 302, 201 I.P.C. He also made an entry of the incident in G.D. on 25.8.2012 at 10:35 a.m. copy of which is Ex.Ka-5.

5. Immediately, after registration of case, investigation was undertaken by PW-6, S.I. Ramayan Singh, who proceeded to spot and held inquest over the dead body of Rajesh Gond, prepared inquest report Ex.Ka-2 and other papers relating thereto and sent for post mortem, visited spot, prepared site plan Ex.Ka-12.

6. PW-4 Dr. Anil Kumar, conducted autopsy over the dead body of deceased and prepared postmortem report (Ex.Ka-3) under his signature, expressing his opinion that death was possible one week prior to postmortem and viscera was preserved for ascertaining cause of death.

7. PW-6 S.I. Ramayan Singh, after completing entire formalities of investigation submitted charge sheet Ex.Ka-14 against the appellant under Section 302 and 201 I.P.C.

8. Case, being exclusively triable by Court of Sessions, was committed by C.J.M. concerned to Court of Sessions for trial after compliance of Section 207 Cr.P.C.

9. Trial Court framed charges against accused-appellant on 12.2.2013 under Sections 302 and 201 IPC which read as under:

आरोप

मैं, ओमप्रकाश, सत्र न्यायाधीश, वाराणसी एतद्द्वारा आप विन्धयवासिनी गोंड़, को निम्न आरोपों से आरोपित करता हूँ–

प्रथम– यह कि आपने दिनांक 20.08.2012 से दिनांक 25.08.2012 के 8.00 बजे प्रातः के बीच किसी समय बहद ग्राम विशोखर (लठिया), अन्तर्गत थाना रोहनियां, जनपद वाराणसी में वादी मुकदमा श्याम लाल गोंड़ के पुत्र राजेश की मृत्यु कारित कर हत्या किया और इस प्रकार आपने धारा 302 भा0द0सं0 के अन्तर्गत दण्डनीय अपराध किया, जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीय*– यह कि दिनांक 25.08.2012 को बहद ग्राम विशोखर (लठिया), अन्तर्गत थाना रोहनियां, जनपद वाराणसी स्थित अपने कमरे में राजेश के शव को, जो इस अपराध का साक्ष्य था, अपने को वैध दण्ड से बचाने के लिए कम्बल से लपेट कर आपने छिपा कर रखा था और इस प्रकार आपने धारा 201 भा0दं0सं0 के अधीन दण्डनीय अपराध किया, जो इस न्यायालय के प्रसंज्ञान में है।*

अतएव, मैं निर्देशित करता हूँ कि आपके विरूद्व उक्त आरोपो का विचारण इस न्यायालय द्वारा किया जावे।

Charge

I, Om Prakash, Sessions Judge, Varanasi hereby charge you Vindhyavasini Gond with following charges :-

First -That at any time during the period from 20.08.2012 upto 8.00 o'clock of the morning of 25.08.2012, you committed the murder of Rajesh- the son of the complainant of the case Shyam Lal

Gond within village Vishokhar (Lathiya) under Police Station- Rohaniya, District- Varanasi and thus you committed the offence punishable under Section 302 I.P.C. which is in the cognizance of this Court.

Second -That on 25.08.2012, for the purpose of saving yourself from the legal punishment you had kept hidden the deadbody of Rajesh wrapped in a blanket at your room within village Vishokhar (Lathiya) under Police Station- Rohaniya, District- Varanasi, which was the evidence of this offence and thus you have committed the offence punishable under Section 201 I.P.C. which is in the cognizance of this Court.

Therefore, I direct that you be tried by this court for aforesaid charges.

(English Translation by Court)

10. Accused-appellant denied the charges and pleaded not guilty and claimed to be tried.

11. In order to substantiate its case, prosecution examined as many as six witnesses, out of whom PW-1 Shyam Lal, PW-2 Anju Devi and PW-3 Manju Devi are witnesses of fact and PW-4 Dr. Anil Kumar, PW-5 Babu Ram Yadav and PW-6 Ramayan Singh are formal witnesses.

12. On closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by the Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto and facts of case were stated to be wrong. In response of question no. 16, he answered that he was ignorant of fact. He desired to produce defence evidence but later on did not produce defence evidence.

13. Trial Court after appreciating entire evidence led by prosecution on record and hearing counsel for the parties, found appellant guilty and convicted him as stated above. Feeling aggrieved and dissatisfied with impugned judgement, present appeal has been filed through Jail.

14. We have heard Sri Lokesh Kumar Dwivedi, learned counsel for appellant and Sri Ratan Singh, learned A.G.A for State-respondent at length and gone through the record available on file carefully.

15. Learned counsel for appellant refuting the impugned judgement, advanced his submissions, in the following manners :-

(i) This is a case of circumstantial evidence and there is no motive to accused to commit murder of Rajesh Gond.

(ii) There is no complete chain of evidence so as to indicate that accused is the only person who has committed crime.

(iii) There are several contradictions rendering prosecution case doubtful.

(iv) FIR has been lodged by PW-1 (father of victim) close relative of deceased on the same day of receiving of information.

(v) PW-1, 2 and 3 are close relatives of the deceased and interested witnesses. No public witness has come forward to supporting the prosecution case.

(vi) It has come in the prosecution evidence that father and elder brother of accused, at first, informed PW-3 that foul smell was coming out of room of accused but they have not been produced from the side of prosecution.

(vii) Prosecution has failed to prove complete chain of circumstance and trial court committed error in holding the accused-appellant guilty.

16. Per contra learned AGA opposed submissions and urged that PWs-1, 2 and 3 are witnesses of fact, who have supported prosecution and established that accused-appellant was angry with victim, dead body of victim was found in the room belonged to accused-appellant and accused disappeared from there. Accused did not offer any explanation as to how dead body of victim was found in his house which was locked from out side. Circumstances show that accused-appellant is the only and only person who committed murder of Rajesh Gond.

17. We now proceed to consider rival submissions on merits.

18. Admittedly, there is no eye-witness in the present case. This case rests upon circumstantial evidence. It is no doubt a case where there is no eye witness of crime. Prosecution totally rests on circumstantial evidences, which found favour with Court below and finding prosecution version proved beyond reasonable doubt, Trial Court has convicted appellant, as stated above.

19. It will be appropriate to briefly consider the evidence on record. PW-1 is the father of deceased and PW-2 and 3 are real sisters of deceased. PW-2 Manju Devi was residing in the same village. PW-1 supporting prosecution case, deposed that, his daughter Anju Devi was married to accused-appellant on 2.6.2011. After marriage she had gone to her matrimonial house. She came back to her parental house in Chauthi ceremony, since then she was living in his house and accused-appellant became annoyed with victim, who was in private job in Gujrat. Accused-appellant threatened victim Rajesh to take his life many times. When victim Rajesh Gond came from Gujrat on 18.8.2012 and went to the house of his sister Manju Devi in village Amra which is at a distance of one kilometer from the house of accused, and stayed there for two days. Thereafter, he left for his house but did not reach. At about 8:00 AM on 25.8.2012, PW-3 Manju Devi informed him that dead body of Rajesh was lying wrapped in blanket in the house of accused-appellant. Then he and his daughter Manju Devi went to the house of accused and identified dead body of Rajesh which was decomposed. It was further stated by him that Rajesh was murdered by accused-appellant Bindhyavasini on account of ill-will and dead body was hidden in the room wrapping it in blanket. Dead body was taken out breaking the lock. He submitted written report Ex.Ka-1 in police station concerned, getting it scribed by one Ram Asrey Gond. He further stated that inquest over dead body was held by Sub Inspector of Police in his presence at spot. In cross-examination, he stated that his daughter,

when came back from his matrimonial house, told him that accused-appellant harassed and tortured her in demand of dowry but he did not complain anywhere.

20. PW-2 Anju Devi, daughter of PW-1 and wife of accused deposed that she was married to accused Bindhyawasini in June, 2011 and recognized accused in the Court as her husband. She further deposed that when she went with her husband after marriage, she found that his character was not good. In Chauthi ceremony, she came back to her house with her father, her maternal uncle and her brother Babloo. Since then she was living in her parental house. Since her father and brother took her to his house, her husband got annoyed with her father and brother on this count. She witnessed dead body of her brother in Police Station Rohaniya and identified the dead body. This witness stated nothing regarding the incident hence her statement does not require any further scrutiny.

21. PW-3 Manju Devi deposed that her younger sister Anju was married to accused Bindhyawasini in June, 2011. She came back to her maternal house in Chauthi ceremony and since then living there for the reasons that her husband (accused-appellant) was not a man of good character. Her brother Rajesh Gond was in private job in Gujrat and had come to her house at the time of Rakshabandhan and remained for two days in her house. On 20.8.2012, at about 8:00 AM in the morning, he left her house saying that he would go to his village after seeing his brother-in-law (accused). Five days after, Lalji (father-in-law of Anju PW-2) and Girish (Jeth of Anju) came to her house and told that foul smell was coming out of Bindhyavasini's room and it was locked from out side. Thereupon she went to house of Bindhyavasini along with them and witnessed that house of accused-appellant was locked from out side and foul smell was coming from inside. Then they broke open the lock and saw inside that dead body of Rajesh was lying wrapped in a blanket and smelling. She felt that her brother Rajesh was murdered by accused Bindhyavasini Gond. She informed to her father about the incident.

22. PW-6 S.I. Ramayan Singh Investigating Officer deposed that on 25.8.2012 he was posted as Station Officer in P.S. Rohaniya and undertook investigation of Case Crime No. 231 of 2012 under Sections 302, 201 I.P.C., proceeded to spot, held inquest over the dead body of Rajesh, prepared inquest report Ex.Ka-2 and other papers relating thereto, took shirt of deceased and blanket, in which body was wrapped, in his possession, prepared memo whereof Ex.Ka-10, recorded statement of Shyam Lal, PW-1, and prepared site plan Ex.Ka-12. Thereafter, he recorded statement of PW-3 Manju Devi and other witnesses, sent viscera of deceased to FSL, Lucknow for examination through constable Ram Asrey, arrested accused-appellant with one Tamancha and two live cartridges on 29.9.2012, recorded statement and after completing entire formalities of investigation submitted charge sheet Ex.Ka-14 against the accused. Witness withstood lengthy cross-examination. In his cross-examination, he deposed that there was no key of lock, therefore, lock of room was broken. Informant, witness of inquest and other person of village were present on spot. The room in which body found, was situated after Varamdhah which was on the road and dead body of

Rakesh was kept on concrete in the room, wrapped in a blanket. Body was decomposed and smelling. Dead body was identified by family members on the basis of cloths and appearance (*Huliya).* It was further deposed that meal was cooked in the room.

23. From the evidence of PWs-1, 3 and 6 adduced by prosecution following circumstances are clearly established :

A. Smt. Anju Devi was married to accused-appellant in 2011 but relations between them were strained and she did not go to her matrimonial house after Chauthi ceremony for the reasons that her husband (accused) was not a man of good character.

B. Victim went to the house of his elder sister Manju Devi on the festival of Rakshabandhan, prior to incident and stayed there for two days.

C. Victim Rajesh left her house saying that he would go to his village after seeing his brother-in-law (accused).

D. Dead body of Rajesh Gond was found lying wrapped in blanket in the house of accused-appellant and his father and elder brother informed PW-3 first about the smell, coming out of house.

E. As per statement of PW-6, meal was cooked in the room and it was locked from out side. I.O. found blood on the spot and body was wrapped in a blanket.

F. When dead body was found in the room of accused, it was locked and accused had disappeared.

G. Postmortem report reveals that death of Rajesh Gond might have occurred one week prior to postmortem. Body was decomposed and smelling.

H. Rajesh Gond was murdered and his body was wrapped in blanket, kept in room which was locked from out side.

24. In the case in hand, there is no eye witness of occurrence and case of prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that circumstances from which an inferences of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and he should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

25. ***Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343***, is the basic judgment of the Supreme Court on appreciation of evidence, when the case depends only on circumstantial evidence, which has been consistently relied in later judgments. In this case as long back as in 1952 Hon'ble Mahajan, J expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

*"**... circumstances should be of a conclusive nature** and tendency and they should be **such as to exclude every hypothesis but the one proposed to be***

proved..... *it must be such as to show that* ***within all human probability the act must have been done by the accused."***

26. In ***Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063***, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person.

27. In ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,*** Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The ***circumstances concerned 'must or should' and not 'may be' established.***

(2) the facts so established should be consistent only with the ***hypothesis of the guilt of the accused,*** *that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

(emphasis added)

28. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890**, Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the ***circumstances*** *from which an inference of guilt is sought to be drawn,* ***must be cogently and firmly established;***

(2) those circumstances should be of a ***definite tendency unerringly pointing towards guilt of the accused;***

(3) the circumstances, taken cumulatively; should form a ***chain so complete that there is no escape from the conclusion that within all human probability*** *the crime was committed by the accused and none else; and,*

*(4) the c****ircumstantial evidence*** *in order to sustain conviction must be* ***complete and incapable of explanation*** *of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."* *(emphasis added)*

29. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC** 193, Court said:

"In a case based on circumstantial evidence, the settled law is

*that the circumstances from which the **conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature**. Moreover, all the **circumstances should be complete** and there should be no gap left in the chain of evidence. Further, the proved **circumstances must be consistent only with the hypothesis of the guilt of the accused** and totally inconsistent with his innocence. "*

(emphasis added)

30. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgement said:

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation**, upon any other reasonable hypothesis than that of his guilt,*

*(5) **if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

31. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in ***Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.***

32. In ***State of Punjab versus Karnail Singh, (2003)11 SCC 27,*** Court observed that law does not enjoying the duty on prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on prosecution is to lead such evidence which it is capable of leading.

33. Now the crucial question remain for consideration is "whether accused-appellant has committed crime or not?"

34. It is a case where an offence has taken place inside the privacy of house where accused was residing. Accused has all opportunity to plan and commit offence at the time and in circumstances of his choice. It will be extremely difficult for prosecution to lead evidence to establish guilt of accused if strict compliance of circumstantial evidence as noticed above, is insisted upon by Court.

35. Here it is necessary to keep in mind Section 106 of Indian Evidence Act, 1872 (hereinafter referred to as 'Act, 1872') which says that when any fact is especially within the knowledge of any

person the burden of proving that fact is upon him.

36. Dead body of Rajesh was found wrapped in a blanket in the house of accused. House, in which dead body was found, belonged to him has not been disputed by accused. Room was evidently found locked out side and accused disappeared for a long time until he was arrested. Fleeing away of accused from spot is a additional link evidence against him. Hence it was only accused who could explain circumstances in which Rajesh Gond died. In view of Section-106 of Act, 1872, burden of proof lay upon accused who has failed to discharge. The accused by virtue of his special knowledge must offer an explanation which might lead a Court to draw a different inference.

37. In ***Trimukh Maroti Kirkan versus State of Maharashtra,*** decided on 11.10.2006, Court has held, where an accused is alleged to have committed murder of his wife and the prosecution succeeds in leading evidence to show that shortly before commission of crime they were seen together or the offence takes placed in the dwelling home where husband also normally resided, if accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstances which indicates that he is responsible for commission of the crime.

38. In ***Nika Ram versus State of Himachal Pradesh, AIR 1972 SC 2077***, it was held that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

39. In ***Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106,*** the appellant was prosecuted for murder of his wife which took place inside his house. It was observed by Court that when death had occurred in his custody, appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of prosecution case coupled with absence of any explanation were held inconsistent with the innocence of the accused, but consistent with the hypothesis that appellant is a prime accused in the commission of murder of his wife.

40. Another argument advanced by learned counsel for appellant is that witnesses of fact, PW-1, 2 and 3 are the relatives of deceased, so their testimony can not be said to be reliable and trustworthy.

41. Admittedly, PW-1 is father of deceased and PW-2 and 3 are the real sisters of deceased, who established the circumstances that victim Rajesh had gone to the village of her sister Manju Devi at the time of Rakshabhandan and his dead body was found in the locked house of accused.

42. In ***Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,*** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated

before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).***"

43. It is settled law that merely because witnesses are closely relative to deceased, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

44. Next argument of learned counsel for the accused-appellant in so far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and find that the same do not go to the root of case.

45. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

46. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, ***Smt. Shamim v. State of (NCT of Delhi),*** decided on 19.09.2018.

47 . Next argument of the learned counsel for the appellant is that prosecution has not produced father and brother of accused-appellant from the side of prosecution, therefore, presumption under Section 114(g) Act, 1882 goes against the prosecution.

48. We are not impressed with the argument of learned counsel for the accused-appellant for the reasons that prosecution is not obliged to produce entire witness in its support.

49. Law is well-settled that as a general rule, Court can and may act on the testimony of a single witness provided he/she is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of Act, 1872, but if there are doubts about the testimony, Court will insist on corroboration. In fact, it is not the numbers, the quantity, but the quality that is material. Time-honoured principle is that evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

50. In ***Namdeo v. State of Maharashtra (2007) 14 SCC 150***, Court

re-iterated the view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence.

51. In the present case, it is fully established that dead body of Rajesh was found wrapped in a blanket in the house of accused-appellant which was locked from out side and accused had disappeared remained so until his arrest. The medical evidence showed that death of Rajesh Gond might have been occurred one week prior to post mortem, accused-appellant in his statement under Section 313 Cr.P.C. did not offer any plausible explanation as to how Rajesh Gond died, recovery of blood stained concrete and shirt of deceased was made from the house of accused-appellant therefore, there cannot be any hesitation to come to conclusion that it was only the accused who was the preparator of crime.

52. In the entirety of the facts and circumstances and legal preposition discussed herein before, we are of considered view that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant and Trial Court has rightly convicted him for having committed murder of Rajesh Gond, an offence punishable under Section 302 and 201 IPC. No interference is warranted. Appeal lacks merit and liable to be dismissed.

53. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

54. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: ***Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs.***

Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].

55. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellant-Bindhyavasini Gond by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

56. In view of above discussion, the **appeal lacks merit and is, accordingly, dismissed.** Impugned judgement and order dated 31.7.2013 passed by Additional Session Judge, Court No.7, Varanasi in Session Trial No. 62 of 2013 (State v. Bindhyavasini Gond) under Sections 302 and 201 IPC, Police Station Rohaniya, District Varanasi, is **maintained and confirmed.**

57. Lower Court record along with the copy of this judgment be sent immediately to Court and Jail Superintendent concerned for necessary compliance and to apprise the accused forthwith. Compliance report be also submitted to this Court.

(2019)10ILR A 465

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 1677 of 2014

Pramod Kumar ...Appellant
Versus
State ...Opposite Party

Counsel for the Appellant:
From Jail, Archana Singh (A.C.)

Counsel for the Opposite Party:
Sri Syed Ali Murtaza (A.G.A.)

A. Evidencery value of relatives-If the witnesses are close relative of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witnesses. (Para 35)

B. Importance of motive and direct witness-If direct witness is worthy then motive does not carry much weight. Only on the ground that there was no strong motive, prosecution case cannot be disbelieved. (Para 36)

The minor contradictions on trivial matter does not affect the core of prosecution. (Para 47)

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Dalip Singh Vs St. of Punj. AIR,1953, SC 364,

2. Dharnidhar VS St. of U.P. (2010) 7 SCC 759,

3. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

4. Lokesh Shiva Kumar Vs St. of Kar. (2012) 3 SCC 196

5. Sampath Kumar Vs Insp. of Police, Krishnagiri (2012) 4 SCC 124

6. Sachin Kumar Singhraha Vs St. of M.P.

7. Smt. Shamim Vs St. of (NCT of Delhi)

8. State Represented by Inspector of Police Vs Saravanan & anr. AIR 2009 SC 152

9. Arumugam Vs St. AIR 2009 SC 331

10. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

11. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Mah. JT 2010 (12) SC 287

12. Pradeep Narayan Madqaonkar & ors. Vs St. of Mah. 1995 (4) SCC 255

13. Balbir Singh Vs St. (1996) 11 SCC 139

14. Paras Ram Vs St. of Har. 1992 (4) SCC 662

15. Sama Alana Abdulla Vs St. of Guj. (1996) 1 SCC 427

16. Anil alias Andya Sadashiv Nandoskar Vs St. of Mah. (1996) 2 SCC 589

17. Subhash Singh Thakurshyam Vs St. (Through CBI) (1997) 8 SCC 732

18. St. of U.P. Vs Zakaulla 1998 Cri. L.J. 863

19. Girja Prasad Vs St. of M.P. (2007) 7 SCC 625

20. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

21. Sham Sunder Vs Puran (1990) 4 SCC 731

22. M.P. Vs Saleem (2005) 5 SCC 554

23. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellant Pramod Kumar has preferred this jail appeal under Section 383 Cr.P.C. from Jail through Senior Superintendent Central Jail, Fatehgarh against judgment and order dated 08.08.2012 passed by Additional Sessions Judge / Special Judge (E.C. Act), Kanpur Nagar in Sessions Trial No. 1434 of 2007, Case Crime No. 504 of 2007, under Section 302 IPC and Sessions Trial No. 1433 of 2007, Case Crime No. 510 of 2007, under Section 4/25 Arms Act, Police Station Govind Nagar, District Kanpur Nagar. By impugned judgement, appellant has been convicted under Section 302 I.P.C. and sentenced to undergo rigorous imprisonment for life with fine of Rs. 20,000/- and in default of payment of fine, three months simple imprisonment and further he has been convicted and sentenced under Section 4/25 Arms Act to undergo one year rigorous imprisonment with fine of Rs. 5,000/- and in default of payment of fine one month simple imprisonment.

2. Factual matrix of case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. P.W.-3 Manoj Kumar submitted a written report Ex.Ka-1 in Police Station Govind Nagar, District Kanpur Nagar stating that there was a quarrel between his brothers Vinod Kumar (now deceased) and Promod Kumar (Accused) regarding eating items like sugar and rice. On 15.9.2007 at about 9:00 PM in the night, a dispute occurred between two brothers for sugar and tea and suddenly, accused-appellant Promod Kumar started beating victim Vinod Kumar. While quarreling, both came out of the house on the road. When Informant PW-3, with the help of neighbours tried to rescue him, accused-appellant Promod Kumar assaulted 3-4 knife blows to his brother Vinod Kumar and ran away. While taking the victim Vinod Kumar to hospital, he succumbed to injuries on the way. Written report Ex.Ka-1 further recites that dead body of Vinod Kumar is lying in front of the house.

4. On the basis of written report Ex.Ka-1, Chick F.I.R. Ex.Ka-2 was prepared by PW-4 Head Constable Yasho Verma at Case Crime No.504 of 2007 and case was registered against accused-appellant under Section 302 I.P.C. An entry of case was made in General Diary (herein after referred to as 'GD'), copy whereof is Ex.Ka-3.

5. Immediately, after registration of case, PW-7 Nirankar Singh, the then Inspector In-charge of Police Station Govind Nagar, commenced investigation and recorded statement of PW-3 Manoj Kumar, proceeded to spot, recorded statement of PW-2, Jhamman Lal; and PW-1 Smt. Jyoti Shakya; collected blood stained and simple earth from spot and prepared site plan Ex.Ka-7. On the same day at about 9:15 PM, he arrested accused-appellant Pramod Kumar siting near a temple, recorded disclosure statement and recovered blood stained knife, allegedly used in the commission of offence, from bushes near the eucalyptus tree at the pointing out of accused-appellant before Babloo and Ashok Kumar (not examined), sealed it in a cover of cloth, got prepared recovery memo Ex.Ka-8, prepared site map of recovery Ex.Ka-9.

6. On the basis of recovery memo, chick F.I.R. Ex.Ka-5 was registered being Case Crime No. 510 of 2007 under Section 4/25 Arms Act against accused-appellant Promod Kumar. Investigation of Case Crime no. 510 of 2007 was done by PW-10.

7. PW-8 S.I. Ramveer Singh, on the direction of Inspector In-charge, PW-7, held inquest over the dead body of Vinod Kumar, prepared inquest report Ex.Ka-11 and other papers relating thereto; handed over the dead body to Constable Hoti Lal and Ram Dhani for post mortem and sent it to District Hospital, Kanpur Nagar.

8. PW-7 after recording statement of witnesses, completed all necessary formalities of investigation and submitted charge sheet Ex.Ka-10 against accused-appellant before the Court of C.J.M. concerned.

9. PW-10, Sri Om Prakash Dwivedi under took investigation of Case Crime No. 510 of 2007 and after completing entire formalities of investigation, submitted charge sheet under Section 4/25 Arms Act.

10. Case under Section 302 I.P.C. being exclusively triable by Court of Sessions and case under Section 4/25 Arms Act being connected with Section 302 I.P.C., learned Chief Judicial Magistrate after making compliance of under Section 207 Cr.P.C. committed both cases to Court of District Judge, Kanpur Nagar for trial wherefrom it was transferred to the Court of Special Judge (E.C. Act), Kanpur Nagar.

11. Trial Court framed charges against accused-appellant on 17.01.2008 under Sections 302 IPC and Section 4/25 Arms Act to which accused denied and claimed trial. Charges read as under :-

आरोप

मैं पी0 के0 जैन विशेष न्यायाधीश ई0सी0ऐक्ट कानपुर नगर आप प्रमोद कुमार पर निम्न आरोप लगाता हूँ–

प्रथम यह कि दिनांक 15.9.2007 को समय लगभग रात्रि 9 बजे मकान नं0 8/6 लेबर

कालोनी के दरवाजे के सामने अन्तर्गत थाना गोविन्द नगर कानपुर नगर आपने आशयपूर्वक विनोद कुमार को चाकुओं से मारकर हत्या की और इस प्रकार आपने भा0दं0वि0 की धारा 302 के अन्तर्गत दण्डनीय अपराध किया जो कि मेरे प्रसंज्ञान में है।

एतद्द्वारा आपको निर्देशित किया जाता है कि उपरोक्त आरोप अन्तर्गत आपका विचारण इस न्यायालय द्वारा किया जाये।

Charge

I, P.K. Jain, Special Judge E.C. Act Kanpur Nagar, charge you i.e. Pramod Kumar with following charge:-

First, that you intentionally committed murder of Vinod Kumar by assaulting him with knives at about night 9 o'clock on 15.9.2007, in front of the door of House No. 8/6 Labour Colony under Police Station Govind Nagar, Kanpur Nagar, and in this manner you have committed an offence under Section 302 of the I.P.C. which is in my cognizance.

You are hereby directed that you are to be tried by this Court for the aforementioned charge.

(English Translation By Court)

आरोप

मैं, पी0 के0 जैन, विशेष न्यायाधीश ई0सी0ऐक्ट, कानपुर नगर आप– प्रमोद कुमार शाक्य को निम्न प्रकार से आरोपित करता हूँ:–

प्रथमः यह कि दिनांक 16/9/2007 समय लगभग 21:15 बजे दादानगर रेलवे क्रासिंग के पहले यूकीलिप्टस के पेड़ के पास झाड़ी से अन्तर्गत थाना गोविन्द नगर, कानपुर नगर में आपकी निशादेही पर विनोद कुमार की हत्या में प्रयुक्त चाकू आपके पास से बरामद हुई, जिसकी लम्बाई प्रतिबन्धित लम्बाई के अन्तर्गत आती है और इस प्रकार आपने आयुध अधिनियम की धारा 25/4 के अधीन दण्डनीय अपराध किया जो कि मेरे प्रसंज्ञान में है।

एतद्द्वारा आपको निर्देशित किया जाता है कि उपरोक्त आरोप के अन्तर्गत आपका विचारण इस न्यायालय द्वारा किया जाये।

Charge

I, P.K. Jain, Special Judge E.C. Act Kanpur Nagar, charge you - Pramod Kumar Shakya with following charge:-

First : That, on 16/9/2007 at about 21.15 Hrs, the knife used in the murder of Vinod Kumar has been recovered from your custody on pointing out by you, from the shrubs near eucalyptus tree before Railway Crossing Dada Nagar under Police Station Govind Nagar, Kanpur Nagar whose length falls under the prohibited length and therefore you committed an offence punishable under Section 25/4 of the Arms Act which is in my cognizance.

You are hereby directed that you are to be tried by this Court for the aforementioned charge.

(English Translation By Court)

12. Accused-appellant denied the charges and pleaded not guilty and claimed to be tried.

13. Both the cases, being connected to each other, came to be heard and decided together.

14. In order to substantiate its case, prosecution examined as many as ten witnesses out of whom PW-1 Smt. Jyoti

Shakya, PW-2-Jhamman Lal and PW-3-Manoj Kumar, are witnesses of fact. Rest are formal witnesses. PW-1 Smt. Jyoti Shakya is the wife of deceased Vinod Kumar; PW-2 Jhamman Lal is father of deceased as well as accused; PW-3 is Informant and brother of accused-appellant; PW-4 Head Constable Yasho Verma registered the case under Section 302 I.P.C. against the accused on the basis of written report Ex.Ka-1; PW-5 Dr. Yogesh Dayal, Medical Officer, who conducted autopsy over the dead body of deceased; PW-6 C.P. Asha Ram registered the case at Crime No. 510 of 2007 under Section 4/25 Arms Act against the accused; PW-7 Nirankar Singh, C.O. Ghaziabad, the then Inspector In-charge of Police Station Kanpur Nagar is the Investigating Officer who submitted charge sheet; PW-8 S.I. Ramveer Singh held inquest over the dead body of deceased Vinod Kumar, under the direction of PW-7 the then Inspector; PW-9 Constable Bhikhari Lal is the witness, who has taken docket to FSL for examination and PW-10 S.I. Om Prakash Dwivedi is the Investigating Officer of Case Crime No.510 of 2007 under Section 4/25 Arms Act and submitted charge sheet against accused-appellant.

15. Subsequent to closure of prosecution evidence, Trial Court recorded statement of accused under Section 313 Cr.P.C. explaining all incriminating and other evidence and circumstances. In the statement under Section 313 Cr.P.C., accused denied prosecution story in toto and claimed false implication on account of enmity. In response of question no. 24, he answered that deceased was addict to drugs and a man of bad habits; he usually used to quarrel other persons in the vicinity due to which, he has been murdered by some one else; accused was not present in the house at the time of incident; he has been falsely implicated in the present case and he is completely innocent. Accused did not choose to adduce any evidence.

16. After hearing counsel for the parties and analyzing entire evidence led by prosecution on record, learned Trial Court has found appellant guilty and convicted him as stated above. Feeling aggrieved with impugned order of conviction, the present appeal has been filed through Jail.

17. We have heard Smt. Archana Singh, Advocate (Amicus Curiae) for appellant and Sri Syed Ali Murtaza, learned A.G.A for State-respondent at length and have gone through the record available on file carefully.

18. Learned Amicus Curiae appearing for appellant assailing impugned judgement of conviction of accused-appellant, advanced submissions, in the following manner :-

(i) PWs-1, 2 and 3 are interested witnesses and they are not independent.

(ii) There is no strong motive to accused to commit murder of his own real brother. Motive as stated by prosecution is not sufficient to commit the present crime.

(iii) Medical report is not compatible with the ocular version.

(iv) There are many major contradiction in the statement of PWs rendering the case of prosecution doubtful.

(v) Knife which is said to be used in the commission of offence is allegedly recovered at the instance of accused before public witness but they have not been produced by prosecution in support of recovery. In absence of public witness recovery cannot be said to be trustworthy and reliable.

(vi) Prosecution has failed to prove its case beyond of shadow of reasonable doubt and accused is entitled to get benefit of doubt and liable to be acquitted.

19. Learned AGA vehemently opposed contentions of accused-appellant and submitted that accused is named in F.I.R.; blood stained knife, allegedly used in the commission of offence, has been recovered from his possession at the pointing out of applicant; PW-2 Jhamman Lal, father of deceased as well as accused and PW-3 real brother of deceased as well as accused, have no reason to falsely implicate accused in the present case like murder; PW-1 being wife of deceased is natural witness for the reasons, incident started from house and happened on road; prosecution witnesses are totally natural and reliable witnesses and there is no scope to disbelieve their testimony; and in the statement recorded under Section 313 Cr.P.C., accused has taken a plea of alibi but could not prove it and even did not suggest as to why his father and real brother were giving false evidence against him. He sought dismissal of appeal.

20. We have considered rival submissions of both parties and travelled through evidence available on record with the valuable assistance of learned counsel for the parties.

21. Although time, date, place and manner of injuries and death of victim as stated by prosecution could not be disputed from the side of defence but according to Advocate for accused-appellant, he is not responsible for causing murder of Vinod Kumar. Even otherwise from the evidence of PWs-1, 2, 3 and 5, time, date and place of incident, death of Vinod Kumar and manner of injuries as stated by prosecution stand proved.

22. Only question remains for consideration is, "whether accused-appellant has committed murder of Vinod Kumar by inflicting knife blows on him and Trial Court has rightly convicted accused-appellant for causing death of Vinod Kumar, punishable under Section 302 I.P.C.?"

23. We may now proceed to consider the submissions of learned counsel for the parties and evidence briefly as well as legal points with few important decisions.

24. PW-1 Smt. Jyoti Shakya deposed that accused Pramod Kumar is real brother of her husband (Vinod Kumar) and Jhamman Lal PW-2 is her father-in-law; on 15.9.2007 at about 9:00 PM in the night there was a dispute between her husband Vinod Kumar and accused-appellant Pramod Kumar in respect of tea leaf and sugar; due to dispute being increased, accused Pramod Kumar abused her husband and started beating; she interfered and rescued both but, thereafter, her husband and accused came out of house on the road; she (witness) also came out of her house; while quarreling, accused-appellant took out knife from house and started stabbing in the stomach and chest of her husband due to which her husband got seriously

injured; on seeing persons coming there, accused-appellant got escaped with knife; while taking her husband to hospital in injured position, he breathed last in the way; report of incident was got registered by PW-3, Manoj Kumar (her Dewar); usually there had to be quarrel between accused-appellant and her husband for households items.

25. In her cross-examination, she admitted that she studied M.A.; her cousin sister was married to accused-appellant; three days prior to the incident, Deepmala wife of accused had gone to her maternal house; when quarrel started, she (PW-1) was in kitchen and making food; there was a quarrel regarding sugar and tea leaf and kitchen was just adjacent to room; and her father-in-law was present at the time of incident.

26. PW-2 Jhamman Lal, happens to be father of accused-appellant as well as deceased. He has deposed that on 15.9.2007 at about 9:00 PM, there was a dispute between Vinod Kumar and Promod Kumar regarding tea leafs and sugar; accused-appellant Pramod Kumar started abusing and assaulting Vinod Kumar victim; his wife Smt. Jyoti, PW-1, rescued them but both of them came out of house; while quarreling, Pramod Kumar took out knife from house; by that time Jyoti also came out of house; Pramod Kumar stabbed knife 3-4 times to victim Vinod Kumar, due to which he got injured; accused-appellant ran away from spot with knife; Manoj Kumar took victim Vinod Kumar to hospital but unfortunately victim succumbed to injuries; dead body of Vinod Kumar was taken to house.

27. PW-2 has admitted in cross-examination that he had four sons, namely, Ashok Kumar, Pramod Kumar, Vinod Kumar and Manoj Kumar; his eldest son was living in Armapur, Kanpur while rest three were living with him; and at the time of occurrence, he, Vinod Kumar, Pramod Kumar, Smt. Jyoti and her son Prashant aged about four and half years were present on spot.

28. PWs-1 and 2 withstood lengthy cross-examination but no adverse material could be brought so as to disbelieve their statement. Their presence on the spot is fully proved and natural. Statements of these two witnesses are wholly reliable and worthy to credence. There is nothing on record to show, why PW-2 Jhamman Lal, father of accused would depose against his own son in the heinous offence like murder. Even accused appellant did not suggest anything in his statement under Section 313 Cr.P.C. while PW-2 has given statement against him. He simply said that statement of witnesses are wrong. He took a plea of alibi but did not prove it.

29. PW-3 Manoj Kumar supporting prosecution case has deposed that on 15.9.2007 at about 9:00 PM he was present in his office and arrived at his house on getting information of incident; Victim Vinod Kumar was lying in injured position; he took him to hospital on Tempo but on the way victim breathed last; he came back to his house with dead body and presented written report Ex.Ka-1 in the Police Station. This witness is not an eye witness, therefore, much more discussion is not required.

30. So far as argument of learned Amicus Curiae for accused-appellant in respect of relation witnesses is concerned, we are not impressed with submission made by learned Amicus Curiae for

accused-appellant for reasons that if relation witnesses are found to be reliable, natural and trustworthy, their evidence cannot be discarded on the ground of their relationship with deceased or accused.

31. Now, next thing to be considered is that PWs.-1, 2 and 3 are family members of deceased. PW-1 is wife of deceased, and therefore, their evidence should be treated to be trustworthy or not. This submission is thoroughly misconceived. Mere relationship is not sufficient to discard otherwise trustworthy ocular testimony.

32. In **Dalip Singh v. State of Punjab, AIR,1953, SC 364**. Court held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

33. In **Dharnidhar v. State of UP (2010) 7 SCC 759**, Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"

34. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(Vide: **Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308**)."

35. It is settled that merely because witnesses are close relatives of victim,

their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

36. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

37. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,** Court has held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

38. According to Advocate for appellant, medical evidence is not compatible with ocular evidence.

39. PW-5 Dr. Yogesh Dayal, deposed that on 16.9.2007, he conducted autopsy over the dead body of Vinod Kumar and found five ante-mortem injuries which reads as under :-

(i) Abraded contusion 6cm x 0.5 cm on left side of face, just above the ramus of mandibular.

(ii) Abraded contusion 17 cm x 7 cm on upper arm on tricep area.

(iii) Stab wound 2 cm x 1 cm x abdominal cavity deep on front of abdomen right side, 1 cm lateral to umbilicus bleeding.

(iv) Stab wound 1 cm x 0.5 cm x Abdominal cavity deep on lower abdomen right side, 7 cm lateral to umbilicus, bleeding.

(v) Stab wound, 2 cm x 1 cm x muscle and bone deep present on back of lower chest right side, 4 cm lateral to vertebral coloum and 15 cm below the interior angle of right scapula.

40. Doctor opined that death of deceased might have occurred due to shock and haemorrhage on account of ante-mortem injuries and it was possible 1/2 days prior to post mortem. He further opined that injury nos. 3, 4 and 5 were possible to be caused by some sharp edged weapon.

41. We are not in agreement with the learned counsel for the appellant for the reasons that PW-1, 2 and 3 supporting prosecution case have deposed that accused-appellant stabbed 3-4 knife blows in the stomach of deceased Vinod Kumar due to which deceased Vinod Kumar received serious injuries and Doctor has opined that death of victim would have been caused due to ante-mortem injuries. In this way medical evidence is totally compatible with oral version.

42. In so far as discrepancies, variations and contradictions in prosecution case are concerned, we have analysed entire evidence in consonance

with submissions raised by learned counsel's and find that the same do not go to the root of case and accused-appellant are not entitled to get benefit of the same.

43. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

44. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

45. om some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

46. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy is Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

47. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the

evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. **[Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].**

48. So far as next argument of learned counsel for the appellant is concerned, according to him, public witness in support of recovery of knife has not been produced from the side of prosecution and absence of public witness recovery become doubtful.

49. We would like to consider briefly the evidence of Officer, who made recovery and some important decisions on this subject. PW-7, Nirankar Singh, I.O. in his statement in chief deposed that he arrested accused Pramod Kumar sitting near a temple at about 9:15 PM. In his disclosure statement, he admitted his guilt and on his pointing out one blood stained knife was recovered from bushes near eucalyptus tree. It is true that recovery is said to be made before public witness as but no public witness has been produced from the side of prosecution to prove recovery. Witness PW-7 was lengthy cross-examined by accused counsel but nothing on record to show that witness had any occusation to falsely implicate the accused.

50. As a matter of rule, there can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of police officer is found acceptable, it would be an erroneous proposition that court must reject prosecution version solely on the ground that no independent witness was examined. In **Pradeep Narayan Madqaonkar & others vs. State of Maharashtra 1995 (4) SCC 255**, it was held:

"Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation of the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony."

51. **Balbir Singh vs. State 1996 (11) SCC 139,** the Court has repelled a

similar contention based on non-examination of independent witnesses. The same legal position has been reiterated time and again by Apex Court vide **Paras Ram vs. State of Haryana 1992 (4) SCC 662, Sama Alana Abdulla vs. State of Gujarat 1996 (1) SCC 427, Anil alias Andya Sadashiv Nandoskar vs. State of Maharashtra 1996 (2) SCC 589.**

52. In **Subhash Singh Thakurshyam vs State (Through CBI) (1997) 8 SCC 732**, a Two Judge Bench of the Apex Court comprising of Hon'ble M. Mukherjee and Hon'ble K. Thomas JJ, in para 90 observed:

"....We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements."

53. In **State of U.P. v. Zakaullah 1998 Cri. L.J. 863** in para-10, it is said:

*"The necessity for "independent witness" in cases involving police raid or police search is incorporated in the statute not for the purpose of helping the indicted person to bypass the evidence of those panch witnesses who have had some acquaintance with the police or officers conducting the search at some time or the other. Acquaintance with the police by itself would not destroy a man's independent outlook. In a society where police involvement is a regular phenomenon many people would get acquainted with the police. But as long as they are not dependent on the police for their living or liberty or for any other matter, it cannot be said that those are not independent persons. If the police in order to carry out official duties, have sought the help of any other person he would not forfeit his independent character by giving help to police action. T**he requirement to have independent witness to corroborate the evidence of the police is to be viewed from a realistic angle. Every citizen of India must be presumed to be an independent person** until it is proved that he was a dependent of the police or other officials for any purpose whatsoever."*

54. Referring to some of the the aforesaid decisions, Court in **Girja Prasad Vs. State of M.P. (2007) 7 SCC 625** held:

"It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was

stated by a witness has a ring of truth, conviction can be based on such evidence." (para 25)

55. In the present case, it is fully established from the statement of PW-1 and PW-2 that Vinod Kumar succumbed to knife injures caused by accused-appellant. Evidence shows that dead body of deceased was found in the house at the time of inquest. Medical evidence shows that death of Vinod Kumar might have occurred due to shock and haemorrhage on account of ante-mortem injuries, as alleged by prosecution. Accused-appellant in his statement under Section 313 Cr.P.C. has given reply that witnesses gave false statement but he did not suggest anything as to why PW-1 and PW-2 gave false statements against him, therefore, there cannot be any hesitation to come to conclusion that accused Pramod Kumar caused death of his brother Vinod Kumar by causing several injuries on his body with knife.

56. In view of facts and legal position discussed hereinabove, we find that Trial Court has rightly analyzed evidence led by prosecution and found accused guilty and convicted him for having committed murder of Vinod Kumar, an offence punishable under Section 302 IPC. Conviction and sentenced awarded by Trial Court is liable to be maintained and confirmed. No interference is warranted by this Court. Jail appeal lacks merit and liable to be dismissed.

57. So far as sentencing of accused-appellant is concerned, it is always a difficult task requiring balance of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in individual cases.

58. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation upon court to constantly remind itself that right of victim, and be it said, on certain occasions or person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

59. Hence, applying the principles laid down in the aforesaid judgments and

having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed, we find that punishment awarded to accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no question arises to interfere in the matter on the point of punishment imposed upon him.

60. Resultantly. **Appeal** lacks merit and is hereby **dismissed.**

61. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

62. Before parting, we provide that Smt. Archana Singh, Advocate, who has assisted as Amicus Curiae, appearing for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 15,000/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)10ILR A 478

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE `VIRENDRA KUMAR SRIVASTAVA, J.

Jail Appeal No. 1621 of 2014

Mahendra ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Mahendra Prasad Mishra

Counsel for the Opposite Party:
Sri M.C. Joshi (A.G.A.)

A. Indian Evidence Act, 1872 - Section 118 - Neither any number of witness required to prove a fact nor evidence of a witness can be rejected only on the ground of his relationship with the victim. The whole prosecution case can be proved by a single witness if evidence is natural and trustworthy. (Para 30)

B. Under Criminal jurisprudence, particularly in rape cases where offence is committed in a secret place, by a man with a woman who is normally physically weaker than the offender, possibility and availability of eye-witness is rare. (Para 33)

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Masalti & ors. Vs St. of U.P. AIR 1965 SC 202

2. Mohabbat Vs St. of M.P. (2009) 13 SCC 630

3. Bharwada Bhogin Bhai Hirji Bhai Vs St. of Guj. AIR 1983 SC 753

4. Vahid Khan Vs St. of M.P. (2010) 2 SCC 9

5. Independent Thought Vs UOI & ors. (2017) 10 SCC 800

6. St. of M.P. Vs Saleem @ Chamaru AIR 2005 SC 3996

(Delivered by Hon'ble Virendra Kumar Srivastava, J.)

1. The present jail appeal under Section 383 Cr.P.C. has been filed by accused-appellant Mahendra through

Superintendent of Jail, Firozabad against the judgment and order dated 21.2.2014 passed in Sessions Trial No. 483 of 2013, convicted under Section 5 (m), 5 (i) read with 6 of Protection of Children from Sexual Offence, 2012 (hereinafter referred as "POCSO Act, 2012') whereby he has been sentenced to undergo life imprisonment along with a fine of Rs. 10,000/-for offence under Section 5(m) read with Section 6 and further has been sentenced for similar sentence i.e. life imprisonment and fine of Rs. 10,000/- for offence under Section 5(i) read with Section 6 of POCSO Act, 2012. In the event of default of payment of fine, he has been directed to further undergo one year additional imprisonment on each count. All the sentences were directed to run concurrently.

2. Prosecution case in short is that on 20.8.2013 at 7:35 p.m., P.W.1, Informant Nirosh Chandra, went along with his grand daughter victim (name of victim is not being disclosed and she is being addressed as a victim) aged about 9 years at Police Station (P.S.) Kahairgarh, District Firozabad and submitted a written report (Ex.Ka.1), stating therein that on the said day victim had gone to the fields for grazing she-goats. In the evening at 6:00 p.m. appellant Mahendra son of Banvari Jatav, dragged her away in Bajra (maiz crops) field of Pappu, committed rape upon her, left victim in injured state and fled away thereafter. Information of the incident was given to him by one Ram Sanehi resident of his village. Thereafter Informant, his son Ram Avtar and other villagers of his village rushed to the place of occurrence and found victim groaning due to pain.

3. On the basis of written report (Ex.Ka.1), P.W.5 Head Moharrir Dharam Pal Singh lodged report on 20.8.2013 at 7:35 p.m. at Case Crime No. 114 of 2013, under Sections 376 I.P.C., 3A and 4 of POCSO Act, 2012 and also prepared chick report (Ex.Ka.6). He made relevant corresponding entry in General Diary at Report No. 42, a copy whereof is Ex. Ka.7 on record. After registration of the case, investigation was undertaken by P.W.7, Station Officer, Manoj Kumar, who recorded statement of Informant, P.W.1 and scribe of the written report, Mukesh Kumar. Victim was sent for medical examination and treatment to District Hospital as she was suffering from severe pain and agony. Thereafter he proceeded to spot, prepared site plan (Ex.Ka.10) of the place of occurrence on pointing out of Informant. During investigation, he arrested accused-appellant Mahendra; copied statement of victim recorded under Section 164 Cr.P.C. in case diary and sealed clothes of the victim which were later on sent for forensic test.

4. The victim was examined by P.W.3, Dr. Sadhna Rathore, on 20.8.2013 at 9:20 p.m. According to this witness, victim was a young girl with 138 cm height and 29 kg weight; breasts were not developed; auxiliary and pubic hair were not present, no mark of external injury on the body was present. On further examination, bleeding from vagina was present; blood clots were also present in vagina; second degree perineal tear at 5:0' clock position about 1 inch in length and ½ inch in depth; and oedema was present around tear. According to P.W.3, she had prepared vaginal smear slide and sent to pathology for examination of history and presence (H/P) of spermatozoa. The victim was referred to S.N. Medical College, Agra for expert management and detailed medico legal examination. She

was advised for X-ray. According to P.W.3, injury was caused to victim by hard and blunt object and possibility of sexual assault could not be ruled out.

5. As per P.W.8, Dr. Shashikant Gupta, Radiologist who had conducted x-ray of victim for determination of her age, the victim was aged about 9 years at the time of occurrence. He had prepared X-ray report (Ex.Ka.13) which was duly counter signed by Chief Medical Officer, Firozabad.

6. On 27.9.2013, during investigation victim was produced before Additional Civil Judge (Judicial Magistrate), II Firozabad who had recorded her statement under Section 164 Cr.P.C. to the following effect:-

"Today on 27.9.2013, victim has been produced by the Investigating officer Manoj Kumar for statement under Section 164 Cr.P.C. Identification and signatures of victim were certified.

Today since victim, daughter of Ram Awtar aged 8 years, class III, School K.P.Singh, School Khairgarh, resident of Khairgarh, District Firozabad, is minor, hence she was asked questions about her education and subject, brothers and sisters to which she replied that Hindi, English, Science and Maths subject were taught in school. Regarding brothers and sisters she stated that she has one brother and two sisters. Hence the victim is capable of tendering statement and possesses common parlance.

Victim stated that:

When my school gets closed, I go to graze goats. That day too, I had gone to graze she-goats and was plucking grass and feeding them. From behind Mahendra Baba came and asked her to jump in Bajra field but I did not go there, whereupon Mahendra Baba shut my mouth and dragged me by his hands in the field of Bajra. Thereafter he undressed my undergarment and committed bad act with me. He had shut my mouth and had also warned if she shouted he would strangulate her.

I had become unconscious. When it rained, I came to my senses and came out of the field gradually. On the field Alka Bua met me, I told her entire episode whereupon she started crying and then "Hat waley Baba" came over there and Alka Bua telephoned at my home and Praveen uncle came on motorcycle. Praveen Uncle directly took me to police station. Subsequently, my parents get my treatment done."

7. After conclusion of investigation, P.W.7 S.O. Manoj Kumar submitted a charge-sheet (Ex.Ka.11) against appellant under Section 376 I.P.C. and 3(a) / 4 of POCSO Act, 2012.

8. Cognizance of the offence was taken by Additonal District and Session Judge, II Firozabad on 21.9.2013. Copies of relevant prosecution papers were supplied to appellant by Trial Court. It appears that case was transferred and charges were framed by Additional District and Session Judge, Court No. 3, Firozabad on 10.10.2013 which read as under:-

मै श्रीमती ज्योत्सना शर्मा, अपर सत्र न्यायाधीश, कोर्ट संख्या–3, फिरोजाबाद आप महेन्द्र पर निम्नलिखित आरोप लगाती हूँ।

प्रथम– *यह कि दिनांक 20–08–2013, समय –6 पी0एम0, स्थान–खेत बाजारा पप्पू, वहद*

ग्राम खैरगढ़, जिला फिरोजाबाद में आपने पीड़िता उम्र–09 वर्ष पुत्री रामौतार के साथ बलात्संग कारित किया। इस प्रकार आपने ऐसा अपराध कारित किया है जो भारतीय दण्ड संहिता की धारा 376 (2) (झ), यथा संशोधित दण्ड विधि (संशोधन) अधिनियम–2013 के तहत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

द्वितीय– *यह कि उपरोक्त दिनांक, समय एवं स्थान पर आपने (पीडिता) उम्र–09 वर्ष के साथ गुरूतर प्रवेशन लैंगिक हमला किया जिससे कुमारी पीड़िता की योनि में चोटे आयी जैसा कि धारा–5 (झ) एवं 5 (ड़) लैंगिक अपराधो से बालको का संरक्षण अधिनियम में परिभाषित है तथा धारा–6, लैंगिक अपराधो से बालकों का संरक्षण नियम–2012, के तहत दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।*

एतद् द्वारा आप को निर्देशित किया जाता है कि उक्त आरोपो के लिए आपका विचारण इस न्यायालय द्वारा किया जायें।

I, Jyotsana Sharma, Additional Session Judge, Court No. 3, Firozabad hereby charge you Mahendra as follows:

"Firstly That you, on 20.8.2013 at 6:00 p.m. in the filed of Bajra of Pappu within the limits of Police Station Khairgarh, District Firozabad committed rape on victim, daughter of Ram Awtar aged about 9 years. You thereby committed an offence which is punishable under Section 376(2) (i) as amended by Criminal Amendment Act, 2013 and within the cognizance of this Court.

Secondly, that on the aforesaid date, time and place you committed penetrative sexual assault on the victim aged about 09 years causing injuries to her vagina as defined under Section 5 (m) and 5 (i) of POCSO Act, 2012 and is punishable under Section 6 of Protection Of Children From Sexual Offences Act, 2012 and within the cognizance of this Court.

You are hereby directed to be tried for the aforesaid charges. (English translation by Court).

9. Charges were read over and explained to accused-appellant who pleaded not guilty and claimed to be tried.

10. In order to substantiate prosecution case, as many as eight witnesses were examined from the side of prosecution, out of whom Informant, P.W.1 Nirosh Chandra, and victim P.W.2 victim are witnesses of fact. Rest are formal witnesses. P.W.3, Dr. Sadhna Rathore, had initially examined victim and has proved photocopy of injury report (Ex.Ka.2) and original injury report Ex.Ka.9. She has also proved supplementary report (Ex.Ka.3) and reference letter (Ex.Ka.4) for pathology.

11. P.W.4, Dr. Richa Singh, had undertaken treatment of victim at S.N. Hospital, Agra and proved discharge slip (EX.Ka.5). P.W.5, Head Constable Dharampal had registered F.I.R. and proved chick report (Ex.Ka.6) as well as copy of General Diary entry (Ex.Ka.7). P.W.6, Constable Clerk Brijesh Kumar has proved letter of request (Ex.Ka.8) addressed to Incharge PHC/CHC, Khairgarh for medical examination of injured victim. P.W.7, S.O. Manoj Kumar had conducted investigation of the case and proved charge-sheet (Ex.Ka.11) as well as site plan and other necessary documents. P.W.8, Dr. Shashikant Gupta, Radiologist has proved age certificate of the victim countersigned by C.M.O. on the basis of X-ray report submitted by him.

12. After conclusion of evidence, accused-appellant was examined under Section 313 Cr.P.C. He denied prosecution evidence and stated to be falsely implicated on account of enmity with the villagers. He did not adduce any evidence in defence.

13. After hearing counsel for parties and on appreciation of evidence available on record, learned Trial Court convicted and sentenced accused-appellant as mentioned in para 1 of this judgment.

14. Feeling dissatisfied, accused-appellant has approached this Court through Superintendent of Jail, Firozabad in the instant appeal.

15. Heard Sri Mahendra Prasad Mishra, learned counsel for appellant and Sri M.C. Joshi, learned A.G.A. for State.

16. Learned counsel for appellant has submitted that appellant is innocent and has been falsely implicated. No eye-witness has been produced by prosecution; statement of P.W.1, Nirosh Chand, is self contradictory and cannot be relied as he is interested witness and no other witness was examined by the prosecution; no external injury on the body of victim was found, no spermatozoa was found in medical examination, thus ocular evidence is not corroborated by medical evidence; place of occurrence is doubtful as the prosecution has failed to prove whether offence was committed in the field of maize crops or on road; thus prosecution has failed to proved its case beyond reasonable doubt and accused-appellant is liable to be acquitted.

17. Per-contra learned A.G.A. has submitted that prosecution has succeeded to prove its case and ocular evidence is fully supported by medical evidence; the evidence of victim is wholly reliable, trustworthy and requires no further corroboration; accused has committed a heinous statutory offence and is not entitled any mercy; hence, appeal is liable to be dismissed.

18. We have considered the rival submission of learned counsel for parties and have gone through the entire record.

19. In this appeal it has to be determined, "whether the prosecution has succeeded to prove the charge levelled against the accused-appellant successfully and beyond reasonable doubt."

20. P.W.1 Nirosh Chand, grandfather of the victim, has stated that on 20.8.2013 at 6:00 p.m. his grand daughter, aged about 9 years, had gone to graze her goats in field. Accused-appellant Mahendra Singh (present before Trial Court) had dragged her in a maize crop field of Pappu and raped her. He fled away leaving her in injured condition. He has further stated that the said incident was informed to him by one Ram Sanehi and upon information he, his son Ram Awtar and so many people rushed towards the place of occurrence and saw that the victim was crying with pain. Thereafter they took her to police station, got First Information Report (Ex.Ka.1) written by one Mukesh Kumar and filed the same. He has further stated that the victim was sent by police to hospital for treatment. As she was badly injured, therefore, she was referred therefrom to Firozabad, District Hospital and thereafter she was further referred to Agra for treatment.

21. P.W.2 is a victim aged about 9 years. Since she was of tender age. Trial

Court, before her examination, asked some preliminary questions in order to testify her competency, whether she was able to give rational answer to the questions, put to her during her examination and after satisfaction that she was competent for deposition, Trial Court permitted her to give her evidence on oath. She stated on oath that incident happened in that year prior to Sanuna (Raksha Bandhan) on the day when a sister used to tie band on the wrist of her brother. It was the evening and not a dark. She had gone to graze her goats in the field situated in her village har (outskirt of village) where accused appellant Mahendra met her and said her to jump (come) in the field of maize crops but she did not jump. Thereafter he shut her mouth, caught her hand and dragged her in the filed of maize crops which was Pappu's field. She has further stated that the appellant had got down her undergarment and laid her in field and said that until he would thrust her whole penis (lund), he would not leave her. Thereafter, he thrust her penis (munia) into her vagina whereupon she became unconscious. She further stated that she had got severe injuries, profused bleeding and became totally unconscious. After sometime when she became conscious, she started to weep, thereafter people arrived there including her Alka Bua (aunty). She was medically examined and referred to Firozabad Hospital and thereafter had also been admitted in Agra for treatment. Police got her statement recorded in Court. Accused-appellant Mahendra had threatened her not to disclose the incident to anyone otherwise he would kill her.

22. P.W.3, Dr. Sadhna Rathore, has stated that on 20.8.2013 she was on duty as Emergency Medical Officer (E.M.O.) at District Women Hospital, Firozabad and examined victim who was brought before her by Constable 619 Ram Bihari at 9:20 p.m. (the injuries and examination report has been mentioned in the preceding paras of this judgment). She said that during examination she had prepared Medico Legal Examination Report (Ex.Ka.9); vaginal smear were sent for pathological examination to detect the presence of spermatozoa and its reference letter (Ex.Ka.4) was prepared by her, but no sperm was detected; thereafter she had prepared supplementary Medico Legal Report (Ex.Ka.3); in her opinion, injury caused to the victim was of hard and blunt object and possibility of sexual assault cannot be ruled out.

23. P.W.4, Dr. Richa Singh has stated that on 21.8.2013, she was posted as Professor in S.N. Medical College, Agra and had given treatment to the victim who was referred by District Hospital, Firozabad. The victim was admitted for treatment under his supervision. Her perineum and vagina was torn. She (P.W.4) had stitched it and discharged after three days as her condition was satisfactory. According to her, discharge slip (Ex.Ka.5) of the victim was prepared by one Dr. Harpreet Singh under his dictation.

24. P.W.5, Head Constable 128 Dharamapl posted at Police Station Khairgarh has stated that he had prepared Chick F.I.R. (Ex.Ka.6) No. 55 of 2013 on the basis of written information given by informant and registered as Case Crime No. 114 of 2013, under Section 376 I.P.C. and ¾ of POCSO Act. He has further stated that the said information was also entered in General Diary Report No. 42 (Ex.Ka.7) at 19:35 p.m.

25. P.W.6, Constable Clerk 849 Brijesh Kumar has stated that on

20.8.2013, he was posted as Const. Clerk at P.S. Khairgarh, District Firozabad and prepared Medico Legal Examination reference letter (Ex.Ka.8) of victim who was brought at P.S. in serious condition and referred her with Constable Ram Bihari at CSC Khairgarh for treatment; condition of victim was serious as there was profuse bleeding from her private part (vagina).

26. P.W.7, S.I. Manoj Kumar posted as Station Officer at P.S. Khairgarh, District Firozabad has stated that he had investigated Case Crime No. 114 of 2013, under section 376 I.P.C. 3(ka), 4 of POCSO Act. During investigation, he had recorded statements of Head Moharrir Dharampal Singh, P.W.1 Nirosh Chandra, P.W.7 Mukesh Kumar, subscriber of F.I.R. and also prepared site plan (Ex.Ka.10) of occurrence; arrested accused-appellant Mahendra; recorded statement of victim; perused supplementary report, X-ray report, age determination report and also took the panty of victim. He has further stated that victim was produced before Magistrate for recording her statement under Section 164 Cr.P.C. and he had copied that statement in case diary. After investigation, as sufficient evidence was found against appellant, he had submitted a charge-sheet against him under Section 376 I.P.C., 3(ka)/4 POCSO Act. He has also identified undergarment (Material Ex.2), produced before him during examination.

27. P.W.8, Dr. Shashikant Gupta, posted as Radiologist on 5.9.2013 at District Hospital, Firozabad, has stated that victim was referred to him for age determination and her X-ray was conducted under his supervision by X-ray technician. According to him in X-ray of her left elbow, epiphysis of lateral epicondyle was not appeared but epiphysis of medial epicondyle and head of radius appeared but not fixed. He has further stated that in X-ray of right wrist, seven carpal bones and right lower head of right radius and ulna were appeared. According to him, X-ray report (Ex.Ka.12) was prepared by him on the basis of X-ray plate (Material Ex.3). He has further stated that age certificate (Ex.ka.13) of victim was prepared by the Board and he had also signed it for determination of age of victim counter signed by Chief Medical Officer.

28. So far as the first submission of learned counsel for appellant is that no eye witness has been produced by prosecution, statement of P.W.1 Nirosh Chandra is self-contradictory and cannot be relied as he is interested witness, is concerned, this is a case of a brutal rape with victim aged about 9 years and rape has been committed by appellant aged about 50 years at the time of occurrence. Evidence on record shows that the victim has called him as "Mahendra Baba' which denotes that she treats and respects appellant as a grand-father or saint (Baba). The way this loathsome wicked act has been committed, has shocked the conscious of the society. Evidently, no eye-witness, other than the victim, has been produced by prosecution. P.W.1, Nirosh Chandra, is the grand-father of the victim. He has clearly stated that when he reached the place of occurrence, he saw that victim was crying and screaming due to severe pain caused by rape, committed by accused-appellant. This witness, though is not a witness of the rape but had reached the place of occurrence just after the occurrence and is a witness of brutal

condition of victim caused by appellant. In his cross-examination he has stated that his grand daughter (victim) had told him regarding the occurrence. His evidence cannot be disregarded in any condition.

29. P.W.2, victim aged about 9 years, victim of brutal rape committed by appellant and left over by him in an open field in a pitiable and serious condition is an innocent child. She has no enmity with appellant. She has narrated the occurrence before Trial Court as well as in her statement under Section 164 Cr.P.C., recorded by Judicial Magistrate. Both the witnesses produced by prosecution have been cross-examined by counsel appearing for appellant before Trial Court but nothing has come out in their cross-examination to disbelieve prosecution story.

30. It is settled principle of law as provided in Section 118 of Evidence Act that specific number of witnesses are not required to prove any fact. Similarly evidence of a witness cannot be rejected only on the ground of relationship of the victim. The whole prosecution case can be proved by a single witness if his/her evidence is natural and trustworthy.

31. It is very pertinent to quote at this very stage the law laid down in **Masalti and others vs. State of U. P., AIR 1965 SC 202**, wherein Court said as under :

".....But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct....."

32. Similarly, in **Mohabbat vs. State of M.P., (2009) 13 SCC 630**, Court held as under :

".....Relationship is not a factor to affect credibility of a witness. It is more often than not a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

33. It is settled principle of Criminal jurisprudence particularly in rape cases that since this type of offence is committed in a secret place by a man with woman who is normally physically stronger than the victim, possibility and availability of eye-witness is rare. Uncorroborated sole testimony of victim may be acted upon, if her evidence is reliable and to refuse the testimony of a victim of sexual assault in absence of corroboration would amount to adding an insult to the victim.

34. In **Bharwada Bhogin Bhai Hirji Bhai vs. State of Gujarat AIR**

1983 SC 753, Court while dealing with the uncorroborated testimony of the victim of sexual assault, has held as under:-

"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social mileu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:

(1) The female may be a 'gold digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengence on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarassing position, on account of personal or political vendatta. (5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy. (7) She may do so to win sympathy of others. (8) She may do so upon being repulsed.

By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so

sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave thewhole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World. Obseisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case,

medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune."

35. In the present case, victim is aged about only 9 years. Neither P.W.1 Nirosh Chandra nor victim had any grudge or enmity with the appellant. Both the victim and appellant are residents of same village. There is no occasion to presume as to why P.W.1 Nirosh Chandra will implicate appellant in false case and stake his honour and dignity in the society. Generally such type of offence is committed in remote sequestered and secluded place, in well pre planned way, so that none can witness the occurrence. It is a case of brutal sexual assault caused by appellant. It is not the case of prosecution that before or at the time of rape any person or witness except victim and appellant was present at the place of occurrence. Thus in this case, prosecution cannot be blamed for non production of any independent witness. Hence submission of learned counsel for appellant, in this regard, has no substance.

36. So far as the argument of learned counsel for appellant that no external injuries on the body of victim or any spermatozoa was found in medical examination and thus there is contradiction between ocular and medical evidence, is concerned, record shows that a serious injury was found in the vagina of victim by P.W.3 Dr. Sadhna Rathore as well as Dr. Richa Singh (P.W.4). Both these medico legal expert have concurrently deposed that deceased was seriously injured and the injury was caused by a blunt object which would have been caused by sexual assault. Although no sperm was detected in pathological report, the same cannot discredit testimony of victim (P.W.2), P.W.3 Dr. Sadhna Rathore and P.W.4 Dr. Richa Singh. The presence of spermatozoa depends upon various facts for example whether accused had ejaculated at the time of occurrence or not or the time gap between the pathological examination and rape. In this case, victim had become unconscious due to pain as appellant penetrated his penis into her vagina and profused bleeding was started therefore it might be that appellant looking into the serious condition of victim would have not ejaculated.

37. In **Vahid Khan vs. State of M.P. (2010) 2SCC 9**, Court reiterating the consistent view in this regard has held that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. Record further shows that both the medical witnesses P.W.3 Dr. Sadhna Rathore and P.W.4 Dr. Richa Singh have fully supported and corroborated prosecution version as alleged by P.W.1 Nirosh Chand and P.W.2 victim. The injury report and other medical document provided by these witnesses also support prosecution case. PW-2, victim in her examination on oath, before Magistrate, has categorically stated that she was sexually assaulted by appellant and became unconscious due to pain occurred during rape committed by appellant. These witnesses were cross-examined at length at each and every aspect but

nothing has come out in their cross-examination whereby any slightest doubt can be assumed in their statement. Thus ocular evidence is wholly corroborated by medical evidence. In view of above discussion, submission of learned counsel for appellant regarding non presence of spermatozoa, absence of injury on the external part of body of victim or contradiction between medical and ocular evidence has no force in the facts and circumstances of this case.

38. It is also pertinent to mention at this juncture that victim was produced before Judicial Magistrate just after she was discharged from hospital after medical examination and treatment. Her statement was recorded under section 164 Cr.P.C., where she has narrated whole occurrence (statement under section 164 Cr.P.C. has been transcribed at para no. 6 of this judgment). This witness in her examination has also stated that she had been produced before Magistrate and her statement was recorded. This witness has not been cross-examined by defence on this point before Trial Court. Thus statement under section 164 Cr.P.C further corroborates prosecution story.

39. So far as the last submission of the learned counsel that place of occurrence is doubtful and prosecution has failed to prove, whether offence was committed in the field of maize crops or on the road is concerned, in F.I.R. it has been clearly mentioned that appellant dragged victim in the maize crops of Pappu, committed rape with her and fled away leaving her alone in that field. P.W.1 Nirosh Chand and P.W. 2 victim have also stated that appellant dragged victim in the maize crops field of Pappu when she had gone to graze her she-goats.

40. In this case, victim is the sole eye-witness. In examination-in-chief, victim has specifically stated that appellant had called her in the field of Maize crops and when she did not follow his command, he shut her mouth and dragged her in maize crops field which was of Pappu. In her cross examination she has unequivocally stated that at the time of occurrence appellant Mahendra met with her on road and from where Pappu's field would be 8-10 steps away; when she had proceeded from her house, appellant Mahendra followed her and met with her after one hour at the place of occurrence; he had not dragged her on road; the maize crops plants were situated 4-5 steps away from the place where she was grazing her goats; there was crushed stones lying on the place from where appellant dragged her; and there were clay pebbles *(dheyla).*

41. Victim, nowhere, in her statement, has stated that occurrence was committed by appellant on the road. Similarly P.W.1 Nirosh Chand has also not stated in his statement that occurrence was committed by appellant on the road. P.W.7 S.I. Manoj Kumar is Investigating Officer who had prepared site plan (Ex.Ka.10) of the occurrence. In Ex.ka.10 it has been specifically mentioned that offence was committed by appellant with victim in the field of maize crops, owned by Pappu @ Amar Singh. The place of occurrence is shown by "A'. This witness has stated in his examination that he had visited the place of occurrence and prepared site plan, Ex.ka.10. In his cross-examination he has specifically stated that he visited the place on the date of occurrence along with Informant, inmates of victim and other police officials and prepared site plan on the pointing out of

Informant. From perusal of statement of these witnesses and documentary evidence, Ex.Ka.1 (F.I.R) and Ex.Ka.10 (site plan), it is clear that the place of occurrence is the field of maize crops belonging to one Pappu which has been fully established without any doubt by prosecution. Thus the submission raised by learned counsel for appellant has no substance.

42. It is also pertinent to note that it is a case of brutal rape committed by accused aged about 50 years with victim who is a kid of just about 9 years old; and appellant is resident of the same village where victim and his grandfather resides.

43. It is established principle of criminal administration of justice that no person will frame her own grand-daughter as a victim of rape who is just about 9 years old because he is very well aware with the fact that whole life of victim may be victimized by society particularly in rural areas. P.W.1 Nirosh Chand and P.W.2 victim are rustic witnesses. P.W.1 is illiterate whereas P.W.2 is innocent child. They were put too lengthy cross examination by learned defence counsel before Trial Court but nothing could be extracted by way of cross examination so as to create any doubt in their testimonies. Their statements are natural and trustworthy. F.I.R. has been lodged without any delay. F.I.R. and medical examination reports of victim are in consonance and corroboration of their statement. According to the statement and examination of all the witnesses, each and every circumstances of the case proved by prosecution leads to only one conclusion that the said brutal offence of rape has been committed by accused appellant. There is nothing on record to show that prosecution witnesses had any animus with appellant so as to implicate him falsely absorbing the actual assailant. Trial Court had elaborately discussed prosecution evidence in the light of arguments advanced by learned counsel of prosecution as well as defence. The impugned judgment and order requires no interference and is liable to be affirmed.

44. Now the question arises, "whether sentence awarded to the appellant by Trial Court is just and proper or not"?

45. In this case, a brutal and hateful offence of rape has been committed by a person aged about 50 years with an innocent victim aged of 9 years and serious injuries have been caused in her vagina. Offence of rape has been defined in Section 375 IPC and its punishment has been provided in Section 376 I.P.C. In addition to it, a special law has been enacted i.e. POCSO Act, 2012 which declares separate offence committed to a child below the age of 18 years as penetrative sexual assault and aggravate penetrative sexual assault. Since victim was aged about 9 years old at the time of occurrence i.e. 20.8.2013, hence, relevant provision of Section 375, 376 of I.P.C. and Section 5, 6, 42, 42A of POCSO Act, (applicable at the time of occurrence) are required to be considered at this stage. These provisions are as follows:

Section 375 *- A man is said to commit "**rape**" if he:*

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

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

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

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

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person whom she is interested, in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

Section 376 - Punishment for rape.

1. .....

2. Whoever, -

.....

i. commits rape on a woman when she is under sixteen years of age; or

.....

m. while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n. .....

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

46. Section 5 and 6 of POCSO Act,2012 are as follows:

Section 5. Aggravated penetrative sexual assault.-

.....

i. whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

.....

m. whoever commits penetrative sexual assault on a child below twelve years; or

.....

Section 6. Punishment for aggravated penetrative sexual assault.-

"Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

47. Thus it appears that a single / same act of aggravated penetrative sexual assault / rape has been declared as offence under Section 375 read with Section 376 I.P.C. and also under Section 5 read with 6 of POCSO Act, if victim is aged about below 12 years.

It is settled principle of law that no person can be punished twice for one offence. Normally Criminal Court by virtue of Section 71 I.P.C., in such cases, where any criminal act is punishable in two or more statutes or in different provision of same statutes, awards sentence in such provision of such statutes where lesser punishment has been provided. Parliament was aware to this situation. Looking into the gravity of nature of rape offences, particularly, rape with victim below the age of 18 years, Section 42 and 42 A of POCSO Act, 2012 were incorporated to deal with such peculiar situation which are as follows:-

Section:42: *Alternative Punishment:- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*

Section42(A)*:Act Not In Derogation Of Any Other Law:- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*

48. Thus it is clear that if offence of sexual assault is punishable in relevant provision of POCSO Act and is also punishable in relevant provision of I.P.C., like 376 I.P.C., Trial Court is bound to punish accused either in the relevant provision of POCSO Act, or under I.P.C. which is greater in degree.

49. Court, while dealing with Section 42 and Section 42A and relevant provisions of POCSO Act, 2012 in **Independent Thought vs. Union of Indian and Others (2017) 10 SCC 800, paras 79 and 80,** has held as under:-

79. *"Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by*

which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The legislature knowingly introduced Section 42 of POCSO to protect the interests of the child. As the objects and reasons of the POCSO show, this Act was enacted as a special provision for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. These children were to be protected from exploitation and given facilities to develop in a healthy manner. When a girl is married at the age of 15 years, it is not only her human right of choice, which is violated. She is also deprived of having an education; she is deprived of leading a youthful life. Early marriage and consummation of child marriage affects the health of the girl child. All these ill effects of early marriage have been recognised by the Government of India in its own documents, referred to hereinabove."

80. *"Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Section 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 in so far as it relates to children, is inconsistent with POCSO."*

50. In this case, victim is aged about 9 years old at the time of occurrence. Section 376 (2) (i) (m) provides, if the offence of rape is committed to a woman aged below 16 years and grievous bodily harm was caused or while committing rape offence or accused has endangers the life of victim; he shall be punished for rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to life imprisonment **which**

shall mean imprisonment for life for the remainder of that person's natural life, and shall also be liable to fine, whereas, Section 6 of POCSO Act, 2012 provides punishment for such offence only for a rigorous imprisonment for a term which shall be not less than 10 years but which may extend to imprisonment for life. Thus imprisonment for remaining natural life as provided in Section 376 is more severe than the imprisonment for life as provided in Section 6 of POCSO Act, 2012.

51. In view of the above, learned Trial Judge ought to have punished appellant in Section 376(2) but due to some reason, best known to learned Trial Judge, he has held appellant guilty only for offence under Section 5(i) and 5(m) read with Section 6 of POCSO Act, 2012 and acquitted accused in Section 376(2) (i).

52. It is pertinent to note at this stage that learned counsel appearing for State has not pointed out Section 42 of POCSO Act before learned Trial Judge. He (Trial Judge) has also neither placed any reliance nor discussed the above important provision of POCSO Act and unfortunately appellant was acquitted for the offence of Section 376 (2) (i). It is also strange that nothing has been stated by learned A.G.A. before this Court, as to whether, State has filed any appeal against acquittal of appellant from the offence under Section 376 (2) (i).

53. Since appellant has been convicted and sentenced for the offence under Section 5(i) and 5(m) read with Section 6 of POCSO Act only and no appeal has been filed by State, hence, we are bound to consider sufficiency of sentence as imposed by Trial Court.

54. In this case appellant has been convicted for life imprisonment and fine of Rs.10,000/- by Trial Court for offence punishable under Section 5 (m) read with Section 6 of POCSO Act, 2012 and for offence under Section 5 (i) read with Section 6 of POCSO Act, 2012 for life imprisonment and fine of Rs.10,000/- but both sentences have been directed by Trial Court to run concurrently.

55. It is settled principle of sentencing and penology that undue sympathy in awarding sentence with accused is not required. The object of sentencing in criminal law should be to protect society and also to deter criminals by awarding appropriate sentence. In this regard Court has observed in State of **Madhya Pradesh Vs. Saleem @ Chamaru, AIR 2005 SC 3996,** as under:-

"10. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal".

56. We have already noticed that Trial Court has not sentenced appellant U/s 376 (2) I.P.C. It has sentenced appellant under Section 6 of POCSO Act, 2012 and punishment of life imprisonment is lesser in nature than life imprisonment provided U/s 376 (2) I.P.C.

Looking into the nature and gravity of the offence, we are of the view that punishment awarded by Trial Court requires no interference. Appeal is liable to be dismissed and impugned judgment and order passed by Trial Court is liable to be affirmed.

57. In the light of above discussions, appeal is hereby dismissed. Impugned judgment and order dated 21.2.2014 passed by Additional Session Judge, Court No. 8 Firozabad in Session Trial No 483 of 2013 (State vs. Mahendra) whereby appellant has been convicted and sentenced for the offence under Section 5 (i) and 5 (m) read with Section 6 of POCSO Act is maintained and affirmed.

58. Let a copy of his judgment along with lower court record be sent to Additional Session Judge, Court No. 8, Firozabad for necessary information and compliance.

59. A compliance report be sent to this Court within two months. Copy of his judgment be also supplied to the accused through Superintendent of Jail, concerned.

(2019)10ILR A 495

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 2935 of 2013

Rajesh ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, SrI Mamta Maurya A.C, Sri Saurabh Sachan (A.C.), Sri Surendra Bir Maurya (A.C.)

Counsel for the Opposite Party:
Sri P.C. Joshi (A.G.A.)

A. Indian Evidence Act, 1872 - Sections 118 and 134 - Neither number of witness required to prove a fact nor evidence of a witness can be rejected only on the ground of her relationship with the victim. The whole prosecution case can be proved by a single witness if evidence is natural and trustworthy.

The adequacy of evidence as has been propounded under Section 134 of Evidence Act. As a general rule, Court can and may act on the testimony of a single witness, provided he is wholly reliable. Testimony of witness, cogent, credible and trustworthy having ring of truth, deserves its acceptance. (Para 46)

C. Indian Evidence Act, 1872 - Section 118 - Marginal variations in the statement of a witness cannot be dubbed as improvements as the same may be elaborations of the statements made earlier. Natural, minor contradictions and discrepancies in comparison to the statement recorded during examination-in-chief which do not go to the root of case, to be overlooked.

Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. (Para 58)

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Rameshwar Vs St. of Raj. AIR 1952 SC 54

2. Masalti Vs St. of U.P. AIR 1965 SC 202

3. Hari Obula Reddi & ors. Vs St. of A.P. AIR 1981 SC 82

4. Kartik Malhar Vs St.of Bih. (1996) 1 SCC 614

5. Pulicherla Nagaraju @ Nagraja Reddy Vs St. of A.P. AIR 2006 SC 3010

6. Harivadan Babubhai Patel Vs St. of Guj. (2013) 7 SCC 45

7. Namdev Vs St. of Mah. (2007) 14 SCC 150,

8. Veer Singh & ors. Vs St. of U.P. (2014) 84 ACC 681,

9. St. of Karnataka Vs Suvarnamma (2015) 1 SCC 323

10. Hema Vs St. (2013) 81 ACC 1 (SC)

11. C. Muniappan Vs St. of T.N. 2010 (6) SCJ 822

12. Sampath Kumar Vs Insp. of Police, Krishnagiri (2012) 4 SCC 124

13. Sachin Kumar Singhraha Vs St. of M.P. (2019) 8 SCC 371

14. Smt. Shamim Vs St. of (GNCT of Delhi) (2018) 10 SCC 509

15. St. Represented by Insp. of Police Vs Saravanan & anr. AIR 2009 SC 152

16. Arumugam Vs St. AIR 2009 SC 331

17. Mahendra Pratap Singh Vs St. of U.P. (2009) 11 SCC 334

18. Dr. Sunil Kumar Sambhudayal Gupta & ors. Vs St. of Mah. JT (2010) 12 SC 287

19. Sumer Singh Vs Surajbhan Singh & ors. (2014) 7 SCC 323

20. Sham Sunder Vs Puran (1990) 4 SCC 731

21. M.P. Vs Saleem (2005) 5 SCC 554

22. Ravji Vs St. of Raj. (1996) 2 SCC 175

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This jail appeal under section 383 Cr.P.C. has been filed by accused-appellant, Rajesh through Senior Superintendent of Police, Meerut against judgement and order dated 31.05.2013 passed by Sri Ajay Kumar, Additional District and Sessions Judge, Court No. 16, Meerut. By the impugned judgement, Rajesh has been convicted under Section 302 I.P.C. and sentenced to life imprisonment along with fine of Rs. 10,000/-. In case of default in payment of fine, he has to further undergo one year additional imprisonment.

2. The prosecution case in short may be stated as under:-

3. On 28.01.2002, a written report (Exhibit Ka-1) was presented by Informant PW-1, Laxmi, at Police Station Nauchandi, District- Meerut, stating that she along with her husband, Dinesh were residing in Sector-4, Shastri Nagar, Meerut, in a rented house of Sharda Sharma. Informant's husband used to pull rickshaw. Smt. Manglo i.e. Dayawati, Bua of Informant's husband resided in House No.114, Sector-3, Shastri Nagar, Meerut. She was ailing. Informant had gone to see her in Sector-3, Shastri Nagar. In the night at about 10:15 PM, her husband Dinesh went to Sector-3 to take her (Informant) back to home. When they reached near Water Tank (Pani ki tanki) situated in Sector-3, accused Rajesh, brother in distant relation, who was hidden in bushes near the corner house situated on road leading to Sector-4, suddenly came out and inflicted knife blow on the neck of Informant's husband by a knife held in his hand. Resultantly, Dinesh fell on the ground. Rajesh again

assaulted him with knife. Rajesh had murdered Informant's husband by knife. When she raised alarm, accused threatened and chased her. She ran and reached back to house of her husband's Bua and apprised her of incident. F.I.R. further says that Rajesh and his elder brother, Natthi used to reside with Informant about 9-10 months prior to lodging of F.I.R. Rajesh and Natthi after consuming liquor used to quarrel with Informant's husband. For that reason, Informant's husband evicted both of them from his house. Since then, Rajesh bore enmity and while leaving the house, he also held threat to Informant's husband Dinesh that he would settle the score. Rajesh committed murder of informant's husband in her presence. She had seen and recognised Rajesh very well in the electric light. F.I.R. further states that her husband's dead body was lying at the spot.

4. On the basis of written report (Exhibit Ka-1), chik report (Exhibit Ka-2) was prepared by Head Muharrir, Ram Bahadur on 28.01.2002 at 23:45 P.M. He also made an entry of incident in General Diary at Report no. 32, a copy of which is Exhibit Ka-13 on record. After registration of F.I.R, initially case was investigated by PW-6 S.I., Arun Kumar Chauhan, who was then S.O. of Police Station Nauchandi. After obtaining necessary documents, he recorded statement of PW-1, Informant and witnesses. He visited spot and on pointing out of PW-1, prepared site plan (Exhibit Ka-5). He got inquest (Exhibit Ka-2) prepared by S.I. Manish Kumar Sharma, who also took blood stained and simple soil from place of occurrence and prepared recovery memo in respect thereof as well as other relevant documents for sending dead body to post mortem, marked as Exhibit Ka-6 to Ka-11.

5. Autopsy on dead body of deceased Dinesh was conducted by PW-5, Dr. R.K. Gupta, on 29.01.2002 at 4:00 PM. According to him deceased was aged about 35 years and duration of death at the time of post-mortem, was about one day. Deceased was of average body built and rigor mortis found present all over the body. There was no decomposition. He found following ante-mortem injuries on the body of deceased:-

"i. ***Incised wound*** *13 cm x 4 cm x bone cut* ***on outer and joint of right side neck****, 4th* ***cervical vertebra cut, blood vessels, trachea and oesophagus cut,*** *incised wound 5.5. cm below the chin.*

*ii. Stab wound 3 cm x 1 cm x c****hest cavity deep on front of chest*** *(left side), 5 cm medial to left nipple at 11 O' clock positive.*

iii. ***Incised wound*** *2 cm x 1 cm x muscle deep o****n outer side of just upper arm upper part,*** *8 cm below left shoulder."* **(emphasis added)**

6. On internal examination, membranes of head and neck were found pale; pleura was lacerated on left side; both lungs were pale and upper lobe of left lung was lacerated; right side heart contained blood weighing 250 gm; left thoracic cavity contained 700 ml blood. In the opinion of Doctor, death had occurred due to shock and haemorrhage as a result of ante-mortem injuries. Doctor prepared post mortem report (Exhibit Ka-4).

7. Despite search, accused could not be arrested and thereafter PW-3 second

Investigating Officer was transferred. It appears from the statement of PW-4 S.I. Mahipal Singh, the second Investigating Officer that since accused could not be arrested, earlier S.O. Shiv Pooran Singh had submitted final report in Court. On 30.11.2011 PW-1 Informant had made an application (Exhibit Ka-3) to Police Station, Nauchandi, that accused Rajesh was residing near Maliyana Phatak, Meerut and pulling on rickshaw. On the said application of PW-1, investigation was undertaken by PW-4 Sri Mahipal Singh after obtaining requisite permission from Court. On 05.12.2011 accused was arrested. Thereafter investigation was undertaken by Smt. Alka Singh, PW-7. After concluding investigation, she submitted charge sheet (Exhibit Ka-14). On charge sheet, cognizance was taken by Chief Judicial Magistrate, Meerut against accused-appellant under Section 302 I.P.C. on 27.01.2012.

8. As the case was exclusively triable by Court of Sessions, learned C.J.M. committed matter to Court of Sessions which was registered as Sessions Trial No. 350 of 2012. Sessions Trial was transferred to Additional District & Sessions Judge, Court No.16, Meerut, who framed charge against accused-appellant on 14.08.2012, which reads as under:-

ष्मैं अजय कुमार, अपर जिला एवं सत्र न्यायाधीश, कक्ष सं0 16, आप अभियुक्त राजेश को निम्नलिखित आरोपों से आरोपित करता हूं:–

*यह कि दिनांक – **28.01.2002 समय रात्रि के 11 बजे** स्थान सैक्टर 3 पानी की टंकी के पास सैक्टर 4 को जानेवाली सड़क पर शास्त्री नगर थाना क्षेत्र नौचन्दी जिला मेरठ में **आपने वादनी श्रीमती लक्ष्मी के पति दिनेश को चाकुओं से घायल करके जानबूझकर स्वेच्छया उसकी हत्या कर दी थी।** इस प्रकार आपने ऐसा अपराध काारित किया जो धारा 302 भा.द.सं. के अधीन दंडनीय है और इस न्यायालय के संज्ञान में है।*

और मैं एतद्द्वारा आपको निर्देशित करता हूं कि उपरोक्त आरोप के लिये आपका विचारण इस न्यायालय द्वारा किया जायेगा।ष

"I Ajay Kumar District & Sessions Judge, Court No. 16 Meerut charge you accused Rajesh as under:-

*That on **28.01.2002 at about 11:00 PM i**n the night on the road heading towards Sector-4 near Water Tank (Pani ki Tanki) in Sector-3 Shastri Nagar, Police Station Nauchandi, District Meerut, **you intentionally and voluntarily by causing injuries to deceased with knife, killed Dinesh, husband of informant, Smt. Laxmi.** Thereby you committed such an offence which is punishable under Section 302 I.P.C. and within the cognizance of this Court.*

I had directed you that will be tried for the aforesaid charge by this Court." (emphasis added)

(English translation by Court)

9. Accused-appellant pleaded not guilty and asked for trial.

10. -1 Laxmi and PW-2 Ram Pal are witnesses of fact. Rest are formal witnesses of Police and Department of Health.

11. PW-6 S.I. Arun Kumar Chauhan was the first Investigating Officer who initiated investigation after lodging of F.I.R. and has proved site plan (Exhibit Ka-5). He has also proved inquest (Exhibit Ka-2) and other documents Exhibit Ka-6 to Ka-11 pertaining to sending of dead body to hospital for post-mortem. Thereafter investigation was undertaken by PW-3, S.I. Pooran Singh on 27.05.2002, who tried to arrest accused but could not succeed and accordingly submitted

final report in the matter. Thereafter investigation was resumed by PW-4 S.I. Mahipal Singh, who has proved application filed by Informant (Exhibit Ka-3) to the effect that accused-appellant was residing in Meerut and pulling on rickshaw. PW-7, Smt. Alka Singh, is the third Investigating Officer, who has proved charge sheet (Exhibit Ka-14).

12. After closure of prosecution evidence, accused-appellant was examined under Section 313 Cr.P.C, who has denied the charge and claimed that he has been falsely implicated and witnesses are deposing against him on account of enmity. He said that he is innocent and had been pulling rickshaw and had not committed any crime.

13. On appreciation of evidence on record and hearing counsel for both the parties, Trial Court convicted and sentenced accused-appellant as mentioned above. Trial Court has convicted the accused-appellant by recording its findings that:

I- There is no delay in lodging FIR inasmuch as incident is said to have taken place at 11:00 PM on 28.01.2002 and report was lodged at 23:45 on the same date, i.e., within 45 minutes.

II- The Informant is eye witness and mere fact that she is wife of deceased would not be sufficient to discard her otherwise trustworthy ocular evidence.

III- There was no difficulty in identification of accused appellant by Informant since she knew her from earlier time.

IV- Production of no independent witness by prosecution was duly explained by Informant that the place at which incident occurred, at relevant time, there was none present and her submission looking to the time and place was natural and trustworthy.

V- PW-2, Ram Pal Saini, another witness of fact, has stated that on the date of incident, deceased and his wife had gone to his residence to meet his ailing wife. Deceased went for his work of Rickshaw pulling after leaving Informant at the residence of PW-2 at around 4-4:30 PM and came back at around 9-10 PM. They left his residence at around 10:45 PM and after 15-20 minutes, Informant came back in a frightened condition and narrated entire incident. Thereafter, PW-2 and other family members went to the spot where they found Dinesh lying dead and accused-appellant had run away. Police prepared Panchayatnama after seizing dead body of Dinesh at the place of incident. Post-mortem report proves that injuries may have been sustained by a sharp edged weapon which supports the manner of death of deceased as explained by PW-1.

VI- Formal witnesses proved documents and no adverse factor could be extracted from their cross examination by defence.

VII- Though, the motive was not relevant in a case where there is ocular evidence but motive was explained by the Informant and nothing otherwise could be extracted in her cross examination by the defence.

VIII- Though investigation has not been properly conducted in the case but for that reason no benefit can be taken by the accused.

14. Feeling dissatisfied with the judgment of conviction and sentence,

accused-appellant has preferred this Jail Appeal through Senior Superintendent of Jail, Meerut.

15. We have heard Sri Saurabh Sachan, learned Amicus Curiae, Sri P.C. Joshi, learned A.G.A. and perused record carefully with valuable assistance of learned counsel for parties.

16. Learned counsel for the appellant has challenged conviction and sentence by Trial Court, raising following issues:-

I- The entire prosecution against appellant is founded on the statement of Informant, PW-1, who is the wife of deceased. She had illicit relation with the younger brother of deceased and this fact came to be detected by deceased whereupon they both murdered deceased and have falsely implicated appellant. This aspect has not been properly examined by Court below.

II- Informant had motive to commit murder of deceased and, therefore, her conduct ought to have been properly examined in the matter but that has not been done by Court below.

III- The sole ocular evidence of Informant could not have been relied to convict appellant since she was close relative of deceased and had reason to falsely implicate appellant.

IV- Appellant never resided at the residence of deceased and Informant, hence there was no occasion of his eviction by deceased for the alleged reason that he quarreled with deceased in drunken condition and for that reason, accused-appellant in revenge, committed murder.

V- Even, PW-2 is relative of deceased and was not present at his house on the date and time of incident. He was a tubewell operator and had gone to attend his duty in the night, but falsely stated in his statement that on the date of incident, he had not gone to attend his duty and was present at his residence. In this regard, no evidence could be adduced by him to prove that he had not gone to attend his duty on that date. The statement of PW 2 that he had not gone on duty is false for the reason that in cross-examination, he could not tell as to what was the time of his duty to attend tubewell which is unbelievable.

VI- Incident took place on 28.01.2002 while appellant was arrested by police on 05.11.2012 alleging that during checking at Shashtri Nagar Crossing he was arrested as stated by PW 4, S.I. Mahipal Singh. The story of arrest given by PW-4 that on the information of Informant, appellant was arrested is concocted.

VII- Post-mortem report does not support the manner in which deceased has been murdered. No weapon of crime has been recovered from appellant.

VIII- Prosecution has failed to prove its case beyond reasonable doubt.

17. Per contra, learned A.G.A. contended that it is a simple case of hit and run. Informant and her husband, while returning from the residence of PW-2, where they had gone to see his ailing wife, when reached the place of incident, accused-appellant, who was well known to Informant and her husband, and was hiding thereat, appeared and attacked Informant's husband with knife on his

neck and thereafter on his body and when she raised alarm, he pushed her. She turned to go towards residence of PW-2. Thereupon accused-appellant ran after her also for some time but could not catch her. She reached residence of PW-2 and narrated the entire incident. Therefrom PW-2, his two sons and younger brother of deceased alongwith Informant came back to the place of incident and found deceased, dead. Appellant thereafter ran away and could be arrested after a long time, i.e., in 2011. Only thereafter, Police could submit charge-sheet and therefore, statements of witnesses have been recorded after more than a decade which may have shown some inconsistencies or contradictions but the same are minor and do not impact the otherwise trustworthy ocular evidence of PW-1, Informant. Further the manner in which appellant attacked and committed murder and various injuries found on the dead body as reported in post-mortem report fortify statement of PW-1. Hence appellant has been rightly convicted and awarded adequate sentence by Court below. The judgment is based on evidence and prosecution succeeded in proving guilt of appellant beyond doubt, therefore, no interference is called for in this appeal and it deserves to be dismissed.

18. We have heard arguments of learned counsel for both parties and relevant authorities relied by both the side.

19. As per F.I.R., as also the statement of PW-1, Informant, the incident had taken place near water tank in Sector 3 on road coming towards Sector 4. Panchayatnama (Ex.Ka-2) also shows the place of incident as mentioned in F.I.R. lodged by Informant, PW-1. Time of recording of F.I.R. mentioned in Panchayatnama is 23:45, i.e. 11:45 PM, in the night on 28.01.2002. Panchayatnama was prepared at 02:05 AM on 29.01.2002 i.e. within two hours twenty minutes of recording of F.I.R. The statements of PW-1 and PW-2 also mention the same place, date and time of incident and this is fortified by statement of PW-5, Dr. R.K. Gupta who conducted post-mortem and stated that the time of death could have been 11:00 PM on 28.01.2002. PW-6, S.I., Arun Kumar Chauhan, is Investigating Officer who initially commenced investigation in this case after recording of F.I.R. He has also supported the date, time and place of the incident. He has also proved site plan which supports place of incident as well as date and time. In these facts and circumstances, date, time and place of occurrence and death of deceased is duly proved by evidence available on record. In facts it is also not seriously disputed by learned counsel for appellant. He, however, submitted that he has been falsely implicated in the case inasmuch as murder has been committed by Informant herself in conspiracy with one Lokesh with whom, she had illicit relations and appellant has been implicated falsely.

20. Now, the question for consideration is "whether prosecution has proved guilt of accused-appellant beyond reasonable doubt by adducing adequate and trustworthy evidence and he (appellant) has rightly been convicted by Court below or not?"

21. In order to examine the aforesaid issue, it would be appropriate to go through the evidence on record.

22. As we have already said, in this case, star witness is Informant herself,

who is eye witness of the incident. It is her statement which is foundation of findings of guilt against appellant. PW-1, wife of deceased, Dinesh, has stated that she and her husband were residing in Sector 4, Shashtri Nagar, Meerut. Her husband's Bua, Smt. Manglo (wife of PW-2, Rampal Saini) was residing in Sector 3. She was calling husband and wife for last few days since she was unwell. On the date of incident, around 10:45 or 11:00 PM, Informant and her husband Dinesh both were returning from the house of husband's Bua. When they reached near Water Tank in Sector 3, from the bushes standing on side of road, Rajesh, accused-appellant, came out and attacked her husband with knife on chest and neck. At that time, road light was glowing in which she could see Rajesh, accused-appellant, clearly. She knew Rajesh since earlier. She tried to protect her husband but Rajesh, accused-appellant pushed her away. When she raised alarm, none came. She started to move towards house of Bua, Smt. Manglo, whereupon Rajesh, accused-appellant ran after her with knife upto some distance but she did not look back and came running to the residence of husband's Bua and narrated entire incident. Thereupon, Fufa of Informant's husband, i.e., Ram Pal Saini, his two sons and younger brother of deceased alongwith Informant came to the place of incident and found Dinesh, husband of Informant, dead. Rajesh came alongwith Informant's husband from Kanpur about 9-10 months back and stayed in Informant's house for about two months. He was accompanied by his brother. Informant's husband told her that Rajesh was son of his uncle. On one day, Rajesh and his brother came after taking liquor and quarreled with her husband whereupon they were thrown away from house. While going, Rajesh threatened P.W.-1's husband that he will see him. For this reason, Rajesh committed murder of her husband. Report was lodged by Informant through younger brother of deceased, i.e., Lokesh. At the time when incident took place, none else was present. She identified Rajesh in Court and stated that he had committed murder of her husband and he is the same person who stayed in her house for about two months. She categorically stated that she was residing in Sector-4, Shastri Nagar while her husband's Bua was residing in Sector-3, Shastri Nagar and the incident took place near Water Tank of Sector- 3, Shashtri Nagar. In cross-examination, she stated that she married Dinesh about seven years prior to the incident. Her husband were five brothers and two sisters. Dinesh was eldest and thereafter Jitendra, Brijendra, Rajendra and youngest one Lokesh. At the time of incident, Lokesh was working as a doctor. Her father-in-law and mother in law both died earlier. Brothers of her husband used to visit residence of Informant. At the time of incident, Lokesh was unmarried. Rajesh was son of uncle of deceased but not real uncle. She was not aware whether Rajesh and his brother were residing at Kanpur or not. When they came, her husband told that they were residing at Kanpur. Her husband was a rickshaw puller. On the date of incident also, he had gone to do his work of rickshaw pulling and came to residence of his Bua in Sector 3 in the night around 10:00 or 10:30 PM. Distance from house of Bua to PW-1's house was not known in kilometers but she said that it is 15 minutes' walk. Her husband when came to take her, had not brought rickshaw since it was parked at the residence. Rickshaw was on hire and in the night, it used to be

parked at her residence. She had gone to residence of Bua on the date of incident at around 3:45-4:00 PM. Her husband had gone for Rickshaw pulling the in morning at 10:00 AM and came in the night at around 10:00-10:30 PM to take her from the residence of Bua, Smt. Mango, i.e., wife of PW-2, Rampal Saini. Lokesh had not visited Informant's house but had come to residence of Bua. Incident took place on main road and on both sides, there were houses and shops. People were residing in the houses. She was not able to tell as to how much time she took to reach from the place of incident to residence of Bua. At that time, Fufa, i.e., PW-2, Ram Pal Saini, his two sons and younger brother of deceased were present and Bua was sleeping on upper storey. When Informant and other people reached Police Station, there was none present and they waited. Thereafter Inspector came. Report was scribed by Lokesh in the Police Station itself. She had no issue from Dinesh. Her parents were residing at Khurja. After cremation and other rituals, she went to stay at her parents' residence. After one year, she solemnized another marriage with a person residing near Kanpur, and from said wedlock, she has a son. Her second husband also died in an accident. At the time of statement recorded in Trial Court, i.e., September, 2012, she was residing with her father. Younger brothers of her husband, Dinesh, after his death, never came to meet her at Khurja. When accused-appellant was arrested, Police visited residence of Informant alongwith younger brother of her husband and then she came from Khurja to Meerut Police Station. She specifically denied suggestion of illicit relations with Lokesh, youngest brother of her husband and further suggestion of herself committing murder of Dinesh in conspiracy with Lokesh.

23. Thus, PW-1 in her examination-in-chief, very categorically stated about manner of death, time and place of incident. She has stated that it is accused-appellant who has committed murder of her husband, Dinesh, by inflicting injuries with knife on chest and neck. F.I.R. was scribed by Lokesh on being told by her and she signed the same and proved said F.I.R. marked as Exhibit Ka-1.

24. There is long cross-examination of PW-1 but we do not find any substantial material which could have been extracted by defence to discredit ocular version of PW-1. Hence, we find no reason to disbelieve her. In our view, statement of PW-1 is natural, pure and trustworthy. The fact that she is directly a close relative of deceased and therefore her statement should not be relied to hold accused-appellant guilty, has no substance inasmuch as law is now well settled that statement of relatives merely on the ground that he or she is relative, cannot be discredited or rejected.

25. Normally, when incident takes place in presence of relatives, it is only they who come forward to depose against accused since they are the persons who would like to see that person who has committed crime, is given due punishment in a Court of law. Such witnesses would not like to give a wrong statement against a person who has not committed crime, and, try to save actual accused. Mere relationship, therefore, is no ground to reject an otherwise trustworthy deposition of such witnesses unless there are other factors to taint such

statements providing some reason to doubt the witness.

26. In a catena of judgments Supreme Court has repeatedly held that a close relative would be the last to screen the real culprit and falsely implicate an innocent person.

27. In **Rameshwar Vs. The State of Rajasthan, AIR 1952 SC 54 at page 59**, Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

(emphasis added)

28. In **Masalti Vs. State of U.P., AIR 1965 SC 202,** Court said:

"Normally close relatives of the deceased would not be considered to be interested witnesses."

29. In **Hari Obula Reddi and others v. The State of Andhra Pradesh, AIR 1981 SC 82,** a three-Judge Bench of Supreme Court has held:

"Evidence of interested witnesses is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. It cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

(emphasis added)

30. In **Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614** Court has opined as under:-

"A close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested' postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason."

(emphasis added)

31. In **Pulicherla Nagaraju alias Nagraja Reddy Vs. State of Andhra Pradesh, AIR 2006 SC 3010,** Court has observed as follows:

"It is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or close relative to the deceased, if it is otherwise found to be trustworthy and credible. The said evidence only requires scrutiny with more care and caution, so that neither the guilty escapes nor the innocent is wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, then it can be acted upon."

(emphasis added)

32. In **Harivadan Babubhai Patel vs. State of Gujarat (2013) 7 SCC 45**, Court observed as under:-

"In view of our aforesaid analysis, we are unable to accept the submission of the learned counsel for the appellant that the evidence of the eye witnesses should be rejected solely on the ground that they are close relatives and interested witnesses."

33. Oral and ocular testimony of PW-1 is supported by PW-2, who is not an eye witness to the incident himself but he corroborates other facts that PW-1 after attack upon her husband (Dinesh) by Rajesh, came back to residence of Bua and Fufa and told them about incident and thereafter Fufa of deceased alongwith his two sons and younger brother of deceased, went to the place of incident and found Dinesh, dead. His dead body was lying at site of incident. Statement of PW-2, therefore, is corroborating statement in respect of other facts i.e. first narration of incident by Informant to PW-2 and other persons at his residence and thereafter their visit to place of incident and finding dead body of Dinesh.

34. PW-2 has said that not real but in relation, he is Fufa of deceased Dinesh. One Manglu, who, in relation, is brother-in-law of PW-2, was married in family of Dinesh and from that relation, he became Fufa of Dinesh. At the time when incident took place, his wife Dayawati was ill. Deceased and his wife came to see her around 4-4:30 PM, in evening, whereafter deceased left his wife at residence of PW-2 and himself went to do his work of rickshaw pulling. He came back in the night around 9:30-10:00 PM to take his wife and at around 10:45 PM, they both walked towards their house. After 15 to 20 minutes, PW-1, Laxmi came back. She was frightened. She told that Rajesh has murdered Dinesh by knife near Water Tank. Thereupon, PW-2 and other family members went to the place of incident and found Dinesh lying dead and Rajesh was not present on the spot. Thereafter, PW-1, Laxmi, wife of deceased, lodged report in Police Station and Police came and prepared Panchayatnama in presence of PW-2. He also signed Panchayatnama and proved said document which was marked as Exhibit Ka-2. In cross-examination, PW-2 stated that he was residing in House No.114, Sector 3, Shashtri Nagar, Meerut. At the time of incident also, he was residing at the same address. His wife was ill at that time. His family comprised of his sons, namely, Subhas and Kiran Pal, their wives and wife of PW-2. All were residing with PW-2 in the said house. His wife remained ill for about 5 years and more but exact disease could not be diagnosed. Dinesh, at the time of incident, was residing in Sector 4, Shashtri Nagar. He was 5 brothers. Dinesh used to reside alone and his other brothers were residing at some other places, not known to him. Dinesh never took wife of PW-2 to any doctor for treatment. Dinesh was earning livelihood by pulling rickshaw. On the date of incident, Dinesh and his wife had come to see wife of PW-2 and no other relative of PW-2 had come on that date. Laxmi, PW-1 came to the house of PW-2 on date of incident at around 4:00 PM and went in night. PW-2 was working as Tubewell Operator in Nagar Nigam. Tubewell was in Sector 2, Shashtri Nagar. On the date of incident, PW-2 had not gone on duty and was present at his residence. In the night, Dinesh alone came

to take his wife and stayed for about half an hour. He came about 10-10:15 PM, in night. He came on foot. After Dinesh and his wife left residence of PW-2, he ,i.e., PW-2 and his family had not gone to sleep. Question of sleeping does not arise since Laxmi came with information of incident just within 15 to 20 minutes. She came alone. When she came, both sons and their wives, PW-2 and Lokesh were present. Lokesh had come to house of PW-2 in the night at around 9:30 PM. On the date of incident, Lokesh and Dinesh had met at residence of PW-2. After information given by PW-1 about incident, PW-2, his two sons and Lokesh, all went to the place of incident and saw dead body of Dinesh. He has also proved Panchayatnama and in cross-examination, has clarified that Police came to place of incident during his presence and prepared Panchayatnama whereupon he had also signed. He has also stated that street light was present at the place of incident and light was glowing. This part also fortifies statement of PW-1 regarding presence of light in the manner stated by PW-1. Suggestion made on behalf of defence that Laxmi, PW-1 and Lokesh were having illicit relations and therefore, may have caused murder of Dinesh has been specifically denied by him. In fact in long cross-examination, defence has completely failed to make out any material contradiction or inconsistencies or otherwise fact to discredit statement of PW-2 which supports that part of deposition of PW-1 that she had gone to residence of PW-2 to see his ailing wife, came back around 10:45 or 11:00 PM from his house and within 15 to 20 minutes, entire incident took place and she went back, gave information to PW-2 and then PW-2 and other family members came to place of incident and found dead body of deceased lying on place of incident in respect whereto Panchayatnama was also prepared. Therefore, we find that statement of PW-2 in this regard, is also clear and trustworthy.

35. Amongst the remaining witness, who are formal, we find that witnesses, who themselves had some information in connection with incident, are PW-3, PW-4, PW-5, PW-6 and PW-7. Reason being that incident took place on 28.01.2002 but accused was arrested on 05.12.2011, charge was framed on 18.08.2012 and trial commenced thereafter. There was a gap of about 10 to 12 years from date of incident and time when witnesses were examined. On account of this lapse of long time, some dates have been given wrongly by some witnesses.

36. PW-3, S.I. Pooran Singh was posted as Station House Officer in Police Station Nauchandi on 07.05.2002. He took over investigation of case from earlier Investigating Officer, Ajay Kumar, Sub-Inspector. He deposed that he tried to find out accused on various dates but when failed, submitted final report. In cross-examination, he admitted of having not visited spot and said that it must have been done by earlier investigating officer. He has also not taken any statement. He said that he only made investigation by searching out accused but when failed to do so, submitted final report. He did not make any investigation with respect to said incident.

37. PW-4, S.I. Mahipal Singh, Police Officer, who alongiwth Investigating Officer, Alka Singh and other Police Officers arrested accused on 05.12.2011, has proved this fact. He was

posted as Sub-Inspector in Police Station Nauchandi on 30.11.2011. Due to non arrest of accused, earlier Investigating Officer, Pooran Singh Chauhan had submitted final report. But, on 30.11.2011 Informant gave a tehrir that accused Rajesh was residing near Maliyana Gate, Meerut and pulling rickshaw. Thereafter, PW-4 took permission from Court to proceed with investigation and on 05.12.2011, arrested accused-appellant near Shashtri Nagar Crossing. Accused was identified by Jitendra Saini, brother of deceased. Information given by Informant regarding presence of accused at Meerut, was proved by PW-4 and it was marked as Exhibit Ka-3. In cross-examination, he has also said that after arrest, accused told that knife by which he committed murder of Dinesh, was thrown by him in Sector 3 near Tubewell whereupon PW-4 alongwith accused came to the said place and made attempt to find out weapon of murder but since it was 10 years old incident, there was no chance of recovery and it could not be recovered. On the aspect of arrest though lot of cross-examination has been made but we do not find any substantial material extracted by defence to discredit this part of statement of PW-4.

38. PW-5, Dr. R.K. Gupta, posted as Medical Officer in mortuary of Medical College, conducted post-mortem on 29.01.2002 at 4:00 PM. He has noted injuries on dead body as we have already noticed. He said that all the three injuries could have been possibly caused due to a sharp edged weapon like knife and death could have taken place at around 11:00 in the night on 28.01.2002. In a short cross-examination, he said that his duty commenced at 8:00 AM in the morning on 28.01.2002 and injury also could have been possibly sustained in the morning at 7:00 AM on 29.01.2002. He also said that Investigating Officer did not record his statement.

39. PW-6, S.I. Arun Kumar Chauhan is the Officer who was posted as Police Station (Incharge) of Police Station, Nauchandi, on 29.01.2002 and commenced investigation himself. He has proved site plan which is marked as Exhibit Ka-5 and also Panchayatnama which was prepared under his direction by S.I. Manish Kumar Sharma and marked as Exhibit Ka-2. He has also proved other documents which were marked as Exhibit Ka-6 to Ka-11. He was transferred subsequently and therefore could not continue with investigation. F.I.R. was registered by Constable Ram Bahadur Singh but he had died and since he was posted with PW-6, he identified his signatures on documents i.e. Chik and Carban G.D. which are marked as Exhibit Ka-12 and Ka-13. In the cross-examination, he admitted that in site plan, he has not mentioned name of accused. When he reached the spot of incident, Informant and Rampal were present thereat. Other persons were also present. He did not enquire about their details. Informant did not tell about knife attack on the chest of deceased but told that road side electric pole was glowing. He recorded statement of Informant and her relative during investigation but made no inquiry from residents of houses, near the place of incident.

40. fact otherwise could have been extracted in cross-examination. Mere fact that some other persons were not enquired or investigated may show some laxity in investigation but would not discredit the witness concerned in respect of

documents he has proved and in particular, the manner in which he conducted investigation.

41. PW-7, Smt. Alka Singh, was a Police Officer posted at Nauchandi Police Station. On 05.12.2011, she took over investigation of matter from earlier Investigating Officer, Mahipal Singh. During checking, she arrested accused. She also submitted charge-sheet and proved it which is marked as Exhibit Ka-14. Accused was arrested at 10:30 in the morning at a public place but she did not record statement of any member of public. She is the witness in respect of arrest of accused and submission of charge-sheet on the basis of material collected by earlier Investigating Officer. On this aspect, we find nothing material which could be extracted by defence in cross-examination.

42. Above discussion of evidence on record, in our view, proves following facts:

(1) Deceased and Informant, PW-1 were residing in Sector 4, Shashtri Nagar while Fufa and Bua (in relation, not real) of deceased, were residing in House No.114, Sector 3, Shashtri Nagar, Meerut.

(2) Husband of Informant as also accused-appellant were rickshaw pullers.

(3) Accused-appellant alongwith his brother had stayed for about 2 months at the residence of deceased and Informant. They were turned out by deceased when some altercation took place between accused and his brother with deceased and thereupon, accused had threatened deceased that he will see him later.

(4) On 28.01.2002 around 4-4:30 PM, Informant came to residence of Bua and Fufa in Sector 3 to see ailing Bua i.e. wife of PW-2.

(5) In the night, around 9-9:30, Lokesh, youngest brother of deceased also came to residence of PW-2. Two sons of PW-2 and their wives were also present in his house.

(6) Deceased came to house of PW-2 at around 10:00-10.30, in the night, to take Informant to their residence and stayed for about half an hour and at around 10:45-11:00 PM, left residence of PW-2 and proceeded towards their own residence. Distance between houses of deceased and PW-2 was just 15 minutes by walk.

(7) When couple i.e. deceased and Informant reached near Water Tank in Sector 3, from behind bushes standing on road side, Rajesh came out and attacked upon neck and chest of Informant's husband who fell on the ground.

(8) Informant tried to save her husband but accused pushed her away. Then she raised alarm whereupon accused run towards her alongwith knife. Informant running came back to residence of PW-2. Accused chased her for a short while and thereafter left.

(9) On information given by Informant to PW-2, he, his two sons and Lokesh alongwith Informant reached place of incident and found dead body of deceased lying on spot.

(10) Manner of injuries caused by accused-appellant upon person of

Dinesh by knife on chest and neck, is duly fortified by injuries reported in post-mortem report.

(11) Dead body of deceased was recovered by police from the place of incident and Panchayatnama was also prepared within about two and half hours from the time of incident. This has been proved by PW-2 and PW-6.

(12) Though, a suggestion was made by defence that there was illicit relations between Informant- (PW-1) and youngest brother of deceased i.e. Lokesh but it has been denied by PW-1 and PW-2 both, who are witnesses of fact and in defence, no evidence has been adduced by appellant to prove the said defence. Therefore, the defence has no substance. It has rightly been rejected by Court below as is evident from the findings recorded in paragraph 20 of judgment under appeal.

43. These facts collectively show and leave no manner of doubt that it is only appellant, who has committed murder of deceased in the manner as stated in F.I.R. and oral and ocular testimony of PW-1 which is duly fortified by PW-2 and PW-5. The submission that only witness of crime is PW-1 and her statement is not corroborated by anyone and therefore only on her statement, conviction of appellant is not justified has no legs to stand for the reason that in criminal trial, it is not the a number which counts but the quality of evidence which is material. Even solitary witness, if otherwise trustworthy, is sufficient and can be relied for conviction.

44. It is now well settled that it is quality and not the quantity of witnesses, which is important. Time honoured principle is that the evidence has to be weighed and not to be counted. The test is whether evidence has a ring of truth, cogent, credible and trustworthy or otherwise.

45. In **Namdev Vs. State of Maharashtra (2007) 14 SCC 150,** Court has said:

*"Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidenc*e."

46. Further in **Veer Singh & Ors. Vs. State of U.P.; 2014 (84) ACC 681,** Court said:

"legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity, or plurality of witnesses. It is not the number of witnesses, but quality of their evidence, which is important. As there is no requirement under the law of evidence that particular number of witness is to be examined to prove / disprove a fact. Evidence must be weighed and not counted. It is quality and not quantity, which determines. The adequacy of evidence as has been propounded under Section 134 of Evidence Act. As a general rule, Court can and may act on the testimony of a single witness, provided he is wholly reliable. Testimony of witness, cogent, credible and trustworthy having ring of truth, deserves its acceptance."

47. Therefore, the submission that on solitary statement of PW-1 who is only witness of incident and that too relative of deceased, accused-appellant should not have been convicted, has no force and is rejected.

48. Further submission that investigation has not been done carefully inasmuch as persons residing in houses near place of incident, have not been examined; Police made no sincere effort to find out weapon of murder; PW-2 could not prove his presence at his residence on the date of incident and therefore, investigation is faulty, also have no force. It is true that investigation has not been conducted in a more systematic and planned manner but these aspects are not material when there is an ocular testimony to prove crime committed by appellant and it is duly proved by other evidences i.e. post-mortem report and another witnesses of fact. Any minor lapse in investigation will not help accused.

49. As regards omissions, contradictions and laches on the part of Investigating Officer, it has been repeatedly held by Apex Court that a defective investigation cannot be fatal to prosecution where ocular testimony is found credible and cogent. In State of **Karnataka Vs. Suvarnamma, (2015) 1 SCC 323,** Apex Court **i**n para 11 held as under:

"It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence."

50 . Similar view has also been taken by **Apex Court in Hema Vs. State, 2013 (81) ACC 1 (SC)** (Three Judge Bench) and **C. Muniappan Vs. State of TN, 2010 (6) SCJ 822.**

51. The above authorities makes it very clear that any lapse on the part of Investigating Agency per se cannot be a ground to throw prosecution case ignoring overwhelming credible and trustworthy evidence sufficient to prove the guilt of accused. Thus the above argument is rejected.

52. The last submission is that there are contradictions in the statement of witnesses.

53. We have gone through the entire evidence very carefully, as have also discussed above, and find no material contradiction, so as to disbelieve the prosecution case or the individual witness. Minor contradictions are bound to occur but the same will not be fatal to prosecution who has otherwise produced trustworthy witness to prove the guilt of accused.

54. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

55 . In **Sachin Kumar Singhraha v. State of Madhya Pradesh in Criminal Appeal Nos. 473-474 of 2019** decided on 12.3.2019, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature

of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

56. Lest we forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision in Smt. **Shamim v. State of (GNCT of Delhi), 2018(10) SCC 509.**

57. When such incident takes place, one cannot expect a scripted version from witnesses to show as to what actually happened and in what manner it had happened. Such minor details normally are neither noticed nor remembered by people since they are in fury of incident and apprehensive of what may happen in future. A witness is not expected to recreate a scene as if it was shot after with a scripted version but what material thing has happened that is only noticed or remembered by people and that is stated in evidence. Court has to see whether in broad narration given by witnesses, if there is any material contradiction so as to render evidence so self contradictory as to make it untrustworthy. Minor variation or such omissions which do not otherwise affect trustworthiness of evidence, which is broadly consistent in statement of witnesses, is of no legal consequence and cannot defeat prosecution.

58. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observations, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. Court has to form its opinion about the credibility of witness and record a finding, whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle, but can be one of the factors to test credibility of the prosecution version, when entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statement of a witnesses cannot be dubbed as improvements as the same may be elaborations of the statements made by the witnesses earlier. Only such omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: **State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v.**

State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].

59. Thus after analysing entire evidence with the settled principle of law as discussed above, we are of the view that contradiction pointed out are not fatal to prosecution case and do not affect the veracity of prosecution witnesses therefore, above arguments also have no substance.

60. In view of above discussion, we are satisfied that prosecution has succeeded to prove that accused-appellant has committed murder of Dinesh on the date, time and place and the manner, as stated in F.I.R. as also oral deposition of PW-1, and the guilt having been proved beyond reasonable doubt, appellant has rightly been convicted for offence under Section 302 I.P.C.

61. So far as sentence is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

62. It is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalized. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide : **(Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

63. In view of above propositions of law, the paramount principle that should be the guiding laser beam is that punishment should be proportionate to gravity of offence.

64. Hence, applying the principles laid down by Supreme Court in the aforesaid judgments and having regard to the totality of facts and circumstances of case, nature of offence and the manner in which it was executed or committed in the case in hand, we are clearly of the view that punishment imposed upon accused-appellants is proportionate to gravity of

offence and, therefore, impugned judgment of Court below does not deserve to be interfered on this score also.

65. In the result, appeal is **dismissed.** Impugned judgment and order dated 31.05.2013 passed by Sri Ajay Kumar, Additional District and Sessions Judge, Court No. 16, Meerut convicting Appellant-Rajesh, under Sections 302 IPC is hereby confirmed/affirmed.

66. Copy of this order along with lower Court record be sent to Court concerned forthwith.

67. A copy of this order be also sent to Appellant through concerned Jail Superintendent.

68. Sri Saurabh Sachan, learned Amicus Curiae has assisted the Court very diligently. We provide that he shall be paid counsel's fee as Rs.11,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad to Sri Saurabh Sachan, Amicus Curiae, without any delay and, in any case, within 15 days from the date of receipt of copy of this judgment.

(2019)10ILR A 513

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Jail Appeal No. 6034 of 2017

Mumtaz ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Vimlendu Tripathi (A.C.)

Counsel for the Opposite Party:
A.G.A.

A. Indian Evidence Act, 1872 - Section 118 and 134 - Neither any number of witness is required to prove a fact nor evidence of a witness can be rejected only on the ground of his relationship with the victim. The whole prosecution case can be proved by a single witness if evidence is natural and trustworthy.

Jail Appeal dismissed (E-2)

List of Cases Cited: -

1. Hanumant Govind Nargundkar & anr. Vs St. of M.P. AIR 1952 SC 343

2. Hukam Singh Vs St. of Raj. AIR 1977 SC 1063

3. Sharad Birdhichand Sarda Vs St. of Mah. AIR 1984 SC 1622

4. Ashok Kumar Chatterjee Vs St. of M.P. AIR 1989 SC 1890

5. C. Chenga Reddy & ors.Vs St. of A.P. (1996) 10 SCC 193

6. Bodh Raj @ Bodha & ors. Vs St. of J & K (2002) 8 SCC 45

7. Shivu & anr. Vs Registrar General, HC of Kar. & anr. (2007) 4 SCC 713

8. Tomaso Bruno Vs St. of U.P. (2015) 7 SCC 178

9. Dharnidhar Vs St. of U.P. (2010) 7 SCC 759

10. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

11. Bhagalool Lodh & anr. Vs St. of UP AIR 2011 SC 2292

12. Dhari & ors. Vs St. of U.P. AIR 2013 SC 308

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Accused-appellant stood for trial in Sessions Trial No. 54 of 2010 (State v. Mumtaz, Case Crime No. 24 of 2010), under Sections 302, 376 and 201 IPC, Police Station Mugalsarain, District Chandauli, pending in the Court of Additional District and Sessions Judge, FTC, Court No.1, Chandauli and came to be convicted by said Court, vide judgment and order dated 31.08.2016, sentencing him under Section 302 IPC to undergo imprisonment for life and fine of Rs. 5,000/-, Section 201 IPC to undergo five years' imprisonment and fine of Rs. 1000/-. Sentence under Sections 302 and 201 shall run concurrently. In default of payment of fine, he shall further undergo three months additional imprisonment, Trial Court has acquitted accused-appellant under Section 376 IPC. Appellant sought interference of this Court by filing this Jail Appeal from Jail through Jail Superintendent concerned.

2. Prosecution story, in brief, as borne out from First Information Report (hereinafter referred to as 'FIR') and factual matrix of the case is that PW-1, Alimuddin, submitted a written report, Ex. Ka-1, in the Police Mugalsarain, District Chandauli, stating that his daughter (victim name withheld by us), used to go to read Arbi language and learn Power-loom work in the house of Mumtaz, who is neighbour of victim. On the fateful day i.e. 19.01.2010, at about 3:00 pm, victim had gone to house of accused-appellant to read Arabi language and to learn Power-loom work, as usual. When she did not return back from the house of accused-appellant, PW-1 went to house of accused-appellant to search his daughter. He found that house of accused-appellant was locked. Then he made a drastic search of his daughter in the village but found no where. In the next morning, he again went to the house of accused-appellant and saw that dead body of his daughter was lying on the earth in the north street adjacent to the door and window of Mumtaj's house. Dead body bore sign of injuries around the face and her both hands were tied with her Scarf in front. He suspected that his daughter has been murdered after committing rape by accused-appellant. He informed the Policed Station concerned and submitted an application requesting to register an FIR against accused-appellant.

3. On the basis of written report Ex.Ka-1, chick FIR, Ex.Ka-17 was registered by PW-8, Kanhaiya Lal Pathak, as Case Crime No. 24 of 2010 under Sections 376, 302 and 201 IPC against accused-appellant. Entry of case was made by him in General Diary. Copy whereof is Ex. Ka-18.

4. Immediately after registration of case, PW-7, Ratan Singh Yadav commenced investigation, proceeded to spot, visited the place of incident, prepared site plant Ex.Ka-12, recorded statement of witnesses, took Scarf (Dupatta) in his possession, prepared memo thereof Ex.Ka-3, took blood stained and simple earth, pieces of brick in his possession and got prepared memo by PW-6.

5. PW-6, SI Sobha Pandey, on the direction of the then SHO Ratan Singh Yadav PW-7, held inquest over the dead body of victim and prepared inquest report Ex.Ka-2 and other papers relating thereto, sealed the dead body and sent to mortuary for postmortem.

6. PW-5, Dr. Vinod Kumar Singh conducted autopsy over dead body of victim, aged about 14 years, daughter of Allimuddin, resident of Muhammadpur Malokhar, Police Station Mugalsarain, District Chanduali and prepared postmortem report Ex. Ka-4, expressing his opinion that death was possible about one day prior to postmortem due to hemorrhage on account of ante-mortem injuries. Doctor found following ante-mortem injuries on the body of deceased, which read as under :-

i. No blood from nose, ear and urethra.

ii. No bleeding from vaginal orifice

iii. Lacerated wound 7cm x 6cm right corner of mouth including upper half lip and lower half lip with cheek exposing teeth.

iv. Abrasion on right side of neck with left eyebrow. Contusion 4cm x 2cm on forehead.

7. PW-7 after receiving the postmortem report of victim, tried to apprehend the accused but could not succeed. Later, on 02.02.2010 Police arrested accused-appellant at Railway Station, Mugalsarain, at about 8:15 pm, recorded his statement. After completing all formalities of investigation, submitted charge-sheet Ex.Ka-13 against accused-appellant.

8. Case, being exclusively triable by Court of Sessions, was committed to Sessions Judge, wherefrom, it was transferred to Additional District and Sessions Judge, FTC, Court No.1, Chandauli for disposal in accordance with law.

9. Trial Court framed charges on 23.08.2010 against accused-appellant under Sections 302, 376 and 201 IPC, which reads as under :-

"आरोप

मैं, दिलीप कुमार, सत्र न्यायाधीश , चन्दौली आप अभियुक्त मुमताज को निम्नलिखित रूप से आरोपित करता हूँ:–

प्रथमत् *:– यह कि दिनांक 19.01.2010 को दोपहर में किसी समय बहद् ग्राम मुहम्मदपुर– मलाखर, थाना– मुगलसराय, जनपद– चन्दौली मे आप यह जानते हुये कि वादी अलीमुद्दीन की पुत्री गुलक्सा कुमारी उम्र 14 वर्ष का गला दबाने से उसकी मृत्यु हो सकती है, आपने गुलक्सा कुमारी का गला दबा कर व चोटे पहुंचा कर उसकी हत्या कारित कर दी और इस प्रकार आपने भा. द. सं. की धारा –302 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

द्वितीयत:– *यह कि उपरोक्त तिथि, समय व स्थान पर आपने वादी अलीमुद्दीन की पुत्री गुलक्सा कुमारी उम्र 14 वर्ष के साथ जबरदस्ती उसकी इच्छा के विरूद्ध बलात्कार किया। इस प्रकार आपने भा. दं. सं. की धारा – 376 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

तृतीयत:– *यह कि उपरोक्त तिथि, समय व रात्रि करीब 10.00 बजे गुलक्सा कुमारी की हत्या करके साक्ष्य को विलोपित करने के उद्देश्य से उसके शव को गली में फेंक दिया और इस प्रकार आपने भा. दं. सं. की धारा – 201 के अन्तर्गत दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

और मैं, एतद्द्वारा आप को निर्देश देता हूँ कि उपरोक्त आरोप को आप का परीक्षण इस न्यायालय द्वारा किया जाय।

दिनांक अगस्त 23, 2010 ई0

उपरोक्त आरोप अभियुक्त को पढ़कर सुनाया व समझाया गया। अभियुक्त ने उक्त आरोपो को अस्वीकार किया तथा परीक्षण की याचना किया।

"I, Dilip Kumar, Sessions Judge, Chandauli, charge you, Mumtaz, with the following:-

First:*That at any time on the noon of 19.01.2010 within the limits of village - Muhammadpur - Malakhar, PS - Mughalsarai, District - Chandauli, you, while knowing that constricting the throat of the complainant Alimuddin's daughter Gulaxa Kumari, aged 14 years, may cause her death, strangulated her and inflicted injuries, causing her death; thereby you committed an offence punishable under Section 302 IPC, which is in the cognizance of this court.*

Second:*That on the aforesaid date, time and place, you against her consent forcibly committed rape on the complainant Alimuddin's daughter Gulaxa Kumari, aged 14 years, thereby you committed an offence punishable under Section 376 IPC, which is in the cognizance of this court.*

Third: *That on the aforesaid date and place, you, having committed the murder of Gulaxa Kumari, disposed of the body at round 10:00 p.m. in a street with the intention to destroy the evidence, thereby you committed an offence punishable u/s 201 IPC, which is in the cognizance of this court.*

I, hereby, direct you that for the aforesaid charges, you be tried by this court.

The aforesaid charges were read over and explained to the witnesses. The accused persons denied the said charges and sought trial. "

(English Translation by Court)

10. Accused-appellant pleaded not guilty and claimed trial.

11. In order to substantiate its case, prosecution examined as many as eight witnesses in the following manner :-

Sr. No.	Name of PWs	Nature of witness	Paper proved
1	Alimuddin	Facts	Ex. Ka-1 and 2
2	Rukaina Bibi	Facts	Nil
3	Noor Ali	Facts	Nil
4	Julfekar Ansari	Formal	Ex.Ka-3
5	Dr. Vinod Kumar Singh	Formal	Ex.Ka-5
6	Shobha Pandey	Formal	Ex.Ka-2, 3, 9, 10 and 11.
7	Ratan Singh Yadav	Formal	Ex.Ka-3, 9, 10, 11, 12, 13, 16, 17 and 18.
8	K.L. Pathak	Formal	Ex.Ka-17 and 18.

12. On closure of prosecution evidence, statement under Section 313 of accused-appellant was recorded. In his statement, accused-appellant denied prosecution story in toto. Entire story is said to be wrong, he claimed false implication but did not choose to lead any defence evidence.

13. Ultimately, case came to be heard and decided by Additional District and Sessions Judge, FTC, Court No.1, Chandauli, who after hearing learned counsel for parties and analysing entire evidence (oral and documentary) led by prosecution, found accused-appellant guilty, convicted and sentenced, as stated above.

14. Sri Vimlendu Tripathi, learned Amicus Curiae assailed order of conviction and sentence advancing following submissions :-

i. There is no eye witness of murder of victim. Case of prosecution rests upon circumstantial evidence.

ii. PW-1, 2 and 3 are not independent witness. They are relatives of deceased, therefore, their evidence cannot be termed as independent witness.

iii. There is no strong motive to accused-appellant to commit murder of victim.

iv. There is no complete chain in the circumstantial evidence leading the guilt of the accused-appellant.

v. There are material contradictions in the statements of witnesses rendering prosecution doubtful.

vi. Prosecution failed to prove its case beyond reasonable doubt. All link of circumstantial is not proved.

vii. Trial Court has not appreciated the evidence in right perspective and has drawn a wrong conclusion regarding the guilt of the accused-appellant.

15. Learned AGA opposed submissions and submitted that accused-appellant is named in FIR; and sufficient motive has been shown in FIR as well as statements against accused-appellant. It was further submitted that dead body of victim was recovered in the street adjacent to the house of accused-appellant. Immediate after incident, accused-appellant was found absent in the house. He was arrested at Railway Station by Police. Fleeing away of accused-appellant from his own house immediately after the incident is an important circumstance against him. Prosecution has proved complete chain of circumstances leading to the guilt of accused-appellant. Trial Court rightly convicted accused-appellant and sought dismissal of appeal.

16. Dead body of victim was found in the street adjacent to the house of accused-appellant in the next morning of her disappearance; hands of victim were tied with her own scarf could not be disputed by the accused-appellant but according to learned counsel for accused-appellant, he is not responsible for committing murder of victim. Even otherwise from the statement of PW-1, 2, 3, 5 and 6, recovery of dead body adjacent to house of accused-appellant and assassination of victim stands proved.

17. Only two questions remain for consideration; (i) "Whether accused-appellant committed murder of victim or not?; and (ii) "Trial Court rightly convicted him under Sections 302 and 201 IPC or not?"

18. Now, we may proceed to consider rival submissions of learned counsel for parties and evidence, in brief,

available on record as well as some important decisions on this point.

19. Only evidence against the accused-appellant to connect him with present case is that (i) the last seen theory as set forth by PW-1, 2 and 3 of victim in association of accused-appellant one day prior to detection of dead body; (ii) disappearance of accused-appellant from his house immediately after the incident; (iii) detection of dead body of the victim in street adjacent to his house; (iv) recovery of Lungi with blood and semens allegedly belong to accused-appellant from the place of occurrence.

20. Argument Nos. 1 and 3 of learned counsel for accused-appellant are being discussed altogether. Now, we would like to proceed to consider the statements of witnesses. PW-1 deposed that his daughter (name withheld), aged about 14 years used to go to learn the work of Powerloom and study of Arabi language to the house of accused-appellant-Mumtaz, where Smt. Jaida (mother of accused-appellant) taught her Arabi language and accused-appellant, in his own house, taught her Power-loom work. On the fateful day, as usual, his daughter (victim) went to learn Arabi language in the house of accused-appellant and came back by 12 O'clock in the noon. Mother of accused-appellant and his wife went their maternal home in afternoon same day. On 19.01.2010, accused-appellant came to his house and took victim with him on the pretext of study. When she did not come back late in the evening, he along with his other family members tried to search her but despite drastic search, she was found no where. House of accused-appellant was locked from outside and there was nobody in the house. Nest morning, they again went to the house of accused-appellant-Mumtaz and found a dead body of his daughter in the street adjacent to north door of accused-appellant's house. It appeared that she was raped by accused-appellant-Mumtaz and on being opposed by her, murdered by accused-appellant, who ran away from the spot after throwing dead body in the street. He got scribed report of incident by one Anil Kumar Pandey and presented it to Police Station concerned.

21. In his cross examination, he deposed that when accused-appellant came to his house to take his daughter, he was present in the house with his other family members.

22. PW-2, Rukaina Bibi (mother of victim) deposed that her daughter used to go to house of accused-appellant for learing Power-loom work. On the fateful day, his daughter, aged about 14 years, went to house of accused-appellant to learn Arabi language from Smt. Jaida (mother of accused-appellant), which one day prior to detection of dead body of victim. Accused-appellant-Mumtaz came to her house to call victim and took her, on the pretext of learning Arbi language, to his house. When victim did not return back to her house by late evening, they went to house of accused-appellant-Mumtaz, where door was locked outside and there was nobody in the house. Despite drastic search, she was found no where. In the next morning, at about 7:00 Am, corpse of victim was found in the street adjacent to the house of accused-appellant. It was further deposed that she was raped. Her Paijama bore semen and there was injury on her face. Her hands were tied with her own scarf. She was assassinated in cruel manner.

23. PW-3, Noor Ali (brother of victim) deposed that. as usual, at about 9:00 am, victim used to go to learn Arabi language to the house of accused-appellant and come back at about 12:00 O'clock in the noon and again she had to go at 1:00 pm and come back at 5:00 pm. This was her usual time. On the fateful day i.e. 19.01.2010, at about 9:00 am, her sister (victim) went to house of accused-appellant to learn Arabi language and came back at 12 O'clock in the noon. At about 2:00 pm, accused-appellant came to his house and took victim to his house on pretext of learning Arabi language. When victim did not come back to house by late evening. They went to house of the accused-appellant-Mumtaz and found his house locked outside. Next morning, on 20.01.2010, dead body of victim was found lying in street adjacent to accused-appellant's house. He came to know that mother of accused-appellant had gone in relation when accused took victim. He further deposed that victim was cruelly assassinated after rape.

24. PW-1, 2 and 3 withstood lengthy cross-examination by learned counsel for accused-appellant but nothing adverse material could be brought so as to discredit their statements. PW-1, 2 and 3 are natural witness. They must be present at the time, when accused-appellant took victim from her house on the pretext of learning Arabi language. PW-1, 2 and 3 saw victim in association of accused-appellant last. Later on, she did not come back and nobody has seen him alive till detection of dead body. Accused-appellant offered a routine answer in his statement under Section 313 Cr.P.C., although he did not admit fact of taking victim with him. PW-1, 2 and 3 established that accused took with him and they saw victim last, in the company of accused-appellant. He did not offer any proper explanation. On the other hand, PW-1, 2 and 3 established that victim was taken by accused-appellant from the house. at 12:00 O'clock in the noon. Accused-appellant was under obligation to offer a proper explanation, what had happened with victim and who murdered her. It is also relevant to mention here that accused-appellant disappeared from his house till his arrest and his house remain locked. This fact also finds support from statement of PW-1, 2 and 3. Conduct of accused-appellant fleeing away from his house becomes relevant and is an additional link evidence against him. Dead body of victim and one Lungi, allegedly belonged to accused-appellant, have been recovered from street adjacent to house of accused-appellant and accused-appellant was not present in the house, if the victim was murdered by someone else, accused-appellant could have informed first, but he did not do so. Accused-appellant has also not offered any explanation how his Lungi was found there. All the circumstances indicate, guilt of accused-appellant and proved that accused-appellant is only and only person who committed murder of victim and threw the body in the street adjacent to his house.

25. In case, in hand, there is no eye witness of occurrence and case of prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused-appellant; that the

circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused-appellant and he should be incapable of explanation on any hypothesis other than that of the guilt of the accused-appellant and inconsistent with his innocence.

26. ***Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343***, is the basic judgment of the Supreme Court on appreciation of evidence, when the case depends only on circumstantial evidence, which has been consistently relied in later judgments. In this case as long back as in 1952, Hon'ble Mahajan, J expounded various concomitant of proof of a case based purely on circumstantial evidence and said:

*"... **circumstances should be of a conclusive nature** and tendency and they should be **such as to exclude every hypothesis but the one proposed to be proved**..... it must be such as to show that **within all human probability the act must have been done by the accused."***

27. In **Hukam Singh v. State of Rajasthan, AIR 1977 SC 1063**, Court said, where a case rests clearly on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of accused-appellant or guilt of any other person.

28. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,** Court while dealing with a case based on circumstantial evidence, held, that onus is on prosecution to prove that chain is complete. Infirmity or lacuna, in prosecution, cannot be cured by false defence or plea. Conditions precedent before conviction, based on circumstantial evidence, must be fully established. Court described following condition precedent :-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The **circumstances concerned 'must or should' and not 'may be' established.**

(2) the facts so established should be consistent only with the **hypothesis of the guilt** of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a **chain of evidence so complete as not to leave any reasonable ground** for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (emphasis added)

29. In **Ashok Kumar Chatterjee v. State of Madhya Pradesh, AIR 1989 SC 1890,** Court said:

"...when a case rests upon circumstantial evidence such evidence must satisfy the following tests :-

(1) the **circumstances** from which an inference of guilt is sought to be

drawn, **must be cogently and firmly established;**

(2) those circumstances should be of a **definite tendency unerringly pointing towards guilt of the accused;**

(3) the circumstances, taken cumulatively; should form a **chain so complete that there is no escape from the conclusion that within all human probability** the crime was committed by the accused and none else; and,

(4) the **circumstantial evidence** in order to sustain conviction must be **complete and incapable of explanation** of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(emphasis added)

30. In **C. Chenga Reddy and Others v. State of Andhra Pradesh, 1996(10) SCC 193**, Court said:

*"In a case based on circumstantial evidence, the settled law is that the circumstances from which the c**onclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature**. Moreover, all the **circumstances should be complete** and there should be **no gap left** in the chain of evidence. Further, the proved **circumstances must be consistent only with the hypothesis of the guilt of the accused** and totally inconsistent with his innocence. " (emphasis added)*

31. In **Bodh Raj @ Bodha and Ors. v. State of Jammu and Kashmir, 2002(8) SCC 45** Court quoted from Sir Alfred Wills, "Wills' Circumstantial Evidence" (Chapter VI) and in para 15 of judgement said:

*"(1) the **facts** alleged as the **basis of any legal inference must be clearly proved and beyond reasonable doubt** connected with the factum probandum;*

*(2) the **burden of proof is always on the party who asserts** the existence of any fact, which infers legal accountability;*

*(3) in all cases, whether of direct or circumstantial evidence the **best evidence must be adduced** which the nature of the case admits;*

*(4) in order to justify the inference of guilt, the **inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation**, upon any other reasonable hypothesis than that of his guilt,*

*(5) i**f there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted."***

(emphasis added)

32. The above principle in respect of circumstantial evidence has been reiterated in subsequent authorities also in **Shivu and Another v. Registrar General High Court of Karnataka and Another, 2007(4) SCC 713 and Tomaso Bruno v. State of U.P., 2015(7) SCC 178.**

33. Learned counsel for accused-appellant argued that all the three witness PW-1, 2 and 3 are relative of deceased,

therefore, they cannot be termed as independent witness and they are not worthy to credence. We are not impressed with the argument of learned counsel for accused-appellant and reject the same. Argument made by learned counsel for accused-appellant is thoroughly misconceived for the reasons that PW-1, 2 and 3 being father, mother and brother of deceased are natural witness. Their presence must have been in the house, when accused-appellant took victim from house on the pretext of learning Arabi language

34. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199****, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

35. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

(**Vide: Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).**"

36. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case, Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

37. In so far as motive is concerned, it is also notable that mind set of accused persons differs from each other. Thus, merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance in the argument advanced by learned counsel for appellant.

38. Next argument advanced by learned counsel for accused-appellant, in so far as discrepancies, variation and contradiction in the prosecution case is concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel for

the accused-appellant and find that the same do not go to the root of case and accused-appellant is not getting its benefits.

39 . In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

40. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of the Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi)**, decided on 19.09.2018.

41. In **Sachin Kumar Singhraha Vs. State of Madhya Pradesh** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019, Court has observed that the Court will have to evaluate the evidence before it keeping in mind the rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature, which do not go to the root of the matter, do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

42. e, we are satisfied that prosecution has successfully proved its case beyond reasonable doubt against accused-appellant and Trial Court has rightly convicted him for having committed an offence under Sections 302 and 201 IPC. Appeal is devoid of merit and liable to be dismissed.

43. So far as sentence of accused-appellant is concerned, it is always a difficult task requiring balancing of various considerations. The question of awarding sentence is a matter of discretion to be exercised on consideration of circumstances aggravating and mitigating in the individual cases.

44. It is settled legal position that appropriate sentence should be awarded after giving due consideration to facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a

crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175].**

45. Hence, applying the principles laid down in the aforesaid judgments and having regard to the totality of facts and circumstances of case, motive, nature of offence and the manner in which it was executed or committed, we find that punishment imposed upon accused-appellant by Trial Court in impugned judgment and order is not excessive and it appears fit and proper and no ground appears to interfere in the matter on the point of punishment imposed upon him.

46. We, therefore, find no merit in appeal. **Present Jail Appeal lacks merit and is, accordingly, dismissed**. Judgement and order dated 31.08.2016 passed by Additional Sessions Judge, FTC Court No.1, Chandauli in Session Trial No. 54 of 2010, (State v. Mumtaz), arising out of Case Crime No. 24 of 2010, Police Station Mugalsarain, under Sections 302 and 201 IPC, is maintained and confirmed.

47. Lower Court record along with a copy of this judgment be sent back immediately to District Court and Jail concerned for compliance and apprising the accused-appellant.

48. Before parting, we provide that Sri Vimlendu Tripathi, Advocate, who has appeared as Amicus Curiae for appellant in present Jail Appeal, shall be paid counsel's fee as Rs. 11,500/- for his valuable assistance. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer, posted in the office of Advocate General at Allahabad, without any delay and, in any case, within one month from the date of receipt of copy of this judgment.

(2019)10ILR A 524

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 1089 of 1996

Umesh Chandra
...Complainant/Revisionist
Versus
The State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Sri B.R. Singh

Counsel for the Opposite Parties:
A.G.A.

A. Cr.P.C., 1973 - Section 397/401 - Revisional Jurisdiction of High Court - is supervisory jurisdiction exercised to correct the manifest error in the orders of subordinate courts. It is distinct from Appellate jurisdiction - Acquittal of accused-Double presumption of innocence in his favour - Revisional powers of High Court to be exercised only when the Court lacks jurisdiction or has excluded evidence which was admissible, or relied on inadmissible evidence or material evidence has been

overlooked. (Para 4, 5, 6, 13 & 15)

In case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.

The revisional jurisdiction of the High Court cannot be invoked merely because the lower court has taken a wrong view of law or misappreciated the evidence on record. If the Court lacks jurisdiction or has excluded evidence which was admissible or relied on inadmissible evidence or material evidence has been overlooked etc., then only this Court would be justified in exercising revisional power and not otherwise.

Unless there is a patent and culpable illegality justifying interference in judgment of acquittal, this Court shall not and should not interfere in criminal revision. The revision is dismissed. Interim order, if any, stands vacated.

Criminal Revision dismissed (E-3)

Case law discussed: -

1. D. Stephens Vs Nosibolla AIR 1951 SC 196

2. K. Chinnaswamy Reddy Vs St. of A.P. AIR 1962 SC 1788

3. Mahendra Pratap Singh Vs Sarju Singh AIR 1968 SC 707

4. Khetrabasi Samal Vs St. of Ori. AIR 1970 SC 272

5. Satyendra Nath Dutta & anr. Vs Ram Narain AIR 1975 SC 580

6. Jagannath Choudhary & ors. Vs Ramayan Singh & anr. (2002) 5 SCC 659

7. Johar & ors. Vs Mandal Prasad & anr. 2008 Cr.L.J. 1627 (S.C.)

8. Duli Chand Vs Delhi Administration (1975) 4 SCC 649

9. Pathumma & anr. Vs Muhammad (1986) 2 SCC 585

10. Munna Devi Vs St. of Raj. & anr. (2001) 9 SCC 631

11. Ram Briksh Singh & ors. Vs Ambika Yadav & anr. (2004) 7 SCC 665

12. Shivaji Sahebrao Bobade & anr. Vs St. of Mah. AIR 1973 SC 2622

13. Girija Prasad (Dead) by L.Rs. Vs St. of M.P. (2007) 7 SCC 625

14. St. of Goa Vs Sanjay Thakran (2007) 3 SCC 755

15. Chandrappa Vs St. of Kar. (2007) 4 SCC 415

16. St. of Raj. Vs Shera Ram alias Vishnu Dutta (2012) 1 SCC 602

17. Shivasharanappa & ors. Vs St. of Kar. & ors. (2013) 5 SCC 705

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri B.R. Singh, learned counsel for revisionist and perused the record.

2. This criminal revision under Section 397/401 Cr.P.C., has been filed aggrieved by order dated 30.05.1996 passed by IInd Additional Sessions Judge, Etah in Session Trial No. 521 of 1994, whereby Respondents were acquitted from the offence under Sections 302/34 IPC.

3. Despite repeated query learned counsel for revisionist could not point out any error in the judgment in question particularly in view of the categorical

finding recorded by Court below in para 28 of judgment that both the witnesses of fact, i.e., PWs-1 and 2 were not present at the time of incident in village in question. Their testimony has also been found contrary to medical report and Court below has also recorded finding that First Information Report was ante-time. These findings have not been shown perverse or contrary to material on record so as to justify interference in criminal revision.

4. The judicial review in exercise of revisional jurisdiction is not like an appeal. It is a supervisory jurisdiction which is exercised by the Court to correct the manifest error in the orders of subordinate courts but should not be exercised in a manner so as to turn the Revisional court in a Court of Appeal. The legislature has differently made provisions for appeal and revision and the distinction of two jurisdictions has to be maintained.

5. Construing old Section 439 of Criminal Procedure Code, 1898, pertaining to revisional jurisdiction, the Court in **D. Stephens Vs. Nosibolla, AIR 1951 Sc 196** said that revisional jurisdiction under Section 439 of the Code ought not to be exercised lightly particularly when it is invoked by private complainant against an order of acquittal which could have been appealed against by the Government under Section 417. It could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. In other words, the revisional jurisdiction of the High Court cannot be invoked merely because the lower court has taken a wrong view of law or misappreciated the evidence on record.

6. In **K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1788** it was held that revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice. However, this was also a case in which revisional jurisdiction was invoked against an order of acquittal. If the Court lacks jurisdiction or has excluded evidence which was admissible or relied on inadmissible evidence or material evidence has been overlooked etc., then only this Court would be justified in exercising revisional power and not otherwise.

7. The above view has been reiterated in **Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707; Khetrabasi Samal Vs. State of Orissa, AIR 1970 SC 272; Satyendra Nath Dutta and another Vs. Ram Narain, AIR 1975 SC 580; Jagannath Choudhary and others Vs. Ramayan Singh and another, 2002(5) SCC 659; and, Johar and others Vs. Mandal Prasad and another, 2008 Cr.L.J. 1627 (S.C.).**

8. In **Duli Chand Vs. Delhi Administration, 1975(4) SCC 649** the Court reminded that jurisdiction of High Court in criminal revision is severely restricted and it cannot embark upon a re-appreciation of evidence. While exercising supervisory jurisdiction in revision the Court would be justified in refusing to re-appreciate evidence for determining whether the concurrent findings of fact reached by learned Magistrate and Sessions Judge was correct.

9. In **Pathumma and another Vs. Muhammad, 1986(2) SCC 585** reiterating the above view the Court said that in revisional jurisdiction the High Court would not be justified in substituting its own view for that of a Magistrate on a question of fact.

10. In **Munna Devi Vs. State of Rajasthan and another, 2001(9) SCC 631** the Court said:

"The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

11. In **Ram Briksh Singh and others Vs. Ambika Yadav and another, 2004(7) SCC 665**, in a matter again arising from the judgment of acquittal, the revisional power of High Court was examined and the Court said:

"4. Sections 397 to 401 of the Code are group of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to be exercised sparingly. Though the jurisdiction under Section 401 cannot be invoked to only correct wrong appreciation of evidence and the High Court is not required to act as a court of appeal but at the same time, it is the duty of the court to correct manifest illegality resulting in gross miscarriage of justice."

12. Moreso, if an appeal is filed against acquittal despite the fact that plenary power of Appellate Court to review the whole evidence on which order of acquittal is founded has been recognized by a Three Judge Bench of Supreme Court in **Shivaji Sahebrao Bobade and another vs. State of Maharashtra, AIR 1973 SC 2622 and it has been followed in Girija Prasad (Dead) by L.Rs. vs. State of Madhya Pradesh, 2007(7) SCC 625 and State of Goa vs. Sanjay Thakran, 2007(3) SCC 755,** still Court has held that in the matter of acquittal there are certain other principles which are to be kept in mind.

13. In **Chandrappa vs. State of Karnataka, 2007(4) SCC 415** Court said that an Appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.

14. Further in **State of Rajasthan vs. Shera Ram alias Vishnu Dutta, 2012(1) SCC 602** Court said that High Court is required to see that unless there are substantial and compelling circumstances, the order of acquittal is

not required to be reversed in appeal. All these authorities have been referred and followed in **Shivasharanappa and others vs. State of Karnatapa and others, 2013(5) SCC 705.**

15. In the present case above principles are not only applicable in entirety but makes the jurisdiction of this Court further narrower for the reason that here the judgment of acquittal has been challenged in revision where the scope of judicial review is further limited as already discussed above and not as wide as that of Appellate Court. Therefore, unless there is a patent and culpable illegality justifying interference in judgment of acquittal, this Court shall not and should not interfere in criminal revision.

16. The revision is dismissed. Interim order, if any, stands vacated

17. Certify this judgment to the lower Court immediately.

(2019)10ILR A 528

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE RAJUL BHARGAVA, J.

Criminal Revision No. 2699 of 2019

Sagar Yadav & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri Rajiv Lochan Shukla, Sri Shiv Shankar Prasad Gupta

Counsel for the Opposite Parties:
A.G.A.

A. Cr.P.C., 1973-Section 319 - Revisionists though nominated in the F.I.R exonerated in the Police Report on basis of alibi -" Evidence" - is limited to the evidence recorded by the trial court - Statement recorded under Section 161 of the Cr.Pc - Has only the limited purpose of contradicting the maker thereof- the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes - Plea of Alibi- Section 103 of the Evidence Act - Burden of Proof for establishing the plea of alibi - Could be done by leading evidence in trial court and not by relying on the material collected during investigation n- The Court in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused- Precedent-a decision is precedent on its own facts- the only thing binding a party is the ratio decidendi which is generally secundum subjectam materiam-Application under Section 319 Cr.P.C.- is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial - Power under Section 319 of the Code - is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence and to render justice to the victim.

Scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the Constitution Bench judgement of Hardeep Singh was not considered in the subsequent cases in Brijendra Singh's and Shiv Prakash Mishra's cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

A decision is precedent on its own facts- The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

Application under Section 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial.

Statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker thereof in the manner laid down in the said proviso.

Consideration of plea of alibi -Section 103 of Evidence Act - burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person- The Court in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C.

The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence and to render justice to the victim. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is in recognition of this that the Code has specifically conferred a power in the court to proceed against others not arrayed as accused in the circumstances set out by this Section. Revision accordingly dismissed.

Criminal Revision dismissed (E-3)

Case law relied upon/discussed: -

1. Hardeep Singh Vs St. of Punj. (2014) 3 SCC 92

2. Brijendra Singh & Ors. Vs St. of Raj. (2017) 7 SCC 706

3. Shiv Prakash Mishra Vs St. of U.P.& ors. passed in Criminal Appeal No.1105 of 2019 (arising out of S.L.P. (Crl.) No.2168 of 2019) dated 23.7.2019

4. Quinn Vs Leathem (1901) AC 495 Earls of Halsbury L.C.

5. St. of Har. Vs Sher Singh, Manu SC/0236/1981

6. Gurcharan Singh Vs St. of Punj. Manu SC/0122/1955

7. Chandrika Prasad Singh Vs St. of Bihar Manu SC/0084/1971

8. St. of Ori. Vs Debendra Nath Padhi (2004) 8 SCC 568

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri Rajiv Lochan Shukla and Sri Shiv Shanker Prasad Gupta, learned counsels of the revisionists and Sri Pankaj Saxena, learned A.G.A. for the State and perused impugned order and material on record.

2. Present revision has been preferred against the impugned order dated 7.05.2019 passed by the Additional Sessions Judge, Court No.1, Azamgarh in Session Trial No.49 of 2017 (State Versus Lakshaman Yadav and others) under Sections 302, 120-B, 506 I.P.C. and 7 Criminal Law Amendment Act, Police Station Maharajganj, District Azamgarh, whereby application 21 kha under Section 319 Cr.P.C. moved by informant/opposite party no.2 for summoning the revisionists has been allowed and the revisionists have been summoned to face trial under aforesaid sections.

3. The facts, in brief, relevant for decision of present revision are that

opposite party no.2 lodged F.I.R. on 22.1.2016 at 2.15 p.m. regarding an incident which is stated to have taken place on the same day at 1.00 p.m.. It is stated that on 12.10.2012 at about 4.00 p.m. accused, Saudagar and Sagar in collusion with hired assailants had caused firearm injuries on the informant's son Vishwajeet alias Santosh in which a case was registered and one of the accused Lakshaman was still in jail. The aforesaid accused, Saudagar and Sagar were extending threat for entering into a compromise or else they will face dire consequences. On 22.1.2016 at about 1.00 p.m. the accused, Sagar and Saudagar along with two unknown miscreants came on motorcycle and after waylaying the tempo of the deceased, made him to fell on the ground and they resorted to indiscriminate firing and fled away. After investigation charge-sheet was submitted only against accused, Laxman Yadav under Sections 302, 120-B, 506, 34 I.P.C. and 7 Criminal Law Amendment Act However, the participation of revisionist / accused, Saudagar was found false on the basis of the some electronic evidences collected by the Investigating Officer in the form of Pen Drive and CCTV footage from 21.1.2016 to 23.1.2016. The revisionist no.1, Sagar Yadav was also exonerated on the ground that he was present before Consolidation Officer on 22.1.2016 which is about 40 kms away from the place of incident. During trial statement of first informant PW 1 was recorded. He was also an eye-witness. He had categorically stated that revisionists and two other accused whose names came into light subsequently have resorted to indiscriminate firing in a bright day light incident and his son died on the spot on account of multiple firearm wounds of entry and exit. An application was moved by the prosecution to summon applicants under Section 319 Cr.P.C. in view of categorical statement of the first informant regarding participation of the revisionists by the impugned order. Learned judge summoned revisionists to face trial.

4. Learned counsel for the revisionists have assailed the impugned order on the ground that the trial judge has misinterpreted evidence on record and has recorded perverse finding about involvement of revisionists in the crime. Trial judge did not consider the material collected during investigation in respect of their plea of alibi which stood unrebutted and solely on the basis of conjectures and surmises summoned the revisionists to face trial. He has also conducted mini trial by even going to the extent of considering the manner in which the Investigating Officer relied on pen drive provided by some well-wisher of the revisionist no.2 from which he had drawn an inference that he was present at a quite far away place and arrived at conclusion that his presence at the spot at the date and time of the incident is doubtful. It has been argued that learned judge has overstepped by scanning the evidence led against revisionists by rejecting it and summoning the revisionists in exercise of powers under Section 319 Cr.P.C.

5. Learned counsel for the revisionists submitted that in view the judgement of Hon'ble Apex Court in the case of **Hardeep Singh Versus State of Punjab (2014) 3 SCC 92**, the trial judge has not considered the evidence on record and has relied on extraneous material without recording satisfaction more than prima facie satisfaction sufficient for framing charges is required under the law

and no such satisfaction to this effect has been recorded in the impugned order. Learned counsels have further place reliance on subsequent decision of the Hon'ble Apex Court in the case of Brijendra Singh and others Versus State of Rajasthan (2017) 7 SCC 706 and followed in the a recent judgement rendered by Hon'ble Apex Court in the case of Shiv Prakash Mishra Versus State of Uttar Pradesh and another passed in Criminal Appeal No.1105 of 2019 (arising out of S.L.P. (Crl.) No.2168 of 2019) dated 23.7.2019 wherein the plea of alibi was raised by the accused and accepted by Investigating Agency which led to filing of charge-sheet without arraying the accused therein despite having been named as one of the assailants in the F.I.R. and they were summoned on the basis of testimony recorded in the trial as one of the assailants. The powers under Section 319 Cr.P.C. was invoked by the prosecution which led to allowing of the application which was assailed in the High Court whereafter the matter was preferred upto Supreme Court wherein challenge made by the accused therein was upheld by holding that a detailed inquiry has been conducted by the investigating agency where the plea of alibi was found to be true, the trial court was not correct in allowing the application under Section 319 Cr.P.C. in a perfunctory and cursory manner without applying its judicial mind to the exonerative evidence collected by the Investigating Officer during investigation. Learned counsels have submitted that case of the revisionists is more or less on the same lines as during investigation on the basis of electronic evidence and documentary evidence their participation in the murder of the son of first informant was found false. Thus the impugned order is in the teeth of the guidelines/parameters stated in paragraph no.106 of Hardeep Singh's case(supra) and the impugned order is liable to be quashed.

6. Sri Pankaj Saxena, learned A.G.A. Appearing for the State has strongly opposed the prayer for quashing the impugned order and has relied upon the Constitution Bench decision of Hon'ble Apex Court in Hardeep Singh Versus State of Haryana.. He has further argued that the plea of alibi cannot be considered at the stage of taking cognizance or claiming discharge by the accused under Section 227 of Cr.P.C. and the trial court while exercising powers under Section 319 Cr.P.C. The trial judge has rightly placed reliance on the statement of PW 1 who is the eye-witness and had lodged the F.I.R. within one and half hours of the incident naming the revisionists and two unknown miscreants. Therefore, the instant revision deserves to be dismissed.

7. In order to deal with the submissions made by learned counsels for the revisionists, especially in respect of subsequent judgements rendered by the Hon'ble Apex Court in Brijendra Singh's and Shiv Prasad Mishra's cases, I would like to deal with legal aspect as to what material/evidence is to be considered under Section 319 Cr.P.C. as laid down in the judgements of the Hon'ble Apex Court in the Constitution Bench decision rendered in the case of Hardeep Singh (supra).

8. The Hon'ble Apex court in it's decision of Constitution Bench in the case of Hardeep Singh(supra) has considered the scope, ambit and sweep of Section

319 Cr.P.C. in detail and has framed several questions including question No.(iii) which is reproduced below:-

"Question (iii) - Whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial ?"

The above said question has been answered in the following manner by the Apex Court :-

"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus limited to the evidence during trial."

9. This Court, after carefully considering the Constitution Bench decision of Apex Court in the case of Hardeep Singh(supra) and subsequent decisions in Brijendra Singh's and Shiv Prakash Mishra's cases is of the opinion that a bare perusal of two Judges's Bench decision of Apex Court in the Brijendra Singh's case reveals that though earlier decision of Hardeep Singh was considered, however, the scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the judgement was not considered in the subsequent cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

10. With profound respect and utmost humility at my command, I may record that it is well settled that authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam.

11. In Quinn v. Leathem (1901) AC 495, Earls of Halsbury L.C. stated:

"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other case is only an authority for what it actually decides.

12. It is also well settled that a decision is precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgement that constitutes a precedent. The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

13. This court indeed cannot comment on the decision of Hon'ble Apex

Court in the Brijendra Singh and Shiv Prakash Mishra's cases(supra) but two conflicting views appeared to exist on the same point of meaning of expression "evidence' used in Section 319 Cr.P.C., the decision of Hon'ble Apex Court in the case of Hardeep Singh rendered by Bench of larger composition shall prevail upon Brijendra Singh's and another decision.

14. In view of the above, this Court has no hesitation to hold that the expression "evidence" found in Section 319 Cr.P.C. is to be understood to mean the evidence collected during the trial in shape of oral and documentary evidence. However, the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes as laid down by the Apex Court in five Judge Bench decision in the case of Hardeep Singh. In other words, an application under Section 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial. While considering such application under Section 319 Cr.P.C. the trial court can take assistance, for corroboration only, of any evidence which is already on record introduced between the stage of taking cognizance and the stage of commencement of trial. However, the trial court is not empowered to invoke Section 319 Cr.P.C. merely based on evidence which is part of investigation stage unless the same is already brought on record between the period of taking cognizance and before the trial begins.

15. Essentially, the main thrust of the learned counsels for the revisionists is to the plea of alibi which according to them was of an impeccable quality and thus the trial judge instead of rejecting the same on flimsy ground should have considered the same as it was tested by electronic evidence and documentary evidence and in this behalf statement of witnesses was also recorded by the Investigating Officer under Section 161 Cr.P.C. to record a positive finding that the revisionists could not have been present at the scene of commission of crime. It is well settled that statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the trial judge was perfectly justified in not placing reliance on wholly inadmissible evidence of alibi collected during investigation and if he had relied upon the same it would squarely be against interpretation given by Constitution Bench of Hon'ble Apex Court in Hardeep Singh's case being extraneous material collected during investigation and could not be treated as an evidence for the purposes of exercise of powers under Section 319 Cr.P.C. Consideration of plea of alibi while exercising powers under Section 319 Cr.P.C. may also be looked into from another angle i.e. Section 103 of Evidence Act which stipulates that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person. Second illustration to Section 103 of Evidence Act reads as under:

"B wishes the court to believe that at that time in question he was elsewhere, he must prove it."

16. This provision makes it obvious that burden of establishing plea of alibi of the revisionists before this Court lay squarely upon them. There is hardly any doubt regarding this legal proposition. Reference may be made to the cases of **State of Haryana Versus Sher Singh, Manu** SC/0236/1981, **Gurcharan Singh Versus State of Punjab, Manu** SC/0122/1955 and **Chandrika Prasad Singh Versus State of Bihar Manu** SC/0084/1971.

17. This could be done by leading evidence in trial court and not by relying on the material collected during investigation. In such a case the prosecution would have to be given an opportunity to cross-examine this witness can demonstrate that their testimony was not correct. The Court also in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C. The revisionists accused will have ample opportunity to place their evidence at the appropriate stage. In this behalf the judgement of the Hon'ble Apex Court, rendered in the case of **State of Orissa Versus Debendra Nath Padhi, 2004(8) Supreme Court Cases 568** be referred to. It was held:

" .....Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

18. The above judgement relates to the stage of claiming of discharge by the accused under Section 227 Cr.P.C. However, in view of well settled law that even at the stage of framing of charge, material in respect of plea of alibi cannot be relied upon to discharge the accused.

19. The power under Section 319 of the Code is conferred on the court to

ensure that justice is done to the society by bringing to book all those guilty of an offence. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power in the court to proceed against others not arrayed as accused in the circumstances set out by this Section. It is a salutary power enabling the discharge of a court's obligation to the society to bring to book all those guilty of a crime.

20. In the light of aforesaid, the present revision is bereft of merit. The impugned order passed by trial judge is perfectly justified and well within the guidelines/parameters laid down by Constitution Bench decision of Hon'ble Apex Court in the case of Hardeep Singh's case.

21. The revision is accordingly, dismissed.

(2019)10ILR A 535

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH-I, J

Criminal Revision No. 2952 of 2019

Aviral Singh & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:

Sri Gopal Misra

Counsel for the Opposite Parties:

A.G.A.

A. Cr.P.C., 1973 - Section 397/401 and Section 227 – Discharge - Requirement at stage of Section 227 & 228 Cr.PC. - Consideration of the "record of the case" and hearing the parties- Ground of Presumption is enough to frame the Charge - Satisfaction of the court - may even be weaker than prima-facie case - At the stage of framing of charge, strong suspicion and not proof is sufficient- Questions of facts are matters of evidence which can only be appreciated during trial. (Para 9,11,12,13 &14)

On the basis of the allegation made by the victim against the accused there arises grave suspicion in respect of the victim having been attempted to be raped as was stated by her in her statement given under Section 164 Cr. P.C. and it is also true that the trial court was not required to make a roving enquiry regarding commission of the offence.

The arguments which have been raised before the trial court relate to the factual aspect of the case, finding where on would be possible only after trial is conducted by adducing evidence of both the sides and its appreciation is made.

The court is required to consider the "record of the case" and the documents submitted therewith and, after hearing the parties may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than prima-facie case. At the initial stage of framing of charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty.

Framing of charge is an exercise of jurisdiction by the trial court in terms of Section 228 Cr. P.C., unless the accused is discharged under Section 227 Cr.P.C. Under both the sections 227 and 228 Cr.P.C., the court is required to consider the "record of the case" and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. To say that at this stage of framing of charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 Cr. P.C.

Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.

No infirmity in the impugned order because the fact as to whether the accused/revisionist actually tried to molest the victim/attempted to commit rape upon her,/had abused and beaten her as has been stated by the victim in her statement under Section 164 Cr. P.C. as well as, as has been stated by her in F.I.R., is a subject matter of evidence because no opinion can be given on these aspects till both the parties have adduced evidence before trial court. Revision accordingly dismissed.

Criminal Revision dismissed (E-3)

Case law relied upon/discussed: -

1. St. of Har. & ors. Vs Ch. Bhajan Lal & ors. 1992 AIR 604 SC.

2. Vikram Jauhar Vs St. of U.P. & anr. 2019 lawsuit (SC) 1123

3. Dilawar Babu Vs St. of Mah. 2002 lawsuit (SC) 12

4. Amit Kapoor Vs Ramesh Chander & anr. (2012) 9 SCC460

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

1. Heard Sri Gopal Mishra, learned counsel for the revisionists, Sri Attreya Dutt Mishra, learned A.G.A. appearing for the State and perused the record.

2. This criminal revision has been preferred by the revisionists against the judgment and order dated 20.07.2019 passed by Additional District & Sessions Judge, VI, Gautam Buddha Nagar in Sessions Trial No. 431 of 2018 (State Vs. Aviral & Others) whereby application 8-kha under section 227 Cr.P.C. has been rejected.

3. It is argued by the learned counsel for the revisionist that no offence under section 376 IPC as well as of other sections are made out and the Learned trial court has failed to appreciate the fact that opposite party no. 2 herself had come to the house of the revisionist to stay there and upon being refused to allow her to stay, she would refuse to leave. It has also not been appreciated that in her statement under sections 164 Cr. P.C. she herself has not made any statement that she was raped by the accused revisionist and yet Section 376 IPC has been imposed. The prosecution story would reveal that on the one hand the opposite party no. 2 is claiming that she herself went to reside with revisionist no. 1 who was known to her while on the other in the F.I.R. she has not even named the revisionist nos. 1 and 2. In FIR she has clearly stated that she had gone to stay with the revisionist no. 1 after taking consent of her parents but the investigating officer has not even recorded the statement of her parents. There are serious contradictions in the F.I.R. and the statement made by the victim under sections 161 and 164 Cr. P.C.. The opposite party no. 2 has made a statement under section 164 Cr. P.C. that

she had called the police at 100 number from railway station New Delhi, but no information about the same was given by her to the investigating officer nor did the investigating officer collect any evidence in this regard during entire investigation. The malafide of the opposite party no. 2 would be clear from the fact that in the F.I.R. she has given her address as that of the revisionist no. 1. The present prosecution has been initiated only in order to blackmail the revisionist no. 1 and his family which would be apparent from the fact that when the real Bua and real brother of the opposite party no. 2 were residing in Delhi/NCR, even then she preferred to stay in the house of revisionist no. 1 of her own free will with some oblique motives to implicate the revisionists. It is the admitted case of the opposite party no. 2 that revisionist no. 1 had requested the opposite party no. 2 to go out from his house but she refused. The medical examination report does not substantiate any offence under section 376 IPC. Therefore it is argued that the trial court has committed grave error in rejecting the discharge application by forcing the revisionist to face the trial. The impugned order is a cryptic one which does not disclose any reasons. As far as revisionist no. 2 is concerned he was neither relative of opposite party no. 2 nor had he any connection in the present matter and was residing separate in his hostel and was pursuing studies. He has been solely implicated in this false case when opposite party no. 2 refused to go away from the house of the revisionist no. 1, the revisionist no. 2 was also called upon by the revisionist no. 1 for moral support only. The impugned order is illegal perverse and against the provisions of law as interpreted by the Hon'ble Supreme Court in various cases and the same deserves to be set aside.

4. The learned counsel for the revisionists has taken the court through the F.I.R. wherein it is recorded by opposite party no. 2 that she was a resident of District Chandauli and was doing B.Tec. from Lucknow. She had come to the house of his acquaintance i.e. revisionist no. 1, regarding which she had also told her parents and they permitted her to do so for doing training. The said revisionist no. 1 had also talked to her parents but about 2 days ago he started threatening her. There was another boy i.e. revisionist no. 2, who was son of her Bua and both of them together had beaten her and told her to leave their house but she refused, whereon she was threatened. The reason behind her being expelled was that she should leave the house before arrival of their parents. They had taken away her phone and was confined to a room and in highly drunken condition they came in her room and ill treated her when she was alone and while defending herself she received an abrasion as she was tightly caught. The son of her Bua tried to forcibly molest her, whereon she screamed loudly, thereafter both of them had closed her in a room and left from there. She could not have done anything there, therefore till the morning she remained there and again both of them came there in the morning and started beating her and did a lot of things and thereafter they had thrown out her belongings and expelled her from the house. She kept crying alone and had to go out along with her belongings but after having come out of the house she realized that her phone was left there and thereafter, leaving her belongings there only, she went back to their house again, then she was again beaten and her wallet was snatched away. Thereafter she came back from there and by Auto started

leaving for Parichauk, then both of them came there from behind and had thrown her wallet inside the Auto, when she looked into it, she found that her phone and the money and a golden chain kept in the wallet were missing. She came to the Delhi railway station and lodged the complaint.

5. Thereafter the learned counsel for the revisionist had taken the court through her statement under sections 164 Cr. P.C. in which she has stated that she had come to the house of her Mausi last month. Her aunt's house was in Greater Noida. She knew revisionist no. 1/Aviral who was son of sister of her aunt for last 5 - 6 years as both of them were doing B.Tech from Lucknow. She had told her home folks that she was going to Noida for training purpose and till she would get a job she would stay in the house of her Mausi. Her brother was also staying for last 2 months in Noida where he had taken a room. She had started living in the house of her Mausi. She continued to enquire about training which was to begin from 30/06/2017. Aviral told her that she should come to his house. She declined, then he stated that his parents were also to come here yet she refused and stated that first he should arrange her meeting with his parents. On this, altercation followed between them and Aviral went away. With Aviral was also staying the son of her Bua, Animesh. Both of them talked to each other and came together in her room in the night at about 12 - 1 AM in drunken state. When she enquired as to what had happened, they started abusing her and gave her a ticket which was of 1st. They would not stop and started ill treating her and at that time she was alone. They started using force against her and she was beaten and an attempt to rape her was also made. Sri screamed loudly, whereafter both of them fled from there closing the door, having taken away her phone. She kept weeping because of fear and again when in the morning both of them came, they started abusing her. She told them that she would leave but both of them had thrown her belongings out, whereafter she left the place after taking her belongings. After having left the place she realized that her phone was left there only, to take which she went back but the same was not given and her purse was also snatched away. Thereafter she returned and engaged an Auto. The accused came from behind and had thrown her empty purse into the Auto, whereafter she made a phone call at 100 number and thereafter she reached Lucknow and got a report lodged at Lucknow police station and also came to meet SSP NOIDA .

6. After having taken the court through the above statements it was vehemently argued by the learned counsel for the revisionists that the said statement would suggest that there was no evidence on record constituting an offence of rape and that the accused revisionists have been falsely implicated by the opposite party no. 2 because it is very much clear from the above statements that the accused were consistently opposing her stay in their house but the victim/opposite party no. 2 was insisting upon staying there despite the fact that her own brother was staying in the same city which clearly suggests that she has fabricated this false story only to falsely implicate the revisionists. No such occurrence has ever happened. The revisionists are students of engineering and come from decent family. Therefore the impugned order dated 20/07/2019 rejecting the discharge

application and directing the accused to appear before court for framing of charge, be set aside.

7. The learned counsel for the applicant by filing written argument has placed reliance on Bhajan Lal's case and it has been argued that the allegations made in the F.I.R. and the statement under sections 164 Cr. P.C. are absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. He has placed reliance upon Vikram Jauhar vs State of Uttar Pradesh and another, 2019 lawsuit (SC) 1123, in which it is held that while considering the discharge application, the court is required to exercise its judicial mind to determine whether a case for trial has been made out or not. In this case the allegation was that appellant with 2 or 3 other unknown persons, one of whom was holding a revolver, came to the complainant's house and abused him in filthy language and attempted to assault him and when some neighbours arrived there, the appellant and the other persons accompanying him fled the spot. It was held that the allegation taken on the face of it does not satisfy the ingredients of Section 504 and 506 IPC as the intentional insult must be of such a great degree that it should provoke a person to break the public peace or to commit any other offence. The mere allegation that appellant came and abused the complainant does not satisfy the ingredients. In this case the allegation was only that the appellant abused the complainant, hence the ingredients of Section 504 and 506 were not found made out from the complaint filed by the complainant and it was held that the courts below committed error in rejecting the application of discharge filed by the Appellant.

8. The other case law relied upon by the learned counsel the applicant is **Dilawar Babu vs State of Maharastra, 2002 lawsuit (SC) 12**, in which it is held that even for the limited purpose of framing charge the evidence can be sifted to ascertain as to whether charge needs to be framed and that charge can be famed even when the suspicion is grave enough. Where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge and to proceed with the trial. By and large, if two views are equally possible and judge is satisfied that the evidence produced before him, gives rise to some suspicion which was not grave one, he will be fully justified to discharge the accused. In exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the judge cannot act merely as a post office or as a mouthpiece of the prosecution but has to consider broad probabilities of the case, the total effect of the evidence and the documents produced before the court, but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting trial.

9. I do not have any quarrel with the above principle of law but even if the above laid principles are applied in the present case, I am convinced that on the basis of the allegation made by the victim against the accused there arises grave suspicion in respect of the victim having been attempted to be raped as was stated by her in her statement given under Section 164 Cr. P.C. and it is also true that the trial court was not required to

make a roving enquiry regarding commission of the offence. So far as the inherent improbability of the statement of the victim is concerned, it does not appear to be improbable at all.

10. The AGA vehemently opposed the quashing of the impugned order and has argued that there is no infirmity in the impugned order as there is sufficient evidence on record to constitute an offence under section 376 read with Section 511 IPC apart from other sections mentioned above and it is wrong to say that the accused - revisionists were summoned by the trial court to face trial under sections 376 IPC, rather they been summoned to face trial under sections 376 read with Section 511 IPC along with other sections. The main emphasis was laid by the Learned AGA on the statement given by the victim that she was tried to be thrown out of the house of the revisionist only because their parents were arriving and that it cannot be ignored that the accused might have molested the victim as she has stated that she was tried to be raped by them. The said statement cannot be disbelieved at inceptional stage of the case/trial.

11. I have gone through the impugned order. It is recorded in it that after registration of the F.I.R., investigation was conducted and the evidence was gathered by the investigating officer, on the basis of which charge sheet has been submitted against the accused/ revisionists, upon which cognizance has been taken by the learned Magistrate. The present matter relates to an effort having been made by the accused/revisionists of making attempt to commit rape upon the opposite party no. 2. The arguments which have been raised before the trial court relate to the factual aspect of the case, finding where on would be possible only after trial is conducted by adducing evidence of both the sides and its appreciation is made. The revisionists/accused would get sufficient opportunity at the stage of evidence to cross-examine the said witness/opposite party no. 2 and also to adduce evidence in defence and therefore at this stage it cannot be held that no such offence was committed and accordingly the application 8 Kha was dismissed which was moved for discharging the accused/revisionist of charges which were to be framed against them.

12. It would be pertinent to refer to the position of law in respect of framing of charge. In **Amit Kapoor vs Ramesh Chander and another, (2012) 9 Supreme Court Cases 460**, the Hon'ble Apex court has laid down that the framing of charge is an exercise of jurisdiction by the trial court in terms of Section 228 Cr. P.C., unless the accused is discharged under Section 227 Cr.P.C.. Under both the sections 227 and 228 Cr.P.C., the court is required to consider the "record of the case" and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section concerned exist, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a

sign quo non for exercise of such jurisdiction. It may even be weaker than prima-facie case. At the initial stage of framing of charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at this stage. There is a fine distinction between the language of sections 227 and 228 Cr. P.C.. Section 227 is the expression of a definite opinion and judgment of the court while Section 228 is tentative. Thus, to say that at this stage of framing of charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 Cr. P.C.. Framing of charge is the first major step in a criminal trial where the courts are expected to apply its mind to the entire record and documents placed before it. Taking cognizance of an offence has been stated to necessitate an application of mind by the court but framing of the charge is a major event where the court considers the possibility of discharging the accused of the offence with which he has been charged or requiring the accused to face trial. There are different categories of cases where the court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case, where considering the record of the case and documents submitted before it, the trial court finds that no offence is made out and there is a legal bar to such prosecution under the provisions of Cr. P.C. or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the court may discharge the accused. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings. The legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the court would not doubt the case of prosecution unduly and extend its jurisdiction to quash the charge in haste. The meaning of the word "presumed" means "to believe or accept upon probable evidence", "to take as proved until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are examined by the defence, incriminating material and evidence is put to the accused in terms of Section 313 Cr. P.C. and then the accused is provided an opportunity to lead defence if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion in delivering its judgment.

13. If the above test in the present case is applied as to whether the impugned order is a defective one on the anvil of law which has been cited above, I come to the conclusion that there is no infirmity in the impugned order because the fact as to whether the accused/revisionist actually tried to molest the victim/attempted to commit rape upon her,/had abused and beaten her as has been stated by the victim in her statement under Section 164 Cr. P.C. as

well as, as has been stated by her in F.I.R., is a subject matter of evidence because no opinion can be given on these aspects till both the parties have adduced evidence before trial court. A perusal of the charge- sheet would reveal that there are as many as 8 witnesses whose statements have been recorded by the investigating officer in this case, out of whom the attention is drawn by the learned counsel for the revisionist to the statement of the victim only under Section 164 Cr. P.C. as well as FIR which have been cited above and not to any other witness which include three witnesses of fact and one Doctor apart from the formal witnesses. The copies of the statements of these witnesses have not been annexed with the present revision, therefore this court does not have opportunity to go through those statements and form an opinion as to whether there was no evidence on record against the accused revisionists constituting offence as mentioned above or not.

14. Accordingly I do not find any force in the present revision which needs to be dismissed and is accordingly dismissed.

(2019)10ILR A 542

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 3848 of 2015

Sanju Thakur ... Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Sri Manoj Kumar Mishra, Sri Raj Kumar Dhama

Counsel for the Opposite Parties:
A.G.A., Sri Paritosh Shukla

A. Cr.P.C., 1973 - Section 319 - Application filed by revisionist rejected - Contradictory and vague statements - Not sufficient to bring the person in the category of offender-Interpretation of Statute-"any relative of her husband" in Section 304-B IPC- Evidence required to summon a person under Section 319 Cr.P.C. - Should be much better in comparison to what is required at the time of framing of the charge and the evidence should be such that the court should be of the view that it will certainly lead to the conviction of such person who is being sought to be summoned under section 319 Cr.P.C. (Para 12,13,14,15 & 16)

From the statement of all the witnesses and the First Information Report it is clear that the role of Ram Prakash was of only mediator in settling the marriage of the deceased. No allegation in First Information Report that Ram Prakash is a relative of the accused persons, but in the application under section 319, he has been stated to be a relative of accused person.

A penal statute should be strictly construed. The expression "any relative of her husband" occurring in Section 304-B IPC should be limited to persons related by blood, marriage or adoption.

PW-1 who is informant has said that Ram Prakash is relative of the accused persons and he said that if they give rupees five lakh, the matter may come to an end and his daughter may live comfortably. Similar statements have been given by PW-2 and 3 also. Only on the basis of this statement, the application under section 319 Cr.P.C. has been given which is not sufficient to involve Ramprakash in the crime and cannot bring him in the category of

associate offender nor can make out a case against him.

It is essentially required that there should be evidence against such person which should be much better in comparison to what is required at the time of framing of the charges and the evidence should be such that the court should be of the view that it will certainly lead to the conviction of such person who is being sought to be summoned under section 319 Cr.P.C.

Criminal Revision dismissed (E-3)

Case law relied upon/discussed: -

1. Hardeep Singh Vs St. of Punj. AIR 2014 SC 1400

2. Babubhai Bhimabhai Bokhiria Vs St. of Guj. 2014 (5) SCC 568

3. Brijendra Singh Vs St. of Raj. AIR 2017 SC 2839

4. Labhuji Amaratji Thakor Vs St. of Guj. AIR 2019 SC 734

5. Rakesh Vs St. of Har. AIR 2019 SC 2168

6. St. of Punj. Vs Gurmit Singh (2014) 9 SCC 632

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Shri Raj Kumar Rawat, learned counsel for the applicants, Shri Paritosh Shukla, learned counsel for the opposite party no.2, learned A.G.A. and perused the record.

2. This revision has been filed against the order dated 17.8.2015 passed by learned Additional Sessions Judge/F.T.C., Aligarh, in S.T.No.927 of 2012 (State vs. Raju Singh and others), under sections 498A, 304B I.P.C. and 3/4 D.P. Act, PS. Gandhipark, District Aligarh by which the learned trial court has rejected the application of the applicant-revisionist under section 319 Cr.P.C. for summoning the accused Ram Prakash for trial in the aforesaid case.

3. Learned counsel for the revisionist submitted that an application 39 Kha under section 319 Cr.P.C. was given by the complainant stating that the name of Ram Prakash was mentioned in the First Information Report and PW-1, PW-2 and PW-3 in their statements have stated that the said Ram Prakash was also involved in commission of crime. According to the complainant this fact was brought in the knowledge of said Ram Prakash that the accused persons are demanding rupees five lakh in dowry and requested that he should try to convince them but Sri Ram Prakash said that if they give rupees five lakh, the matter will be over. On the basis of the statements of witnesses, the complainant has requested to summon said Ramprakash as an accused in the said trial under section 319 of the Criminal Procedure Code.

4. After hearing both the sides, the learned trial court applying the law laid down in Hardeep Singh vs State of Punjab, AIR 2014 SC 1400, rejected the said application by the impugned order.

5. Aggrieved by the order, this revision has been filed and the impugned order has been challenged on the ground that the order is illegal and is not based on evidence on record. The learned court has committed error and has wrongly appreciated the evidence without applying judicial mind.

6. Section 319 Cr.P.C. reads as under :-

"319. Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub - section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

7. In **Hardeep Singh (supra)**, the Constitution Bench has settled the law in respect of Section 319, Criminal Procedure Code. that the standard of proof employed for summoning a person as an accused under Section 319 is higher than the standard of proof employed for framing a charge against an accused. The Supreme Court observed for the purpose of Section 319 as under:

".....what is, therefore, necessary for the Court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to the conviction of a person sought to be added as the accused in the case."

Regarding the degree of satisfaction necessary for framing a charge, the Court observed:

"However, there is a series of cases wherein this court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 of the Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused.

The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further".

The Court concluded as below:

"106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction....."

8. In **Babubhai Bhimabhai Bokhiria vs. State of Gujarat, 2014 (5) SCC 568**, the aforesaid view of Hardeep Singh (supra) has been further quoted

with approval and the Supreme Court has held as under :-

"Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher."

9. In **Brijendra Singh vs State of Rajasthan, AIR 2017 SC 2839**, the supreme court discussed the meaning of 'evidence' in section 319, Criminal Procedure Code and expressed the view that the examination-in-chief of prosecution witnesses is to be considered and there is no need to wait for cross-examination. The prima facie opinion and satisfaction with regards to complicity of the person in commission of the offence is not mere probability of involvement. It requires stronger and cogent evidence. In this case, the IO investigated the offence and did not submit charge-sheet for the reason that at the time of incident the appellant was at a distance of 175 km from the place of occurrence. The supreme court set aside the summoning order and observed that no doubt, the trial court can summon the person on the basis of the statement of witnesses given during trial. However, where plethora of evidence was collected by the IO including documentary evidence indicating his plea of alibi to be correct, the trial court is duty bound to consider the evidence so collected by IO while forming opinion and recording satisfaction regarding prima facie case for the purpose of section 319 of the Criminal Procedure Code.

10. The view expressed in **Hardeep Singh (supra)** has been further reiterated in **Labhuji Amaratji Thakor vs State of Gujarat, AIR 2019 SC 734** and has laid down that the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. The Supreme Court set aside the order of the High Court and up held the order of Court below rejecting the application under section 319.

11. In **Rakesh vs State of Haryana, AIR 2019 SC 2168**, It appears that the facts of the case was quite similar in the case before the Supreme Court as in that case also the name of the persons was not mentioned in the FIR and when the statement under section 161 Cr.P.C. was recorded by the Investigating Officer, the name of these persons did not find mention. The supreme court again considered the ambit of section 319 and laid down as follows:

"Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing

charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction."

12. In this instant case, from the perusal of the First Information Report, it appears that the complainant side asked Ram Prakash to advise the accused persons not to harass the deceased and went to in-laws side but they did not follow the advice so given by Ram Prakash. Thus from the statement of all the witnesses and the First Information Report it is clear that the role of Ram Prakash was of only mediator in settling the marriage of the deceased. Therefore on the request of the complainant side he further got himself involved to make the accused person in the incident that they should not demand the additional dowry nor harass the deceased. It is no where alleged in the application on the basis of which the First Information Report was lodged that Ram Prakash is a relative of the accused persons. But in the application under section 319, he has been stated to be a relative of accused person. What is the relation and whether he comes in the category of the 'husband or the relative of the husband' as occurred in 498-A of the IPC is not clear.

13. In State of Punjab Vs. Gurmit Singh, (2014) 9 SCC 632, it has been held that meaning of the words "any relative of her husband" occurring in Section 304-B IPC & meaning of the words "relative of the husband" occurring in Section 498-A IPC are identical and mean such person related by blood, marriage or adoption. A penal statute should be strictly construed. The expression "any relative of her husband" occurring in Section 304-B IPC should be limited to persons related by blood, marriage or adoption. Nowhere it has been stated that Ramprakash is related with accused by blood, marriage or adoption nor there is any evidence that he resides with the accused persons.

14. Learned trial court has found that in the First Information Report itself it has been mentioned that the role of Ram Prakash was of only mediator in the marriage and he was asked to settle the dispute between in-laws and parents of the deceased so that the accused could not harass her for demand of additional dowry. It has further been mentioned in the First Information Report that Ram Prakash tried to convince the in-laws of the deceased but he did not succeed and the accused continued demanding additional dowry. PW-1 who is informant was examined in the case and in his statement he has said that Ram Prakash is relative of the accused persons and on his saying, he tried to convince the accused persons. He also said that if they give rupees five lakh, the matter may come to an end and his daughter may live comfortably. Similar statements have been given by PW-2 and 3 also. Only on the basis of this statement, the application under section 319 Cr.P.C. has been given which is not sufficient to involve Ramprakash in the crime.

15. Moreover, merely saying that Ram Prakash asked to give rupees five lakh to the accused to end the trouble of the deceased, cannot bring him in the category of associate offender nor can make out a case against him. The trial court has taken reference of the judgement of Hon'ble Supreme Court in the case of **Hardeep Singh (supra)** and has concluded that for summoning a person under section 319 Cr.P.C. It is essentially required that there should be evidence against such person which should be much better in

comparison to what is required at the time of framing of the charges and the evidence should be such that the court should be of the view that it will certainly lead to the conviction of such person who is being sought to be summoned under section 319 Cr.P.C.

16. In view of the above discussions, I find that there is no material illegality and infirmity in the impugned order nor there is any jurisdictional error.

17. This revision has got no force and it is accordingly dismissed.

18. The stay order, if any, shall stand vacated.

19. The court below shall take all endeavors in concluding the trial.

(2019)10ILR A 547

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.09.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Revision No. 1269 of 2019

Rahul Verma ...Revisionist
Versus
State ...Opp. Party

Counsel for the Revisionist:
Pranjal Krishna

Counsel for the Opposite Party:
A.S.G.

A. Cr.P.C., 1973-Section 319 - Revisionists though nominated in the F.I.R exonerated in the Police Report on basis of alibi -" Evidence" - is limited to the evidence recorded by the trial court - Statement recorded under Section 161 of the Cr.Pc - Has only the limited purpose of contradicting the maker thereof- the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes - Plea of Alibi- Section 103 of the Evidence Act - Burden of Proof for establishing the plea of alibi - Could be done by leading evidence in trial court and not by relying on the material collected during investigation n- The Court in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused- Precedent-a decision is precedent on its own facts- the only thing binding a party is the ratio decidendi which is generally secundum subjectam materiam-Application under Section 319 Cr.P.C.- is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial - Power under Section 319 of the Code - is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence and to render justice to the victim.

Scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the Constitution Bench judgement of Hardeep Singh was not considered in the subsequent cases in Brijendra Singh's and Shiv Prakash Mishra's cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

A decision is precedent on its own facts- The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

Application under Section 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial.

Statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker thereof in the manner laid down in the said proviso.

Consideration of plea of alibi -Section 103 of Evidence Act - burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person- The Court in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C.

The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence and to render justice to the victim. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is in recognition of this that the Code has specifically conferred a power in the court to proceed against others not arrayed as accused in the circumstances set out by this Section. Revision accordingly dismissed.

Criminal Revision dismissed (E-3)

Case law relied upon/discussed: -

1. Hardeep Singh Vs St. of Punj. (2014) 3 SCC 92

2. Brijendra Singh & Ors. Vs St. of Raj. (2017) 7 SCC 706

3. Shiv Prakash Mishra Vs St. of U.P.& ors. passed in Criminal Appeal No.1105 of 2019 (arising out of S.L.P. (Crl.) No.2168 of 2019) dated 23.7.2019

4. Quinn Vs Leathem (1901) AC 495 Earls of Halsbury L.C.

5. St. of Har. Vs Sher Singh, Manu SC/0236/1981

6. Gurcharan Singh Vs St. of Punj. Manu SC/0122/1955

7. Chandrika Prasad Singh Vs St. of Bihar Manu SC/0084/1971

8. St. of Ori. Vs Debendra Nath Padhi (2004) 8 SCC 568

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

1. The present criminal revision has been referred by the accused-revisionist against the order dated 07.09.2019 passed by the learned Trial Court in Sessions Trail No. 385 of 2012 (C.B.I. versus Rahul Verma) arising out of Crime No. R.C. 14 (S) of 2010 of Police Station C.B.I./S.C.B./Lucknow under Sections 302, 201, 364 IPC pending in the Court of learned Special Judge C.B.I., Court No. 2, Lucknow.

2. Vide impugned order, the learned Trial Court has accepted the application dated 06.08.2019 filed by the C.B.I. for taking on record the certificate under Section 65-B of the Evidence Act in respect of Call Details Record(C.D.R.) of Mobile Nos. 9869306235 and 9454741884.

3. The present case is based on circumstanial evidence. An FIR at Case Crime No. 842 of 2008 was registered under Section 302 and 201IPC, Police Station Kalyanpur, District Kanpur on 03.09.2008 on the basis of inquest and post mortem report etc, and on the complaint of Mr. O.P. Arya,

4. This Court vide order dated 08.10.2010 passed in Writ Petition No.15831(MB) of 2009 filed by Mr. S.K. Bajpai, transferred the investigation of both the cases to C.B.I./S.C.B., Lucknow. Charge-sheet No.2 of 2012 was filed against the accused, Rahul Verma on 18.04.2012. According to the aforesaid charge-sheet, a stack of human bones was recovered from the I.I.T. Campus, Kanpur. It was sent to C.F.S.L. Candigarh for examination. C.F.S.L. Chandigarh prepared its report dated 05.04.2011. According to the said report on the basis of Cellular and Molecular examination, the skeleton was of Sri Adesh Kumar Bajpai s/o Surya Kumar Bajpai and Savitri Devi. Along with the aforesaid charge-sheet, document D-32, true copy of C.D.R. and D-33, E-mail massages and Exh.Ka29 and Ka25 were enclosed. Along with the charge-sheet certificate under Section 65-B of the Evidence Act was not enclosed.

4. The accused-applicant filed an application No.25-B before the Trial Court stating that in absence of the certificate under Section 65-B of the Evidence Act, the electronic record/evidence is not admissible in evidence. The C.B.I. filed its objection to the said application and the learned Trial Court vide order dated 05.04.2019 held that as many as 41 witnesses were examined and the application dated 17.10.2018 was filed when the examination of P.W.34, Rana Pratap Singh was on. The Trial Court held that decision on admissibility or inadmissibility of evidence should not be rendered at the stage of taking evidence on record inasmuch as there is no provision like Order XIII, Rule 3 C.P.C. in the Code of Criminal Procedure. Therefore, the trial Court said that the said application would be decided at the time of final stage and at this stage the decision could not be rendered on the admissibility or non admissibility of the evidence.

5. After the aforesaid order, it appears that the C.B.I. vide letter dated 12.07.2019 wrote to D.E.(Vigilance), BSNL, Kanpur Telecom District, Kanpur stating that during investigation of the case, C.D.Rs. of Mobile Nos. 9869306435 and 9454741884 were provided to the C.B.I. by the BSNL vide letter dated 08.06.2011 and now the Special Judge/C.B.I. trying the case had directed to produce the certificate under Section 65-B of the Evidence Act in respect of the above mentioned C.D.Rs. of the mobile numbers. It was, therefore, requested that certificate under Section 65-B of the Evidence Act, 1872 to be provided for the C.D.Rs. of the aforesaid two mobile numbers. Therefore, certificate under Section 65-B of the Evidence Act was issued on 20.07.2019 by Manoj Manjul, S.D.E. (MS) BSNL office of O/o GM (Mobile Services), Kanpur in respect of C.D.Rs. of Mobile Nos. 9869306435 (for the period between 25.08.2007 to 28.08.2008) and 9454741884 (for the period between 10.08.2008 to 23.08.2008). It was said that the C.D.Rs. were directly fetched from the C.D.R. server Chandigarh by using printer of the available electronic records of BSNL, Kanpur. It was further said that no tampering was made in the aforesaid C.D.Rs.

6. C.B.I. vide application dated 06.08.2019 submitted the aforesaid certificate in the court of learned Trial Court stating therein that by inadvertent mistake a certificate under Section 65-B

of the Evidence Act in respect of C.D.Rs. of aforesaid two mobile numbers could not be filed by the investigating officer and, now the certificate under Section 65-B of the Evidence Act had been obtained in respect of C.D.Rs. of the aforesaid two mobile numbers from the competent authority and, therefore, the same be taken on record.

7. The accused filed objection a on 13.08.2019 against the said application dated 06.08.2019 stating that the S.P., C.B.I.(S.C.B.) at Lucknow in its letter dated 12.07.2019 had mislead the BSNL inasmuch as it was wrongly mentioned that "Now the Hon'ble Court of Spl. Judge C.B.I. Anti Corruption has directed to produce certificate u/s 65-B, Evidence Act in respect of above mentioned mobile number". It was further said that the prosecution could not be allowed to plug in the holes in its case so as to take advantage of its own wrong. The certificate obtained under Section 65-B of the Evidence Act in the garb of direction by the trial Court amounted to reinvestigation of the case to plug in the holes in the prosecution story which was not permissible under the law. It was further said that application dated 06.08.2019 for taking on record the certificate under Section 65-B of the Evidence Act should be rejected.

8. Besides taking primarily objections on merit, it was said that the Evidence Act was amended in the year 2000 incorporating Sections 65-A and 65-B. The investigating officer filed charge-sheet in the year 2012 and, therefore, it should be assumed that he had knowledge of the existing provisions of the Evidence Act. However, no such certificate as required under Section 65-B of the Evidence Act was filed along with the charge-sheet and, therefore, at this stage the Court should not allow any lacunae in the investigation to be filled in during the trial. It was also said that the certificate under Section 65-B of the Evidence Act had been obtained only on 20.07.2019 and, it was not part of the charge-sheet and, therefore, it was not provided to the accused under Section 207 Cr.P.C. neither the said certificate was available before the Court at the time of framing of the charge. It was said that as many as 44 prosecution witnesses had been examined since 06.04.2013 and, the accused did not have liberty to cross examine the witness(es) on the said certificate under Section 65-B of the Evidence Act. It is well established law that the certificate has to be of the date when electronic record is generated and it cannot be of the later date.

9. The Trial Court after considering the submissions of the parties has passed the impugned order whereby it has accepted the application dated 06.08.2019 filed by the C.B.I. and taken it on record the Certificate under Section 65-B of the Evidence Act on the ground that non filing of certificate under Section 65-B of the Evidence Act along with electronic record is a irregularity which can be rectified later on.

10. Heard Mr. Nandit Srivastava, Senior Advocate assisted by Mr. Pranjul Krishna appearing for the revisionist, Mr. S.B. Pandey Senior Advocate assisted by Mr. Kazim Ibrahim, appearing for the respondent.

11. Assailing the order dated 07.09.2019 passed by the Trial court, Sri Nandit Srivastava, learned Senior

Advocate submits that there is no provision in law which permits the prosecution to move an application for taking on record the certificate under Section 65-B of the Evidence Act at the belated stage inasmuch if same is not filed with the charge sheet. Trial court has no power to take the certificate on record at the later stage. It is further submitted that as many as 44 prosecution witnesses have been examined and the certificate which was not part of the charge sheet, was not given to the accused under Section 207 Cr.P.C. and, therefore, the accused did not have liberty to cross examine any of the witnesses on the certificate. He further submits that certificate dated 20.07.2019 has been obtained almost after 7 years from the date of submission of the charge sheet wherein in the case of **Anvar P.V. versus P.K. Basheer and ors : (2014) 10 SCC 473**, it has been held that the certificate has to be of the date when the electronic record is produced and, therefore, it cannot be generated subsequently. He further submits that there is no provision under the Code of Criminal Procedure except under Section 391 Cr.P.C. to take additional evidence. Accepting certificate under Section 65-B of the Evidence Act vide impugned order dated 07.09.2019 amounts to filling in the lacunae in the prosecution case and, the same is not permitted under the law inasmuch as it would seriously prejudice the case of the accused.

12. On the other hand, Mr. S.B.Pandey, learned Senior Advocate submits that non filing of the certificate under Section 65-B of the Evidence Act along with the electronic record was a mere omission which could be rectified at later stage. He further submits that evidence has not been closed and trial is still on and, the accused would have liberty to cross examine any of the witnesses on the certificate. Further, certificate has been taken on record and, when it is proved, the accused would have liberty to cross examine the witness. He, therefore, submits that no prejudice has been caused to the accused by taking certificate under Section 65-B of the Evidence Act on record.

13. I have considered the submissions carefully.

14. Chapter 5 of the Evidence Act provides for documentary evidence. Section 65 of the Evidence Act provides the case in which secondary evidence relating to document is given. Section 65-A and 65-B were inserted by the Information Technology Act, 2000 with effect from 17.10.2000. These two sections provides special provisions as to evidence relating to Electronic records. Section 65-A of the Evidence Act provides that contents of electronic records may be produced in accordance with the provisions of Section 65-B of the Evidence Act.

Section 65-B of the Evidence Act reads as under:-

"65B. Admissibility of electronic records.--

(1)Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are

satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:--

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b)during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3)Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,--

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.--For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]"

15. Preliminary purpose of incorporating Sections 65-A and 65-B of the Evidence Act is to sanctify proof by secondary evidence. Computer output is a deemed document for the purpose of proof. Under sub-section 1 of Section 65-B, it is mandated that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer, shall also be deemed to be a document. The section lays down certain conditions which have to be satisfied in relation to the information and computer in question. If those conditions are satisfied, the electronic record shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated.

16. Sub-section 2 of the Section 65-B of the Evidence Act provides conditions which have to be satisfied so as to make computer output as primary evidence. Thus, when a statement is to be produced under this section, it should be identifying the electronic record containing the statement and describing the manner in which it was produced; giving particulars of the device involved in the production of the electronic record showing that the same was produced by the computer and showing compliance with conditions of Sub-section 2 of Section 65-B of the Evidence Act. The statement should be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities such statement shall be evidence of the matter stated in the certificate.

17. Under Sub-section 4 of Section 65-B of the Evidence Act, it would be sufficient for this purpose that the statement is made to the best of the knowledge and belief of the person making it.

18. The present case is based on circumstantial evidence. Evidence consists of three parts (i) electronic record; (ii) documentary evidence other than electronic record; and (iii) oral evidence.

19. The Supreme Court in the case of **Anvar P.V. versus P.K. Basheer and ors (supra)** held that the evidence relating

to electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B of the Evidence Act are satisfied. It has further been held that the electronic records should be accompanied by the certificate in terms of Section 65-B of the Evidence Act obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record is inadmissible.

Para 22 of the said judgment is extracted hereinbelow:-

"22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

20. Thus, the aforesaid judgment is not an authority on the point whether certificate under Section 65-B of the Evidence Act in respect of the electronic record can be produced subsequently as is the case at hands. Section 311 Cr.P.C. provides that at any stage of inquiry or trial or other proceedings under the Code, the Court may summon any person as a witness or examine any person in attendance though not summoned as witness, recall and re-examine any person already examined, if it appears to be essential to the just decision of the case. Thus, what is relevant for calling the additional evidence is to prevent failure of justice and, once the Court is of the opinion that to prevent the failure of justice and for the just decision of the case, it is required to receive additional evidence, there is no restriction on the count of the evidence which may be received, evidence may be former or substantial.

21. The Supreme Court in the case of **Rajeswar Prasad Misra v. State of W.B., (1966) 1 SCR 178** in para 10 had opined as under:-

"**10.** Additional evidence may be necessary for a variety of reasons which it is hardly proper to construe one section with the aid of observations made to do what the legislature has refrained from doing, namely, to control discretion of the appellate court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be

impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon the Code are full of cases in which the powers under Section 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised."

22. The Supreme Court Mohanlal Shamji Soni v. Union of India: 1991 Supp (1) SCC 271 has held that the cardinal rule of law of evidence that the best available evidence should be brought before the court to prove the fact or points in issue. It is the duty of the court not only to do justice but also to ensure that justice is being done.

Para 10 of the aforesaid report is reproduced hereinbelow:-

"10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under Illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge its statutory functions -- whether discretionary or obligatory -- according to law in dispensing justice because it is the duty of a court not only to do justice but also to ensure that justice is being done. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a

witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

23. The Supreme Court in its recent judgment in the case of State by Karnataka Lokayukta Police Station, Bengaluru versus M.R. Hiremath passed in Criminal Appeal No.819 of 2019 has considered the effect of failure to produce a certificate under Section 65-B(4) of the Evidence Act, at the stage when the charge sheet was filed. The Supreme Court in the aforesaid judgment has held that need for production of certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage when the necessity of production of certificate would arise.

Paras 14 to 17 of the aforesaid report are extracted here in below:-

"14. The provisions of Section 65-B came up for interpretation before a three-Judge Bench of this Court in Anvar P.V. v. P.K. Basheer [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] . Interpreting the provision, this Court held: (SCC p. 483, para 14)

"14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer."

15. Section 65-B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of sub-section (4) the decision in Anvar [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. This is clarified in the following extract from the judgment: (Anvar P.V. case [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , SCC p. 484, para 16)

"16. ... Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice."

(emphasis supplied)

16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra V. Desai [Union of India v. Ravindra V. Desai, (2018) 16 SCC 273 : (2019) 1 SCC (L&S) 225] . The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a

curable defect. The Court relied upon the earlier decision in Sonu v. State of Haryana [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , in which it was held: (Sonu case [Sonu v. State of Haryana, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , SCC p. 584, para 32)

"32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency."

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

24. The Supreme Court in the case of **Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 1 SCC (Cri) 860** has clarified the legal position regarding admissibility of the electronic evidence, especially by a party who is not in a possession of device from which a document is produced. In the aforesaid judgment, it has been held that after taking note of the judgment of three judge bench in the case of Anvar P.V. versus P.K. Basheer and Ors (supra), if electronic evidence is authentic and relevant, the same can be admitted subject to the court being satisfied about its authenticity and procedure for its admissibility may depend on the facts, situation such as whether a person producing such evidence is in a position to furnish under Section 65-B(4) of the Evidence Act.

25. It has further been said that Sections 65-A and 65-B of the Evidence Act cannot be held to be a complete code on the subject

Paras 26 to 30 of the aforesaid report which are relevant are reproduced herein below:-

"26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

27. The term "electronic record" is defined in Section 2(1)(t) of the Information Technology Act, 2000 as follows:

"2. (1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

28. The expression "data" is defined in Section 2(1)(o) of the Information Technology Act as follows:

"2. (1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;"

29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

26. Thus, there is no bar for accepting the certificate under Section 65-B(4) of the Evidence Act at later stage if it was not filed along with the charge sheet. The trial is yet to conclude and the accused may avail liberty of examining or re-examining any witnesses in respect of the certificate and electronic record of call detail of two mobile numbers mentioned hereinabove. The certificate under Section 65-B(4) of the Evidence Act is procedural requirement for admissibility of secondary evidence of electronic record and, therefore, it can be produced at a later stage during the trial, if it was not part of the charge sheet. The accused is not prejudiced in any manner by taking on record the certificate under Section 65-B of the Evidence Act at the later stage when trial is still on. Further, it is the duty of the court under Section 311 Cr.P.C. to see that the best available evidence is brought before it to prevent failure of justice and for the just decision of the case. For the said purpose the court is bestowed with wide discretion.

27. In view thereof, I do not find any illegality or impropriety in the impugned order dated 07.09.2019. The present revision petition is, thus, disposed of with liberty to the accused-revisionist to move an appropriate application to recall any witness who may be relevant for the purpose of electronic record and, the certificate produced under Section 65-

B(4) of the Evidence Act, if he is so advised and, the trial court will take appropriate decision on such an application in accordance with law.

(2019)10ILR A 559

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32621 of 2019

Amar Cheema ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Vidit Narayan Mishra

Counsel for the Opposite Parties:
G.A.

A. Indian Penal Code, 1860 – Sections 420 and 406 - Prima facie offences of fraud and deception, thereby, delivery of property by fraudulent acts made out against the applicant- summoned on the basis of evidence recorded under Sections 200 and 202 Cr.P.C. - Exercise of inherent powers under section 482 Cr.P.C. - High Court is not expected to analyse factual evidence, which is to be placed during trial before the Trial court. (Para 4,5,6 & 7)

It is apparent that this was not a case regarding an embezzlement of capital of the Company, rather the Company, in question, was constituted upon the instigation of Arjun Cheema, with three other Directors, in which complainant, was an authorised signatory, on behalf of other Directors of the Company and while there occurred loss in the business of the Company, in the year 2011, the Company was wound-up, however, till then there was no loss, rather a capital was to be refunded back to the Uro Tiles Private Company Limited for having its payment back. There was no investment by other Directors, except investment of Rs. 27 Lakhs by the complainant and this payment, on being returned back by the Uro Tiles Private Company Limited, was to be refunded to the complainant. For completion of this winding up proceeding, Arjun Cheema and Applicant were authorised and handed over documents, seal and password etc. They made promise of winding up of the Company, but it came to notice that the Company was not wound-up rather it was kept on running till 2018, with fraudulent signature of the complainant. Then, effort was made for getting this fact known to those Companies, which were dealing with the Company, in question, under fraud. On demand of money being made, they threatened of sending the complainant to jail and demanded money for winding up of the Company.

While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court.

There was fraud and deception, thereby, delivery of property by fraudulent acts by those two persons, who have been summoned and this was on the basis of evidenced, recorded, under Sections 200 and 202 Cr.P.C. Magistrate, after appreciating facts and evidence, brought on record, has passed the impugned summoning order. Hence, Application under Section 482 of Cr.P.C., stands dismissed accordingly.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Inspector of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 49

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs St. of U.P. reported in (2004) 57 ALR 290

8. (2009) 3 ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs St. of U.P.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for applicant, moved by the applicant, Amar Cheema, under Section 482 of Criminal Procedure Code, 1973 (in short 'Cr.P.C.') as well as learned AGA, appearing on behalf of State of U.P. and perused the record.

2. Learned counsel for the applicant argued that the applicant has been summoned because of being brother of Arjun Cheema. He is neither Director of Company, in question, nor was having any concern with the Company. A complaint was filed with incorrect facts that there were three Directors of the Company, whereas the documents, filed with this Application, are to the effect that there were four Directors of the Company and the complainant was neither Director nor is having any concern with above Company. It was said that Company was wound-up in the year 2011, whereas the Company was running till 2018. All taxes were being paid. If any embezzlement in the capital of the Company was there, the Directors will be responsible for the same, whereas present applicant, Amar Cheema, has no concern with the Company, but the Trial court of Additional Chief Judicial Magistrate, Gautam Buddh Nagar, vide summoning order, dated 22.10.2018, passed in Criminal Complaint No. 4645 of 2018 (Abhimanyu Ahlawat vs. Amar Cheema & others), has summoned the applicant, alongwith one other, for offence, punishable, under Sections 420 and 406 IPC, Police Station Sector 39, NOIDA, District Gautam Buddh Nagar. Hence, this Application, under Section 482 of Cr.P.C., with a prayer for quashing of the impugned summoning order and entire criminal proceeding of Complaint Case No. 4645 of 2018 (Abhimanyu Ahlawat vs. Amar Cheema & others), with a further prayer for staying further proceeding of above case till disposal of this Application.

3. Learned AGA, appearing for the State of U.P, has vehemently opposed this Application, under Section 482 of Cr.P.C.

4. From very perusal of the of the complaint and the impugned summoning order, it is apparent that this was not a case regarding an embezzlement of capital of the Company, rather complainant, Abhimanyu Ahlawat, by his complaint as well as statement, recorded, under Section 200 of Cr.P.C., has said that the Company, in question, was constituted upon the instigation of Arjun Cheema, with three other Directors, in which complainant, was an authorised signatory, on behalf of other Directors of the Company and while the there occurred loss in the business of the Company, in the year 2011, the Company was wound-up, however, till then there was no loss, rather a capital was to be refunded back to

the Uro Tiles Private Company Limited for having its payment back. There was no investment by other Directors, except investment of Rs. 27 Lakhs by the complainant and this payment, on being returned back by the Uro Tiles Private Company Limited, was to be refunded to the complainant. For completion of this winding up proceeding, Arjun Cheema and Amar Cheema were authorised and handed over documents, seal and password etc. They made promise of winding up of the Company, but it came to notice that the Company was not wound-up, rather it was kept on running till 2018, with fraudulent signature of the complainant. Then, effort was made for getting this fact known to those Companies, which were dealing with the Company, in question, under fraud. On demand of money being made, they threatened of sending the complainant to jail and demanded money for winding up of the Company. Meaning thereby, there was fraud and deception, thereby, delivery of property by fraudulent acts by those two persons, who have been summoned and this was on the basis of evidenced, recorded, under Sections 200 and 202 Cr.P.C. Magistrate, after appreciating facts and evidence, brought on record, has passed the impugned summoning order.

This Court, in exercise of inherent jurisdiction, under Section 482 of Cr.P.C., is not expected to appreciate factual aspect because the same is a question of trial before the Trial.

5. As per law propounded by the Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

6. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

7. In view of what has been discussed above, there is no ground for interference in the proceeding, as prayed for by this Application, under Section 482 of Cr.P.C., thereby, this Application merits its dismissal and it stands dismissed, accordingly.

(2019)10ILR A 562

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE RAJEEV MISRA, J.

Application u/s 482 No. 38644 of 2016

Jaspreet Singh ...Applicant (In Jail)

Versus

State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sikandar B. Kochar

Counsel for the Opposite Parties:
A.G.A., Sri Anoop Trivedi, Sri Abhinav Gaur, Sri Vibhu Rai

A. Cr.P.C., 1973 - Section 362 -Ex Parte order finally deciding- Resulting in serious prejudice to the Opposite Party No. 2- Jurisdiction of the Court to entertain recall application- Replied affirmatively. (Para 37,48,49,68,69,79, 83 & 84)

1. Following questions arise for determination in this recall application:

I. Whether Complaint Case No.1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are cross-cases.

HELD :- Question No.1 is answered in negative that two case crime numbers, are not cross cases, but they relate to different incidents which occurred at different places and at different points of time.

II. Whether the ex-parte order dated 15.12.2016 passed by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. has caused serious prejudice to opposite party no.2, Nitin Jaiswal and can be recalled at the behest of opposite party no.2, who admittedly was not heard at the time of passing of order dated 15.12.2016.

III. Whether the bar of Section 362 Cr.P.C. will come into play regarding recall of

ex-parte order dated 15.12.2016. (Considering question nos. 2 and 3 together)

Held: - The application came up for admission on 15.12.2016 and this Court allowed the application on same day i.e. 15.12.2016. The opposite party No.2 was not represented by any counsel nor notices were issued to opposite party No.2 before finally deciding the application. As such, order dated 15.12.2016 is ex-parte against opposite party No.2. Rule of audi alterem partem requires that opportunity of hearing should be afforded before an order is passed on judicial side. By seeking recall of order dated 15.12.2016, opposite party No.2 is not seeking review of order dated 15.12.2016 and therefore bar contained in section 362 Cr.P.C. will not come in way. Consequently, order dated 15.12.2016, is liable to be recalled at the behest of opposite party No.2, who admittedly was not afforded any notice or opportunity of hearing before order dated 15.12.2016 was passed.

IV. Whether in view of the orders dated 29.08.2017, 31.01.2018 and 15.12.2016 passed by Apex Court, this Court has jurisdiction to entertain the recall application filed by opposite party no.2, Nitin Jaiswal.

Held: - As to whether order dated 15.12.2016 can or cannot be recalled in view of subsequent orders passed by Apex Court- The case in hand is covered by conclusion no.4 contained in Paragraph 27 of the judgement of Khoday Distilers Ltd. (Now known as Khoday India Limited and others) Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator reported in 2019 (4) SCC 376, - Consequently, the principle of merger will not apply. As such, I am of the view that there is no legal impediment in recalling the order dated 15.12.2016.

2. The present recall application is allowed. Order dated 15.12.2016 passed by this Court is hereby recalled. The application shall now stand restored. The same shall be listed for hearing on merits.

Recall Application allowed (E-3)

Case law relied upon/discussed: -

1. Vishnu Agarwal Vs St. of U.P.& anr. (2011) 14 SCC 813

2. Jawahar Lal @ Jawahar Lal JalaJ Vs St. of U.P. (2015) 91 ACC 128

3. Punjab Vs Devendar Pal Singh Bhullar & ors. (2011) 14 SCC 770

4. Makkapati Nagaswara Sastri Vs S.S. Satyanarayan (1981) 1 SCC 62

5. Habu Vs St. of Raj. AIR 1987 RAJ 83

6. Rajnarayan & ors. Vs St. of U.P. A.I.R. 1959 ALL 315

7. Khoday Distilers Ltd. (Now known as Khoday India Ltd. & ors.) Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator 1995 SCC (1) 574

8. Smt. Suraj Devi Vs Pyare Lal 1981 SCC (Cri) 188

9. Mohd. Zakir Vs Sabana & ors. (2018) 15 SCC 316

10. Atul Shukla Vs St. of M.P.& anr. 2019 (6) SCJ 246

11. Shivpoojan Upadhyay & anr. Vs St. of U.P.& anr. 2019 (3) ALJ 407

(Delivered by Hon'ble Rajeev Misra, J.)

Ref: Criminal Misc. Recall Application No. 4345 of 2017

1. This application under Section 482 Cr.P.C. has been filed by applicant-Jaspreet Singh Garewal (a co-accused) challenging the order dated 02.12.2016 passed by Additional Sessions Judge, Court No.1, Bareilly in Sessions Trial No.123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly arising out of Case Crime No. 2568 of 2012 under Sections

452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, whereby application (Paper No. 309 Kha) filed by accused under Section 309 Cr.P.C. has been rejected.

2. It transpires from record that during pendency of S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and 2 others) one of the accused Nirmal Singh Garewal, the applicant herein, filed an application under Section 309 Cr.P.C. (Paper No. 309 Kha) praying therein that S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly be tried alongwith Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, as both the cases are cross cases.

3. The aforesaid application was opposed by opposite party no.2 herein namely Nitin Jaiswal. Accordingly, an objection (Paper No. 323 Kha) was filed by opposite party no.2 opposing the aforesaid application.

4. The Additional Sessions Judge Court No.1, Bareilly, vide order dated 02.12.2016 rejected the aforesaid application (Paper No. 309 Kha) filed by accused-applicant Nirmal Singh Garewal. While rejecting the application (Paper No. 309 Kha), Court below has held that evidence has been recorded and trial is at the stage of Section 313 Cr.P.C. Secondly, it would not be appropriate to try Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. alongwith the present Sessions Trial as according to accused-applicant Case Crime No. 2675 of 2012 is pending consideration before the Magistrate. In the aforesaid complaint case the accused have not yet appeared, nor the concerned Magistrate has passed any such order on the basis of which, it could be said that Case Crime No. 2675 of 2012 is cross version of Case Crime No. 2568 of 2012. Moreover, the complaint case has not yet been committed to the Court of Sessions. Further, without perusal of record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., it cannot be said that above mentioned complaint case is a cross case. Lastly, the record of the complaint case cannot be summoned as the Hon'ble High Court has directed for early disposal of the Sessions Trial itself and if possible on day to day basis. For ready reference order dated 23.07.2015 which has been referred to in the order dated 02.12.2016 is reproduced herein-under:.

"Heard learned counsel for the applicant and the learned AGA and have been taken through the record.

By means of the present application under section 482 Cr.P.C. the applicant has invoked inherent jurisdiction of this Court with a prayer to direct the court

concerned to conclude the Sessions Trial No 123 of 2013 arising out of Case Crime No. 2568 of 2012 under section 452/307 IPC, Police Station Kotwali District Bareilly pending in the court of learned Addl. District & Sessions Judge, Court No.1 Bareilly.

It is submitted by the learned counsel for the applicant that the applicant lodged the first information report against the opposite party no.2 and his sons under sections 452/307 IPC. The investigating officer after conducting the investigation submitted charge sheet dated 30.11.2012.The opposite party no.2 filed Criminal Misc. Bail Application No. 17956 of 2013 (Nirmal Singh Versus State of U.P.) before another Bench of this Court . The Hon'ble Single Judge was pleased to release the opposite party no.2 on bail vide order dated 25.7.2013 stipulating certain conditions and also directing the trial court to decide the case expeditously. The opposite party no.2 after being released on bail, has adopted subterfuge of stalling and dilating the trial. The trial is proceeding at snail's pace and till date, the opposite party no.2 has not allowed the evidence of the doctors to be completed and the cross examination is going on by the opposite party no.2 since last 7 months so as to elongate the proceedings. The witnesses have also not been cross-examined whereby the trial is being obstructed. There is specific direction of this Court that the trial may be concluded speedily avoiding undue delay. The applicant is getting constant threats by the opposite party no.2 and his comrades. There is imminent danger of his life and property due to hanging of trial hence the court below may be directed to conclude the trial within stipulated period as granted by this Hon'ble Court. Learned counsel for the applicant has relied upon the decision of this Court dated 25.11.2013 passed in Special Leave to Appeal (Crl) No. 24066 of 22013 (Mohd. Rashid Vs. State of U.P.) wherein Hon'ble Apex Court held the trial court should strictly comply with the direction issued by High Court and take effective steps to ensure that the trial be conducted on day to day basis and the presence of the witnesses be secured by adopting, if necessary coercive means. The Administrative Judge of the District concerned should monitor the progress of trial proceeding in order to ensure that the trial court does not defy the orders issued by High Court with impunity.

Learned AGA did not oppose the contention of learned counsel for the applicant and submitted that speedy trial is the quintessence of the code which cannot be withheld years together on flimsy grounds.

Having considered the rival submission advanced by the learned counsel for the parties, there are serious consequences where the trial is unnecessarily delayed. Speedy trial is a right of every person in public interest and serves the social requirement of the present day, therefore, it is provided that the court below shall make earnest endeavour to conclude the aforesaid trial as expeditiously as possible preferably on day to day basis within six months from the date of production of a certified copy of this order.

This application is disposed of as above. "

Aforesaid order dated 23.7.2015 was subsequently corrected, vide order dated 7.8.2015. It was now provided that Court below shall endeavor to conclude S.T. No. 123 of 2013 (State Vs. Nirmal Singh)

within a period of two months. For ready reference, order dated 7.8.2015 is reproduced herein below:

"Criminal Misc. (Correction) Application No. 253536 of 2015 is allowed.

Necessary correction has been made in the original order.

Order dated 23.7.2015 will stand corrected as follows:

In the 6th line of fifth paragraph six months should be read as two months.

Office is directed to correct the certified copy of the aforesaid order, if already issued to the learned counsel for the applicant as per Rule of the court. "

On aforesaid findings, Court below rejected the application (Paper No. 309 Kha) filed by accused-applicant, vide order dated 02.12.2016.

5. Feeling aggrieved by order dated 02.12.2016 passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application (Paper No. 309 Kha) filed by accused-applicant, he has now approached this Court by filing present application under Section 482 Cr.P.C.

6. Present Criminal Misc. Application came up for admission on 15.12.2016 and same was disposed of finally by this Court on the same day, vide order dated 15.12.2016, which is quoted herein under:-

"Supplementary affidavit filed today, the same is taken on record.

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

The present application has been filed with a prayer to quash the order dated 2.12.2016 passed by the Additional Sessions Judge, Court No. 1 Bareilly in Sessions Trial No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) arising out of Case Crime No. 2568 of 2012, under sections 452, 307 IPC, Police Station Kotwali Bareilly, District Bareilly whereby the application of the applicant filed under section 309 Cr.P.C. has been rejected.

Learned counsel for the applicant contended that civil dispute with regard to the property is pending between applicant and O.P. No. 2 and the O.P. No. 2 is trying to illegally took the possession of the property in question, on account of which the incident took place. Admittedly, cross version were lodged by both the sides.

It is contended that initially O.P. No. 2 initiated the proceeding of the incident which took place on 21.10.2012 against the applicant, his father and his brother under sections 452, 307 IPC in Case Crime No. 2568 of 2012. It is contended that on the same day applicant went for lodging the first information report but same was not lodged by the police, then application was moved under section 156(3) Cr.P.C. on 22.10.2012 which was allowed, pursuant to which a FIR was lodged by the police against O.P. No. 2 and five others under sections 307, 452, 427, 504, 506, 380, 436, 392 IPC in Case Crime No. 2675 of 2012. It is further contended that Investigating Officer of Case Crime No. 2675 of 2012 of Sessions Trial No. 123 of 2013 filed report on 19.12.2012 wherein it was mentioned that it was a cross version. It is next contended that applicant's father filed a protest petition, which was treated as a complaint case and after the statement recorded under sections 200 and 202 Cr.P.C. opposite party No. 2 and others were summoned by the Magistrate vide order

dated 5.9.2016 under sections 143, 456 and 427 IPC in Complaint Case No. 1716 of 2016. It is contended that in spite of having knowledge of the same, the opposite party No. 2 and 5 others did not appear before the court concerned till date with the sole intention that the case against the applicant may proceed and the cross version of complaint case No. 1716 of 2016 may remain pending. It is contended that the Sessions Trial No. 123 of 2013 is proceeded on day to day basis because of the direction given by this Court vide order dated 24.10.2016 passed in Crl. Misc. Application U/s 482 Cr.P.C. No. 27370 of 2016 to be concluded the the trial if possible within two months on day to day basis.

Learned counsel for the applicant further contended that opposite party No. 2 did not bring this fact to the notice of the Court that opposite party No. 2 and others have already been summoned in Complaint Case No. 1716 of 2016. It is further contended that application under section 323 Cr.P.C. was filed before the Additional C.J.M., Court No. 2, Bareilly for committing the case to the court of sessions where Sessions Trial No. 123 of 2013 is proceedings and both the admitted cross case be heard and decided in view of the law laid down by this Court as well as by the Apex Court. Learned Magistrate vide order dated 19.11.2016 rejected the aforesaid application on account of the fact that accused persons had not appeared, therefore, no order could be passed. Copy of the aforesaid order has been filed as Annexure-10 to the accompanying affidavit. It is contended that as there is no dispute with regard to the fact that Sessions Trial No. 123 of 2013 and Complaint Case No. 1716 of 2016 are cross cases, therefore, an application was moved under section 309(2)(a) Cr.P.C. for adjournment of the proceedings till the complaint case is committed to the Court of sessions which application has been rejected by the order impugned. Learned counsel has cited the judgement of Sudhir Vs. State of M.P. 2001 SCC (Crl.) 387 and relied upon the paragraphs No. 8,9,10 and 11 of the aforesaid judgment indicating that the Apex Court has held that if there are cross cases, the same shall be disposed of by the same Court by pronouncing judgements on the same day. Paragraphs No. 8,9,10 and 11 are quoted below:

8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called : case and counter-case" by some High Courts and 'cross-cases" by some other High Courts. Way back in the nineteen hunded and twenties a Division Bench of the Madras High Court (Waller and Cronish, JJ.) made a suggestion (Goriparthi Krishtamma, IN re that 'a case and counter-case arising out of the same affairs should always, if practicable, be tried by the same Court; and each party would represent themselves as having been the innocent victims of the aggressions of the others:

9. Close to its heels Jackson, J., made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial or both cases by the same court (Vide Krishna Pannadi Vs. Emperor). The learned Judge said thus:

"There is o clear law as regards the procedure in counter-cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such

cases should be tried in quick succession by the same Judge, who should not pronounce judgement till the hearing of both cases is finished."

10. We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross-cases shall be tried by the same court, can be summarised thus: (1) it staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; (3) In reality the case and the counter-case are, to all intents and purposes, different or conflicting versions of one incident.

11. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This Court has given its approval to the said practice in Nathi LalV. State of U.P. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here: (SCC pp. 145-46, para 2)

"2. We think that the fair procedure to adopt in a matter like the present where there are cross-cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case can not be looked into. Nor can the judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidnece or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

It is contended by learned A.G.A. that it is not disputed that that both the cases being Complaint Case No. 1716 of 2016 and Sessions Trial No. 123 of 2013 are cross cases.

In view of the above, this matter requires re-consideration. Accordingly the order dated 2.12.2016 passed by Additional Sessions Judge,Court No. 1 Bareilly in Sessions Trial No. 123 of 2013 is set aside and matter is remitted back to the court concerned for reconsideration afresh, in accordance with law as well as the observations made above within a period of three week from the date a certified copy of this order is produced before him. Learned counsel for the applicant undertakes to file the certified copy of this order before the court concerned within two weeks from today.

Accordingly, this application is disposed of. It is clarified that the proceeding of sessions trial No. 123 of 2013 may go on but final orders may not be passed."

7. Feeling aggrieved by order dated 15.12.2016, opposite party no.2, Nitin Jaiswal, who admittedly was not heard at the time of passing of order dated 15.12.2016, has filed Criminal Misc.

Recall Application No. 4345 of 2017 seeking recall of order dated 15.12.2016.

8. During pendency of above mentioned recall application, Criminal Misc. Application No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) was filed challenging the order dated 25.01.2018 passed by Additional District Judge, Court No.1, Bareilly, in Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others), under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareily, District-Bareilly, whereby application (Paper No. 70 Kha) filed by Nirmal Singh Garewal-Complainant was allowed and also the order dated 23.06.2018 passed by Additional District Judge Ist, Bareilly, by which application No. 71 Kha-1 filed by Nitin Jaiswal and others, has been rejected. Vide order dated 23.06.2018, Court below held that proceedings of Complaint Case No. 1716 of 2018 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareily, District-Bareilly, shall proceed in accordance with Chapter 18 Cr.P.C., whereas vide order dated 23.06.2018, Court Below fixed 25.06.2018 as the next date for framing of charges under Sections 147, 458, 427 I.P.C. against Nitin Jaiswal, Adesh Jaiswal, Sachin Jaiswal, Raju Jaiswal. Annu Jaiswal and Manish Goel.

9. Criminal Misc. Application U/S 482 Cr.P.C. No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) came up for admission on 03.08.2018 and this Court passed the following order:

"Heard Mr. Anoop Trivedi, learned counsel for the applicant in length and detail, the learned A.G.A. for the State and the Mr. Sikandar Kochar, Advocate, who has put in appearance on behalf of the opposite party No. 2 by filing his vakalatnama in Court today, which is taken on record.

This application under section 482 Cr. P. C. has been filed with the following prayer:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may very kindly be pleased to allow this application and to quash the orders dated 25.01.2018 passed by the Additional District Judge, Bareilly in Complaint Case no. 1716 of 2016 whereby the application no. 70 kha of the opposite party no. 2 has been allowed and the order dated 23.6.2018 passed by the Additional District Judge, First, Bareilly in Case No. 1716 of 2016 (Nirmal Singh Garewal Versus Nitin Jaiswal and other) under Sections 456, 427 and 143 I.P.C. and by which the application no. 71 (kha) (1) has been rejected."

Mr. Anoop Trivedi, learned counsel for the applicant submits that the applicant had filed an application (Paper No. 71 kha), whereby it was prayed that entire consequential proceedings subsequent to the order dated 8.2.2016 are null and void. The said prayer was made on the ground that since second final report had already been rejected, vide order dated 6.4.2015, therefore, by rejecting the said final report by means of the order dated 8.2.2106 and directing that the protest petition shall be treated as complaint and consequently proceeding thereafter in the matter as a complaint case has rendered the entire consequential proceedings illegal. He thus submits that subsequent to the order dated 6.4.2015 passed by the Magistrate, whereby the second final report was

rejected and the protest petition was allowed with a direction for further investigation, the case was further investigated by the police and thethird final report dated 20.8.2015 has been submitted, which is pending consideration before the Magistrate.

On the aforesaid factual premise, the legal submission urged by the learned counsel for the applicant is that in the absence of an order rejecting the final report no direction can be issued by the Magistrate that the protest petition shall be treated as a complaint and accordingly to be proceeded with as a complaint case.

It is further submitted that the Court below while passing the impugned order dated 23.6.2018, whereby the application (Paper No. 71 Kha) had been rejected has travelled beyond the controversy and has also acted in excess of jurisdiction vested in it at that stage by observing that in view of the material on record, charges under sections 147, 458, 427 are also liable to be framed and for that purpose fixed the matter for 25.6.2018.

Sri Anoop Trivedi, learned counsel for the applicant at this stage submits that the Court below has no jurisdiction to pass the impugned order when the real issue was not answered one way or the other way.

It was next contended that by means of the impugned order dated 25.1.2018, the Court below has allowed the application (Paper No. 70 Kha) filed by the opposite party No. 2. From the record, it appears that the said application was filed by the opposite party No. 2 with a prayer that he be provided a Government counsel as the said case is going on in the Court of Sessions. The applicant his objection dated 21.12.2017. However, the Court allowed the same.

From the perusal of this bulky record, it transpires that one of the issues engaging the attention of the Court is whether the transfer of the complaint case to the Court of Sessions in exercise of power under section 409 Cr. P. C. is valid or not.

Learned counsel appearing on behalf of the opposite party No. 2 submits that the issue has become final and it cannot be open at this stage.

Perusal of the order dated 06.11.2017 passed by the Apex Court clearly shows that this question as to whether the Sessions Judge was empowered to transfer the complaint case under section 409 Cr. P. C. has been left open. It is admitted to the parties that pursuant to the order passed by the Apex Court, the said question has not been decided till date. It further transpires that the consolidation of the cases i.e. the State case and Complaint case has taken place in the light of the observations contained in the order dated 15.12.2016 passed by His Lordship Hon'ble Mr. Justice R.D. Khare. A perusal of the said order will go to show that in the proceedings in which the aforesaid order has been passed, a concession was made by the learned A.G.A. that both the cases are cross cases and on the basis of the said concession, the Court below passed the order dated 15.12.2016. Learned counsel for the applicant submitted that the applicant has filed a recall application seeking recall of the order dated 15.12.2016 which is pending.

In the light of the aforesaid facts, it is desirable that the recall application filed by the applicant in Criminal Misc. Application No. 38644 of 2016 be also heard along with the present application.

Put up this case along with the record of Criminal Misc. Application No.

38644 of 2016 as unlisted case on 10.08.2018.

Till then, the Court below is restrained from proceeding with the above mentioned complaint case pending before the Court of Sessions."

10. However, order dated 03.08.2018 was corrected by this Court, vide order 26.07.2019. It was now provided that in place of Section 409 Cr.P.C. occurring in 4th line of third last paragraph Section 408 Cr.P.C. shall be read.

11. Subsequently, Office submitted the report dated 23.05.2019 and on the basis of office report dated 23.05.2019, Hon'ble the Senior Judge, vide order dated 24.05.2019 nominated Criminal Misc. Application No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another), Criminal Misc. Application No. 38644 of 2016 (Jaspreet Singh Garewal Vs. State of U.P. and another) and Criminal Misc. Application No.11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) before this Court. Accordingly, the above mentioned Criminal Misc. Applications have come up before this Bench.

12. It may be noted here that against interim order dated 03.08.2018 passed in Criminal Misc. Application No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another) which has been quoted herein-above, S.L.P. (Criminal) No.16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another) was filed before the Apex Court. The same was disposed of finally, vide order dated 10.05.2019, which is reproduced herein-under.

" Delay condoned.

These petitions by special leave have been filed against the interim orders passed by the High Court in an application under Section 482 Cr.P.C.

Learned counsel for the petitioner has submitted that the matter is already fixed for hearing on 17.05.2019. The application being pending, we are of the view that the High Court shall take steps for early disposal of the matter looking into the nature of issues which have been raised in the Application under Section 482 Cr.P.C. Learned counsel for the petitioner has relied upon an order of this Court dated 06.11.2017 passed in SLP (Crl.) No. 8152 of 2017.

The special leave petitions are disposed of accordingly."

13. I have heard Mr. Anoop Trivedi, learned Senior Counsel assisted by Mr. Abhinav Gaur, learned counsel for opposite party no.2 Nitin Jaiswal, who has filed the recall application seeking recall of order dated 15.12.2016, Mr. Sikandar B. Kochar, learned counsel for applicant and learned A.G.A. for the State.

14. Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party no.2, who has filed recall application seeking recall of order dated 15.12.2016 submits that recall application has been filed primarily on the grounds that opposite party no.2 was not heard before order dated 15.12.2016 was passed. Admittedly, opposite party no.2 was not represented through counsel nor any notice was issued to opposite party no.2 affording him an opportunity of hearing before order dated 15.12.2016 was passed. Further Criminal Misc. Application No. 482 Cr.P.C. came up for admission on 15.12.2016 and this Court allowed the application on same day. As

such order dated 15.12.2016 is ex-parte against opposite party no.2. which is contrary to the Rules of natural justice enshrined in the principle Audi alteram partem.

15. The order dated 15.12.2016 passed by this Court has caused serious prejudice to opposite party no.2 as on account of aforesaid order disposal of S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others), under Sections 452 and 307 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly, arising out Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, has come to a halt. It is submitted that this Court while deciding bail application No. 17956 of 2013 (Nirmal Singh Garewal Vs. State of U.P), vide order dated 25.7.2013, directed trial Court to expeditiously decide S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and another) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of case Crime No. 2568 of 2012, under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly.

16. It is then submitted that as no progress was being made in aforesaid Sessions Trial as proceedings were being prolonged by filing applications by accused, three criminal misc. applications under section 482 Cr.P.C. came to be filed before this Court. Application U/s 482 No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging the order dated 18.1.2014, whereby trial court summoned the witnesses and documents other than those mentioned in the charge sheet; Application U/s 482 No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging order dated 18.1.2014, whereby Court below declined prayer made by accused for furnishing copies of statements of witnesses to them. Application U/s 482 No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was filed by complainant for expeditious disposal of case. All the above mentioned criminal misc. applications came to be decided vide order dated 9.4.2014. Criminal Misc. Application No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) and Criminal Misc. Application No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) were dismissed, whereas Criminal Misc. Application No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was disposed of with a direction to proceed with trial expeditiously irrespective of pendency of any application or petition before this Court except where specific order of stay has been passed.

17. Then reference was made to the order dated 23.7.2015 as corrected vide order dated 7.8.2015, which have been quoted in paragraph 4 of present judgement. Lastly reference was made to order dated 24.10.2016, passed in Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) and Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another). Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) was allowed with further direction to trial Court to proceed with trial on day to day basis and conclude same, within two months from date of production of certified copy of order, whereas Criminal Misc. Application No.

27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another) was dismissed. For ready reference, order dated 24.10.2016 is reproduced herein below:

"The application No.27370 of 2016 has been moved by the first informant for issuing appropriate direction to the trial court for concluding the trial of Sessions Trial No.123 of 2013 (State of U.P. vs. Nirmal Singh Garewal and others) pending in the Court of Additional District and Sessions Judge Court No.1 Bareilly within a time frame of one month from the date of receiving the certified copy of the order passed by this court.

and

The Application No. 27511 of 2016 has been moved for quashing the order dated 27.08.2016 passed by Additional Sessions Judge Court No.1 Bareilly in Sessions Trial No 123 of 2013 (State Vs. Nirmal Singh Garewal and others) rejecting the application Under Section 311 Cr.P.C. moved by the accused applicant.

The learned counsel for the first informant Sri Anoop Triwedi counsel for applicant in Misc. Application No. 27370 of 2016 filed Vakalatnama on behalf of opposite party No.2 in Misc. application No.27511 of 2016 moved by accused Taran Preet Garewal and similarly the learned counsel for the accused applicant, Sri Sikandar B. Kochar in Application No.27511 of 2016 filed Vakalatnama on the behalf of the accused opposite party No.2 Nirmal Singh Garewal in Misc. Application No. 27370 of 2016.

The two applications under Section 482 Cr.P.C., one by first informant and the other by accused, have been moved in respect of and arise out of the one and the same Sessions Trial No. 123 of 2013 pending before Additional Sessions Judge Court No.1, Bareilly, were heard together on request of the learned counsel for the parties and are being disposed off by common order.

The learned counsel for the applicant-accused in Application No. 27511 of 2016 contended that the opposite party No.2 has stated in FI.R. that "due to indiscriminate firing by the applicant and two other co-accused persons, Sachin Jaiswal the brother of first informant as well as Gaurav, Bhagwan Das and Veer Bahadur sustained gun shot injuries"; that the prosecution did not produce all the witnesses and got discharged the witnesses Gaurav, Bhagwan Das and Veer Bahadur on the application of first informant dated 04.06.2013; that the evidence of above witnesses is necessary for bringing truth before this Court and so the applicant moved an application under Section 311 Cr.P.C. for summoning them, which has wrongly been rejected by the trial court vide impugned order dated 27.08.2016; that the above order of trial court/ the Additional Sessions Judge Court No.1 Bareilly is bad on the facts of law and is labile to be quashed.

Per contra, learned counsel for Nitin Jaiswal the first informant/ opposite party No.2 contended that the applicant had moved the application under Section 311 Cr.P.C. for summoning the witnesses with malafide intention to delay the disposal of trial after a period of more than three years from the date when they were discharged; that the application moved by applicant and co-accused persons was malafide and misconceived; that the above witnesses Gaurav, Bhagwan Das and Veer Bahadur,need not be examined before the Court and they have been rightly discharged by the prosecution; the

accused persons, if finds their evidence necessary and beneficial to them, may produce them as defence witnesses; that the applicant and co-accused persons are habitual of making abuse process of Court by moving one application or the other, to delay the disposal of trial as well as to flout various orders passed by this court for expeditious disposal of trial; that the prosecution evidence was concluded on 23.10.2015 and due to the misconduct of applicant-accused persons, their statements under Section 313 Cr.P.C. could be recorded on 27.08.2016 after a period of over 10 months; that since 27.08.2016 was fixed for recording the statements of accused persons under Section 313 Cr.P.C, this application was moved on 26.08.2016 just one day before the date fixed, so that the proceeding of case may further be adjourned; that the application under Section 482 Cr.P.C. has been moved with malafide intention to further delay the disposal of trial and is liable to be rejected.

In application No.27370 of 2016 learned counsel for the applicant/ the first informant contended that regarding incident dated 21.10.2012, committed by the Opposite party No.2 along with his two sons Jaspreet and Taranpreet, a prompt F.I.R. was lodged by applicant on the same day under Sections 452 & 307 IPC, in which the bail application of accused/opposite party no.2 was dismissed by this court by order dated 21.01.2013 at Annexure No.2, with a direction to trial Court to conclude the trial expeditiously on day to day basis preferably within a period of six months from the date of production of copy of the order; that in above order at Annexure No.2, this Court observed that the bailed out applicant Nirmal Singh Garewal, opposite party No.2 is a lawyer, but has no respect to the judicial system and on rejection of his bail application by Session Judge, Bareilly, several members of bar at his instance vandalized the court room of Sessions Judge, Bereilly and stormed entire Court campus at Bareilly; that opposite party No.2 moved second bail application, which was allowed by this court by a detailed order dated 25.07.2013 at Annexure No.3, with a further direction to trial court for expeditious disposal of the case; that opposite party no.2 again moved three applications under Section 482 Cr.P.C., which were disposed of by this Court by common order dated 09.04.2014 at Annexure No.4, with the direction to trial court not only to proceed with the trial expeditiously, but also to proceed with the trial, even if, any application or petition is pending before this court, except where specific order of stay has been passed by this court; that the delaying tactics adopted by unscrupulous type of accused persons can be measured from the chart at Annexure No.6, which shows that cross examination with prosecution witnesses Nitin Jaiswal-the first informant continued for 35 dates, in 137 pages, of Scahin Jaiswal- injured witness for 9 dates in 59 pages, of Constable-Rakshpal Singh for 7 dates, of Prashant Kumar for 27 dates in 102 pages, and of Dr. Brijeshwar Singh for 12 dates in 28 pages and so on; that on another application of applicant (first informant) under Section 482 Cr.P.C., this Court vide order dated 23.07.2015, at Annexure No.10, directed the trial court for expeditious disposal of trial on day to day basis, if possible, within six months, which period was reduced to two months by way of correction order dated 07.08.2015, at Annexure No.11; that despite repeated orders of this court as mentioned above,

the opposite party No.2 and his sons, the co-accused persons are continuing to move one frivolous application after the other including the applications for transfer of the case, which were rejected by the trial court vide order dated 14.03.2016, at Annexure No.13; that another application moved before the Sessions Judge, Bareilly for transfer of trial was rejected by the Sessions Judge, Bareilly vide order dated 23.0.2016, at Annexure No.14 whereafter the accused-applicant approached this Court through transfer application No.179 of 2016, which was dismissed by this Court by detailed order dated 08.07.2016, at Annexure No.15; that inspite of rejection of above applications, the illegal designs of accused persons did not stop; that the opposite party no.2 and co-accused persons continued to make misuse the process of court, and approached the Apex Court against the order dated 08.07.2016 passed by this Court rejecting the transfer application, which too was dismissed by Apex Court vide order dated 08.08.2016, at Annexure No.16; that after rejection of S.L.P. against the rejection of transfer application, the accused persons again moved Application Nos. 235-B, 236-B, 232-B before the trial court, which were dismissed with costs of Rs.1,000/- on accused vide order dated 22.08.2016 at Annexure No.17; that the chart at Annexure No.12 shows that the accused persons moved as many as 13 applications for adjournment of case apart from various frivolous applications every now & then; that the certified copy of order sheet of trial court at Annexure No.19, makes it clear that opposite party No.2 and his sons, the three accused persons in this case, are willfully and deliberately flouting the orders of this Court being Advocate and sons of Advocate; that despite being Advocate, the opposite party no.2 has no respect even for the orders of this Court what to say about respecting the Court of Sessions Judge or Additional Sessions Judge/ trial court; that in the circumstances, trial court was directed to decide the trial as expeditiously possible within six months from 21.01.2013, but after lapse of over 44 months from the above initial order followed by subsequent orders as well as last order dated 07.08.2015 (more than 13 months ago) for expeditious disposal within two months, the trial court may again be directed to decide the trial expeditiously within a period of one moth from the date of production of copy of order before it.

Per contra, learned counsel for the opposite party No.2 contended that opposite party No.2 has not committed any abuse of process of Court that in (2015) 3 Supreme Court Cases (Criminal) 862 in the Case of Bablu Kumar Vs. State of Bihar, the Apex Court has held that the direction for conclusion of trial within a fixed duration does not mean mechanical conclusion of trial anyhow, regardless of whether justice is miscarried and the trial court can always seek extension of time from that court to ensure fair trial.

Upon hearing the learned counsel for the parties and perused the record, I have come to the conclusion that the application Under Section 313 Cr.P.C. moved by accused-applicant Taran Preet Garewal and another on 26.08.2016 (after a period of 10 months from completion of prosecution evidence on 23.10.2015), for summoning the witnesses, which were discharged 3 years ago on 04.06.2013, was malafide and misconceived and has been rightly rejected by the trial court. The learned counsel for the accused-applicant Taran

Preet Garewal failed to show any illegality, irregularity, incorrectness or impropriety in the impugned order dated 27.08.2016 rejecting the application of accused under Section 311 Cr.P.C. The learned counsel for the applicant has failed to show that the impugned order dated 27.08.2016 if allowed to stand, may cause any miscarriage of justice or injury to the accused persons and that quashing of the same is necessary in order to secure the ends of justice. From material on record, I find that the learned counsel for the applicant has failed to show any sufficient ground, which may require exercise of inherent powers by this court for preventing any alleged abuse of process of Court. It is proved from the material brought on record that the accused themselves are committing abuse of the process of Court by flouting the repeated orders of this Court for expeditious disposal of the case. The application under Section 482 Cr.P.C. No.27511 of 2016 is frivolous, vexatious and devoid of merits and is liable to be dismissed.

It is clear from the material on record that the accused persons including bailed out accused Nirmal Singh Garewal, an advocate are committing abuse of process of court by moving one frivolous application or the other and approaching this Court every now and then by filing one frivolous application or the other under Section 482 Cr.P.C. or under Section 397/401 Cr.P.C. or even transfer application. In the circumstances, it is necessary to observe that the bailed out accused Nirmal Singh Garewal, who is also an Advocate, with co-accused persons, his sons, is making misuse of his professional degree. The conduct of accused persons indicates that they have no respect for the Courts as well as orders passed by Court. The law relied on behalf of opposite party Sri Nirmal Singh Garewal has no application to the facts of the case.

In view of the facts and circumstances brought before this Court through application No.27370 of 2016 and in view of the earlier orders dated 25.07.2013, 09.04.2014, 23.07.2015 and 07.08.2015 of this Court directing expeditious disposal of the trial in time bound period, the application No.27370 of 2016 is liable to be allowed with further direction to trial court for expeditious disposal of the trial by proceeding from day to day and if possible within two months from the date of submission of copy of this order before this Court without granting any unnecessary adjournment to the accused-persons.

However, if the trial Court finds that the opposite party Nirmal Singh Grewal or his sons the co-accused persons are continuing to follow the same delaying tactics by moving frivolous applications, the same shall be disposed of expeditiously in accordance with law by appropriate orders, including order for imposition of special costs on accused-persons if so required. If the trial is not concluded within a period of 2 months due to misconduct of accused persons, it will be deemed that opposite party Nirmal Singh Grewal is making misuse of liberty of bail and on being approached, this Court shall be compelled to curtail the liberty so granted and cancel the bail granted to him vide order dated 25.07.2013.

Accordingly, application No.27370 of 2016 is allowed with the directions to the trial court for expeditious disposal of trial within two moths form the date of production of copy of order before it and

application No.27511 of 2016 is dismissed with costs."

18. He, therefore, submits that in view of facts as noted herein above and also findings recorded in the order dated 2.12.2016, passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application under section 309 Cr.P.C. filed by accused, it is explicit that the trial is at an advanced stage. Evidence has already been recorded and now only the accused have to give their defence testimony as provided under Section 313 Cr.P.C. The order dated 15.12.2016 runs counter to the order dated 23.07.2015 passed by this Court in Criminal Misc. Application U/S 482 Cr.P.C. No. 20143 of 2015 (Nitin Jaiswal Vs. State of U.P. and another) as corrected, vide order dated 7.8.2015, wherein it was provided that Sessions Trial 123 of 2013 (State Vs. Nirmal Singh Garewal and others) be decided on day to day basis within a period of two months.

19. The incident giving rise to Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareily, District-Bareilly, arising out of Case Crime No.2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452 and 307 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, are not similar and therefore the two cases are not cross-cases. He further submits that in case a parallel is drawn between the two F.I.Rs. or the Two Case Crime numbers following distinctions are clearly evident. The F.I.R. dated 25.11.2012 registered as Case Crime No. 2675 of 2012 under sections 307, 452, 427, 504, 506, 380, 426, 392 IPC, lodged by Nirmal Singh Garewal is in respect of an incident, which took place on 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126, Civil Lines, situate in Southern direction and at a distance of 3 km. from Police Station Kotwali Sadar, District Bareilly. However, F.I.R. dated 21.10.2012 registered as Case Crime No. 2568 of 2012 under sections 452, 307 IPC contains a recital that the incident took place on 21.10. 2012 at 6 a.m. at 126A, Civil Lines, situate at a distance of 2 km. and in the Southern direction from the Police Station Kotwali Sadar, District Bareilly.

20. It is then contended that the last direction of order dated 15.12.2016, whereby it has been directed that the proceedings of S.T. No. 123 of 2013 may go on, but no final order may be passed amounts to a perpetual injunction on the power of the Court restraining it from deciding a case, which is not permissible under law.

21. He has further submitted with vehemence that various facts have been concealed in the present application, which can be brought to the notice of the Court when the matter is heard and opportunity of hearing is afforded to opposite party no.2. In support of aforesaid submission, reliance is placed upon paragraphs 32 to 55 of the affidavit filed in support of recall application.

22. It is also contended that applicant has concealed materials facts as

stated in paragraphs 32 to 35 of the affidavit filed in support of recall application and in that eventuality, the present application under Section 482 Cr.P.C. filed by accused-applicant Jaspreet Singh Garewal is liable to be dismissed on the ground of concealment of material facts.

23. On the aforesaid factual and legal premise, it is vehemently urged by Mr. Anoop Trivedi, learned Senior Counsel that recall application and pending Criminal Misc. Application may be heard and decided together finally. To sum up his arguments, Mr. Anoop Trivedi, learned Senior Counsel has submitted that recall application is being pressed on limited grounds that the order dated 15.12.2016, whereby the application under Section 482 Cr.P.C. filed by accused-applicant Jaspreet Singh Garewal has been decided ex-parte inasmuch as even though, the applicant Nitin Jaiswal was impleaded as the opposite party No. 2 in the memo of petition, but no notice was issued to him and the final order has been passed against him without affording any notice or opportunity of hearing causing serious prejudice to the opposite party no.2. It is then urged that the petition as presented suffers from the vice of concealment of material facts and once an opportunity is granted to the applicant-opposite party no.2 to bring on record those facts then in that eventuality, the petition itself is liable to be dismissed.

24. To lend legal support to his submissions, learned Senior Counsel has relied upon judgement of Apex Court in the case of **Vishnu Agarwal Vs. State of U.P. and another** reported in **2011 (14) SCC 813**, Judgement of learned Single Judge of Allahabad High Court in **Jawahar Lal @ Jawahar Lal JalaJ Vs. State of U.P.** reported in **2015 (91) ACC 128**, judgement of Apex Court in State of **Punjab Vs. Devendar Pal Singh Bhullar and others** reported in **2011 (14) SCC 770**, judgement of Apex Court in **Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan** reported in **1981 (1) SCC 62**, the Full Bench decision of Rajsthan High Court in the case of **Habu Vs. State of Rajsthan** reported in **AIR 1987 RAJ 83**, the Full Bench decision of this Court in the case of Rajnarayan and others Vs. The State of U.P. reported in A.I.R. 1959 ALL 315 and judgement of Apex Court in Khoday Distilers Ltd. (Now known as Khoday India Limited and others) Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator reported in 1995 SCC (1) 574.

25. Per-contra, Mr. Sikandar B. Kochar, learned counsel for applicant has opposed the recall application filed by opposite party No. 2. Countering the submissions made by learned Senior Counsel appearing for opposite party no.2, he submits that prior to passing of the order dated 15.12.2016 by this Court, Investigating Officer while submitting final report dated 19.12.2012 in Case Crime No. 2675 of 2012 had opined that Case Crime No. 2675 of 2011 and Case Crime No. 2568 of 2012 appear to be in the same sequence of events. He thus submits that the concession given by learned A.G.A. before his Lordship Hon'ble Mr. Justice R.D. Khare at the time of hearing of the present application on 15.12.2016 cannot be said to be contrary to facts on record.

26. Attention of the Court was then invited to order dated 13.7.2017 passed by

Sessions Judge, Bareilly, whereby Misc. Case/Transfer Application No.113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and 6 others) filed by Nirmal Singh Garewal was allowed and Additional Chief Judicial Magistrate Court No.2, Bareilly, was directed to transfer Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly to the Court of 1st Additional Sessions Judge, Bareilly, to buttress the submission that even the Sessions Judge, Bareilly, while considering the transfer application had opined that where the Magistrate refuses to transfer the cross-case to the Court of Sessions by exercising powers under Section 323 Cr.P.C. then in that eventuality the Sessions Court by taking recourse to Section 408 (1) Cr.P.C. can transfer the cross-case to the Court of Sessions. It is pertinent to mention here that while passing the order dated 13.07.2017, the Sessions Judge, Bareilly, relied upon the earlier order dated 15.12.2016, which is sought to be recalled, passed by His Lordship Hon'ble Mr. Justice R.D. Khare and on the basis of the said order, opined that the transfer application needs to be allowed with a direction to the Additional Chief Judicial Magistrate Court No. 2, Bareilly, to transfer the record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly to the Court of Ist Additional Sessions Judge, Bareilly. On the aforesaid facts, it is thus urged that Complaint Case No. 1716 of 2016 and S.T. No. 123 of 2016 are cross-cases and therefore, the concession conceded by learned A.G.A. at the time of passing of order dated 15.12.2016 cannot be said to be illegal.

27. Order dated 13.07.2017 was challenged by Nitin Jaiswal by filing Criminal Misc. Application U/S 482 Cr.P.C No. 22262 of 2017 (Nitin Jaiswal Vs. State of U.P. and another), which was dismissed, vide order dated 29.08.2017. For ready reference order dated 29.08.2017 is reproduced herein-below:

" Heard Sri Anoop Trivedi, learned counsel for the applicant, Sri Sikander B. Kocher as well as the learned A.G.A. for the State and perused the record.

By means of the instant 482 petition the applicant has invoked the power of this court under Section 482 Cr.P.C. to quash the order dated 13.7.2017 passed by the learned Sessions Judge, Bareilly in Criminal Misc. Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others).

The transfer application moved by the respondent no. 2 along with an affidavit with a prayer to transfer the Case No. 1716 of 2016, under Sections 456, 427 and 143 I.P.C., police station Kotwali, district Bareilly from the court of Additional Chief Judicial Magistrate, Bareilly to the court of First Additional Sessions Judge, Bareilly where S.T. No. 123 of 2013 (State vs. Nirmal Singh and others), under Sections 307 and 452 I.P.C. is pending.

It is submitted by the learned counsel for the applicant that a first information report was lodged by the applicant against the respondent no. 2 Nirmal Singh Garewal and two others, namely, Jasprit Singh Garewal and Taranpreet Singh Garewal under Sections 452, 307 I.P.C

on 21.10.2012 at 6.55 A.M. with respect to the incident dated 21.10.2012 at 6 A.M. In respect of the aforesaid offence the accused/respondents are facing trial in pursuance of the aforesaid first information report lodged by Nitin Jaiswal in S.T. No. 123 of 2013. This court by order dated 21.1.2013 directed the trial court to conclude the trial expeditiously on day to day basis preferably within a period of six months. On account of dilatory tactics played by the opposite party no.2 and his sons the trial has yet not been decided besides four years have elapsed despite this court has passed specific orders in several other 482 petitions filed on behalf of the applicants or by the opposite party no. 2. At a very belated stage, the opposite party no.2 moved an application under Section 309 (1) (a) Cr.P.C. on 29.11.2016 contending therein that a cross case is pending before the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly and hence an appropriate order be passed. The said application was rejected by the learned Additional Sessions Judge, Court No. 1, Bareilly vide order dated 2.12.2016. Jasprit Singh Garewal filed a 482 petition before this Court, which was numbered as 482 Petition No. 38644 of 2016, which was finally disposed of by another Bench of this Court on 15.12.2016. Pursuant to the order dated 15.12.2016 an application was moved by the opposite party no. 2 to pass appropriate order in the light of the observation made in the said order. The transfer application, which was moved by the opposite party no. 2 was only to delay the trial proceeding before the court of Sessions by the opposite party no. 2 and other when there was a specific order of this court for early disposal of the case within a stipulated period but without considering any aspect of the matter the learned Sessions Judge has proceeded to pass the order impugned by which the Additional Chief Judicial Magistrate, Court No. 2, Bareilly has been directed to transmit/transfer the file of Case No. 1716 of 2016 (Nirmal Singh Vs. Nitin Jaiswal) under Sections 456, 427 and 143 I.P.C. forthwith to the court of Additional Sessions Judge, Bareilly. The order passed by the learned Sessions Judge is absolutely without jurisdiction as the learned Sessions Judge is not empowered to transfer the trial, which is cognizable by the court of Magistrate as it is against the provisions of Section 408 Cr.P.C. Section 408 Cr.P.C. do not authorize the District Judge to assign the trial of a case triable exclusively by a court of Magistrate to court of Sessions. The application for transferring the case pending before the Chief Judicial Magistrate to the court of Sessions with regard to an application under Section 309 (1) (a) Cr.P.C. is pending in the court of Chief Judicial Magistrate, Court No. 2 Bareilly hence the application moved under Section 408 Cr.P.C. by the opposite party no. 2 before the District Judge, Bareilly is not maintainable on the ground that an application filed by the opposite party no. 2 under Section 323 Cr.P.C. in case No. 1716 of 2016 in the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly was rejected by the court concerned by an order dated 19.11.2016. The said order has attained finality and thus the order under challenge passed by the District Judge exercising power under Section 408 Cr.P.C. for transferring the trial of Case No. 1716 of 2016 from the court of Additional Chief Judicial Magistrate, Court No. 2, Bareilly to the court of District & Sessions Judge, Barielly is per

se without jurisdiction, arbitrary unreasonable and illegal, which is in gross contravention of the provision of Section 209 Cr.P.C. It is further contended that the sessions court gets jurisdiction to deal with the matter only after the case is instituted upon by police or otherwise is committed by the court of Magistrate. When the power conferred under Section 209 or under Section 323 is exercised only then the provisions of Chapter XVIII would be applicable to such cases. The order passed by the court below is also in contravention of the various orders passed by this court to conclude the trial on day to day basis within two months, which was passed in Criminal Misc. Application No. 20143 of 2015, thus the opposite party no. 2 is somehow trying to elongate the proceeding in which the opposite party no. 2 along with two others are the accused persons and the trial is at the fag end thus by moving the transfer application the opposite party no. 2 has somehow obtained favourable order by the impugned order whereby it has been directed to transfer the case which is pending before the concerned Magistrate to the court of Additional Sessions Judge, Bareilly, which is unsustainable in the eye of law, hence liable to be rejected by this Court.

Learned counsel appearing on behalf of the opposite party no.2 has submitted that in respect of the incident which had taken place on 21.10.2012 the first information report was lodged against the opposite party no. 2 Nirmal Singh Garewal and his two brothers under Sections 452 and 307 I.P.C. as case Crime No. 2568 of 2012 on the same day the opposite party no. 2 also went for lodging the first information report but the same was not lodged by the police, then an application was moved under Section 156 (3) Cr.P.C. on 22.10.2012 pursuant to which a first information report was lodged by the police against the applicant and five others under Sections 307, 452, 427, 504, 506, 380, 436 and 392 I.P.C. as case Crime No. 2675 of 2012. The matter was investigated by the Investigating Officer and a final report was filed on 19.12.2012 and after further investigation the police again submitted the second final report on 16.8.2013. The matter was again sent further investigation and the police reiterated the final report and then the opposite party no.2 filed a protest petition before the court below and the court below proceeded to pass the order on 8.2.2016 rejecting the final report and treated the protest petition as complaint Case No. 1716 of 2016. After the statements of the complainant and witnesses were recorded under Sections 200 and 202 Cr.P.C. the applicant and others were summoned by the learned Magistrate by order dated 5.9.2016 under Sections 143, 456, 427 I.P.C. in complaint Case No. 1716 of 2016. The applicant did not appear before the court despite having full knowledge of summoning order with the sole intention that the case against the opposite party no. 2 may proceed and the cross version of complaint Case No. 1716 of 2016 may remain kept pending. Pursuant to the order of this court it was directed to proceed with the case on day to day basis and trial be concluded if possible within two months. Since the applicant and others had already been summoned in complaint case the application under Section 323 Cr.P.C. was filed before the Additional Chief Judicial Magistrate for committing the case to the court of sessions where S.T. No. 123 of 2013 is

proceeding so that both the cases be heard and decided in accordance with law. It is settled law as held by the Hon'ble Apex Court in number of cases that counter or cross cases should be decided by the same court hence the learned Sessions Judge after considering that the date of incident in both the cases is the same, which took place between both the parties on the same date passed the order impugned that both the cases have to be tried by the same court. The learned District Judge has committed no error in allowing the application moved by the opposite party no. 2 exercising power under Section 408 (2) Cr.P.C. directing the Additional Chief Judicial Magistrate, Court No. 2, Bareilly to transmit the record of Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427 and 143 I.P.C to the court of Ist Additional District & Sessions Judge, Bareilly. By challenging the order passed by the learned District Judge the applicant himself is trying to elongate the proceeding when the order passed by the learned Sessions Judge was well within its jurisdiction. The cases cited by the learned counsel for the applicant is not applicable in the present facts and circumstances of the case. There is no infirmity in the order passed by the court below, hence the petition may be dismissed with special costs as fraud and perjury has been committed by the applicant while filing the instant application for which an application has already been moved under Section 340 and 195 Cr.P.C. for initiating proceedings to take cognizance for the fraud played by the applicant upon the court of law which should not be ignored.

I have considered the submissions of the learned counsel for the parties. From the perusal of the record it is not disputed that both the sides have lodged cases against each other in respect of the incident of the same date. The first information report, which was lodged by the applicant the trial has been proceeded against the opposite party no. 2 and other persons. The first information report in respect of the incident of the same date could not be lodged on behalf of the opposite party no. 2 against the applicant and others and on account of repeated submissions of final report the protest petition was filed by the opposite party no. 2 and on the basis of the statement of the complainant and witnesses under Sections 200 and 202 Cr.P.C the learned Magistrate treating the protest petition as a complaint proceeded to pass order summoning the applicant and other persons to face trial. It is an admitted fact that there is cross case which should be heard and decided by the same court. In view of the law laid down by the Hon'ble Apex Court in Nathi Lal and others reported in 1990 SCC Criminal 638 that the counter cases should be tried in quick succession by the same judge by the same court who should not pronounce the judgment till the hearing of both the cases is finished. After recording of evidence in one case is completed the trial judge must hear the argument and reserve the judgment and thereafter he must proceed to hear the cross case and after recording of the evidence he must hear the argument and reserve the judgment and thereafter dispose of the matter by two separate judgments. In other words case must be decided on the basis of the evidence, which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. In Sudhir and others Vs. State of M.P.

reported in A.I.R. 2001 SC 826 while relying upon the aforesaid decision in (Natthi Lal) supra the Hon'ble Apex Court has exhaustively dealt with the case and counter case relating to the same incident and even one of those cases involves offence not exclusively triable by Sessions Court, could be tried in the manner indicated in Natthi Lal's case. The practical reason in adopting the procedure that such cross cases shall be tried by the same court has been summarized thus;

(I) It staves off the danger of an accused being convicted before his whole case is before the court;

(ii) It deters conflicting judgments being delivered upon similar facts; and (iii) In reality the case and the counter case are to all intents and purposes different or conflicting versions of one incident.

The Hon'ble Apex Court has further observed that from the aforesaid decisions it is crystal clear that in a situation where one of the two cases relating to the same incident is charge sheeted, involves offence or offences exclusively triable by a court of Sessions, but none of the offences involved in other case is exclusively triable by the court of Sessions, the Magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the court of Sessions court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though the cross case cannot be committed in accordance with Section 209 of the Code, the Magistrate has nevertheless power to commit the case to the Court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. The Sessions Judge has to exercise discretion regarding the cases, which he has to continue for trial in his court and the case, which has to be summoned from the court of Chief Judicial Magistrate.

When earlier 482 petition was filed by the respondents there was clear observations that there are two cross cases for which the direction was given for re-consideration of the matter. The present impugned order has been passed, which has been challenged by means of the instant petition under Section 482 Cr.P.C. The learned Sessions judge is fully empowered to withdraw any case at any time before the trial of the case from one court to another court in his session division. The trial in both the cases must be decided by the same judge one after the other. This court does not find any illegality or perversity in the impugned order which was passed against the applicant and six others but the applicant alone has challenged the order on flimsy ground installing the entire proceeding which is pending against the applicant and others as complaint case.

In view of the above prolix and verbose discussion, the petition lacks any merit and is accordingly dismissed.

The learned court below is directed to proceed with the police case and the cross case instituted by the complainant by way of complaint and decide the trial in both the matter in the light of the direction given herein above. It is further directed that the learned court blow will accord priority to the cross case and dispose of both the cases expeditiously"

28. Against order dated 29.08.2017, Special Leave to Appeal (Crl.) No. 8152

of 2017 was filed by Nitin Jaiswal before the Apex Court, which was decided finally, vide order dated 06.11.2017. For ready reference order dated 06.11.2017 is reproduced herein-below:

"In the peculiar facts of this case, we are not inclined to entertain the present petition as the order of consolidation of two cases is substantially correct. However, we leave the question open as to whether the Additional Sessions Judge had the power to order consolidation of the cases under Section 408 of the Cr.P.C., even when we find that the Additional Sessions Judge did not have the power to do so.

We are also conscious of the fact that insofar as the case filed by the petitioner is concerned, it has already reached the advanced stage of final arguments. In these circumstances, we would impress the Trial Court to have expeditious trial of the case which is filed by the respondent, possibly within one year.

The Special Leave Petition is disposed of.

Pending applications(s), if any, stands disposed of accordingly."

29. It is thus urged by Mr. Sikandar B. Kochar, learned counsel for applicant that in view of order dated 06.11.2017 passed by Apex Court, this Court cannot sit in appeal over order dated 06.11.2017 and consequently, recall application filed by opposite party no.2 is liable to be rejected.

30. In continuation of his opposition to the recall application, it was then submitted by Mr. Sikandar B. Kochar, learned counsel for the applicant that His Lordship Hon'ble Mr. Justice B.K. Narayan passed interim order dated 17.4.2014 in Criminal Misc. Application No. 11932 of 2014. For ready reference, order dated 17.04.2014 is reproduced herein below:

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

Notice on behalf of the opposite party no. 1 has been accepted by learned AGA. He prays for and is allowed six weeks' time to file counter affidavit.

Issue notice to opposite party no. 2, who may also file counter affidavit within the same period.

Rejoinder affidavit may be filed within two weeks thereafter.

List after expiry of the aforesaid period.

It is contended that this is cross case. In the case registered against the opposite party no. 2 at the behest of the applicant final report has been submitted against which he has preferred a protest petition which is pending before the concerned Magistrate, while the instant case in which the applicant is an accused is proceeding. He further submitted that that the investigation in the matter was done by the I.O. in an extremely unfair manner with the object of conferring undue benefit on the opposite party no. 2, who is under the influence of opposite party no. 2 and accordingly further investigation is required.

Considering the submissions made by learned counsel for the applicants, it is directed that till the next date of listing, the proceedings of the Sessions Trial no. 123 of 2013, Case Crime no. 2568 of 2012, State Vs. Nirmal Singh Garewal and others, under sections 452, 307 IPC, P.S. Kotwali, District Bareilly may go on but the judgement will not be pronounced."

31. The aforesaid Criminal Misc. Application was filed with a prayer that further proceedings of Case Crime No. 2568 of 2012 (Nirmal Singh Garewal Vs. State of U.P. and another) under sections 452, 307 IPC pending in the Court of Additional Sessions Judge, Court No.1, Bareilly be stayed, with a further prayer that direction for further investigation of the Case Crime No. 2568 of 2012 under sections 452, 307 IPC, P.S. Kotwali Sadar, District Bareilly by the C.B.I or any other investigating agency be passed. Feeling aggrieved by interim order dated 17.04.2014, opposite party no.2 therein namely Nitin Jaiswal filed a recall application, which was registered as Criminal Misc. Recall Application No.172452 of 2014. This recall application came to be allowed, vide order dated 23.12.2014 passed by Hon'ble Mr. Justice B. K. Narayana. For ready reference order dated 23.12.2014 is reproduced herein below:

"This application has been moved on behalf of the opposite party no. 2, Nitin Jaiswal with the prayer to recall the interim order dated 17.4.2014 passed by this Court in the present case. The recall application is supported by a counter affidavit sworn by Sri Nitin Jaiswal, opposite party no. 2.

Rejoinder affidavit and supplementary affidavits which have been filed by Sri Sikandar B. Kochar on behalf of the applicant today are kept on record.

Learned counsel for the opposite party no. 2 submitted that the applicant Nirmal Singh Garewal, who is facing trial for the offences punishable under Sections-452 and 307 IPC in S. T. No. 123 of 2013 has obtained an ex parte interim order in his favour from this Court on 17.4.2014 in this case by suppressing material facts including the earlier orders passed by this Court in different proceedings arising out of the same session trial. He further submitted that this Court while rejecting the first bail application being Criminal Misc. Bail Application No. 364 of 2013 filed by the applicant by order dated 21.1.2013, copy whereof has been filed as Annexure-CA, had directed the trial court to conclude the trial expeditiously on day to day basis preferably within a period of six months from the date of receiving of the copy of the order of this Court. He also drew the attention of this Court to the order dated 25.7.2013 passed by this Court in Criminal Misc. Bail Application No. 17956 of 2013, copy whereof has been filed as Annexure CA 3 to the counter affidavit, by which the applicant was enlarged on bail by this Court with a specific direction to the trial court to decide the case expeditiously.

Sri Anoop Trivedi, learned counsel for the opposite party no. 2 next referred to the order of this Court dated 21.5.2013 passed in Criminal Misc. Application (U/s 482 Cr. P. C.) No. 16535 of 2013; Nirmal Singh Garewal Versus State of U. P. and another, copy whereof has been filed as Annexure CA 2, by which this Court rejected the aforesaid application filed by the applicant against the order dated 27.4.2013 passed by the Additional Sessions Judge, Court No. 1, Bareilly in Session Trial No. 123 of 2013, under Sections-452, 307/34 IPC, P. S.-Kotwali, district-Bareilly whereby application moved by the applicant before him for conducting spot inspection was rejected as well as the order dated 9.4.2014 passed by this Court whereby three applications under Section-482 Cr. P. C. nos. 3811 and 6775 of 2014 preferred by the applicant and 6095 of 2014 preferred

by the complainant-opposite party no. 2 before this Court were finally disposed of with a direction to the trial court not only to proceed with the trial expeditiously but also to proceed with the trial irrespective of the pendency of any application or petition before this Court except where specific order of stay has been granted by this Court (Annexure 5 to the affidavit accompanying recall application). This Court while deciding the aforesaid applications had issued several directions to the trial court for concluding the trial expeditiously on day to day basis.

Advancing his submissions further, Sri Trivedi urged that in case abovenoted orders were brought to the notice of this Court by the applicant, he may not have succeeded in obtaining any ex parte interim order in his favour from this Court.

He lastly submitted that the applicant having failed to approach this Court with clean hands and succeeded in obtaining an ex parte interim order in his favour without disclosing the entire facts and circumstances of the case and the details of previous cases filed by him before this Court and the orders passed therein, the order dated 17.4.2014 is liable to be recalled.

Per contra, Sri Sikandar B. Kochar, learned counsel for the applicant vehemently submitted that the prayer made by the applicant in this application is founded upon allegations which have no connection with the earlier proceedings initiated before this Court by the applicant and the opposite party no. 2 and the orders passed by this Court therein and even if the litigative history between the parties was disclosed by the applicant, the same would not have made any difference to the merit of the present case. He next submitted that there is cross version of the incident also which was registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC at P. S.-Kotwali, sub-district-Sadar, district-Bareilly against the informant in the present case and several other persons.

Learned counsel for the applicant also submitted that initially after registration of Case Crime No. 2568 of 2012 against the applicant and his two sons in pursuance of the first information report lodged by the opposite party no. 2, the matter was investigated by the S. S. I. Brahmanand of P. S.-Kotwali, district-Bareilly. The investigation was later transferred to Prashant Kumar who is hand in glove with the opposite party no. 2. The aforesaid Prashant Kumar made some interpolations in the parcha prepared by S. I. Brahmanand, the earlier I. O. Strangely, the investigation of the cross case was also entrusted to him and who without making proper investigation submitted final report in the cross case against which the protest petition filed by the applicant is still pending. He next submitted that in view of the settled legal position on the issue that the cross cases should be decided together, in case the session trial in which the applicant is an accused is decided separately, the same will result in failure of justice. He also submitted that the applicant has disclosed each and every material fact necessary to enable this Court to decide whether the applicant is entitled to the prayer made by him in this application or not. There being no suppression of any material fact by the applicant, this recall application deserves to be rejected.

After having considered the submissions made by learned counsel for the parties and perused the material on record, I find that there is no dispute

about the fact that a cross version of the incident which has been registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC, P. S.-Kotwali, sub-district-Sadar, district-Bareilly in which final report has been submitted and against which protest petition has been filed by the applicant is pending. There is no quarrel about the settled legal position that where there are cross cases, the same should be decided together. It is equally true that prior to moving this application, the applicant had approached this Court twice for being enlarged on bail by means of Criminal Misc. Bail Application Nos. 364 of 2013 and 17956 of 2013. He had further invoked the inherent jurisdiction of this Court by means of filing Criminal Misc. Application (Under Section 482 Cr. P. C.) Nos. 16535 of 2013, 3811 and 6775 of 2014. The aforesaid cases were disposed of by this Court with directions.

Thus, in view of the above, it transpires that the applicant has failed to disclose in this application the details of the cases filed by him before this Court earlier and the orders passed therein and although in the strict sense it cannot be said that had the aforesaid facts been disclosed in this application, this Court would not have passed any interim order in favour of the applicant but nevertheless the Court cannot ignore the fact that the applicant had failed to disclose in this application the details of the earlier cases filed by him before this Court and orders passed by this Court therein which have now been brought to the notice of this Court by the opposite party by moving the present recall application.

For the aforesaid reasons, this recall application is allowed. The order dated 17.4.2014 passed by this Court in this case is hereby recalled.

List this application before the appropriate Court on 19.1.2015."

32. Mr. Sikandar B. Kochar, learned counsel for accused-applicant invited the attention of the Court to the 3rd paragraph at internal page no.3 of the order dated 23.12.2014 (which has been highlighted by me) to submit that Hon'ble Court has been pleased to observe that cross version of the incident has been registered as Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 436 and 392 I.P.C. P.S.-Kotwali, District Bareilly.

33. On the basis of aforesaid recital contained in order dated 23.12.2014, it is urged by Mr. Sikandar B. Kochar, learned counsel for accused-applicant that this Court, vide order dated 23.12.2014 had already opined that the two cases between the parties are cross cases. As such order dated 15.12.2016, whereby this Court held that the two cases are cross-cases on the basis of concession conceded by learned A.G.A. cannot be faulted with. Furthermore, in view of order dated 23.12.2014 referred to above, there is no room before this Court to sit in appeal over that order or direction or to proceed with the matter in compliance of earlier interim order dated 03.08.2018 passed in Criminal Misc. Application U/S 482 Cr.P.C. No.25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another). It may be mentioned here that aforesaid Criminal Misc. Application has subsequently been dismissed as not pressed vide order 02.08.2019 passed by this Court.

34. Then reliance was placed upon order dated 16.7.2013 passed by Additional Sessions Judge, Court No. 1, Bareilly, in S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others)

under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, whereby objection raised by one of the parties that Case Crime No. 2658 of 2012 and Case Crime No. 2657 of 2012 arise out of same incident and therefore the record of cross-case i.e Case Crime No. 2657 of 2012 may be summoned and further P.W. 4, Prashant Kumar, Sub Inspector, who had investigated both the cases may be cross-examined to ascertain the aforesaid issue. The Additional Sessions Judge, Court No. 1, Bareilly, vide order dated 16.07.2013 directed that the record of Case Crime No. 2675 of 2012 may be summoned. This order dated 16.7.2013 was challenged by Mr. Nitin Jaiswal by means of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and others). Aforesaid Criminal Misc. Application ultimately came to be dismissed at that stage of proceedings, vide order dated 16.10.2014. For ready reference order dated 16.10.2014 is reproduced herein-below:

" Heard learned counsel for the applicant and learned A. G. A. for the State as well as Sri Sikandar B. Kochar, learned counsel for the opposite party No. 2.

The applicant by means of this application under Section 482 Cr. P. C. has invoked the inherent jurisdiction of this Court with the prayer to quash the order dated 16.7.2013 passed by the Additional Sessions Judge, Court No. 1, Bareilly in Sessions Trial No. 123 of 2013 by which he has allowed the application 68-Kha moved on behalf of the accused before him with a prayer for summoning the Case Diary of cross case No. 2675 of 2012, P. S.-Kotwali, district-Bareilly and the photostat copies of the other related documents from the Court of C. J. M., Bareilly and S. I. S., Bareilly as witness, has been allowed.

After having heard the submissions made by learned counsel for the parties and perused the impugned order as well as the other materials brought on record, I do not find any reason to interfere with the impugned order at this stage.

Accordingly, this application is dismissed at this stage."

35. On the aforesaid factual premise, submission urged by learned counsel for original applicant is that recall application filed by opposite party No. 2 is thus barred by section 362 Cr. P. C., as in the garb of recall this Court cannot review order dated 12.12.2016.

36. Mr. Sikandar B. Kochar learned counsel for the applicant has relied upon the following judgements to extend legal support to his submissions:

A. Smt. Suraj Devi Vs. Pyare Lal, 1981 SCC (Cri) 188.

B. Mohd. Zakir Vs. Sabana and others 2018 (15) SCC 316

C. Atul Shukla Vs. The State of Madhya Pradesh and another 2019 (6) SCJ 246.

D. Shivpoojan Upadhyay and another Vs. State of U.P. and another 2019 (3) ALJ 407

37. On the basis of submissions urged by counsel for parties, following questions arise for determination in this recall application:

I. Whether Complaint Case No.1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S.

Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are cross-cases.

II. Whether the ex-parte order dated 15.12.2016 passed by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. has caused serious prejudice to opposite party no.2, Nitin Jaiswal and can be recalled at the behest of opposite party no.2, who admittedly was not heard at the time of passing of order dated 15.12.2016.

III. Whether the bar of Section 362 Cr.P.C. will come into play regarding recall of ex-parte order dated 15.12.2016.

IV. Whether in view of the orders dated 29.08.2017, 31.01.2018 and 15.12.2016 passed by Apex Court, this Court has jurisdiction to entertain the recall application filed by opposite party no.2, Nitin Jaiswal.

38. Mr. Anoop Trivedi, learned Senior Counsel appearing on behalf of opposite party no.2 has tried to persuade the Court that Complaint Case No.1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are not cross-cases. He further submits that in case a parallel is drawn between the two F.I.Rs. or the Two Case Crime numbers, following distinctions are clearly evident. The F.I.R. dated 25.11.2012 registered as Case Crime No. 2675 of 2012 under sections 307, 452, 427, 504, 506, 380, 426, 392 IPC, lodged by Nirmal Singh Garewal is in respect of an incident, which took place on 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126A, Civil Lines, situate in Southern direction and at a distance of 3 Kms. from Police Station Kotwali Sadar, District Bareilly. However, F.I.R. dated 21.10.2012 registered as Case Crime No. 2568 of 2012 under sections 452, 307 IPC contains a recital that the incident took place on 21.10. 2012 at 6 a.m. at 126 Civil Lines, situate at a distance of 2 km. and in the Southern direction from Police Station Kotwali Sadar, District Bareilly.

39. Mr. Sikandar B. Kochar, learned counsel for applicant on the other hand submits that this question as to whether complaint case and Sessions Trial are cross-cases or not is no more open to consideration and the same stands concluded by the observations made by Investigating Officer as well as the observations made by courts below and also by this Court. Detailing his argument, he submits that the Investigating Officer while submitting the final report dated 19.12.2012 in Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly, has opined that Case Crime No. 2675 of 2012 and Case

Crime No. 2568 of 2012 appear to be in the same sequence of events.

40. Then attention of the Court was invited to order dated 13.07.2017 passed by Sessions Judge, Bareilly, allowing the transfer application filed by Nirmal Singh Garewal and directing the Additional Chief Judicial Magistrate, Court no.2, Bareilly to transfer Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., PS-Kotwali Bareilly, District-Bareilly to the Court of Additional Sessions Judge, Bareilly on the ground that Complaint Case No. 1716 of 2016 is cross-version of S.T. No. 123 of 2013.

41. Reference was also made to order dated 17.04.2017 passed by His Lordship Hon'ble Mr. Justice B. K. Narayana in Criminal Misc. Recall Application No. 172452 of 2014 in Criminal Misc. Application U/S 482 Cr.P.C. No. 11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) wherein the following recital is contained:

"After having considered the submissions made by learned counsel for the parties and perused the material on record, I find that there is no dispute about the fact that a cross version of the incident which has been registered as Case Crime No. 2675 of 2012, under Sections-307, 452, 427, 504, 506, 380, 436 and 392 IPC, P. S.-Kotwali, sub-district-Sadar, district-Bareilly in which final report has been submitted and against which protest petition has been filed by the applicant is pending. There is no quarrel about the settled legal position that where there are cross cases, the same should be decided together. It is equally true that prior to moving this application, the applicant had approached this Court twice for being enlarged on bail by means of Criminal Misc. Bail Application Nos. 364 of 2013 and 17956 of 2013. He had further invoked the inherent jurisdiction of this Court by means of filing Criminal Misc. Application (Under Section 482 Cr. P. C.) Nos. 16535 of 2013, 3811 and 6775 of 2014. The aforesaid cases were disposed of by this Court with directions"

42. On the strength of the aforesaid recita,l it is contended by Mr. Sikandar B. Kochar learned counsel for applicant that this Court, vide order dated 23.12.2014 has already opined that the two cases between parties are cross-cases and therefore, there is no room before this Court to sit in appeal over order dated 23.12.2014.

43. Attention of the Court was further invited to order dated 16.07.2013 passed by Additional Sessions Judge, Court No.1, Bareilly, in S.T. 123 of 2013, whereby objection raised by one of the parties that Case Crime No. 2568 of 2012 and Case Crime No. 2657 of 2012, arise out of the same incident and therefore, record of cross-case i.e. Case Crime No. 2657 of 2012 may be summoned and further P.W.-4 Prashant Kumar, Sub-Inspector who had investigated both the cases may be cross-examined to ascertain the aforesaid issue was allowed. This order dated 16.07.2013 was challenged by Nitin Jaiswal by means of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and others), which came to be dismissed, vide order

dated 16.10.2016. Therefore, it is now not open to judge whether the two cases are cross-cases or not.

44. Contradicting the submissions urged by Mr. Sikandar B. Kochar, learned counsel for applicant, Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party no.2 has submitted that when the two FIRs. giving rise to Case Crime No. 2657 of 2012 and 2658 of 2012 are examined together, it is explicit that they relate to different incidents which have taken place at different points of time and at different places. Case Crime No. 2657 of 2012 has come into existence pursuant to the F.I.R. dated 25.11.2012, wherein the date and time of occurrence has been mentioned as 21.10.2012 at 3 a.m. and the place of occurrence has been shown as 126A, Civil Lines, situate in Southern direction and at a distance of 3 Kms. from Police Station Kotwali Sadar, District Bareilly. Similarly Case Crime No. 2568 of 2012 has come into existence pursuant to the F.I.R. dated 21.10.2012 wherein the date and time of occurrence has been mentioned as 21.10. 2012 at 6 a.m. and the place of occurrence has been shown to be as 126 Civil Lines, situate at a distance of 2 Kms. and in the Southern direction from Police Station Kotwali Sadar, District Bareilly. He thus contends that in view of the aforesaid facts explicit on the record, the opinion of Investigating Officer, who had investigated Case Crime Nos. 2657 of 2012 and 2568 of 2012 are cross-cases as they arise out of same sequence of events, cannot be relied upon to conclude that the two cases are cross-cases

45. In continuation of his submissions, learned Senior Counsel further submits that reliance placed upon by counsel for applicant on the order dated 13.07.2017 passed by Sessions Judge, Bareilly allowing Criminal Misc. Case/Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others), is wholly misconceived. The order dated 13.07.2017 was passed by the Sessions Judge as the order dated 15.12.2016 passed by this Court against which the present recall application has been filed was still in operation. Secondly, vide order dated 15.12.2016, the Additional Sessions Judge, Bareilly, was directed to re-examine the matter in the light of observations made in the order dated 15.12.2016 itself. Furthermore, as the concerned Magistrate failed to commit Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) to the Court of Sessions by exercising powers under Section 323 Cr.P.C., then Sessions Judge by exercising powers under Sections 408(1) Cr.P.C. transferred the complaint case to the Court of Sessions. However, he further points out that Sessions Judge, Bareilly, vide order dated 13.07.2017 only transferred Complaint Case No.1716 of 2013 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareily, District-Bareilly and did not connect the same with S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly being cross-cases. On the aforesaid premise, it is thus urged that order dated 13.07.2017 passed by Sessions Judge, Bareilly, does not decide the issue whether Case Crime No. 2675 of 2012 and Case Crime No. 2568 of 2012 are cross-cases or not. As the order dated

15.12.2016 passed by this Court observing therein that the Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436,392,380,504,506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly are cross-cases, the transfer application was allowed by the Sessions Judge, Bareilly. The submission urged is that Sessions Judge, Bareilly, while passing the order dated 13.07.2017 has not adjudicated upon the issue as to whether the two cases referred to above are cross-cases or not, but has followed the order dated 15.12.2016 passed by this Court and allowed the transfer application.

46. It is then contended that observations made by His Lordship Hon'ble Mr. Justice B. K. Narayana in order dated 17.04.2014 are of no relevance as the same were made at the time of deciding Criminal Misc. Recall Application filed by applicant no.2 herein Nitin Jaiswal, seeking recall of interim order dated 17.04.2014. Criminal Misc. Application No. 11932 of 2014, wherein recall application No. 172452 of 2014 was filed for recall of interim order dated 17.04.2014 has itself been dismissed as not pressed, vide order dated 02.08.2019. On the aforesaid facts, learned Senior Counsel submits that it is well settled that any observation made at the time of deciding interlocutory application will merge with the final order and secondly, if the petition is ultimately dismissed, the same shall amount that no interim order was passed. As such, no benefit can be derived from the observations contained in order dated 02.08.2019.

47. In addition to the aforesaid submissions, learned Senior Counsel appearing for opposite party no.2 further submits that vide order dated 16.07.2013 passed by Additional Sessions Judge, Court No.1, Bareilly, in S.T. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, summoned record of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and also the Investigating Officer, namely P.W.-4, Prashant Kumar Sub-Inspector, who had investigated both the Case Crime Nos. to ascertain whether Case Crime No. 2568 of 2012 and 2657 of 2012 are cross-cases or not. The order dated 16.07.2017 does not decide the issue as to whether the aforesaid two cases are cross-cases or not but only a step was taken by Court below to adjudicate this controversy. Therefore, the dismissal of Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and another) which was filed challenging the order dated 16.07.2013 will not amount to res-judicata. Secondly, the order dated 16.10.2016 was passed at that stage of proceedings. Learned Senior Counsel further submits that up to this stage, no order has been passed by any of the

Courts below adjudicating that the two cases are cross-cases. Consequently, it is urged that Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 436, 392, 380, 504, 506 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly and S.T. 123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under Sections 452 and 307 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, are not cross-cases, but relate to different incidents which occurred at different places and at different points of time. Consequently, the concession granted by the learned A.G.A. on 15.12.2016 before His Lordship Hon'ble Mr. Justice R.D. Khare is contrary to the record.

48. I have considered the rival submissions raised by counsel for the parties. From what has been noted herein-above, it is established that up till date, no adjudication has been made by any of the Courts below that Case Crime No. 2675 of 2012 and Case Crime No. 2658 of 2012 are cross cases. Whatever orders have been passed by Courts below are either in furtherance of exercise to adjudicate the said issue or it has been passed in compliance of order dated 15.12.2016, passed by this Court, whereby on the basis of concession given by learned A.G.A. , it has been held that the two cases are cross-cases. The High Court has independently not examined the issue in any proceeding. The observation contained in the order dated 23.12.2014 passed by Hon'ble Mr. Justice B. K. Narayana in Criminal Misc. Recall Application No. 172452 of 2014 in Criminal Misc. Application U/S 482 Cr.P.C. No. 11932 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and another) that the two cases are cross-cases cannot be taken as a concluded fact. It is well established that any observation made during the pendency of the proceedings will ultimately merge with the final order. It is also equally true that when a petition is dismissed it means as if no interim order was passed. However, irrespective of the aforesaid Criminal Misc. Application No. 11932 of 2014 has itself been dismissed as not pressed. Consequently, the effect of the same is that no final adjudication was made by His Lordship, Hon'ble Mr. Justice B. K. Narayana. As such, question No.1 is answered in negative that two case crime numbers, as stated above, are not cross cases, but as submitted by learned Senior Counsel appearing for opposite party No. 2 that they relate to different incidents which occurred at different places and at different points of time.

49. Question nos. 2 and 3 are inter-related and inter linked, therefore, decided together.

50. Mr. Anoop Trivedi, learned Senior Counsel appearing for opposite party No.2 has strenuously urged that Criminal Misc. Application No. 25681 of 2018 was filed on 13.12.2016 and was disposed of finally on 15.12.2016. Admittedly, the complainant Nitin Jaiswal was impleaded as opposite party No.2 in the aforesaid criminal misc. application, but no notice was issued to him. Furthermore, without affording any opportunity of hearing to the opposite party No.2, order dated 15.12.2016 was

passed. As a corollary to the aforesaid, it is also urged by learned Senior Counsel that order dated 15.12.2016 passed by this Court has caused serious prejudice to the opposite party No. 2 as in spite of fact that two cases i.e. Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly and Sessions Trial No.123 of 2013 (State Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly are not cross cases, they have been directed to be decided together. S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and Others) is at an advanced stage inasmuch as evidence has been recorded and trial is at the stage of defence evidence as provided under Section 313 Cr.P.C.

51. It is also urged that the accused somehow or the other want to throttle the proceedings of Sessions Trial. Detailing his arguments, learned Senior Counsel submits that in furtherance of aforesaid objective, the accused had raised an objection by filing application (Paper No. 68 Ka) before the Court below that Case Crime No. 2658 of 2012 and Case Crime No. 2657 of 2012 arise out of same incident and therefore the record of cross-case i.e. Case Crime No. 2657 of 2012 may be summoned and further P.W.-4, Prashant Kumar, Sub-Inspector, who had investigated both the cases may be cross-examined to ascertain the aforesaid issue. The said objection was allowed, vide order dated 16.07.2013. Order dated 16.07.2013 came to be challenged by Nitin Jaiswal, the opposite party no.2 herein by filing Criminal Misc. Application No. 23954 of 2013 (Nitin Jaiswal Vs. State of U.P. and another) ultimately came to be dismissed, vide order dated 16.10.2014. As the accused could not derive any benefit from order dated 16.07.2013, they thereafter filed an application in terms of Section 309 Cr.P.C. (Paper No. 309 Kha) which was rejected by Court below vide order dated 02.12.2016.

52. Mr. Sikandar B. Kochar learned counsel for applicant vehemently contends that in view of the bar contained in Section 362 Cr.P.C. order dated 15.12.2016 passed by this Court cannot be recalled.

53. Mr. Anoop Trivedi, learned Senior Counsel has tried to impress upon the Court that irrespective of the bar contained in Section 362 Cr.P.C. this Court has power to recall an order passed ex-parte at the behest of a person who is a party to the proceedings, but was not heard at the time of passing of the order sought to be recalled.

54. Reliance is placed upon the judgement of the Apex Court in the case of **Vishnu Agarwal Vs. State of U.P.** and another reported in **2011 (14) SCC 813** to contend that an ex-parte order can be recalled and in such a situation, bar of Section 362 Cr.P.C. does not come into play. Reference was made to paragraphs 2, 3, 4, 5, 6 and 7, which are reproduced herein-below:

"2.It appears that the aforesaid Criminal Revision was listed in the High

Court on 2.9.2003. No one appeared on behalf of the Revisionist, though the Counsels for respondents appeared. In these circumstances, the judgment was passed. Subsequently, an application was moved for recall of the Order dated 2.9.2003 alleging that the case was shown in the computer list and not in the main list of the High Court, and hence, the learned Counsel for the Revisionist had not noted the case and hence he did not appear.

3. It often happens that sometimes a case is not noted by the Counsel or his clerk in the cause list, and hence, the Counsel does not appear. This is a human mistake and can happen to anyone. Hence, the High Court recalled the order dated 2.9.2003 and directed the case to be listed for fresh hearing. The aforesaid order recalling the order dated 2.9.2003 has been challenged before us in this appeal.

5.Learned Counsel for the appellant Mr. Manoj Swarup submitted that in view of the aforesaid decision, the High Court erred in law in recalling the Order dated 2.9.2003. We regret we cannot agree.

6. In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed :

"Kevalam Shastram Ashritya Na Kartavyo Vinirnayah Yuktiheeney Vichare tu Dharmahaani Prajayate"

which means:

"The Court should not give its decision based only on the letter of the law. For if the decision is wholly unreasonable, injustice will follow."

7. Apart from the above, we are of the opinion that the application filed by the respondent was an application for recall of the Order dated 2.9.2003 and not for review. In Asit Kumar Vs. State of West Bengal and Ors. 2009(1) SCR 469, this Court made a distinction between recall and review which is as under:-

"There is a distinction between ..... a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association Vs. Raghabendra Singth & Ors. [2007(11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."

55. On the strength of the aforesaid observations made by Apex Court as noted above it is urged that the application filed by opposite party no.2 which is registered as Criminal Misc. Recall Application No. 4345 of 2017 is not a review application but an application for recall of order dated 15.12.2016 passed by this Court ex-parte against opposite party no.2, which has caused serious prejudice to opposite party no.2. As such the order dated 15.12.2016 is liable to be recalled.

56. Reference was then made to a single judge judgement of this Court in Jawahar Lal @ Jawahar Lal Jalaj Vs. State of U.P. reported in 2015 (91) ACC 128, wherein a learned Single Judge has considered the question regarding recall of a final order and the bar of Section 362 Cr.P.C. Reference was made to paragraphs 6, 10, 13, 14, 15, 16, 17, 27,

28, 30, 31, 32, 33, 34, which are reproduced herein-under

6. The main question for consideration is that whether a petition under section 482 Cr.P.C., which has been dismissed for want of prosecution can be restored to its original number or not and whether the prohibition as provided by Section 362 Cr.P.C. will apply or not?

10. Learned counsel for the petitioner has emphasized the word "secure the ends of justice".

13. In Asit Kumar Kar vs. State of West Bengal and others; (2009) 1 SCC (Cri) 851, Hon'ble the Supreme Court has held as under :

"There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh & Ors. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.

14. In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions."

In Ram Naresh Yadav and others vs. State of Bihar; 1987 CRI.L.J. 1856 & AIR 1987 SCC 1500, Hon'ble the Apex Court has held as under :

"It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants. Since the order of conviction and sentence in the present matter has been confirmed without hearing either the appellants or counsel for the appellants, the order must be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf. As the matter is being remanded to the High Court, no orders can be passed on the bail application. The appellants, if so advised, may approach the High Court for bail"

15. In Rafiq and another vs. Munshi Lal and another; AIR 1981 SC 1400, Hon'ble the Apex Court has held as under :

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

16. In Raghuvera and others vs. State of U.P.; 1990 CRI.L.J. 2735 (All.), this Hon'ble Court has held as under :

"It is no doubt true that Section 362 Cr. P.C. debars the court from altering or reviewing any final order or judgment given by a court except to correct the clerical or arithmetical error. But the question arises whether an order dismissing an application for revision for

default of the counsel as not pressed can be termed as a judgment or final order? The term "Judgment" has not been defined in the Criminal Procedure Code but a judgment means the expression of the opinion of the Court arrived at after due consideration of the entire material on record, including the arguments, if any, advanced at the Bar. A final order or judgment can only be passed in a criminal court when the court applies its mind to the merit of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or a judgment. Thus Section 362 Cr. P.C. is no bar to review ore alter the order dated 14th March 1990. The order in question was passed without going into the merit of the case and is without jurisdiction and as such it has to be set aside."

17. In K. G. Keralakumaran Nair vs. State of Kerala and other; 1995 CRI. L. J. 2319, the Kerala High Court has held as under:

"That leads us to the further question whether an appeal or other criminal proceeding dismissed by this Court can be restored to file. The contention is that this Court has no power by virtue of Section 362 of the Code which reads:

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

The Section relates only to judgment or final order disposing of a case. What is a judgment or a final order is not seen defined in the Code But the word 'judgment' is understood to mean an order in a trial terminating in either conviction or acquittal of the accused. It has also been held that judgment means the expression of opinion of the Court arrived at after due consideration of the evidence and all the arguments. Understood in this light, every order under the provisions of the Code cannot be considered to be a judgment within the meaning of Section 353 or coming under the scope of Section 362, of the Code. In short, there must be an investigation of the merits on evidence and after hearing arguments in order to constitute a judgment. In the case of an appeal, such judgment has to be one rendered on merits after hearing counsel for appellant or the appellant, as the case may be, and Public Prosecutor or counsel appearing for respondent.

15. Whether an order dismissing an appeal for default amounts to a judgment or a final order coming within the scope of Section 362 of the Code is the next aspect that requires consideration. The Calcutta High Court in the decision in Bibhuty Mohun Roy v. Dasimoni Dassi (1909) 10 Cri LJ 287, held that in India a Court cannot review or alter its own judgment in a criminal case, but it has jurisdiction to hear and determine a criminal case which has not been heard and determined on the merits. It was further held that where the Court discharged a rule because no one appeared, it has power to re-open it.

16. In Sahadeo v. Jagannath, AIR 1950 Nagpur 77: (1950 (51) Cri LJ 662), the appeal was dismissed for non-filing of a copy of the judgment. It was held that the order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of Section 369 of the Code of 1898 and there was no bar to the consideration of the appeal on its merits.

17. The question whether a criminal Court has inherent power to revive a

complaint in a warrant case which was dismissed under Section 259 of the Code of 1898 for the absence of the complainant on the date of commencement of the preliminary enquiry came up for consideration in W.T. Singh v. C.A. Singh, AIR 1961 Manipur 34 : (1961 (2) Cri LJ 352). While holding that such dismissal of the complaint or discharge of the accused will not amount to an acquittal within the meaning of Section 403, of the Code, it was observed that such an order of dismissal, is not a judgment within Section 366, and therefore Section 369, would not apply. It is also observed that the absence of any provision on a particular matter in the Code does not mean that the Court has no such power and the Court may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law.

18. The Andhra Pradesh High Court has gone to , the extent of holding that there should be no objection to the maintainability of a second petition for revision when the first one had failed not on the merits but by default. In Satyanarayana v. Narayanaswami AIR 1961 Andh. Pra. 18 (1961) (2) Cri LJ 37), it was held that there is no question of the High Court becoming functus officio by reason of an order of dismissal for default passed by it on a petition by a private party, who has really no right but a mere concession in the matter of moving the High Court in revision.

19. The Mysore High Court had occasion to consider whether a revision application dismissed for default can be restored in the decision in Madiah v. State of Mysore, AIR 1963 Mysore 191 : (1963(2) Cri LJ 23). That was a case of a dismissal of a revision by the High Court. It was held that subject , to the provisions contained in the Code, a judgment , delivered or an order passed on merits is final after it is duly signed by Court. The inherent power of a High Court cannot be exercised in matters specifically covered by the provisions of the Code. Where the Code is silent about the power of the High Court in respect of any, matter arising before it, it can pass suitable orders in exercise of its inherent powers to give effect to any order passed under the Code or to prevent the abuse of the process of any Court or to secure the ends of justice. It was held that this power can also be exercised to reconsider orders of dismissal of an appeal or application passed without jurisdiction or in default of appearance, where reconsideration is necessary to secure the ends of justice.

20. The Bombay High Court in the decision in Deepak v. State of Maharashtra 1985 Cri LJ 23, observed that the High Court in exercise of its inherent powers can review or revise its judgment if such judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault, the reason being that a party cannot suffer for the mistake of the Court. In that case, the hearing was adjourned to 13th February but the adjourned date was inadvertently marked as 8th February on which date the petitioner and his counsel were absent. The High Court on going through the record passed the order dismissing the petition. It was held that since the petitioner was entitled to a hearing, it could be said that the Court acted without jurisdiction and in violation of the principles of natural justice and in the circumstances the review petition must he allowed.

21. A Division Bench of this Court in Padmachandran v. Radhakrishnan (1984

Ker LT 416), was considering the question whether the inherent powers of this Court under Section 482, can be exercised to restore a revision dismissed for default. In that case, the revision was decided in the absence of the counsel. Request was made for re-hearing the revision. The Division Bench held that the earlier order dismissing the revision was really a disposal for default, counsel for petitioner being absent. For the purpose of securing the ends of justice it was found necessary that the Criminal Revision should be heard afresh,

22. The question whether dismissal of a Criminal Revision petition as not pressed amounts to a final order coming within the scope of Section 362, of the Code arose for consideration before the Allahabad High Court in Raghuvira v. State of U. P. (1990) 3 Crimes 225 : (1990 Cri LJ 2735). If was held that a final order or judgment can only be passed by a criminal Court when the Court applies its mind to the merits of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or judgment. It was held that Section 362, of the Code is no bar to review or alter the order of dismissal.

23. The same view was expressed by the Karnataka High Court in Ibrahimsab v. Faridabi (1986) 2 Kant LJ 65. It was held that the expression "final order disposing of the ease" means a considered order on merits and not an order of dismissal for default and the provision contained in Section 362, does not come in the way of the Court recalling such order and restoring the revision dismissed for default. \ The decision in Chandran's case ((1989) 2 Ker LJ 845) (supra) did not also consider the scope of the inherent power of this Court under Section 482, of the Code and power of this Court to dismiss an appeal or any other criminal proceeding in exercise of that power or the power of restoration. Having considered those matters in detail in the light of the pronouncements of the various High Courts. I am of the considered view that this Court has all the inherent powers to make any order to prevent the abuse of the process of Court or for the ends of justice or to enforce discipline by invoking the powers under Section 482, of the Code, Section 386 of the Code notwithstanding. The provision contained in Section 386 cannot therefore have any application to the exclusion of those inherent powers. Viewed from this angle and in the light of the principle laid down in Ram Naresh Yadav's case (1987 Cri LJ 1856) (SC). I hold that this Court has power to dismiss an appeal or any other criminal proceeding for default and this Court has also the power to restore such proceeding on sufficient grounds being shown for non-appearance. But the right of dismissal and the power of restoration can be exercised only by this Court, and that too in exercise of the powers under Section 482 of the Code, and not by any of the Courts subordinate to this Court since those courts have no inherent powers envisaged under Section 482 of the Code.

The point formulated is answered thus:-

i. A Criminal Appeal shall be disposed of only after perusing the record and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears.

ii. A criminal appeal can be decided on merits, only after hearing the appellant or his counsel.

iii. The High Court has powers under Section 482 of the Code of Criminal

Procedure to dismiss an appeal or revision or any other criminal proceeding for default or non-prosecution.

iv. The High Court has also inherent power to restore any matter dismissed for default or non-prosecution on sufficient reason being shown.

v. The power of dismissal for default and the power of restoration inhere only in the High Court and cannot be exercised by the Courts subordinate to the High Court since they do not possess the inherent powers under Section 482 of the Code.

27. In the present case, the petition has been dismissed for want of prosecution, although opportunity of hearing was given but that opportunity of hearing could not be availed due to sudden illness of the counsel. The inherent power under section 482 Cr.P.C. can be exercised to give effect to any order under Cr.P.C. or to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Certainly, if the application has been dismissed for default, that cannot be termed as 'judgement'.

28. Accordingly, the bar as provided by section 362 Cr. P.C. shall not be applicable. This court has power to dismiss in default any application or writ petition and at the same time has also power to restore such proceedings on sufficient grounds being shown for non-appearance provided it appears to the court that default was not wilful and it was accidental. There are instances, where either legal advise is given or due to shrewd character of the litigant malafide efforts are adopted with a view to delay the proceedings of the case, such tactics are also adopted to get the case dismissed in default and then to move application for restoration and thus, lingering on the proceedings. Certainly, such practice must be carved out and should not be permitted to continue.

30. Therefore, I am of the view that if any petition has been dismissed in default and the application for recall is made, then it will not come within the meaning of words 'alter' or 'review' as expressed in Section 362 of the Code. Accordingly, such orders may be recalled or set aside provided the intention of the parties is bonafide i.e. party who has moved the application for recall or restoration is not unnecessary lingering on the proceedings malafidely or that interim order or stay order, if any, is not being misused.

31. Accordingly, the application for restoration or recall of the order is maintainable and the prohibition of Section 362 Cr.P.C. do not apply in the petitions, which have been dismissed in default without discussing the merits of the case because it do not come within the prohibition of 'alter' or 'review' of judgment, which has entirely a different meaning.

32. In the present case, the petition was dismissed for want of prosecution because the counsel for the petitioner could not appear due to sudden illness for which the learned counsel for the CBI also has raised no objection.

33. Accordingly, the application for recall is allowed.

34. The order dated 29.04.2015 is recalled. The petition is restored to its original number and status."

57. On the strength of aforesaid observations, it is urged that recall application filed by opposite party no.2 seeking recall of ex-parte order dated 15.12.2016 is liable to be recalled.

58. Then attention of the Court was invited to the judgement of Apex Court in

State of Punjab Vs. Devendar Pal Singh Bhullar and others reported in **2011 (14) SCC 770.** Reliance was placed upon paragraphs 2, 44, 46 and 47 which are reproduced herein-below:

"2. The Appeals herein raise peculiar substantial questions of law as to whether the High Court can pass an order on an application entertained after final disposal of the criminal appeal or even suo motu particularly, in view of the provisions of Section 362 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) and as to whether in exercise of its inherent jurisdiction under Section 482 Cr.P.C. the High Court can ask a particular investigating agency to investigate a case following a particular procedure through an exceptionally unusual method which is not in consonance with the statutory provisions of Cr.P.C.

44. There is no power of review with the Criminal Court after judgment has been rendered. The High Court can alter or review its judgment before it is signed. When an order is passed, it cannot be reviewed. Section 362 Cr.P.C. is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and is disentitled to entertain a fresh prayer for any relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the order for disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. There is also no provision for modification of the judgment. (See: Hari Singh Mann v. Harbhajan Singh Bajwa & Ors., AIR 2001 SC 43; and Chhanni v. State of U.P., AIR 2006 SC 3051).

46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault. (Vide: Chitawan & Ors. v. Mahboob Ilahi, 1970 Crl.L.J. 378; Deepak Thanwardas Balwani v. State of Maharashtra & Anr., 1985 Crl.L.J. 23; Habu v. State of Rajasthan, AIR 1987 Raj. 83 (F.B.); Swarth Mahto & Anr. v. Dharmdeo Narain Singh, AIR 1972 SC 1300; Makkapati Nagaswara Sastri v. S.S. Satyanarayan, AIR 1981 SC 1156; Asit Kumar Kar v. State of West Bengal & Ors., (2009) 2 SCC 703; and Vishnu Agarwal v. State of U.P. & Anr., AIR 2011 SC 1232).

47. This Court by virtue of Article 137 of the Constitution has been invested with an express power to review any judgment in Criminal Law and while no such power has been conferred on the High Court, inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code itself. (Vide: State Represented by D.S.P.,

S.B.C.I.D., Chennai v. K.V. Rajendran & Ors., AIR 2009 SC 46."

59. Then reliance was placed upon judgement in **Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan** reported in **1981 (1) SCC 62**, wherein revision was decided by High Court without hearing counsel for respondent. The judgement is a short one and accordingly the whole of it is reproduced herein under:

"This appeal is directed against an order dated March 20, 1973 of the High Court of Andhra Pradesh whereby it accepted a reference made by the Additional Sessions Judge, West Godavari at Elura under Section 435 read with Section 438 of the Code of Criminal Procedure with the recommendation that the order of Additional First Class Magistrate, Elura in Crl MP No. 163 of 1971 refusing to give direction to the respondent to hand over all the records, accounts, properties, cash etc. of Sahakara Parapathi Sangham, Pragadavaram, to the petitioner, be set aside and revised. It appears from the impugned order that no notice of the date of hearing was issued to the respondent or his counsel. A note appears to have been added to the impugned order later which reads as follows:

"It is true that the case has been disposed of without hearing the counsel for the respondent as he could not appear at the time of the hearing because his name was not printed in the cause list. But this is a revision case where the respondent is not entitled to be heard as of right. Having regard to the facts of the case, I do not think any review of the order already passed is necessary."

2.This view taken by the High Court is manifestly contrary to theaudi alteram partemrule of natural justice which was applicable to the proceedings before the High Court. On this short ground we think that the order of the High Court does not deserve to be maintained. Accordingly, we set aside that order and send the case back to the High Court with the direction that it should dispose of Crl R. No. 411 of 1972 within two months from the receipt of a copy of this order, after hearing both the parties.

3.The appeal is disposed of in terms of the above order."

60. Mr. Anoop Trivedi, learned Senior Counsel, submits that in the present case also, the application under section 482 Cr.P.C. filed by accused-applicant, Jaspreet Singh Garewal has been allowed ex-parte without giving any notice or opportunity of hearing to opposite party No.2. Consequently, recall application filed by opposite party No.2 is liable to be allowed so that the matter is heard and decided after affording opportunity of hearing to opposite party No.2, which shall be in compliance of principles of natural justice. Consequently ex-parte order dated 15.12.2016 passed by this Court is liable to be recalled.

61. Attention of the Court was then invited to the Full Bench decision of Rajsthan High Court in **Habu Vs. State of Rajsthan** reported in **AIR 1987 RAJ 83**. Referring to paragraphs 1, 38, 39 and 45, it is urged that the power of recall is different from power of altering or reviewing the judgement. In the present case, the opposite party no.2 has filed a recall application seeking recall of order dated 15.12.2016 on the ground that the said order has been passed without affording any notice or opportunity of hearing to opposite party No.2, and order

dated 15.12.2016 has caused serious prejudice to opposite party No.2. For ready reference, paragraphs 1, 38, 39 and 45 of full Bench decision are reproduced herein below:-

"1. This larger Bench has been constituted by the orders of the Chief Justice, dt. July 3, 1986, to answer a question referred to larger Bench by our brother Hon'ble G. K. Sharma, J. vide his order of reference, dated May 28, 1986 wherein he has framed the following question :

"Whether the judgment given in absence of the appellant or his counsel but the case decided on merits, can be re-called by the Court in its inherent powers under Section 482, Cr.P.C."

38. There are two views available on the point. According to one view Section 362 Cr. P.C. has been held to be mandatory and puts complete bar and it has been therefore, held that Section 482 Cr. P.C. can also not be invoked for the purposes of reviewing or altering the judgment. The other view is that re-calling is different than reviewing and altering and if the Court is of the opinion that gross injustice has been done, then Section 482 Cr. P.C. should be invoked to re-call the judgment and re-hear the case. !n fact the earlier view has impliedly been done away with by their Lordships of the Supreme Court in Sankatha Singh's case (AIR 1962 SC 1208) (supra). Their Lordships have held that the appellate Court had no power to review or restore an appeal which has been disposed of under Sections 424 and 369 Cr. P.C. (old). Similar was the view taken in State of Orissa v. Ram Chandra, (AIR 1979 SC 87) (supra). Sankatha Singh's case has been referred to in Sooraj Devi's case (AIR 1981 SC 736) (supra) wherein also their Lordships have held that inherent powers cannot be invoked when there is a complete bar. Scope of Section 482 Cr. P.C. was then considered by their Lordships in Manohar Nathu Sao Samarth v. Marot Rao, (AIR 1979 SC 1084) (supra). Thus on one side as mentioned above the principles which have been laid down by their Lordships of the Supreme Court can be summarized as under :--

1. That the powers to deal with the case must flow from the statute,

2. That the powers given under Section 362 Cr. P.C. (S. 369 Cr. P.C. old) given to the Court for reviewing or altering is limited only for correcting an arithmetical or clerical error and specifically prohibits Courts from touching the judgment by taking away the powers altering or reviewing the judgment or the final order and as such principle of functus officio has been accepted.

3. That the prohibition contained in Section 362 Cr. P.C. (Section 369 Cr. P.C. Old) is not only restricted to the trial Court but also extends to appellate Court or the revisional Court.

4. That the inherent powers of the Court cannot be invoked where there is an express prohibition and in other words Section 482 Cr. P.C. cannot be invoked.

39. As against this the analogical deduction which comes out from another set of cases is--

(i) Right of the accused to be heard is his valuable right which cannot be taken away by any provision of law,

(ii) If the accused has not been given an opportunity of being heard or is not provided with the counsel when not duly represented it will be violative of principles of natural justice as well as Article 21 of the Constitution,

(iii) That to provide defence counsel in case the accused is not in a position to engage is fundamental duty of the State

and has throughout been recognized and now incorporated in Section 304 Cr. P.C. and in Article 39 A of the Constitution,

(iv) That bar of review or alter is different than the power of re-call,

(v) That inherent powers given under Section 482 Cr. P.C. (Section 561-A Cr. P.C. Old) are wide enough to cover any type of cases if three conditions mentioned therein so warrant, namely--

(a) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;

(b) for the purposes of preventing the abuse of the process of any Court; and

(c) for securing the ends of justice.

(vi) The principle of audi alteram partem shall be violated if right of hearing is taken away,

(vii) That when the judgment is re-called it is a complete obliteration/abrogation of the earlier judgment and the Appeal or the ' Revision, as the case may be, has to be heard and decided afresh,

(viii) That a Court subordinate to High Court cannot exercise the inherent powers and the Code restricts it to the High Court alone.

(ix) That no fixed parameters can be fixed and hard and fast rule also cannot be laid down and Court in appropriate cases where it is specified that one of the three conditions of Section 482 Cr. P.C. are attracted should interfere.

45. Their Lordships of the Supreme Court in a case of Bhagwant Singh v. Commr. of Police, AIR 1985 SC 1285 even while giving interpretation to Section 173(2)(ii) Cr. P.C. have laid great emphasis on the right of hearing and held as under :

"in a case where the Magistrate to whom a report is forwarded under Sub-section (2) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."

What we intend to emphasize is that right of hearing is very important right of which no litigant should be deprived. Thus on the consideration of all the cases cited and on the two cases quoted by learned single Judge, we answer the reference as under :

(i) That the power of re-call is different than the power of altering or reviewing the judgment.

(ii) That powers under Section 482 Cr. P.C. can be and should be exercised by this Court for re-calling the judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down under Section 482 Cr. P.C."

62. Then reference was made to the Full Bench decision of this Court in the case of **Rajnarayan and others Vs. The State of U.P**. reported in **A.I.R. 1959 ALL 315**, in support of proposition that High Court in exercise of its powers under section 482 Cr.P.C. can revoke, review, recall or alter its own decision and rehear the same. The Full Bench is in reference to the provisions of old Cr.P.C. and therefore, the same is not of much help to the counsel for opposite party No.2.

63. On the other hand Mr. Sikandar B. Kochar, learned counsel appearing for applicants has relied upon the judgement of Apex Court in Smt. Suraj Devi Vs.

Pyare Lal, 1981 SCC (Cri) 188, wherein Apex Court has held that High Court cannot review an order passed by it on the criminal side by exercising its inherent powers under section 482 Cr.P.C. because of the bar contained under section 362 Cr.P.C. Following has been observed in paragraphs 4, 5 and 6, which are reproduced herein under:

"4. The sole question before us is whether the High Court was right in refusing to entertain Criminal Miscellaneous Application No. 5127 of 1978 on the ground that it had no power to review its order dated September 1, 1970. Section 362 of the Code of Criminal Procedure declares: "Save as otherwise provided by this Code or by any other law for the time being in force, no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error" It is apparent that what the appellant seeks by the application is not the correction of a clerical or arithmetical error. What she desires is a declaration that the High Court order dated September 1, 1970 does not affect her rights in the house property and that the direction to restore possession to Pyare Lal is confined to that portion only of the house property respecting which the offence of trespass was committed so that she is not evicted from the portion in her possession. The appellant, in fact, asks for an adjudication that the right to possession alleged by her remains unaffected by the order dated September 1, 1970. Pyare Lal disputes that the order is not binding on her and that she is entitled to the right in the property claimed by her. Having considered the matter, we are not satisfied that the controversy can be brought within the description "clerical or arithmetical error". A clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in writing or typing. Master Construction Co. (P) Ltd. v. State of Orissa [AIR 1966 SC 1047 : (1966) 3 SCR 99 : (1966) 17 STC 360] .

5. The appellant points out that he invoked the inherent power of the High Court saved by Section 482 of the Code and that notwithstanding the prohibition imposed by Section 362 the High Court had power to grant relief. Now it is well settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code (Sankatha Singhv.State of U.P.[AIR 1962 SC 1208 : 1962 Supp 2 SCR 817 : (1962) 2 Cri LJ 288]). It is true that the prohibition in Section 362 against the court altering or reviewing its judgment is subject to what is "otherwise provided by this Court or by any other law for the time being in force". Those words, however, refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in Section 362 and, therefore, the attempt to invoke that power can be of no avail.

6. The High Court, in our opinion, is right in declining to entertain the application. The appeal must be dismissed. But we may observe that anything said by the High Court in the criminal proceeding against Kailash

Chandra Jain should not be allowed to influence the judgment of the court in the civil suits mentioned above or in any proceeding arising therefrom."

64. Reference was then made to judgement of Apex Court in **Mohd. Zakir Vs. Sabana and others 2018 (15) SCC 316**, for proposition that High Court cannot correct an order on merits by virtue of bar contained in section 362 Cr.P.C. Reference is made to paragraph 3 of the judgement, which is as under:

"3. The High Court should not have exercised the power under Section 362 CrPC for a correction on merits. However patently erroneous the earlier order be, it can only be corrected in the process known to law and not under Section 362 CrPC. The whole purpose of Section 362 CrPC is only to correct a clerical or arithmetical error. What the High Court sought to do in the impugned order is not to correct a clerical or arithmetical error; it sought to rehear the matter on merits, since, according to the learned Judge, the earlier order was patently erroneous. That is impermissible under law. Accordingly, we set aside the impugned order dated 28-4-2017."

65. Then reliance was placed upon judgement of Apex Court in **Atul Shukla Vs. The State of Madhya Pradesh and another 2019 (6) SCJ 246**, wherein correctness of order passed by High Court reviewing its earlier order dated 20.7.2018, was examined. The Apex Court dealt with said issue in following terms:

" .....A petition under Section 482 of the Code of Criminal Procedure 1973 was filed by the second respondent for quashing of the FIR. In the meantime, charges are framed on 24 April 2017. On 20 July 2018, the High Court dismissed the petition under Section 482 in the following terms:-

"Considering the circumstances, this petition under Section 482 of Cr.P.C. has no merit. The petitioner may challenge the framing of charge under appropriate provisions.

With the above observation, this petition is dismissed."

After the above order, the second respondent filed another petition under Section 482 in which the following relief was sought:

It is therefore, prayed that this Hon'ble Court may kindly review, recall and modify the order dated 20.07.2018 in the interest of justice."

It is on the second petition that the High Court passed its impugned order dated 20 August 2018 allowing the petition and recalling its earlier order dated 20 July 2018.

The submission which has been urged on behalf of the appellant is that the High Court could not have entertained the subsequent petition under Section 482 for review or, as the case may be, for modification of its earlier order having regard to the specific bar contained in Section 362 of the Cr.P.C. Section 362 provides as follows:

"Section 362: Court not to alter judgement. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgement or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error....."

66. Lastly reliance was placed upon a judgement delivered by a single Judge

of this Court in **Shiv Poojan Upadhyay and another Vs. State of U.P. and another 2019 (3) ALJ 407**. In the above case, a recall application was filed by applicant for recall of order dated 4.8.2018 on the ground that he was not heard. The learned Single Judge referred to the judgements in the case of **Vishnu Agarwal vs. State of U.P. and Ors, 2011 (14) SCC 813; Asit Kumar Kar Vs. State of West Bengal, 2009 (2) SCC 703; Popular Muthiah Vs. State, 2006 (7) SCC 296 and in Ajay Singh and another Vs. State of Chhattisgarh and another, AIR 2017 SC 310; Hari Prakash Vs. State of U.P., 2014 (84) ACC 45; Mohammad Zakir Vs. Shaband and Ors, 2018 (3) JIC 17; Suraj Devi Vs. Pyare Lal and Ors; 1981 (1) SCC 500; Sankata Singh Vs. state of U.P. , AIR 1962 SC 1208; State through Special Cell, New Delhi vs. Navjot Sandhu @ Afshan Guru & Ors, 2003 (6) SCC 641**, and concluded that by virtue of section 362 Cr.P.C., it is not possible to recall the order dated 4.8.2018, merely on the ground that counsel was not present at the time of hearing.

67. Deriving support from aforesaid judgements, Mr. Sikandar B. Kochar, learned counsel for applicant submits that order dated 15.12.2016, passed by this Court is an order deciding the application under section 482 Cr.P.C. on merits. Irrespective of the fact that no notice was issued to opposite party No.2 and also that opposite party No.2 was not heard before passing order dated 15.12.2016, the said order cannot be recalled at the instance of opposite party No.2 as that would amount to review of earlier order dated 15.12.2016. Since there is a specific bar contained in section 362 Cr.P.C. prohibiting review of an order the recall application filed by opposite party No.2 is liable to be rejected.

68. I have perused the judgements relied upon by counsel for parties. It is an undisputed fact that present criminal misc. application was filed on 13.12.2015 in Registry of this Court. The application came up for admission on 15.12.2016 and this Court allowed the application on same day i.e. 15.12.2016. The opposite party No.2 was not represented by any counsel nor notices were issued to opposite party No.2 before finally deciding the application. As such, order dated 15.12.2016 is ex-parte against opposite party No.2. Rule of audi alterem partem requires that opportunity of hearing should be afforded before an order is passed on judicial side. The aforesaid view has also been reiterated by Apex Court in the case of **Makkapati Nagaswara Sastri** (Supra). The order dated 2.12.2016 impugned in the application was in favour of opposite party No.2 and therefore, the said order could not have been set aside without hearing opposite party No.2. Consequently, prayer for recall made by opposite party No.2 for recall of order dated 15.12.2016 on aforesaid grounds is perfectly just and legal. The Apex Court in case of **Vishnu Agarwal (Supra)** and judgement of learned Single Judge in **Jawahar Lal (Supra**) have reiterated that there is difference between recall and review. By seeking recall of order dated 15.12.2016, opposite party No.2 is not seeking review of order dated 15.12.2016 and therefore bar contained in section 362 Cr.P.C. will not come in way. Consequently, I am of the considered opinion that order dated 15.12.2016, is liable to be recalled at the behest of

opposite party No.2, who admittedly was not afforded any notice or opportunity of hearing before order dated 15.12.2016 was passed.

69. Now I come to the last question involved in this recall application i.e. whether in view of orders dated 29.8.2017, 31.1.2018 and 15.12.2016, passed by Apex Court, this Court has jurisdiction to entertain recall application filed by opposite party No.2 seeking recall of earlier order dated 15.12.2016.

70. During pendency of S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, Misc. Case/Transfer Application No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) was filed seeking transfer of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly to the Court of Additional Sessions Judge, Court No.1, Bareilly. The aforesaid transfer application was filed on the ground that Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) and S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six others) are cross-cases and therefore Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Case Crime No. 2675 of 2012, under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly, be transferred to the Court of 1st Additional Sessions Judge, Bareilly. It is pertinent to mention here that when the aforesaid transfer application was filed, order dated 15.12.2016, passed by this Court in Criminal Misc. Application No. 38644 of 2016 (Jaspreet Singh Garewal Vs. State of U.P. and another) was already operative. This Court, vide order dated 15.12.2016, set aside order dated 02.12.2016 passed by Sessions Judge, Court No.1, Bareilly, whereby application filed under Sections 309 Cr.P.C. was rejected and directed the Additional Sessions Judge, Court No.1, Bareilly, to reconsider the matter as above mentioned cases are cross-cases. Admittedly, no decision was taken by the Magistrate concerned before whom Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, was pending to transfer the same to the court of Sessions being cross-cases. The Magistrate did not exercise his powers in terms of section 323 Cr.P.C. The High Court, vide order dated 15.12.2016 had remanded the matter to Additional Sessions Judge, Court No.1, Bareilly, to decide the matter afresh. Section 408 (1) Cr.P.C. provides that power of transfer can be exercised only by Sessions Judge. It is in the aforesaid circumstances that transfer application was filed and was allowed vide order dated 13.7.2017. The Sessions Judge, Bareilly, only transferred

Complaint Case to the Court of Additional Sessions Judge, but did not consolidate the two cases. Order dated 13.7.2017 was challenged before this Court by way of Criminal Misc. Application U/s 482 No. 22262 of 2017 (Nitin Jaiswal Vs. State of U.P. and another) which was came to be dismissed, vide order dated 29.8.2017. This order has been quoted in Paragraph 27 of this judgement. This order dated 29.8.2017 was challenged before Apex Court by way of Special Leave Petition to Appeal (Crl.) No. 8152 of 2017 and was decided finally vide order dated 6.11.2017. The same is reproduced herein-under:-

"In the peculiar facts of this case, we are not inclined to entertain the present petition as the order of consolidation of two cases is substantially correct. However, we leave the question open as to whether the Additional Sessions Judge had the power to order consolidation of the cases under Section 408 of the Cr.P.C., even when we find that the Additional Sessions Judge did not have the power to do so.

We are also conscious of the fact that insofar as the case filed by the petitioner is concerned, it has already reached the advanced stage of final arguments. In these circumstances, we would impress the Trial Court to have expeditious trial of the case which is filed by the respondent, possibly within one year.

The Special Leave Petition is disposed of.

Pending applications(s), if any, stands disposed of accordingly."

71. Subsequently, against order dated 29.8.2017, a review petition was filed, which came to be dismissed vide order dated 31.1.2018. Order dated 31.01.2018 is reproduced herein-under:-

" The instant review petition is filed against the order dated 06.11.2017 whereby the aforementioned special leave petition was disposed of.

We have carefully gone through the review petition and the connected papers. We find no error much less apparent in the order impugned. The review petition is, accordingly, dismissed."

72. Against interim order dated 3.8.2018, passed in Criminal Misc. Application No. 25681 of 2018 (Nitin Jaiswal Vs. State of U.P. and another), Special Leave to Appeal (Criminal) No. 16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another) was filed, which was decided finally, vide order dated 10.5.2019. It is pertinent to mention here that at the time of consideration of S.L.P No. 16536 of 2019 (Nirmal Singh Garewal Vs. State of U.P. and another), reference was also made to order dated 6.11.2017, passed by Apex Court. For ready reference, it may be mentioned that order dated 10.05.2019 has already been quoted in paragraph 12 of this judgement.

73. On the aforesaid factual premise, Mr. Sikandar B. Kochar, learned counsel for applicant submits that once order dated 13.7.2017, passed by Sessions Judge, Bareilly, transferring Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, to the Court of Additional Sessions Judge, Court No.1, Bareilly, where S.T. No. 113 of 2017 (Nirmal Singh Garewal Vs. Nitin Jaiswal and six

others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012 under Sections 452, 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, was pending, has been upheld upto Apex Court, this Court cannot adjudicate the said issue.

74. In reply it is submitted by Mr. Anoop Trivedi, learned Senior Counsel that this Court while deciding Bail Application No. 17956 of 2013 (Nirmal Singh Garewal Vs. State of U.P) vide order dated 25.7.2013, directed trial Court to expeditiously decide the S.T. No. 123 of 2013 (State Vs. Nirmal Singh Garewal and others), under Sections 452 and 307 I.P.C., P.S.-Kotwali Bareilly, District-Bareilly, arising out of Case Crime No. 2568 of 2012, under sections 452, 307 IPC, P.S. Kotwali, District Bareilly.

75. It is then submitted that as no progress was being made in aforesaid Sessions Trial as proceedings were being prolonged by filing applications by accused, three criminal misc. applications under section 482 Cr.P.C. came to be filed before this Court. Application U/s 482 No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging the order dated 18.1.2014, whereby trial court summoned the witnesses and documents other than those mentioned in the charge sheet; Application U/s 482 No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) was filed challenging order dated 18.1.2014, whereby Court below declined prayer made by accused for furnishing copies of statements of witnesses to them. Application U/s 482 No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was filed by complainant for expeditious disposal of case. All the above mentioned criminal misc. applications came to be decided vide order dated 9.4.2014. Criminal Misc. Application No. 3811 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) and Criminal Misc. Application No. 6775 of 2014 (Nirmal Singh Garewal Vs. State of U.P. and Another) were dismissed, whereas Criminal Misc. Application No. 6095 of 2014 (Nitin Jaiswal Vs. State of U.P. and Another) was disposed of with a direction to proceed with trial expeditiously irrespective of pendency of any application or petition before this Court except where specific order of stay has been passed.

76. Then reference was made to the order dated 23.7.2015 as corrected, vide order dated 7.8.2015 passed by this Court in Criminal Misc. Application No. 20143 of 2015, whereby directions were issued to conclude the trial within a period of two months. The orders dated 23.07.2015 and 07.08.2015 have been quoted in paragraph 4 of present judgement.

77. Lastly, reference was made to last fourth paragraph of order dated 24.10.2016, passed in Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) and Criminal Misc. Application No. 27511 of 2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another). Criminal Misc. Application No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and Others) was allowed with further direction to trial Court to proceed with trial on day to day basis and conclude same, within two months from date of production of certified copy of order. Criminal Misc. Application No. 27511 of

2016 (Taranpreet Garewal @ Dimpal Vs. State of U.P. and Another) was dismissed. The order dated 24.10.2016 is already quoted above in paragraph 13 of this judgement. He, therefore, submits that in view of facts as noted herein above and also findings recorded in the order dated 2.12.2016, passed by Additional Sessions Judge, Court No. 1, Bareilly, rejecting the application under section 309 Cr.P.C. filed by accused, it is explicit that the trial is at an advanced stage. Evidence has been recorded and now only the accused have to give their defence testimony as provided under Section 313 Cr.P.C. The order dated 15.12.2016 runs counter to the orders referred to above. However, it may be noticed that Sessions Judge, Bareilly transferred Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal) under Sections 456, 427, 143 I.P.C., arising out of Case Case Crime No.2675 of 2012 under Sections 307, 452, 427, 504, 506, 380, 426 and 392 I.P.C. P.S.-Kotwali Bareilly, District-Bareilly to the Court of 1st Additional Sessions Judge, Bareilly, but did not consolidate the two being cross-cases as is explicit from the recital contained in the order 06.11.2017 passed by the Apex Court. There is nothing on record to show that the two cases were consolidated to be tried together by Sessions Judge, Bareilly while exercising his power under Section 408 Cr.P.C.

78. Both the counsels have referred to judgement of Apex Court in **Khoday Distilers Ltd. (Now known as Khoday India Limited and others) Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. Kollegal (Under Liquidation) Represented by the Liquidator reported in 2019 (4) SCC 376,** in support of their respective contentions as to whether order dated 15.12.2016 can or cannot be recalled in view of subsequent orders passed by Apex Court. Reliance is placed upon paragraph 27, which is as under:-

27) From a cumulative reading of the various judgments, we sum up the legal position as under:

(a) The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.

(b) We reiterate the conclusions relevant for these cases as under:

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special

leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

(c) Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case.

79. The case in hand is covered by conclusion no.4 contained in Paragraph 27 of the judement. Consequently, the principle of merger will not apply. As such, I am of the view that there is no legal impediment in recalling the order dated 15.12.2016.

80. There is an another aspect of the matter. This Court, vide order dated 23.07.2015, quoted in paragraph 4 of this judgement had directed that trial should be concluded within a period of six months preferably on day to day basis. Subsequent to the order dated 23.07.2015 accused filed an application under Section 311 Cr.P.C. which came to be rejected vide order dated 27.08.2016. At this stage Criminal Misc. Application U/S482 Cr.P.C. No. 27370 of 2016 (Nitin Jaiswal Vs. State of U.P. and another) for issuing appropriate direction to the trial court to conclude the trial of Sessions Trial No. 123 of 2013 (State of U.P. Vs. Nirmal Singh Garewal and others) and Criminal Misc. Application No. 27511 of 2016 (Taran Preet Garewal @ Dimpal Vs. State of U.P. and another) came to be filed before this Court. The same was decided vide order dated 24.10.2016. Reference may be made to the last four paragraphs of order dated 24.10.2016, which reads as under:

"It is clear from the material on record that the accused persons including bailed out accused Nirmal Singh Garewal, an advocate are committing abuse of process of court by moving one frivolous application or the other and approaching this Court every now and then by filing one frivolous application or the other under Section 482 Cr.P.C. or under Section 397/401 Cr.P.C. or even transfer application. In the circumstances, it is necessary to observe that the bailed out accused Nirmal Singh Garewal, who is also an Advocate, with co-accused persons, his sons, is making misuse of his professional degree. The conduct of accused persons indicates that they have no respect for the Courts as well as orders passed by Court. The law relied on behalf of opposite party Sri Nirmal Singh Garewal has no application to the facts of the case.

In view of the facts and circumstances brought before this Court through application No.27370 of 2016 and in view of the earlier orders dated 25.07.2013, 09.04.2014, 23.07.2015 and

07.08.2015 of this Court directing expeditious disposal of the trial in time bound period, the application No.27370 of 2016 is liable to be allowed with further direction to trial court for expeditious disposal of the trial by proceeding from day to day and if possible within two months from the date of submission of copy of this order before this Court without granting any unnecessary adjournment to the accused-persons.

However, if the trial Court finds that the opposite party Nirmal Singh Grewal or his sons the co-accused persons are continuing to follow the same delaying tactics by moving frivolous applications, the same shall be disposed of expeditiously in accordance with law by appropriate orders, including order for imposition of special costs on accused-persons if so required. If the trial is not concluded within a period of 2 months due to misconduct of accused persons, it will be deemed that opposite party Nirmal Singh Grewal is making misuse of liberty of bail and on being approached, this Court shall be compelled to curtail the liberty so granted and cancel the bail granted to him vide order dated 25.07.2013.

Accordingly, application No.27370 of 2016 is allowed with the directions to the trial court for expeditious disposal of trial within two moths form the date of production of copy of order before it and application No.27511 of 2016 is dismissed with costs.

81. After order dated 24.10.2016 was passed, the accused filed an application under Section 309 Cr.P.C. dated 29.11.2016 before Additional Sessions Judge, Court No.1, Bareilly, in S.T. No. 123 of 2013 (State of U.P. Vs. Nirmal Singh Garewal and others) under Sections 452 and 307 I.P.C. P.S. Kotwali Bareilly, District-Bareilly, for transfer of Complaint Case No. 1716 of 2016 (Nirmal Singh Garewal Vs. Nitin Jaiswal and others) under Sections 307, 436, 392, 380, 504 and 506 I.P.C., P.S. Kotwali Bareilly, District-Bareilly, pending in the Court of Judicial Magistrate Ist, Bareilly and the same be tried alongwith above mentioned Sessions Trial.

82. This application under Section 309 Cr.P.C. came to be rejected by 1st Additional Sessions Judge, Court No.1, Bareilly, vide order dated 02.12.2016 against which Criminal Misc. Application U/S 482 Cr.P.C No. 38644 of 2016 was filed, in which order dated 15.12.2016 was passed.

83. From perusal of record of Criminal Misc. Application No. 38644 of 2016, the Court finds that there is no reference of the orders dated 25.07.2013, 09.04.2014 and 07.08.2015 passed by this Court nor copies of same have been appended alongwith the present application. The application under Section 309 Cr.P.C. has been filed much after aforesaid orders have been passed.

84. For the facts as noted herein above and also the reasons recorded, the present recall application is liable to succeed. Accordingly, the same is allowed. Order dated 15.12.2016 passed by this Court is hereby recalled. The application shall now stand restored. The same shall be listed for hearing on merits.

(2019)10ILR A 615

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32682 of 2019

Raju Lawaniya ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sanjay Singh

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 – Section 420, 504 and 506 and Cr.P.C., 1973 - Section 482 - Summoning Order- Passed on basis of reiteration of the occurrence by complainant in his statement recorded under Section 200 Cr.P.C. and by two witnesses of complainant, examined under Section 202 of Cr.P.C – Case instituted as a counterblast –is to be seen by trial Court at the time of appreciation of evidence - In the exercise of its inherent powers under section 482 of the Cr.Pc., High Court cannot analyze factual evidence. (Para 5,6,8 & 9)

Present complaint is of offence of deception, resulting in forgery punishable under Section 420 I.P.C. wherein Rs. 2 lacs was taken with an assurance for getting job at Railway to son of complainant but job was neither given nor money was returned back, for which persistent demand was being made by complainant and protest was being lodged, as a result of this , assault with abuse and a criminal intimidation was made by accused persons, when complainant and his family members were at their home. This occurrence was reiterated by complainant in his statement recorded under Section 200 Cr.P.C and by two witnesses of complainant, examined under Section 202 of Cr.P.C.

Previous incident or report of same or pendency of criminal trial, is of no concern with present occurrence, it may be a motive or basis of difference by either side, which is to be seen by trial Court in appreciation of evidence at the time of appreciation and judicial decision making.

This Court is not to analyse the factual evidence in exercise of inherent power under Section 482 of Cr.P.C..

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 49

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

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

2. The present 482 Cr.P.C. application has been filed by Raju Lawaniya against State of U.P. and Mahesh Chand with a prayer for quashing summoning order and entire criminal proceeding of Complaint Case No. 5904 of 2017, (Mahesh Chand Vs. Raju Lawaniya), under Sections 420, 504, 506 I.P.C., Police Station Tajganj, District

Agra, pending before the Court of Additional Chief Judicial Magistrate-IIIrd, Agra, District Agra.

3. Learned counsel for the applicant argued that accused applicant is innocent. He has been falsely implicated in this very complaint case because of his registration of a case of theft of his motorcycle, which was recovered from the possession of son of Mahesh Chand, for which charge-sheet has been filed and no relief from this Court was granted to him. This occurrence was of year 2014 and with a view to influence above criminal case, this counterblast is by complainant, wherein no offence was made out, on the basis of evidence produced before the Magistrate, even then summoning order was passed, hence, this application with above prayer.

4. Learned AGA has vehemently opposed the present proceeding.

5. Having heard learned counsels for both sides and gone through the impugned summoning order, it is apparent that the present complaint is of offence of deception, resulting forgery punishable under Section 420 I.P.C. wherein Rs. 2 lacs was taken with an assurance for getting job at Railway to son of complainant but this job was neither given nor money was returned back, for which persistent demand was being made by complainant and protest was being lodged, as a result of this on 25.6.2017, assault with abuse and a criminal intimidation was made by accused persons, when complainant and his family members were at their home. This occurrence was reiterated by complainant in his statement recorded under Section 200 Cr.P.C. This has further been reiterated by two witnesses of complainant, examined under Section 202 of Cr.P.C and trial Court, on the basis of those testimony, has passed impugned summoning order dated 5.2.2019 regarding Raju Lawaniya for offence punishable under Sections 420, 504, 506 I.P.C.

6. Previous incident or report of same or pendency of criminal trial, is of no concern with present occurrence, it may be a motive or basis of difference by either side, which is to be seen by trial Court in appreciation of evidence at the time of appreciation and judicial decision making. Regarding present occurrence, there is testimony of complainant and his two witnesses on the basis of which this summoning order has been passed.

7. Section 482 of Cr.P.C. is quoted as under:-

"Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in ***State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844*** *has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court*

would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent ***Hamida v. Rashid, (2008) 1 SCC 474****, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular* ***Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

Regarding prevention of abuse of process of Court, Apex Court in ***Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494*** *has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

8. Hence, this Court is not to analyze the factual evidence in exercise of inherent power under Section 482 of Cr.P.C. Hence, this proceeding merits its dismissal.

9. The present application stands dismissed, accordingly.

(2019)10ILR A 617

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32637 of 2019

Akhtar Ali & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Pavan Kishore, Sri Mahendra Kumar Sharma

Counsel for the Opposite Parties:

A.G.A.

A. Indian Penal Code, 1860 – Sections 323, 452, 504 and Cr.P.C., 1973- Section 482 - Quashing of criminal proceedings on basis of Compromise - both sides have entered into compromise and complainant does not want to proceed with her complaint - Case within the purview of law laid down by Apex Court in Gian Singh Vs. State of Punjab & another 2012 LawSuit (SC) 623. (Para 5 and 6)

The summoning order is for offences punishable under Section 323, 452, 504 and 506 I.P.C., wherein both side have entered in compromise and complainant does not want to proceed with her complaint, hence, this case is within the purview of law laid down by Apex Court. Accordingly, for the end of justice, application is allowed and proceedings of Complaint Case pending in the court below are dismissed.

Application u/s 482 Cr.P.C. allowed (E-3)

Case law relied upon/discussed: -

1. Gian Singh Vs St. of Punj. & anr. 2012 Law Suit (SC) 623

(Delivered by Hon'ble Ram Krishna Gautam, J.)

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

2. The present 482 Cr.P.C. application has been filed to quash the summoning order dated 25.1.2012 as well as the entire proceedings of Complaint Case No. 3785 of 2015, (Usha Devi Vs. Akhtar Ali and others), under Sections- 323, 452, 504 and 506 I.P.C., Police Station- Mehndawal, District- Sant Kabir Nagar, pending in the Court of Civil Judge (Senior Division)/A.C.J.M., Sant Kabir Nagar.

3. Learned counsel for the applicants submits that it was a dispute between both side which led filing of complaint against accused Akhtar Ali, Sukurunnisha alias Sakurunnisha, Rizwana Khatoon, Sabana Khatoon, Gulsana Khatoon, Parma Devi and Nirja Devi wherein complainant Smt. Usha Devi was examined under Section 200 of Cr.P.C. and her witnesses were examined under Section 202 of Cr.P.C. Thereafter, a summoning order dated 15.1.2012, for offence punishable under Sections 323, 452, 504 and 506 I.P.C. against Akhtar Ali, Sukurunnisha alias Sakurunnisha, Rizwana Khatoon, Sabana Khatoon, Gulsana Khatoon, Parma Devi was passed, which is pending as Complaint Case No. 345 of 2011 (Usha Devi Vs. Akhtar Ali and others) of P.S. Mehndawal, District Sant Kabir Nagar. Parties have entered in compromise, which is at Page No. 24 wherein both sides has mentioned about their compromise. Thereafter, an application dated 22.9.2012 was moved by complainant Usha Devi before Court of Chief Judicial Magistrate, Sant Kabir Nagar, for ending proceeding of criminal complaint case but the same is still pending and no order over it has been passed. Hence, in view of law laid down by Apex Court in **Gian Singh Vs. State of Punjab & another 2012 LawSuit (SC) 623**, the proceeding be ended.

4. Sri Mahendra Pratap Yadav, learned counsel for the opposite party No. 2 as well as learned AGA for the State is having no objection over it.

5. Paragraph No. 57 of the order passed in **Gian Singh Vs. State of Punjab & another (supra)** is quoted as below:-

"57. The position that emerges from the above discussion can be summarised

thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim?s family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding"

6. This summoning order is for offences punishable under Section 323, 452, 504 and 506 I.P.C., wherein both side have entered in compromise and complainant does not want to proceed with her complaint, hence, this case is within the purview of above law of Apex Court.

7. Accordingly, for the end of justice, this application is being allowed and proceeding of Complaint Case No. 3785 of 2015, (Usha Devi Vs. Akhtar Ali and others), under Sections- 323, 452, 504 and 506 I.P.C., Police Station- Mehndawal, District- Sant Kabir Nagar,

pending in the court of Civil Judge (Senior Division)/A.C.J.M., Sant Kabir Nagar, is being dismissed.

(2019)10ILR A 620

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE

THE HON'BLE RAJ BEER SINGH, J.

Application u/s 482 No. 28614 of 2019

Hasan Akhtar ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Kamal Kumar Kesherwani

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 and Cr.P.C., 1973 - Section 482 - Non-Bailable warrants - Complaint challenged after eight years - On basis of allegations, prima facie case made out against the applicant - Questions of fact cannot be examined by this Court in proceedings under Section 482 Cr.P.C. - The jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases.
(Para 5,6,7 & 8)

The impugned complaint was filed against the applicant and co-accused in the year 2011 and after summoning order, the applicant has appeared before the trial court. There are allegations against the applicant in the impugned complaint that opposite party no.2 was abused and given beatings by the applicant and co-accused persons over the issue of property and that his wrist watch and cash of Rs. 1200/- was snatched from him. It was also alleged that the applicant and co-accused has threatened to kill the complainant. It is apparent from the allegations that prima facie case is made out against the applicant.

It is apparent from the complaint and material on record that a prima facie case is made out against the applicant. The case of the applicant does not fall in any of the category enumerated by the Apex Court through various judicial pronouncements for quashing of proceedings. It is well settled that at this stage, this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the proceedings deserves quashing.

On merits of the matter, no case for quashing of the impugned proceedings is made out. The legal position on the issue of quashing of criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases.

Questions of fact cannot be examined by this Court in proceedings under Section 482 Cr.P.C. Applicant was continuously absconding and was not appearing before the trial court and that non-bailable warrants were being issued against him continuously since last several years. No illegality or perversity or any other error could be pointed out in the impugned order. Application accordingly dismissed.

Application u/s 482 Cr.P.C. dismissed (E-3)

Judgements relied upon/discussed: -

1. AIR 1992 SC 605 St. of Har. & ors. Vs. Ch. Bhajan Lal

2. R. Kalyani Vs Janak C. Mehta & ors. 2009 (1) SCC 516

3. Kamlesh Kumari & ors. Vs St. of U.P. & ors. 2015 AIR SCW 3700

4. Rupan Deol Bajaj Vs K.P.S. Gill (1995) SCC (Cri) 1059

5. Rajesh Bajaj Vs St. of NCT of Delhi (1999) 3 SCC 259 and

6. Medchl Chemicals & Pharma (P) Ltd. Vs Biological E Ltd. & ors. 2000 SCC (Cri) 615

7. St. of Ori. Vs Saroj Kumar Sahoo (2005) 13 SCC 540

(Delivered by Hon'ble Raj Beer Singh, J.)

1. Heard Sri Kamal Kumar Kesherwani, learned counsel for the applicant, learned A.G.A. for the State-respondent and perused material on record.

2. This application u/s 482 Cr.P.C. has been filed with the prayer to quash the impugned non-bailable warrant order dated 11.06.2019 as well as entire proceedings in Criminal Complaint Case No. 378 of 2019, (Talat Nabi vs. Hasan Mohammad and others), under Sections 323, 504 and 506 of IPC, pending in the Court of IIIrd Additional Chief Judicial Magistrate, Amroha.

3. It has been argued by the learned counsel for the applicant that a false and baseless complaint was lodged by opposite party no.2 against the applicant and others. It was submitted that the dispute relates to the property and the complaint filed by opposite party no.2 is concocted. No prima facie case is made out against the applicant. The applicant and co-accused have appeared before the court below, however, on some fixed dates, the applicant, who is aged about 70 years, could not appear before the court and non-bailable warrants were issued against him. It was submitted that impugned order dated 11.06.2019, by which non-bailable warrants have been issued against the applicant, is illegal and arbitrary and thus, applicant must be granted some interim protection to appear before the trial court.

4. Per contra, learned A.G.A. has submitted that from the perusal of the material on record, it cannot be said that no cognizable offence is made out, hence the impugned proceedings are not liable to be quashed. At the outset it may be mentioned that the impugned complaint was filed in the year 2011 and the applicant is seeking its quashing in this year 2019. Thus, apparently the prayer of applicant for quashing the entire proceedings appears barred by limitation. Further, the applicant is not challenging the summoning order, rather he is challenging the order dated 11.06.2019 by which non-bailable warrants have been issued against the applicant.

5. Even on merits of the matter, no case for quashing of the impugned proceedings is made out. The legal position on the issue of quashing of criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases. However, where the allegations made in the FIR or the complaint and material on record even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, the charge-sheet may be quashed in exercise of inherent powers under Section 482 of the Cr.P.C. In well celebrated judgment reported in **AIR 1992 SC 605 State of Haryana and others Vs. Ch. Bhajan Lal**, Supreme Court has carved out certain guidelines,

wherein FIR or proceedings may be quashed but cautioned that the power to quash FIR or proceedings should be exercised sparingly and that too in the rarest of rare cases.

In the case of **R. Kalyani v. Janak C. Mehta and Others** reported in **2009 (1) SCC 516,** the Hon'ble Apex Court has held as under:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

The said decision has also been followed by the Apex Court in the case of **Kamlesh Kumari and Ors. v. State of U.P. and Ors**. reported in **2015 AIR SCW 3700**. Thus, there is no controversy about the legal proposition that in case a prima facie case is made out, the proceedings cannot be quashed. Here it would also be pertinent to mention that questions of fact cannot be examined by this Court in proceedings under Section 482 Cr.P.C.

6. Keeping in view the above stated settled position of law, in the instant case perusal of record shows that the impugned complaint was filed against the applicant and co-accused in the year 2011 and after summoning order, the applicant has appeared before the trial court. There are allegations against the applicant in the impugned complaint that opposite party no.2 was abused and given beatings by the applicant and co-accused persons over the issue of property and that his wrist watch and cash of Rs. 1200/- was snatched from him. It was also alleged that the applicant and co-accused has threatened to kill the complainant. It is apparent from the allegations that prima facie case is made out against the applicant.

It is apparent from the complaint and material on record that a prima facie case is made out against the applicant. The case of the applicant does not fall in any of the category enumerated by the Apex Court through various judicial pronouncement for quashing of proceedings. It is well settled that at this stage, this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the proceedings deserves quashing. In case of **Rupan Deol Bajaj v. K.P.S. Gill; reported in (1995) SCC (Cri) 1059, Rajesh Bajaj v. State of NCT of Delhi; reported in (1999) 3 SCC 259 and Medchl Chemicals & Pharma (P) Ltd. v. Biological E Ltd. & Ors; reported in**

2000 SCC (Cri) 615, the Apex Court clearly held that if a prima facie case is made out disclosing the ingredients of the offence, Court should not quash the complaint. The note of caution was reiterated that while considering such petitions the Courts should be very circumspect, conscious and careful. In State of Orissa v. Saroj Kumar Sahoo (2005) 13 SCC 540 it has been held that probabilities of the prosecution version cannot be analysed at this stage. Likewise, the allegations of mala fides of the informant are of secondary importance.

In the instant matter, the submissions raised by learned counsel for the applicant call for determination on questions of fact which may be adequately adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial court. Adjudication of questions of facts and appreciation of evidence or examining the reliability and credibility of the version, does not fall within the arena of jurisdiction under Section 482 Cr.P.C. In view of the material on record, it can also not be held that the impugned criminal proceeding are manifestly attended with mala fide and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

7. In view of the aforesaid, no case for quashing of impugned proceedings is made out.

8. So far as the impugned order dated 11.06.2019 is concerned, it appears from the record that applicant was continuously absconding and was not appearing before the trial court and that non-bailable warrants were being issued against him continuously since last several years. No illegality or perversity or any other error could be pointed out in the impugned order. It is well settled that the power under section 482 Cr.P.C has to be exercised by the High Court, inter alia, to prevent abuse of the process of any court or otherwise to secure the ends of justice. Though the powers possessed by the High Court under Section 482 of CrPC are very wide but the very plenitude of the power requires great caution in its exercise. The inherent power can not be exercised to stifle a legitimate prosecution. Such powers can not be invoked to interfere with such type of routine or interim orders like issuance of non-bailable warrants by court below in course of trial unless some glaring illegality or perversity is shown. The inherent powers have to be exercised only to give effect to any order under CrPC, to prevent abuse of the process of any court and to secure the ends of justice to scuttle proceedings being in accordance with law. In the instant matter, no case for exercise of these powers is made out.

9. The application u/s 482 CrPC lacks merit and thus, it is dismissed.

(2019)10ILR A623

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32686 of 2019

Dinesh Chandra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:

Sri Arvind Kumar Mishra

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 - Sections 498 A, 323 IPC and Cr.P.C., 1973- Section 482 - Cruelty and assault of wife in pursuance of demand of dowry - Complainant, herself, under Section 200 Cr.P.C. and two witnesses under Section 202 Cr.P.C., - reiterated the contention of complainant - Magistrate passed summoning order for offence punishable under Section 498A and 323 I.P.C.- No illegality found - Under exercise of inherent jurisdiction under Section 482 of Cr.P.C. the High Court is not expected to analyze the factual evidence, which is a subject of trial Court. (Para 9 & 10)

This Court under exercise of inherent jurisdiction under Section 482 of Cr.P.C. is not expected to analyze the factual evidence, which is a subject of trial Court and under the facts and circumstance of the case and legal proposition, this proceeding merits its dismissal. Application rejected. Direction to applicants to appear and surrender before the court below within 30 days. Prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case Law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs St. of U.P. 2004 (57) ALR 290

8. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) 3 ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

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

2. The present 482 Cr.P.C. application has been filed to quash the order dated 4.7.2019 as well as the entire proceedings of Complaint Case No. 2471 of 2018, under Section 498A, 323 I.P.C., Police Station Dataganj, District Budaun, pending before the Additional Chief Judicial Magistrate, Court No. 2, Budaun.

3. Learned counsel for the applicants argued that it was a case filed in counterblast of Criminal Complaint No. 43 of 2017 (Rampal Vs. Prempal and others) Police Station Ujhani, District Budaun, wherein Prempal, Smt. Rajrani, Dinesh, Ashish, Yogesh, Harish Chandra, Smt. Rekha and Ramdeen have been summoned for offence punishable under Section 323 and 406 of I.P.C., against which a proceeding before this Court has been filed wherein the criminal proceeding has been stayed.

4. No cruelty with regard to dowry was ever made by accused persons. It was a false and malicious prosecution wherein entire family members have been falsely implicated. Hence, the application with above prayer.

5. Learned AGA has vehemently opposed the application.

6. Having heard learned counsels for both sides and gone through the summoning order, it is apparent that a complaint was filed by Smt. Urvashi wife of Dinesh Chandra before the Court of Chief Judicial Magistrate, Budaun, as Complaint No. 294 of 2017 against her husband Dinesh Chandra, Smt. Chameli (Mother-in-law), Rajpal (Father-in-law) and Km. Savita (Sister-in-law) for offence punishable under Sections 323, 498A, 504, 506 I.P.C. read with Section 3/4 of D.P. Act, with contention that complainant was married with Dinesh Chandra on 4.5.2011 wherein Rs. 4 lacs were spent and dowry was given as per the capacity but accused persons being husband and his family members, were no satisfied with it and since the first entry in the nuptial house, cruelty with regard to demand of additional dowry of one motorcycle and a golden chain was made, which was narrated to mother of complainant but under persuasion, she was again sent to her nuptial house but this cruelty continued. In between, she was blessed with two child Gauri and Gaurav. There occurred some panchayat in between but on 22.1.2017 accused persons did assault with regard to demand of dowry and when family members of complainant rushed at the house of complainant, in front of them, she was beaten and tortured. Matter was reported but of no avail. She was medically examined. An application was sent before the Superintendent of Police, that too, was of no avail, hence, this complaint was filed. Complainant, herself, under Section 200 Cr.P.C. and two witnesses under Section 202 Cr.P.C., Harish Chandra and Dinesh Chandra were examined, who reiterated the contention of complainant, thenafter Magistrate, vide order dated 4.7.2019 passed summoning order for offence punishable under Section 498A and 323 I.P.C.

7. Apex Court in "State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844 has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent Hamida v. Rashid, (2008) 1 SCC 474, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296 has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while

exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

8. Regarding prevention of abuse of process of Court, Apex Court in Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

9. This Court under exercise of inherent jurisdiction under Section 482 of Cr.P.C. is not expected to analyze the factual evidence, which is a subject of trial Court but under above facts and circumstance and legal proposition, this proceeding merits its dismissal.

10. Hence, the application is rejected.

11. However, in view of the entirety of facts and circumstances of the case, it is directed that in case the applicants appear and surrender before the court below within 30 days and no more from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court reported in 2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P. Till then no coercive measure shall be taken against the applicants.

(2019)10ILR A 626

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32612 of 2019

Kharag Bahadur Chauhan & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri M.S. Chauhan, Sri Shivkumari Chauhan

Counsel for the Opposite Parties:
G.A.

A. Indian Penal Code, 1860 - Section 323, 427, 452, 504, 506 and Cr.P.C., 1973 - Section 482 -Quashing of the entire criminal proceeding and summoning order - Specific accusation against accused/applicants of criminal trespass, assault and damage to goods in statements under sections 200 & 202 of the Cr.Pc making out prima facie case - Exercise of inherent powers under section 482 of the Cr.Pc - High Court is not expected to analyze factual evidence,

which is to be placed during trial before the Trial court. (Para 4,5,6,7,9,10,11,12)

Specific accusations that Applicants tried to encroach upon land of complainant. Upon protest by the complainant, Applicants abused complainant and did criminal trespass into his house, assaulted him and, thereby, damaged the household goods.

In exercise of inherent power, conferred by Section 482 of Cr.P.C., this Court is not expected to analyze factual evidence, which is to be placed during trial before the Trial court. Prima facie, there was evidence, which was recorded, under Sections 200 and 202 of Cr.P.C., on the basis of which impugned summoning order was passed. Application under Section 482 of Cr.P.C., lacks merits and stands dismissed. Direction to applicants to appear and surrender before the court below within 30 days.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 494

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs St. of U.P. reported in (2004) 57 ALR 290

8. Lal Kamlendra Pratap Singh Vs St. of U.P. (2009) 3 ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Criminal Procedure Code, 1973 (In short 'Cr.P.C.'), has been filed by the applicants, Kharag Bahadur Chauhan and three other accused persons, against State of U.P and another, with a prayer for quashing of the entire criminal proceeding and for setting aside summoning order, dated 20.5.2019, passed by the Additional Chief Judicial Magistrate-I, Ballia, in Complaint Case No. 1791 of 2018, Ram Vilash Chauhan vs. Kharag Bahadur Chauhan and others, under Sections 323, 427, 452, 504, 506 of Indian Penal Code (In short 'IPC') of Police Station- Rasra, District Ballia,

2. Learned counsel for the applicants argued that it was a false implication. There was enmity with the complainant. Both sides are from one and same family. Just to harass the applicants, this complaint was filed wherein interested witness, who were of same family, were got examined, under Section 202 of Cr.P.C., on the basis of which, impugned summoning order was passed. There was neither any injury nor damage of property, because of assault, is on record. Hence, this Application with above prayer.

3. Learned AGA, representing the State of U.P., has opposed this proceeding.

4. Having heard learned counsel for both sides and gone through the summoning order, it is apparent that the same was passed by the Magistrate, after examining complainant, under Section 200 of Cr.P.C. and his two witnesses, under Section 202 of Cr.P.C. Contention of the complaint has been reiterated in those testimonies and it was with specific

accusation that on 24.8.2018, at 10.00 AM, Kharag Bahadur, alongwith others, tried to encroach upon his land by planting Bamboo plant over it, which was protested by the complainant. Reacting to it, on being exhorted by applicant, Kharag Bahadur Chauhan, co-accused, Anil Kumar, Vishal Kumar, Nand Lal and others, abused complainant and did criminal trespass into his house. They assaulted him and, thereby, damaged the household goods. The occurrence was instantly reported at local Police Station, but to no avail. Thus, this complaint, through Registered Post, was sent to the Superintendent of Police, but that too yielded no action. Hence, this complaint was moved before the Additional Chief Judicial Magistrate and on the basis of testimonies, these applicants were summoned for offences, punishable, under Sections 452, 323, 504, 506, 427 IPC.

5. In exercise of inherent power, conferred by Section 482 of Cr.P.C., this Court is not expected to analyze factual evidence, which is to be placed during trial before the Trial court. Prima facie, there was evidence, which was recorded, under Sections 200 and 202 of Cr.P.C., on the basis of which impugned summoning order was passed.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

7. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent* ***Hamida v. Rashid, (2008) 1 SCC 474****, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent* ***Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781****, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular* ***Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296*** *has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of*

substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

8. Regarding prevention of abuse of process of Court, Apex Court in Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494 has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

9. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

10. In view of what has been discussed above, this proceeding, under Section 482 of Cr.P.C., lacks merits and as such, this Application, under Section 482 of Cr.P.C., stands dismissed.

11. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P.** reported in **2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

12. For a period of 30 days from today, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2019)10ILR A 629

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.07.2019

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Application u/s 482 No. 42378 of 2018

Braj Lal ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
In Person

Counsel for the Opposite Parties:
A.G.A., Moeez Uddin

A. Cr.P.C., 1973 - Section 482 - For Cancellation of bail granted to opposite party no. 2 & 3 -Maintainability of Criminal Application under section 482 Cr.P.C. - when specific provision present under section 439(2) of the Code of Criminal Procedure for cancellation of bail - Present petition under section 482, Cr.P.C. for that very purpose is not maintainable.

The High Court while exercising jurisdiction under section 482,C.P.C. is empowered enough to make orders in the nature as contended by the applicant but it is equally

true and well settled that the inherent powers under section 482 can be exercised only when no other remedy is available to the litigant and not where specific remedy is provided by the statute.

Since Section 439 (2) occurring in Chapter XXXIII of the Code of Criminal Procedure which deals with the provisions as to bail and bonds, specifically provides that a High Court or Court of Session may direct that any person who has been released on bail under this Chapter, be arrested and commit him to custody, therefore, this Court is not inclined to accept the submission as raised by the Applicant , hence the present petition under section 482,Cr.P.C. is dismissed as not maintainable, leaving it open for the applicant to take recourse to section 439(2),Cr.P.C.

Application u/s 482 Cr.P.C. dismissed (E-3)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard applicant Sri Braj Lal, Advocate, in person. and Sri Moeez Uddin, learned counsel for opposite party no. 2 & 3.

2. By this petition under section 482,Cr.P.C., the applicant seeks cancellation of bail orders dated 25.4.2018 & 24.3.2018 to opposite party no. 2 & 3 passed by the learned Special Judge,SC/ST Act, Allahabad in Case Crime No. 362/2014, U/s 147,382,504,506 IPC and U/s 3(2)(V), SC/ST Act, S.T. No. 422/2018, Police Station Phoolpur, Allahabad.

3. A preliminary objection has been raised by the learned counsel appearing for the opposite party no. 2 & 3 regarding maintainability of the present petition on the ground that when specific provision is there under section 439(2) of the Code of Criminal Procedure for cancellation of bail, the present petition under section 482,Cr.P.C. for that very purpose is not maintainable.

4. In reply, Sri Braj Lal, Advocate submits that inherent powers of the High Court under section 482,Cr.P.C. are very wide and the same can be exercised in order to prevent the abuse of the process of any court or otherwise to secure the ends of justice.

5. No doubt, the High Court while exercising jurisdiction under section 482,C.P.C. is empowered enough to make orders in the nature as contended by the applicant but it is equally true and well settled that the inherent powers under section 482 can be exercised only when no other remedy is available to the litigant and not where specific remedy is provided by the statute. The inherent jurisdictio0.79 "n under section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in section 482 itself.

6. Since Section 439 (2) occurring in Chapter XXXIII of the Code of Criminal Procedure which deals with the provisions as to bail and bonds, specifically provides that a High Court or Court of Session may direct that any person who has been released on bail under this Chapter, be arrested and commit him to custody, therefore, this Court is not inclined to accept the submission as raised by Sri Braj Lal.

7. The preliminary objection raised by Sri Moeez Uddin, learned counsel for the opposite parties has force and is sustained.

8. In view of the above, the present petition under section 482,Cr.P.C. is dismissed as not maintainable, leaving it open for the applicant to take recourse to section 439(2),Cr.P.C.

(2019)10ILR A 631

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE RAJUL BHARGAVA, J.

Application u/s 482 No. 27216 of 2019

Nirdosh Tyagi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Zia Naz Zaidi

Counsel for the Opposite Parties:
A.G.A., Sri Sudhir Mehrotra, Sri Dhirendra Kumar Agrahari

A. Indian Evidence Act, 1872 - Section 103 - Quashing of Charge-sheet and entire criminal proceedings - Plea of alibi cannot be examined by this Court in the exercise of its inherent powers under Section 482 Cr.P.C. - For the Plea of Alibi the burden of proof can only be discharged by leading evidence before the trial Court-Statement recorded under Section 161 of Cr.Pc is not a substantive piece of evidence - Judicial precedent-has to be understood in context of facts based on which the observation made therein are made. (Para 9,10,11,12,13 & 14)

Accused resorted to indiscriminate firing upon the brother of informant who after sustaining injuries succumbed on the spot.

Plea of alibi cannot be examined by this Court in the exercise of its inherent powers under Section 482 Cr.P.C. whether it is the stage of taking cognizance or the framing of charge. The Magistrate at the stage of taking cognizance of the offence has primarily to be satisfied that prima facie commission of cognizable offence is disclosed and cannot meticulously scan the statements of witnesses recorded under Section 161 Cr.P.C. and other material / evidence collected during investigation by the Investigating Officer.

Section 103 of Evidence Act - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person - This could be done by leading evidence in the trial court.

Statement recorded under Section 161 Cr.P.C. is not a substantive piece of evidence and in view of proviso Sub-section (1) to Section 162 Cr.P.C. the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso.

Authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam. - The application under Section 482 Cr.P.C. is bereft of merit and is, accordingly, dismissed.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of Orissa Vs Debendra Nath Padhi (2004) 8 S.C.C. 568

2. Quinn Vs Leathem (1901) AC 495 Earls of Halsbury L.C.

3. Criminal Appeal No.1105 of 2019 Shiv Prakash Mishra Vs St. of U.P. & Ors. (S.C. of India)- Distinguished on facts.

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Ms Zia Naz Zaidi, learned counsel for the applicants, Sri Dhirendra Kumar Agrahari, learned counsel for the opposite party no.2 and learned A.G.A. for the State and perused the material placed on record.

2. This application under Section 482 Cr.P.C. has been filed for quashing

the entire criminal proceeding as well as charge-sheet no. 14B of 2019 dated 25.5.2019 in Case No.4050 of 2019 (State vs. Nirdosh Tyagi and others) arising out of Case Crime No. 202 of 2016 under Sections 302 and 120-B IPC, P.S.Sayana, District Bulandshahar, pending in the court of Chief Judicial Magistrate, Bulandshahar.

3. Brief facts of this case are that an F.I.R. was lodged by opposite party no.2 on 29.6.2016 at 10.30 a.m. with the allegation that on the same day at about 7.30 a.m., his elder brother Sanjay and father were present on the tubewell, at that time the applicants and two others armed with firearms reached there and then accused Nirdosh and Alok resorted to indiscriminate firing upon the brother of informant who after sustaining injuries succumbed on the spot. The accused persons unleashed reign of terror by indiscriminating firing and fled away from the place of the occurrence.

4. Submission of learned counsel for the applicants is that the applicants have not committed any offence and they have been falsely nominated in the F.I.R. by opposite party no.2. The allegation in the F.I.R. that the applicants had taken part in commission of murder of informant's brother stood falsified from the fact that on the date of the incident the applicants were present in High Court of Judicature at Allahabad on the alleged date and time of the incident for swearing an affidavit in connection with some case. During investigation ample evidence was placed before the Investigating Officer that on 29.06.2016 verification photo for affixing on the affidavit was done at 12.23 p.m. and 12.24 pm, evidencing that the applicants could not have been present at the place of the incident in the morning at 7.30 a.m. Copy of the verification photo has been annexed as annexure-4 to the affidavit. It has been argued that the applicants had also furnished tickets that they have travelled by Sangam Express a day before the incident i.e. 28.06.2016 and they had reservation in sleeper class, the ticket was booked online on 28.06.2016.

5. The applicants had given the tickets to investigating officer that they had travelled on 28.06.2016 from Ghaziabad to Allahabad and they had returned to Ghaziabad on 29.06.2016. The investigating officer has also recorded the statement of Manager of the hotel where the applicants had stayed in a hotel on 28.06.2019 and checked out on 29.06.2016. The statement under Section 161 Cr.P.C. was recorded especially of the lawyer who had got photo verification done from High Court and statements of some other persons from which earlier investigating officer drew conclusion that the applicants could not remain present on the place of the occurrence. Thereafter, the matter was transferred to CBCID and ultimately charge-sheet was submitted against the applicants on which cognizance was also taken by learned Magistrate. Learned counsel has argued that that there was ample evidence in the form of documentary and oral evidence i.e statements of the witnesses recorded under Section 161 Cr.P.C., yet not only charge-sheet was submitted by the investigating officer for extraneous considerations against the applicants but learned Magistrate has also taken cognizance in a routine manner without considering the evidence collected in respect of plea of alibi of the applicants. Therefore, prayer for quashing the

cognizance order and impugned charge-sheet has been made.

6. Per contra, learned A.G.A. as well as learned counsel for the opposite party no.2 have submitted that the applicants had challenged the F.I.R. on the basis of plea of alibi and had prayed for quashing of the F.I.R. and the entire investigation in Criminal Misc. Writ Petition No.14162 of 2019. The said writ petition was dismissed vide order dated 24.05.2019 by the Division Bench of this Court while recording that from perusal of the F.I.R. prima facie offence of committing murder is made out against the applicants. The F.I.R. was lodged promptly against them. The applicants have challenged aforesaid order in Special Leave to Appeal (Criminal) 5265 of 2019) in which the applicants had placed material / evidence in support of their plea of alibi. However, the Hon'ble Apex Court vide order dated 17.06.2019 declined to interfere in the matter and the SLP was accordingly dismissed.

7. Learned A.G.A. as well as learned counsel for the opposite party no.2 have further argued that plea of alibi of an accused cannot be considered at the stage of taking cognizance or the framing of charge against the accused and submitted that the applicants will have ample opportunity to place their evidence at appropriate stage. They have relied on judgement of the Hon'ble Apex Court, rendered in the case of **State of Orissa Versus Debendra Nath Padhi, 2004(8) Supreme Court Cases 568** which is quoted below:

" .....Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

8. The above judgement relates to framing of charge. However, they argued

that even at the stage of taking cognizance no meticulous scrutiny of the material collected during investigation can be done.

9. After giving my anxious consideration to the submission made by learned counsel for the parties, I find sufficient force in the submission made by learned counsel for the opposite party no.2 and learned A.G.A. that plea of alibi cannot be examined by this Court in the exercise of its inherent powers under Section 482 Cr.P.C. whether it is the stage of taking cognizance or the framing of charge. The Magistrate at the stage of taking cognizance of the offence has primarily to be satisfied that prima facie commission of cognizable offence is disclosed and cannot meticulously scan the statements of witnesses recorded under Section 161 Cr.P.C. and other material / evidence collected during investigation by the Investigating Officer.

10. Section 103 of Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Second illustration to Section 103 of Indian Evidence Act reads as under:

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

11. This proviso makes it obvious that burden to establish plea of alibi set up by the accused-applicants in petition filed under Section 482 Cr.P.C. lay squarely upon them. There is hardly any doubt regarding this legal proposition. This could be done by leading evidence in the trial court. Learned counsel for the applicants wants this court to believe the statements of the some of the witnesses recorded under Section 161 Cr.P.C. to record a positive finding that the applicants could not have been present at the scene of occurrence as they were present in High Court Allahabad. It is well settled that statement recorded under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso Sub-section (1) to Section 162 Cr.P.C. the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, High Court, especially in the present case wherein brutal day light murder has been committted, cannot quash the proceeding relying on the wholly inadmissible evidence to accept the plea of alibi of the applicants.

12. Learned counsel for the applicants has placed reliance on a recent judgement of Hon'ble Apex Court rendered in Criminal Appeal No.1105 of 2019 Shiv Prakash Mishra Versus State of Uttar Pradesh and another wherein the accused were named in the F.I.R. and were exonerated during investigation and the application for summoning them under Section 319 Cr.P.C. was moved, based on the plea of alibi and the material collected during investigation in respect of their plea of alibi the trial court refused to summon them and the said order was upheld by the High Court of Judicature at Allahabad. Thus the Hon'ble Apex Court has also recognized that evidence/material collected in support of plea of alibi during investigation that accused were not present on the spot of the incident can be considered, even at the stage of summoning them under Section 319 Cr.P.C. At the very outset, with profound respect and utmost humility, I may

record that the aforesaid judgement of Hon'ble Apex Court renders no help to the applicants and is distinguishable on the facts of the case inasmuch as there were material contradictions in the statements of the witnesses recorded during trial.

13. It is well settled that authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam. In **Quinn v. Leathem (1901) AC 495, Earls of Halsbury L.C.** stated:

"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."

14. In the light of aforesaid, I do not find good ground to quash the impugned charge-sheet and the order taking cognizance against the applicants.

15. The application under Section 482 Cr.P.C. is bereft of merit and it is, accordingly, dismissed.

(2019)10ILR A 635

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32602 of 2019

Smt. Manisha @ Ranu ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Ray Sahab Yadav

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 – Section 498-A, 406, 323, 504 and 506 and Cr.P.C., 1973 - Section 482 - Complaint filed against husband and other relatives - Only husband of the complainant summoned since specific allegations made only against him- In exercise of inherent powers under Section 482 of Cr.P.C High Court cannot examine questions of fact.

Complainant was examined, under Sections 200 and 202 of Cr.P.C. wherein she has specifically levelled accusations against her husband only. No recital against in-laws regarding demand of dowry. Even, in the complaint, it has been written that gift was given to her husband by complaint's parents. Thus, on the basis of it, only husband was summoned for above offence and this order was confirmed in the revision as well by the revisional Court.

This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to analyze the factual aspect of the cases because the same remains with trial court, being questions of fact. Section 482 of Cr.P.C. is the saving of inherent power of High Court, with a provision that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The orders, impugned, do not suffer from any illegality or irregularity or defeat ends of justice. Hence, this proceeding, by way of Application under Section 482 of Cr.P.C., merits rejection and as such Application stands dismissed accordingly.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 49

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Criminal Procedure Code, has been filed by Smt. Manisha @ Ranu, against State of U.P. and others, challenging the order dated 30.5.2018, passed in the Complaint Case No. 1299 of 2017, Smt. Manisha vs. Vivek Kumar and others, under Section 498-A, 406, 323, 504 and 506 of Indian Penal Code, Police Station-Mahila Thana, District Jhansi, pending in the court of Judicial Magistrate-I, Jhansi as well as order of the Revisional Court, dated 15.5.2019, passed in Criminal Revision No. 131 of 2018, Smt. Manisha vs. State of U.P. and others, passed by the Court of Additional District & Sessions Judge/Special Judge, Dacoity Affected Area, Jhansi, with a prayer for allowing this application and quashing of impugned order, dated 30.5.2018 in above Complaint Case No. 1299 of 2017, as well as order of the Revisional court, dated 15.5.2019 and for summoning of Opposite party nos. 2 , 3, 4, 5 and 6, in Complaint Case No. 1299 of 2017, Smt. Manisha vs. Vivek Kumar and others, under Sections 498-A, 406, 323, 504 and 506 IPC, Police Station Mahila Thana, Jhansi.

2. Learned counsel for the applicant argued that the complaint was filed against Vivek Kumar @ Santosh Kumar (Husband), Daya Ram Prajapati, Ashok Kumar Prajapati, Ganesh Prasad Prajapati, Smt. Poonam @ Pukkhan, and Smt. Rajni for offence punishable, under Sections 498-A, 406, 323, 504 and 506 IPC, read with Section 3/4 of Dowry Prohibition Act, Police Station Mahila Thana, Jhansi, but the learned Magistrate passed the impugned order of summoning whereby only Opposite party no.1, husband of the complainant, has been summoned for offence, punishable, under Sections 498-A, 406, 323, 504 and 506 IPC, read with Section 3/4 of Dowry Prohibition Act, leaving behind other accused persons whereas there was sufficient evidence on record, under Sections 200 and 202 Cr.P.C., against those accused persons, but they were not summoned. Criminal Revision, under Section 397 of Cr.P.C. was filed against the impugned summoning order wherein the order of Magistrate was confirmed and revision was dismissed. Hence, this proceeding, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application, filed under Section 482 of Cr.P.C.

4. This Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to analyze the factual aspect of the cases because the same remains with trial court, being question of fact.

5. Section 482 of Cr.P.C. is the saving of inherent power of High Court, with a provision that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

6. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474,** hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

7. Meaning thereby, exercise of inherent jurisdiction under Section 482

Cr.P.C. is within the limits, propounded as above.

8. In the present case, complainant was examined, under Sections 200 and 202 of Cr.P.C. wherein she has specifically levelled accusations against her husband only. She has said that she was married with Vivek Kumar on 30.4.2013 at Chirgaon and Vivek Kumar was in Job at Mumbari. She, after her marriage, made her first entry in his nuptial house at Chirgaon and she remained there for 15 days where her husband used to to always say that the marriage was settled for Rs.10 laksh ,as dowry, whereas complainant's father had given cash of Rs.8 Lakhs and house hold goods, valuing to Rs.2 lakhs. Complainant remained with her husband for one year and she conceived pregnancy, when she has been sent to Baruasagar, where she delivered a family child on 7.7.2014. Again she was taken to Mumbai and was illtreated by her husband Vivek Kumar, who demanded Rs.2 lakhs as the additional dowry there-at. He was a government employee in Railways, who used to give her of of life and caused cruelty with the complainant. Her brother-in-law was also in Railways and was having a flat separately at a distance of ten steps from her nuptial house. This illtreatment was owing to exhortion by husband's sister-in-law. Her husband beaten her, while at Mumbai. Meaning thereby, no recital was there against in-laws regarding demand of dowry. Even, in the complaint, it has been written that gift was given to her husband by complaint's parents. Thus, on the basis of it, only husband was summoned for above offence and this order was confirmed in the revision as well by the revisional Court.

9. In view of above, the orders, impugned, do not suffer from any illegality or irregularity or defeat ends of justice. Hence, this proceeding, by way of Application under Section 482 of Cr.P.C., merits rejection and as such Application stands dismissed accordingly.

(2019)10ILR A 638

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32634 of 2019

Ramesh Chandra & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Brajesh Shukla

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 - Section 498-A and Cr.P.C., 1973 - Section 482 - Applicants being father-in-law and mother-in-law summoned for offence punishable under Section 498-A, on basis of statements recorded under sections 200 & 202 of the Cr.P.C. and after giving full reasons-Jurisdiction under section 397 Cr.P.C. - Revisional court is never expected to analyse factual aspect of the matter -Jurisdiction under section 482 of the Code - High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained or whether the allegations in the complaint are likely to be established by evidence or not. (Para 4,5,6,7 & 8)

Husband and his family members caused mental and physical cruelty with regard to demand of additional dowry resulting in ouster of Complainant from her nuptial house, but, subsequently, taken back by her husband and his relatives. She delivered a female child which infuriated them culminating in a specific occurrence committed by husband, father-in-law, and mother-in-law, (both present applicants, herein), in which demand of dowry, cruelty with regard to it, abuse and threat were given by the accused persons. Complaint was filed and the version was reiterated by the complainant, in her statement, recorded under Section 200 of Cr.P.C and witnesses, in their statements, recorded, under Section 202 of Cr.P.C. Hence, on the basis of those evidences, accused persons were summoned for offence, punishable, under Section 498-A of IPC and this summoning was with full reasons and was based on evidence on record.

Revisional court, in exercise of its power of revision, conferred under Section 397 of Cr.P.C., is never expected to analyze factual aspect of the matter and as such Revisional court passed the impugned order well within its jurisdiction confirming the summoning order.

While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained or whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Judge/Court.

Hence, Application under Section 482 of Cr.P.C., stands dismissed accordingly with direction to the Applicants to surrender and apply for bail before the learned Court below.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 49

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

7. Amrawati & anr. Vs St. of U.P. reported in 2004 (57) ALR 290

8. (2009) 3 ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs St. of U.P.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Criminal Procedure Code, 1973 (In short 'Cr.P.C.) has been filed, by the applicants, Ramesh Chandra and Smt. Ramwati, with a prayer for quashing of the summoning order, dated 3.10.2018, passed by the Additional Chief Judicial Magistrate, Amroha, as well as order, dated 10.5.2019, passed by the Additional Sessions Judge, Amroha, and a further prayer for quashing of entire criminal proceeding of Complaint Case No. 730 of 2018 (Sushama vs. Mahendra singh and others), under Section 498-A of Indian Penal Code, Police Station Mahila Thana, District Amroha.

2. Learned counsel for the applicants argued that both the applicants are father-in-law and mother-in-law of the complainant and they have been summoned for offence, punishable, under Section 498-A, whereas similar accusation was also made against sister-in-law and brother-in-law of the complainant, who were also summoned, but in a proceeding, filed by them, proceeding, against them has been stayed. Applicants have no concern, but both the courts failed to appreciate facts placed

before them. Hence, this proceeding, with above prayer.

3. Learned AGA opposed this proceeding.

4. From very perusal of the complaint, statements, recorded, under Sections 200 and 202 of Cr.P.C. and other materials, it is apparent that the complainant was married on 16.1.2012, with Mahendra, Son of Ramesh Chandra and Smt. Ramwati. Husband, Mahendra, and his family members were not satisfied with dowry given in the marriage. They were causing mental and physical cruelty with regard to demand of additional dowry of Rs. 5 lakhs. She was ousted from her nuptial house, but, subsequently, taken back by her husband and his relatives on 1.10.2014. She delivered a female child on 11.9.2017, which furiated them. A specific occurrence of 11.3.2018 of 5.00 PM has been said on oath, which was said to have been committed by Mahendra, husband, father-in-law, Ramesh Chandra and mother-in-law, Smt. Ramwati (both present applicants, herein), with Surendra and Chaman @ Laxmi in which demand of dowry, cruelty with regard to it, abuse and threat were given by those accused persons. Thenafter, this complaint was filed and this version was reiterated by the complainant, in her statement, recorded under Section 200 of Cr.P.C and her two witnesses, CW-1, Devendra Kumar and CW-2, Premwati, in their statements, recorded, under Section 202 of Cr.P.C. Hence, on the basis of those evidences, accused persons were summoned for offence, punishable, under Section 498-A of IPC and this summoning was with full reasons and was based on evidence on record.

5. Revisional court, in exercise of its power of revision, conferred under Section 397 of Cr.P.C., is never expected to analyze factual aspect of the matter and as such Revisional court passed the impugned order well within its jurisdiction confirming the summoning order.

6. Saving of inherent power of High Court, as given under Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or

may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

7. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

8. In view of what has been discussed above, this proceeding, under Section 482 of Cr.P.C., lacks merits and as such, this Application, under Section 482 of Cr.P.C., stands dismissed.

9. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

10. For a period of 30 days from today, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2019)10ILR A 641

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Application u/s 482 No. 32617 of 2019

Smt. Kanta Devi & Anr. ...Applicants
Versus

State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Anil Kumar Dubey, Sri Dilip Kumar Goswami

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 – Sections 420 and Cr.P.C., 1973 - Section 482 - Complaint Case - Dishonest deception by accused stood established from the evidence led before the Court below - In exercise of inherent powers under Section 482 of Cr.P.C, High Court would neither appreciate the factual aspects of the case, nor embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. (Para 2,4,5,6,7 & 8)

On facts, it is apparent that there was dishonest deception by the Applicants, who had taken money in lieu of promise for making transfer of a plot of land and there was evidence to this effect, under Section 200 of Cr.P.C., which stood further corroborated by evidence, recorded, under Section 202 of Cr.P.C., hence summoning order was passed for offence, punishable, under above sections, against the applicants.

In exercise of inherent power, conferred by Section 482 of Cr.P.C., factual aspect is not to be appreciated by this Court because of same being question of fact. Allegations made in the complaint are supported by evidence, recorded in the enquiry, by the Magistrate, hence cannot be interfered with by this Court.

Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. Application dismissed.

Application u/s 482 Cr.P.C. dismissed (E-3)

Case law relied upon/discussed: -

1. St. of A.P. Vs Gaurishetty Mahesh JT (2010) 6 SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844

2. Hamida Vs Rashid (2008) 1 SCC 474

3. Monica Kumar Vs St. of U.P. (2008) 8 SCC 781

4. Popular Muthiah Vs St. Represented by Insp. of Police (2006) 7 SCC 296

5. Dhanlakshmi Vs R. Prasana Kumar (1990) Cr LJ 320 (DB): AIR 1990 SC 49

6. St. of Bihar Vs Murad Ali Khan (1989) Cr LJ 1005: AIR 1989 SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard learned counsel for the applicants over this Application, moved under Section 482 of Criminal Procedure Code, 1973 (In short 'Cr.P.C.), by Smt. Kanta Devi and Dinesh Baghel, against State of U.P. and Mitthan Khan, challenging summoning order, dated 13.3.2019, passed in Complaint Case No. 6901940 of 2018 (Mitthan Khan vs. Zannat & others), under Section 420 of Indian Penal Code (In short 'IPC'), Police Station-Shahganj, District Agra, pending in the court of Additional Chief Judicial Magistrate, court no.4, Agra as well as impugned summoning order, dated 13.3.2019 and other process issued against them.

2. Learned counsel for the applicants argued that both the applicants are having no concern nor there was any evidence for their summoning for offence, punishable,

under Section 420 of IPC, whereas vide impugned order, dated 13.3.2019, they have been summoned, but no summoning is there for those other accused persons, who were also made party in complaint, filed by the complainant, Opposite party no.2. Hence, this was abuse of process of court and as such this Application, with a prayer for quashing of impugned summoning order and entire proceeding of above case.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application, under Section 482 of Cr.P.C.

4. Having heard learned counsel for both sides and gone through the summoning order as well as the complaint, filed before the Magistrate, it is apparent that the complaint was filed by Mitthan Khan against Zannat and five others for offence, punishable, under Sections 147, 148, 420, 467, 468, 471, 323, 504, 506 and 120B of IPC, Police Station-Shahganj, District Agra, by way of an application, moved, under Section 156 (3) of Cr.P.C., which was treated to be a complaint, wherein contention was that Mitthan Khan entered in an agreement for purchase of a plot of 40 sq. yard of Khasra No. 59, Mauja Dauretha, Tehsil & District Agra, through a dealer, Mukesh Kumar with Dinesh Baghal, applicant no.2 herein, and in lieu of above, amount of Rs.75,000/- and Rs.30,000/- were paid to Dinesh Baghel and his wife, Kanta Devi, applicant no.1 herein. Subsequently, Rs.1,45,000/- was also paid in cash to them, but they did not execute sale deed, rather disclosed the property to be owned by Zannat. Ultimately, by making additional payment, through Bank Cheque, above property was got purchased, by way of registered sale deed from Zannat on 23.6.2017. Lateron, it was came to notice that Kanta Devi had executed sale deed in favour of Bhuri Begum, fraudulently, for the same plot, prior to execution of sale deed by Zannat. Hence, it was a dishonest deception by Dinesh Baghel and Kanta Devi, who had taken money in lieu of promise for making transfer of above plot and there was evidence to this effect, under Section 200 of Cr.P.C., which stood further corroborated by evidence, recorded, under Section 202 of Cr.P.C., that is why summoning order was passed for offence, punishable, under above sections, against the applicants.

5. In exercise of inherent power, conferred by Section 482 of Cr.P.C., factual aspect is not to be appreciated by this Court because of same being question of fact. Allegations made in the complaint are supported by evidence, recorded in the enquiry, by the Magistrate, hence cannot be interfered with by this Court.

6. Section 482 Cr.P.C, provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

7. Meaning thereby this inherent power is with High Court (I) to make such order as may be necessary to give effect to any other order under this Code (II) to prevent abuse of the process of any Court (III) or otherwise to secure the ends of justice. But Apex Court in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844** has propounded that "While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or

whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court". In another subsequent **Hamida v. Rashid, (2008) 1 SCC 474**, hon'ble Apex Court propounded that "Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again another subsequent **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781**, the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court in Popular **Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296** has propounded "High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".

Regarding prevention of abuse of process of Court, Apex Court in **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494** has propounded "To prevent abuse of the process of the Court, High Court in exercise of its inherent powers under section 482 could quash the proceedings but there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive" as well as in **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1**, Apex Court propounded "In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".

8. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

9. In view of what has been discussed above, this Application, being devoid of merits, stands dismissed.

(2019)10ILR A 644

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

U/S 482/378/407 No. 7313 of 2019

Smt. Malti Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Jai Narayan Singh, Lav Singh, Vishal Singh

Counsel for the Opposite Parties:
G.A.

A. Criminal Law Amendment Act, 1908 - Section 7 - Quashing of Charge-sheet and Summoning Order – On the basis of allegations prima facie case made out-Alibi-is a matter of evidence-Impermissible to consider defence of accused at this stage- Criminal Procedure Code, 1973-Purpose of coercive processes- to procure the attendance of accused before the Court in trial-Issuance of process like summons then bailable warrant or non-bailable warrant as and when required under the alternating circumstances before the court is not punitive-Interest of Justice and Bonafides-Requirement of balance-Application for bail by the applicant to be considered on the same day by the court concerned. (Para 12,14,18,21,22,23,25,26,34 & 35)

The allegations in the FIR are disclosing the commission of offence as the allegations made therein on being taken on their face value as correct, in their entirety, the allegations do not seem impossible or improbable. Defences cannot be looked into at this stage and the Court has to see into the FIR allegations and the materials placed before the Court in the chargesheet only. The question whether the accused-applicant was present in the assembly or not is of evidence which can be seen only in the trial.

In the present case when accused are alleged, blocking the national highway obstructing the movement of passengers on the road by using criminal force making inflammatory, derogatory and abusing speeches, causing apprehension in the mind of people, are undoubtedly fulfilling the ingredients of such offence with which the accused persons are slapped.

Making prima facie findings by this Court as to the correctness, falsity of allegations in the FIR or the materials included in the chargesheet would be premature at this stage. It is sufficient to see that whether the FIR allegations along with the materials placed on record are fulfilling the ingredients of the offence alleged against the accused. There is no prima facie case as to the quashing of FIR found in the application, therefore, it deserves to be rejected.

It is clear that after chargesheet, summoning was made first by the Court and ultimately after the lapse of eight years, presently non-bailable warrant is running against the accused-applicant.Therefore, there is no skip in the procedure and no abuse of process on the part of complainant or the Court reflecting from the application. In view of the procedure provisioned in Criminal Procedure Code, 1973 to procure the attendance of accused before the Court in proceeding of trial the issuance of process like summons then bailable warrant or non-bailable warrant as and when required under the alternating circumstances before the court is not punitive.

Simply by reason of defaulting the process of the Court issued to procure her appearance in the trial her arrest can cause irreparable loss to her present reputation.

Interest of justice to make balance between the apprehension of the feared applicant from the non-bailable warrant running against her with regard to irreparable loss of her reputation and in convenience of her presence being lady of 68 years old age and the proceeding of a legitimate trial running against her.

7. The accused-applicant to appear and apply for bail, the Court concerned is to entertain the same, if possible, on the same date keeping in mind that the accused-applicant is a 68 years old lady and is willing to participate in the proceedings. Application under Section 482 Cr.P.C. disposed of accordingly.

Application u/s 482 Cr.P.C. disposed of (E-3)

Case law relied upon/discussed: -

1. Inder Mohan Goswami Vs St. of U.K. (2007)12 SCC 1

2. Ramchandran Vs St. of Ker. reported in AIR (2011) SCC 3581

3. Mahesh Chaudhary Vs St. of Raj. & anr. (2009) 4 SCC 439

4. Kamaladevi Agarwal Vs St. of W.B. & ors.

[(2002) 1 SCC 555]

5. St. of Har. & ors. Vs Bhajan Lal & ors. reported in MANU/SC/0012/1992

6. Joginder Kumar Vs St. of U.P. (1994) 4SCC 260

7. Amravati Vs St. of U.P. reported in (2005) CRLJ 755 (Allahabad)

8. Lal Kamlendra Pratap Singh Vs St. of U.P. & anr. reported in 2009 (3) ADJ 322

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The application in hand is moved under section 482 of Criminal procedure code,1973 by learned counsel on behalf of applicant-accused involved in case crime no.1147 registered under Sections 147, 149, 341, 332, 352, 336, 506 of IPC and Section 7 of Criminal Law Amendment Act in Police Station Gazipur, District Lucknow. The applicant seeks following reliefs-

"To quash/set aside the chargesheet submitted by police after investigation and the order dated 22.07.2011 summoning the accused in the case."

2. Heard the learned counsel for the applicant and the Learned AGA appearing on behalf of the state opposite parties. Perused the materials available on record.

3. Learned counsel has moved this application with grounds for the relief of quashing the chargesheet no.125 of 20111, submitted by police after investigation of case crime no.1147 of 2008 under Sections 147, 149, 341, 332, 352, 336, 506 of IPC and Section 7 of Criminal Law Amendment Act. The grounds as pleased are:-

"First information report was lodged by the Station Officer of Police Station Gazipur, District Lucknow dated 01.10.2008 reporting the incident that an Ex-MLA, 'Rajendra Singh Yadav' alongwith corporator, 'Smt. Malti Singh' and companions, more than two hundred in number, blocked the national highway near Surendra Nagar turning and thus obstructed the traffic. They were raising slogans using inflammatory and filthy words against government and the administration, they were delivering inflammatory speeches. When they were requested to remove the blockade from the road for the sake of public convenience, irritated thereby they jointly assaulted and made the police party, threatened and began to pelt the bricks and stones."

4. Learned counsel in the above context submits that the MLA and the corporator are members of well reputed family and elected representative of public. They individually have not used any filthy or derogatory word. Since at the time of incident the applicant was in power being leader of ruling party, in her connivance the police falsely implicated her.

5. Learned counsel further submits that none of the offence under Sections 147, 149, 341, 334, 352, 336, 506 of IPC and Section 7 of Criminal Law Amendment Act is made out from the allegations in F.I.R. then also the Investigating Officer, under the pressure of leaders of the ruling party, submitted the chargesheet without any materials to support the constitution of offence thereunder.

6. Before entering into merit of the present application under Section 482 Cr.P.C., it would be relevant to keep into

mind the scope and ambit of the said section and circumstances under which the extra ordinary power of the court inherent therein can be exercised. It is explained in a plethora of judgements of the Honorable the Apex Court. One of those judgements is, **Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1**, para 23 is quoted here under:

"This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

7. In the light of materials placed on record as well as ingredients of the concerned Sections of IPC and Criminal Law Amendment Act wherein the applicant is charged, Sections 147 and 149 from the offence falling under Chapter VIII of the IPC relate to, "offence against the tranquility", Section 146 of the IPC defines the 'rioting', ingredients to constitute offence are given under Section 146 IPC. It is constituted, when force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the criminal object of such assembly, every member of such assembly is guilty of the offence of rioting.

8. Section 147 of the IPC provides punishment of imprisonment of description for a term which may extend to two years or with fine or with both, the offence is cognizable and bailable.

9. Section 149 of the IPC is relating to common object wherein every member of unlawful assembly is guilty of offence committed in prosecution of common object.

10. **"Unlawful Assembly"** is defined in Chapter VIII of IPC in Section 141 as an assembly of five or more persons and is designated "Unlawful Assembly." If the common object of the persons comprising the assembly is:

"(First) -- To overawe by criminal force, or show of criminal force, 1[the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

(Second) -- To resist the execution of any law, or of any legal process; or

(Third) -- To commit any mischief or criminal trespass, or other offence; or

(Fourth) -- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(Fifth) -- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation.--An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

11. To determine the existence of common object, the Court is required to see the circumstances in which the incident had taken place and conduct of the members of unlawful assembly including the weapon of offence though carried or used on the spot. This can be find out from circumstances and facts proved in trial on the basis of legally adduced evidence.

12. Further, in the case of ***Ramchandran Vs. State of Kerala reported in AIR (2011) SCC 3581***, it is alleged that common object may be formed in spur of the moment. "Prior concern in the sense of meeting of unlawful assembly of members is not necessary" whether or not the common object of the unlawful assembly was possessed by him or her at the time of incident is immaterial. The question whether the accused-applicant was present in the assembly or not is of evidence which can be seen only in the trial.

13. Further, Section 341 of the IPC falls in Chapter XVI, "offence effecting the human body". One of such offence is 'wrongful restraint', defined under Section 339 of IPC, when a person voluntarily obstructs another person so as to prevent that person from proceeding in any direction in which that person has have a right to proceed, is said to wrongfully restrain that person. Section 341 is punishment for wrongful restraint.

14. In the present matter, it is alleged in the FIR that national highway was blocked by the accused-applicant alongwith the accused MLA and their companions more than two hundred in person. The public at large were stood obstructed on the highway, restrained to move on the road in the direction where they were proceeding and had right to proceed. As such these allegations even if their face value taken in their entirety, they constitute fulfilling their ingredients.

15. Section 332 and Section 336 of IPC are also the offence "affecting the human body" and relate with the offence of hurt. Both the above offences are related to voluntarily causing hurt to detect public servant from his duty and at endangering life or personal safety of others respectively.

16. In the present case, the allegation is to the effect that the police officials when forbidden and requested the unlawful assembly to remove the blockade and let the public free to move on the road, they became irritated and began to attack the police party throwing bricks and stones upon them. They were making slogans in absurd and derogatory words thus offence of Section 506 of IPC is slapped thereon.

17. So far as Section 352 of IPC is concerned, it falls within Chapter XVI, "offence affecting the life". Criminal force is defined in Section 350 of the IPC. It is constituted when a person intentionally uses force without that person's consent in order to commit any offence or intending by the use of such force to cause, or nothing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to others. Further, assault is defined under Section 351 of IPC and this offence is constituted when a person makes any gesture, or any preparation intending or nothing it to be likely the

such gesture or preparation will cause any person to apprehend that he who makes gesture or makes the preparation is about to use criminal force to that person. Section 352 of IPC is the punishment for assault or criminal force otherwise on grave provocation.

18. In the present case when accused are alleged, blocking the national highway obstructing the movement of passengers on the road by using criminal force making inflammatory, derogatory and abusing speeches, causing apprehension in the mind of people, are undoubtedly fulfilling the ingredients of such offence with which the accused persons are slapped. Further, on being forbidden by the police personnel having been requested to remove the blockade, the unlawful assembly led by the applicant attacked the police party, began stone pelting and throwing bricks on the police party are reported in unambiguous explicit words in the first information report.

19. Hon'ble the Supreme Court in ***Mahesh Chaudhary Vs. State of Rajasthan and Another*** reported in (2009) 4 SCC 439 in para 11, 12, 14 and 17 has held as under:

"11. The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the Complaint Petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence.

12. It is also well settled that save and except very exceptional circumstances, the court would not look to any document relied upon by the accused in support of his defence. Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or Complaint Petition fulfill the ingredients of the offences alleged against the accused.

14. While saying so, we are not unmindful of the limitations of the court's power under Section 482 of the Code of Criminal Procedure which is primarily for one either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The court at that stage would not embark upon appreciation of evidence. The Court shall moreover consider the materials on record as a whole.

In ***Kamaladevi Agarwal vs. State of W.B. & ors. [(2002) 1 SCC 555]****, this Court opined:*

"7. This Court has consistently held that the revisional or inherent powers of quashing the proceedings at the initial stage should be exercised sparingly and only where the allegations made in the complaint or the FIR, even if taken it at the face value and accepted in entirety, do not prima facie disclose the commission of an offence. Disputed and controversial facts cannot be made the basis for the exercise of the jurisdiction."

It was furthermore observed that the High Court should be slow in interfering with the proceedings at the initial stage and that merely because the nature of the dispute is primarily of a civil nature, the criminal prosecution cannot be quashed because in cases of forgery and fraud

there would always be some element of civil nature.

17. The charge-sheet, in our opinion, prima facie discloses commission of offences. A fair investigation was carried out by the Investigating Officer. The charge-sheet is a detailed one. If an order of cognizance has been passed relying on or on the basis thereof by the learned Magistrate, in our opinion, no exception thereto can be taken. We, therefore, do not find any legal infirmity in the impugned orders. We, however, must place on record that before us Mr. Dhankar stated that the appellant is ready and willing to get the disputes and differences between the parties settled.

20. As such power under Section 482 Cr.P.C. is to be exercised to prevent abuse of process of Court or to secure ends of justice as repeatedly have been held and guided by the Hon'ble the Apex Court in present case where the relief of chargesheet on the basis of facts and materials placed before the Court and discussed hereinabove, relief of quashing the chargesheet is sought.

21. Here the allegations in the FIR under Sections 147, 149, 341, 332, 352, 336, 506 of IPC and Section 7 of Criminal Law Amendment Act in Police Station Gazipur, District Lucknow are disclosing the commission of offence as the allegations made therein on being taken on their face value as correct, in their entity the allegations do not seem impossible or improbable. Further, Hon'ble the Apex Court held that while considering the materials placed before the Court for quashing the chargesheet should not to embark upon the appreciation of evidence, and should consider only materials on record as a whole.

22. In the present case, the allegations in the FIR and materials placed before the Court as collected by the Investigating Officer in chargesheet submitted before the Magistrate are fulfilling the ingredients of the offence alleged against the accused. So far as the defences as to the malafide of leaders of ruling party, connivance with the police of such leaders for false implication or to be gathered from the evidence legally adduced before the Court during trial. Such defences can not be looked into at this stage and the Court has to see into the FIR allegations and the materials placed before the Court in the chargesheet only.

23. Making prima facie findings by this Court as to the correctness, falsity of allegations in the FIR or the materials included in the chargesheet would be premature, at this stage. It is sufficient to see that whether the FIR allegations alongwith with the materials placed on record are fulfilling the ingredients of the offence alleged against the accused.

24. In the case of ***State of Haryana and Ors. Vs. Bhajan Lal and Ors. reported in MANU/SC/0012/1992***, the following seven guidelines are given:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

25. In view of the aforesaid guidelines of Hon'be Supreme Court, it is clear from the materials placed before the Court in the application that there is no prima facie case to interfere in the lower court's proceeding or to quash the chargesheet after such long lapse of time of eight years or to set aside the non-bailable warrant running against the accused-applicant. The purpose of Section 482 Cr.P.C. and the power given therein is not to exercise the same for stifling the bonafide proceeding of the Court unless some abuse of process is sufficiently shown. The power is to be used sparingly.

26. There is no prima facie case as to the quashing of FIR found in the application, therefore, it deserves to be rejected.

27. Since in criminal proceeding submission of charge sheet by the Investigating Officer, the Court takes cognizance of offence on the basis of material placed in chargesheet. Thereafter it issues summon. In the present case, admittedly it is issued. If the summons are avoided then issuance of bailable warrant and ultimately when that is too avoided, non-bailable warrant is issued. If non-bailable warrant is also defied then the procedure under Sections 82 and 83 Cr.P.C is to be started. From the allegation made in the application, it is clear that after chargesheet, summoning was made first by the Court and ultimately after the lapse of eight years, presently non-bailable warrant is running against the accused-applicant. Therefore, there is no skip in the procedure and no abuse of process on the part of complainant or the Court reflecting from the application.

28. In view of the procedure provisioned in Criminal Procedure Code, 1973 to procure the attendance of accused before the Court in proceeding of trial the issuance of process like summons then bailable warrant or non-bailable warrant as and when required under the

alternating circumstances before the court is not punitive. The case on the part of court is not to skip the proceeding prescribed for issuing them. In the present case such skipping of proceeding is neither pleaded nor shown by the materials on record.

29. However, hearing the learned counsel for the parties, it becomes apparently clear that the applicant is afraid of process against her however the purpose of the process is only to ensure the presence before the Court for the participation in the trial.

30. Learned counsel conceded that the accused-applicant would like to participate if her personal liberty is secured. If it is so then it is bonafide on the part of accused-applicant to have intent of participating in the proceeding. It is just and proper to secure the liberty of the accused-applicant keeping in view her bonafide intention.

*In **Kamaladevi Agarwal vs. State of W.B. & ors. [(2002) 1 SCC 555]**, this Court opined:*

18. In that view of the matter and keeping in view the peculiar facts and circumstances of this case and with a view to do complete justice to the parties, we, in exercise of our jurisdiction under Article 142 of the Constitution of India, direct that in the event the appellant appears before the learned Magistrate within a period of four weeks from date and files an application for grant of bail, he shall be released on bail on such terms and conditions as the learned Magistrate may seem fit and proper. In the event, the appellant files an application for exemption from his personal appearance, the same may also be considered on its own merits. It would be open to the complainant to consider the offer of the appellant."

31. Further, this is important to refer here that in case of ***Joginder Kumar Vs. State of UP (1994) 4SCC 260***, it is held that arrest is not a must when FIR is lodged in a cognizable offence. Further, Hon'ble the Apex Court held that arrest of person can cause irreparable loss to the person's reputation.

32. In the application, the applicant has averred the status of applicant as 68 years old lady of political carrier, therefore, simply by reason of defaulting the process of the Court issued to procure her appearance in the trial her arrest can cause irreparable loss to her present reputation.

33. Keeping in view in the full bench decision of ***Hon'ble High Court, Allahabad in Amravati Vs. State of UP reported in (2005) CRLJ 755 (Allahabad)*** approved by Hon'ble Supreme Court (Supra) in Joginder Kumar Vs. State of UP and Anothers reported in 1994 AIR 1349 held that the Court if it deems fit in the facts and circumstances of the case, may grant interim bail pending final decision of the bail applications though in the present case, Section 438 Cr.P.C. is made applicable in the State of UP also but so far as the principles propounded in the case of Amravati (Supra) by the full Bench of our own High Court as approved by Hon'ble Supreme Court in the case of ***Lal Kamlendra Pratap Singh Vs. State of U.P and Anothers reported in 2009 (3) ADJ 322*** are fully applicable in the circumstances and facts of the case in hand where the non-bailable warrant

for the reason of skipping the process issued to procure the presence of applicant in trial running against her.

34. This would be in the interest of justice to make balance between the apprehension of the feared applicant from the non-bailable warrant running against her with regard to irreparable loss of her reputation and in convenience of her presence being lady of 68 years old age and the proceeding of a legitimate trial running against her by issuing certain directions in exercise of power under Section 482 Cr.P.C. as follows.

35. In view of the aforesaid observation, the accused-applicant if appears within three weeks from the date of order and applies for bail, the Court concerned is directed to entertain the same promptly as soon as practicable, if possible, on the same date keeping in mind that the accused-applicant is a 68 years old lady and she is willing to participate in proceeding, moreover, the purpose of issuance of process is only to ensure the participation in the trial, the same be disposed of.

36. Till the aforesaid three weeks or till the applicant appears/surrenders and applies for bail on non-bailable warrant running against the accused-applicant, no coercive action shall be taken pursuant to the non-bailable warrant.

37. Accordingly the application under Section 482 Cr.P.C. is disposed of.

(2019)10ILR A 653

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.09.2019

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

U/S 482/378/407 No. 4553 of 2019

Jai Narain Tiwari ...Applicant
Versus
U.O.I. & Ors. ...Opp. Parties

Counsel for the Applicant:
Bal Keshwar Srivastava, Jai Prakash Narain

Counsel for the Opposite Parties:
Shiv P. Shukla

A. Railway Property (Unlawful Possession) Act, 1966 - Section 3 - Essential that the allegations of theft of Railway property or dishonest misappropriation should be alleged to prosecute anyone under Section 3 of the Act - Only averment against the applicant is that he was the Supervisor and was negligent - No case made out for prosecuting the applicant under Section 3 of the Act. (Para 5,6,7,12,13 & 14)

It is essential that the allegations of theft of Railway property or dishonest misappropriation should be alleged to prosecute anyone under Section 3 of the "Act, 1966'. Even in the allegations levelled in the complaint, there is no averment or whisper with regard to any theft or misappropriation of any Railway property as against the applicant. The only allegation is that the applicant being a Supervisor was negligent in supervising. It is clear that the negligence will not constitute an offence which can be tried under Section 3 of the "Act, 1966'.

On the basis of law laid down by the Apex Court as well as the plain reading of the complaint, no case is made out for prosecuting the applicant under Section 3 of the "Act, 1966'. The learned Magistrate has further erred in summoning the accused without any application of mind.

The proceedings in Criminal Case under Section 3 of Railway Property (Unlawful

Possession) Act, 1966, as well as the summoning order as against the applicant are quashed and the application under Section 482 Cr.P.C. is allowed.

Application u/s 482 Cr.P.C. allowed (E-3)

Case law relied upon/discussed: -

1. Madhavrao Jiwajirao Scindia & ors. Vs Sambhajirao chandrojirao Angre & ors. (1988) 1 SCC 692

2. St. of Har. & ors. Vs Chaudhary Bhajan Lal & ors. 1992 SCC (Cri) 426

3. Dilawar Babu Kurane Vs St. of Mah. (2002) 2 SCC 135

4. Som Mittal Vs Govt. of Kar. (2008) 3 SCC 753

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present application under Section 482 Cr.P.C. has been filed praying for quashing the enquiry report/charge-sheet dated 30.3.2019 passed in Criminal Case No. 1203 of 2019 arising out of Crime No. 13 of 2018, under Section 3 of Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred to as the "Act, 1966'), Police Station R.P.F. Post Gonda, District Gonda as well as the summoning order dated 3.5.2019.

2. I have heard learned counsel for the applicant as well as the learned A.G.A. for the State.

3. The brief submission of the learned counsel for the applicant is that from perusal of the F.I.R., the charge-sheet even if taken to be a gospel truth, does not make out any case against the applicant under Section 3 of the "Act, 1966'. The learned counsel for the applicant has taken me across the F.I.R. filed, which is on record as Annexure-6. A plain reading of the F.I.R. on record states that on 19.7.2018, Sri Vishal Srivastava, Chief Commercial Superintendent, Gonda had written a written report that Sri Jamuna Prasad, the Ticket Inspector, Gonda did not deposit the entire amount collected for the period October, 2016 to May, 2018, which amounts to approximately Rs. 13,78,673/-. It is stated that the said report was sent by the Chief Commercial Superintendent, Gonda to the Zonal Officer, Lucknow, which is being audited at Gorakhpur. The said Audit Department has confirmed the deficiency of Rs. 4,12,584/- for the period January, 2018 to May, 2018, the rest amount is under audit. It was further stated that Sri Jamuna Prasad, the Ticket Inspector, did not deposit the amoutn of Rs. 92,830/- for the month of Autust, 2017 and subsequently when the matter came to light, Sri Jamuna Prasad deposited the said amount. It was thus alleged that not depositing the income of the Railways in accordance with law amounts to misappropriation and criminal breach of trust. As regards the applicant, it was stated that Supervisor J.N. Tiwary is also negligent and prima facie appears to be involved in the crime and with the said allegations, the complaint was filed.

4. The counsel for the applicant has placed on record a report dated 13.6.2018, wherein departmental action was proposed against Sri Jamuna Prasad on account of non-deposit of the revenue of Railways. Counsel for the applicant has further placed on record the fact that on the basis of the allegations made in the complaint, summoning orders were passed on 31.5.2019 recording that on the basis of the complaint a cognizable

offence is made out for trial and thus the accused Jamuna Prasad and Jai Narain Tiwary be summoned. It is stated that in pursuance to the said summons, the applicant was not arrested and was released on personal sureties. The summoning order was under Section 3 of the "Act, 1966'. The counsel for the applicant has specifically argued that from the plain reading of the provisions of Section 3 of the "Act, 1966', no offence can be said to be made out even if the entire allegations levelled are treated to be correct. It is stated that the only averment with regard to the applicant is that he was the Supervisor and was negligent and thus Jamuna Prasad could carry out the offences as alleged against him.

5. Section 3 of the "Act, 1966' is as under:-

"3. [Penalty for theft, dishonest misappropriation or unlawful possession of railway property.]

[Whoever commits theft, or dishonestly misappropriates or is found, or is proved] to have been, in possession of any railway property reasonably suspected of having been stolen or unlawful obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable--

(a) for the first offence, with imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees;

(b) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine and in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than two years and such fine shall not be less than two thousand rupees."

6. A plain reading of Section 3 of the "Act, 1966' as quoted above makes it clear that for the rigour of the Section 3 of the "Act, 1966' to apply, it is essential to allege that theft or dishonest misappropriation was found or the person accused should have been in possession of any Railway property reasonably suspected of having been stolen or unlawfully obtained. Thus, in sum and substance, it is essential that the allegations of theft of Railway property or dishonest misappropriation should be alleged to prosecute anyone under Section 3 of the "Act, 1966'. As already pointed out even in the allegations levelled in the complaint, there is no averment or whisper with regard to any theft or misappropriation of any Railway property as against the applicant. The only allegation is that the applicant being a Supervisor was negligent in supervising. It is clear that the negligence will not constitute an offence which can be tried under Section 3 of the "Act, 1966'.

7. The learned counsel for the applicant states that for prosecuting under Section 3 of the "Act, 1966' it is essential to allege that the property recovered is a Railway property and the same was found in possession of the accused and if these two allegations are alleged and established the onus shifts on the accused to prove that the Railway property came into his possession lawfully. There being no averment even in the complaint against the applicant, the prosecution under

Section 3 of the "Act, 1966' is not made out against the applicant.

8. The Apex Court in ***Madhavrao Jiwajirao Scindia and others vs. Sambhajirao chandrojirao Angre and others (1988) 1 SCC 692*** observed in para 7 as under :-

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

9. The Apex Court in **State of Harayana and others vs Chaudhary Bhajan Lal and others 1992 SCC (Cri) 426**, considering a series of decisions has laid down seven criterias for quashing the entire proceedings in exercise of powers under Section 482 Cr.P.C. by this Court, which reads as under:-

"(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or 'complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. The Apex Court in case of ***Dilawar Babu Kurane Vs. State of Maharashtra 2002 (2) SCC 135***, has observed that:-

" In exercise of jurisdiction under Section of Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but could not make a roving enquiry into the pros and cons of the matter and weigh the evidence, as if he was conducting a trial."

11. The Apex Court in the case of ***Som Mittal vs Government of Karnataka, 2008 (3) SCC 753***, has held that :-

"When grave miscarriage of justice would be committed if the trial is allowed to proceed; or where the accused would be harassed unnecessarily if the trial is allowed; or when prima facie it appears to Court that the trial would likely to be ended in acquittal. Then the inherent power of the Court under section 482 of the Code of Criminal Procedure can be invoked by the High Court either to prevent abuse of process of any Court, or otherwise To secure the ends of justice."

12. Thus on the basis of law laid down by the Apex Court as well as the plain reading of the complaint, no case is made out for prosecuting the applicant under Section 3 of the "Act, 1966'. The learned Magistrate has further erred in summoning the accused without any application of mind.

13. As a result of the conclusion and the findings recorded above, the proceedings in Criminal Case No. 1203 of 2019 arising out of Crime No. 13 of 2018, under Section 3 of Railway Property (Unlawful Possession) Act, 1966, Police Station R.P.F. Post Gonda, District Gonda as well as the summoning order dated 3.5.2019 as against the applicant Jai Narain Tiwari are quashed.

14. The application under Section 482 Cr.P.C. is allowed in terms of the order passed above.

(2019)10ILR A 657

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.09.2019

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

U/S 482/378/407 No. 3855 of 2013
alongwith
U/S 482/378/407 No. 5430 of 2013

Siya Ram Saran Aditya ...Applicant
Versus
The State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Santosh Srivastav, K.K. Sharma

Counsel for the Opposite Parties:
Bireshwar Nath, Nadeem Murtaza

A. Cr.P.C., 1973 - Section 482 and Section 197 - For initiation of prosecution of Public Servant, the sanction under Section 197 of Cr.P.C. is mandatory and submission of charge sheet without any valid sanction is illegal - Subsequent sanction granted by State Government on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction - On facts, act of the Petitioners found to be done within their

official capacity and in discharge of their official duty-The act complained of is done in performance of duty or in purported performance of duty is to be determined by the competent authority and not by the Court- No prima facie case made out. (Para 21, 22,23,24,25,32,33,45,47,48,54 & 55)

The following issues are required to be adjudicated while deciding the instant petition under Section 482 of Cr.P.C.:

"(I). Whether the act done by petitioners in the present case was within the official capacity in discharge of their official duty? - Section 129 is attracted in the instant case and any Executive Magistrate or officer in-charge of the Police Station or, in the absence of such officer in charge, any police officer not below the rank of a Sub-Inspector may command any unlawful assembly to disperse. If such a command given under sub-section (1) is not obeyed, then such force as may be necessary may be used to disperse the assembly. The facts of the case clearly show that the petitioner Siya Ram Saran Aditya who was the then Senior Superintendent of Police are present on the spot and took decision to open fire and accordingly firing was done after examining the situation and necessity of the said act.

(II) Whether prior sanction under Section 197 of Cr.P.C. is necessary in the present case before prosecuting the petitioners?

(III) Whether the charge-sheet could be submitted against the petitioners without prior sanction under Section 197 of Cr.P.C.? (Considering issues no, II & III together) - The petitioners were (sic) at the place of incident in his official capacity and during that time he was the Senior Superintendent of Police, therefore, being the senior most police officer at the place of incident, it was the duty of the petitioner Siya Ram Saran Aditya to maintain law and order of the said locality. In the present case on hand, the accused being a Police Officer while maintaining the law and order was discharging the official duty. Therefore, for initiation of prosecution, the sanction under Section 197 of Cr.P.C. is required whereas in the present case the charge-sheet was filed against the accused persons in absence of any valid sanction.

(IV) Whether the court concerned has committed legal error in taking cognizance and summoning the petitioners to face trial in absence of valid / prior sanction under Section 197 of Cr.P.C.?

(V) Whether the firing in which one person died and other sustained firearm injury was justified?" (Considering issues no, IV & V together)- The question as to whether the act complained of is done in performance of duty or in purported performance of duty is to be determined by the competent authority and not by the Court. The Legislature has conferred "Absolute Power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation, the court would not proceed without sanction of the competent statutory authority. The entire incident of firing by the police personnel was only in order to maintain law and order and while directing for firing, the Competent Officer has followed the procedure as prescribed in the Police Manual. A change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course.

It is settled law that when the documents relied on by the respondents demonstrate that no prima facie offence is made out on the face value of those materials, then the criminal prosecution should not be allowed to continue and, therefore, it should be quashed, and in such a situation and circumstances, the petitioner who had got a right under the Constitution for the protection of their liberty have rightly approached this Court and this Court in these circumstances has no option left

except to grant the relief as prayed by the petitioner.

Impugned orders quashed.

Application u/s 482 Cr.P.C. allowed (E-3)

Case law relied upon/discussed: -

1. Matajog Dubey Vs H.C. Bhari AIR 1956 SC 44

2. Bakhshish Singh Brar Vs Smt. Gurmej Kaur & anr. AIR 1988 SC 257

3. P.K. Pradhan Vs St. of Sikkim (2001) 6 SCC 704

4. Yusofalli Mulla Vs The King AIR 1949 PC 264

5. Basdeo Agarwalla Vs King Emperor AIR 1945 FC 16

6. Budha Mal Vs St. of Delhi [Criminal Appeal No.17 of 1952 disposed of on 3/10/1952]

7. General Officer Commanding, Rashtriya Rifles Vs C.B.I. & anr. (2012) 6 SCC 228

8. Punj. Vs Mohd. Iqbal Bhatti (2009) 17 SCC 92

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. By means of Criminal Misc. Case No.3855 of 2013 filed under Section 482 of Criminal Procedure Code (in short "Cr.P.C."), the petitioner Siya Ram Saran Aditya has challenged the order dated 16.08.2013 passed in Criminal Revision No.164 of 2012 by the Additional Sessions Judge/ Special Judge (SC/ ST Act), Lucknow, whereby the criminal revision preferred by the petitioner has been dismissed affirming the order 26.03.2012 passed in Case No.3/ 12, R.C. No.7(S)/ 2008, under Sections 147, 148, 302, 307, 342, 504, 506 IPC, Police Station CBI (ACB), Lucknow by the Special Judicial Magistrate (CBI), Lucknow by which the protest petition filed by Sri Ram Gopal (complainant) was accepted and summoned the petitioner along with other co-accused persons under Sections 34, 304(2) and Section 326 IPC.

2. Petitioners of Criminal Misc. Case No.5430 of 2013 filed under Section 482 of Cr.P.C. have also prayed for quashing of the order dated 26.03.2012, whereby they have been summoned under the said sections by the learned special Judicial Magistrate (CBI), Lucknow.

3. As common question of law and facts arise in both these petitions filed under Section 482 of Cr.P.C. and arises out of common impugned judgment and order, therefore, both the petitions are being decided together by this common judgment and order.

4. In the year 2007, the then Government had put a ban on the Students' Union Elections in the entire State of U.P. On 08.01.2008, a protest against ban had been started by a Political Party on the Foundation Day Function of Jai Narain Post Graduate College, Lucknow under the supervision of Political Party's Youth Wing-Samajwadi Chhatrasabha. The Police Authorities after taking into consideration the aggressiveness of the protesters started Lathi charge and as a result whereof, one of the leaders, namely, Sunil Singh and some others were received injuries and they were admitted in the Hospital. Some other protesters were arrested and sent to jail.

5. After the aforesaid incident in order to protest Sri Shiv Pal Singh Yadav

(Ex-Minister) and Sri Akhilesh Yadav (Ex-Chief Minister) along with other party members sat on Dharna in front of the office of the Superintendent of Police, Lucknow on the same day i.e. 08.01.2008. On the very next day, on 09.01.2008, a news item was flashed in print and electronic media with regard to pushing Sri Shiv Pal Singh Yadav in a van and slapping him by the police personnel. Thereafter, Political Party had announced a massive protest across the State on 09.01.2008 to register their anger against the alleged police highhandedness including the alleged misbehave with Sri Shiv Pal Singh Yadav.

6. Sri Syed Mohammad Abbas the then Station Officer, Police Station Saifai, District Etawah had received an information with regard to blockage of road before the Chaudhary Charan Singh P.G. College, Hewra which resulted into a heavy traffic jam. The Station Officer along with other police personnel reached there and found that about 400-500 students and public persons blocked the road. The Station Officer, Police Station, Saifai while trying to convince the students and controlled the situation, the Additional Superintendent of Police, Sri Ram Pal Gautam along with other personnel reached there and tried to pacify the matter but the students instead of stopping Dharna started abusing and pelting stones on the police party. The Senior Superintendent of Police also reached at the place of Dharna and asked the unlawful assembly to vacate the site but they did not pay any heed to the request of the then Senior Superintendent of Police and started firing on the police personnel. It is said that in self defence and since no other effective option left, the police force had also fired and as a result whereof, two persons were received injuries on their persons in which one of the injured, namely, Mukesh had died.

7. Sri Syed Mohammad Abbas, Station Officer, Police Station Saifai, District Etawah had lodged a first information report in Case Crime No.01 of 2008, under Sections 147, 148, 149, 342, 504, 336, 307, 353, 332, 427, 435, 504 IPC and Section 7 of the Criminal Law (Amendment) Act and in Crime No.02 of 2008, under Sections 25/ 27 of the Arms Act and arrest several persons who were the members of unlawful assembly.

8. After concluding investigation, the Investigating Officer had submitted charge-sheet on 19.02.2008 in Case Crime No.01 of 2008 against 20 persons upon which the learned Magistrate had taken cognizance vide orders dated 01.03.2008 and summoned the accused persons. In the aforesaid incident, a magisterial inquiry was also conducted and in the magisterial inquiry, it was found that none of the police officials were responsible for the said incident.

9. The Complainant Sri Ram Gopal had filed an application under Section 156(3) of Cr.P.C. with the allegation that on 09.01.2008 at about 11:30 A.M., the petitioners Siya Ram Saran Aditya posted as Senior Superintendent of Police along with Additional Superintendent of Police Sri Ram Pal Gautam, Head Constable Malkhan Singh, Constable Rajiv Dubey, Constable Shri Krishna Saini and Constable Sanjiv Kumar Gautam along with others had entered into the premises of the College and had taken away some of the students. It is also alleged that on protest made by the student, the Senior

Superintendent of Police and the Additional Superintendent of Police started abusing and exhorted the police personnel to fire, as a result whereof, three students, namely, Mukesh, Avnish and Sunil had suffered firearm injuries.

10. The aforesaid application under Section 156(3) of Cr.P.C. filed by Sri Ram Gopal was allowed and an FIR was registered as Case Crime No.1-B of 2008, under Sections 147, 148, 149, 302, 307, 342, 506, 504 IPC on 01.03.2008. After concluding investigation, the Investigating Officer had submitted final report, against which, complainant Ram Gopal had approached this Court at Allahabad by way of filing Criminal Misc. Writ Petition No.6589 of 2008. The Co-ordinate Bench of this Court vide an ad-interim order dated 11.11.2008 had directed for entrustment of the investigation to the Central Bureau of Investigation with a further direction to transfer the Senior Superintendent of Police and the Additional Superintendent of Police from Etawah. It had also been directed that during the course of investigation, the Officers named in the FIR shall not be arrested. The said writ petition was dismissed for want of prosecution vide order dated 29.09.2010.

11. In compliance of the direction of this Court, the Central Bureau of Investigation had registered a formal case as R.C. No.7(S) of 2008 and applied for sanction under Section 197 of Cr.P.C. which was refused by the State Government vide order dated 03.12.2010. Thereafter, after completing investigation, the Central Bureau of Investigation had submitted its Closure Report under Section 173 of Cr.P.C. on 24.12.2010 in the court concerned and prayed for acceptance of the same. Against the Closure Report, the Complainant Ram Gopal has submitted an objection on 19.04.2011 with a prayer to reject the closure report and summoned the accused persons. The learned Magistrate concerned after considering the reply submitted by the Central Bureau of Investigation and the objection of the complainant, vide impugned order dated 26.03.2012, summoned the petitioners as accused for the offences punishable under Section 34, 304(2), 326 IPC. The order dated 26.03.2012 had been challenged by the petitioner Siya Ram Saran Aditya in Criminal Revision No.164 of 2012 before the learned Sessions Judge, which had been dismissed vide impugned order dated 06.08.2013 by the learned Additional Sessions Judge/ Special Judge (SC/ ST Act), Lucknow. In the meantime, vide order dated 31.08.2012, the State Government has granted sanction under Section 197 of Cr.P.C. to prosecute the petitioners and other persons.

12. Learned Counsel for petitioners have submitted that the Central Bureau of Investigation after registering the case had applied for sanction against the petitioners but the same had been refused by the Government. Thereafter, the Central Bureau of Investigation filed its closure report before the concerned Magistrate. In the meantime, the Government has been changed due to fresh election and the matter was again put up before the State Government for sanction of the prosecution without placing any fresh material. The State Government having found that as the learned Magistrate has already taken cognizance in the matter, so there is no need to grant sanction but it has also been stated that in order to avoid any technicality in the progress of trial, it

would be appropriate to grant sanction for prosecution to the petitioners and accordingly, the sanction has been granted, which is not permissible in the eyes of law as the prosecution has failed to place any fresh material.

13. It has further been submitted by learned Counsel for the petitioners that once the sanction for prosecution under Section 197 of Cr.P.C. has been refused, the subsequent sanction might have not been granted by the State Government on the same material which were produced before the Sanctioning Authority, as such the subsequent sanction dated 31.08.2012 is nothing but only to harass the petitioners. In support of his submissions, learned Counsel for the petitioners have relied upon the judgment rendered by the Hon'ble Supreme Court in the case of State of ***Himachal Pradesh vs. Nishant Sareen; (2010) 14 SCC 527***, in which it has been held by the Apex Court that where, after the refusal of the sanction once, if no material was produced for the second sanction, it ought to have challenged the order of the Sanctioning Authority but that was not done. Learned Counsel have further placed reliance on the judgment rendered by the Apex Court in the case of ***State of Army Head Quarter vs. CBI; (2012) 6 SCC 228***, in which it has been held by the Apex Court that the question as to whether the act complained off, is done in performance of the duty or in purported performance of the duty is to be determined by the competent authority and not by the Court. The legislature has conferred the absolute power on the statutory authority to accord sanction or withhold the same and the Court has no role in this subject. In such a situation, the court would not proceed in absence of prosecution sanction, and therefore, the order passed by the learned Magistrate concerned is liable to be quashed.

14. It has been contended by learned Counsel for petitioners that the order passed by the State Government refusing to accord sanction was not challenged either by the Central Bureau of Investigation or by the complainant Ram Gopal before any forum or before any court of law, therefore, the subsequent sanction order passed by the State Government in absence of new material is illegal and arbitrary. Learned Magistrate failed to consider the provisions of Section 132 of Cr.P.C. which provides protection against the prosecution.

15. Per contra, the learned Counsel appearing on behalf of the Central Bureau of Investigation has vehemently opposed the submissions made by learned Counsel for petitioners and has submitted that the Central Bureau of Investigation has concluded the investigation in most scientific and objective manner by engaging experts of Central Forensic Science Laboratory, New Delhi and All India Institute of Medical Sciences, New Delhi to arrive at the truth vis-a-vis allegations made against the petitioners. It is further submitted that CBI conducted the investigation without favouring to any person and without being influenced by anyone. He has further submitted that the order passed by the learned Judicial Magistrate taking cognizance of the offence as well as the order of the learned Additional Sessions Judge/ Special Judge (S.C./ S.T. Act), Lucknow dated 6.8.2013 upholding the cognizance taken by the learned Judicial Magistrate for the offences, is according to the judicial process of law.

16. Learned Counsel for the complainant has submitted that on 09.01.2008, while the complainant was discharging his duties in the College on 09.01.2008 at about 11:30 AM, the petitioners along with other police personnel entered into the premises of the College and taking away the innocent students forcibly. The other students of the College protested against the act of the police personnel and after hearing the hue and cry of the students, the complainant and the Principal of the College also came out and they also started protest. The petitioners instigated other police personnel to kill the students, as a result whereby, three students namely, Mukesh Singh, Avnish and Sunil had sustained fire armed injuries and out of which, Mukesh Singh succumbed to the injuries.

17. It has further been submitted by learned Counsel for the complainant that after investigation, the Central Bureau of Investigation has found that the accused persons have committed serious offence under sections 34, 304(ii) IPC and section 326 IPC. He has again submitted that in the instant case, the sanction for prosecution is not required as the killing of the innocent person cannot be said to be anyway connected with the discharge of official duty.

18. It has again been submitted by the learned Counsel for the complainant that in the instant case, the Central Bureau of Investigation was not supposed to ask sanction for prosecution as the offence committed by the petitioner and other accused persons cannot be said to be connected with the discharge of official duty. Further, since the petition before the Hon'ble Court was kept pending for monitoring, there was no need for obtaining sanction and also, the petitioner may raise the said question of sanction during the trial. So far as section 132 Cr.P.C. is concerned, it falls within Chapter-X of Cr.P.C. and provides for Maintenance of Public Order and Tranquility. It is submitted that the Section 132 of Cr.P.C. comes when previous sections of the aforesaid Chapter i.e. Sections 129 to 130 Cr.P.C. are applicable.

19. It has also been submitted by learned Counsel for the complainant that a perusal of the order dated 31.08.2012 shows that after considering the entire material in detail and examining the matter afresh as also subsequent developments, the sanction for prosecution has been granted. It has consistently been held by Hon'ble Supreme Court as well as this Court that litigants are supposed to approach the Court with clean hands and if a litigant does not come to the court with clean hands is not entitled for any discretionary relief from any of the court.

20. I have heard learned Counsel for the parties and perused the record.

21. The following issues are required to be adjudicated while deciding the instant petition under Section 482 of Cr.P.C.:

"(I). Whether the act done by petitioners in the present case was within the official capacity in discharge of their official duty?

(II) Whether prior sanction under Section 197 of Cr.P.C. is necessary in the present case before prosecuting the petitioners?

(III) Whether the charge-sheet could be submitted against the petitioners without prior sanction under Section 197 of Cr.P.C.?

(IV) Whether the court concerned has committed legal error in taking cognizance and summoning the petitioners to face trial in absence of valid / prior sanction under Section 197 of Cr.P.C.?

(V) Whether the firing in which one person died and other sustained firearm injury was justified?"

ISSUE NO.I

22. The situation was such that if the police had not opened fire, there was apprehension of death or grievous injury to the police personnel. It was in the exercise of the right of private defence falling under Section 99 of the Indian Penal Code. In such an event, the question is whether the act of petitioners was referable to the delegation of sovereign power of the State is available. For dealing of this aspect, it would be useful to refer certain statutory provisions which governs maintenance of public order and tranquility. Chapter X of Cr.P.C. has laid down the procedure that is required to be followed in the dispersal of unlawful assemblies either by the use of civil force or armed force. Section 129 reads thus:

"129(1). Any Executive Magistrate or officer in charge of police station or, in the absence of such officer in charge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law."

23. Sections 130 to 132 relate to the use of armed forces to disperse the unlawful assembly which are not material for our purpose as the services of the armed forces were not requisitioned. Section 132 deals with protection against prosecution for acts done under the aforesaid Sections. Under sub-section (1) of Section 132, no prosecution against any person for any act purporting to be done under Sections 129, 130 or 131 shall be instituted in any Criminal Court excepting with the sanction of the Central Government where such person is an officer or member of the armed forces; or with the sanction of the State Government in any other case. Similarly, no Executive Magistrate or Police Officer acting under any of the said Sections in good faith or no person doing any act in good faith in compliance with a requisition under Section 129 or Section 130 shall be deemed to have thereby committed an offence (Section 132 (2)(a) and (b)). Sub-section (3) of Section 132 defines "armed forces" to mean the military, naval and air forces operating as land forces and includes any other armed forces of the Union so operating. Suffice it to note that

Section 129 is attracted in the instant case and any Executive Magistrate or officer in-charge of the Police Station or, in the absence of such officer in charge, any police officer not below the rank of a Sub-Inspector may command any unlawful assembly to disperse. If such a command given under sub-section (1) is not obeyed, then such force as may be necessary may be used to disperse the assembly.

24. These are some of the salutary instructions given to the police officers and men who are called upon to control riotous mobs and to disperse them. Section 129 of Cr.P.C. makes it amply clear that only an Executive Magistrate or Officer in charge of a Police Station or in the absence of such Officer in charge, any police officer not below the rank of a Sub-Inspector has the power to command an unlawful assembly to disperse, it is clear from these various safeguards against reckless use of force that officers with some responsibility should command use of force including one of firing to disperse an unlawful assembly.

25. In the instant case, the Senior Superintendent of Police and the Additional Superintendent of Police along with others are present on the spot and the firing was opened by the police personnel on the direction of the petitioner Siya Ram Saran Aditya as it was necessary to take an action or to open a fire for the disbursal of the unlawful assembly. It is abundantly clear from the facts and circumstances of the case that opening of fire was on the direction of the petitioner Siya Ram Saran Aditya, which is not below the rank of Inspector, after examining the situation on the spot. The facts of the case clearly shows that the petitioner Siya Ram Saran Aditya who was the then Senior Superintendent of Police are present on the spot and took decision to open fire and accordingly firing was done after examining the situation and necessity of the said act.

26. For examining Issue No.I, there must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty. What I must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.

27. The act must fall within the scope and range of the official duties of the public servant concerned. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider, if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant.

28. It is necessary to protect the public servants in the discharge of their duties. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge

of official duties and protection of private citizens have to be balanced by finding cut as to what extent and how far is a public servant working in discharge of his duties or purported to discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 197 of Cr.P.C. states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. The protection given under Section 197 of Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution.

29. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by the Supreme Court in the case of ***Matajog Dubey Vs. H.C. Bhari; AIR 1956 SC 44***, which is as under:

"The offence alleged to have been committed must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

30. The nexus between the discharge of the public duty and the offending act or omission must be inseparable. The obvious reason is to balance the public good and efficiency of the performance of the public duty by a public servant and the legitimate and bona fide grievance of an aggrieved person. Sometimes while discharging or purported to discharge the public duty, the officer may honestly exceed his limit or pass an order or take a decision which may later be found to be illegal, etc. Therefore, the prior sanction by the appropriate Government is an assurance to a public servant to discharge his official functions diligently, efficiently and honestly without fear or favour, without having haunt of later harassment and victimization, so that he would serve his best in the interest of the public.

31. The offending act must be integrally connected with the discharge of duty and should not be fanciful or pretended. If the act complained of is directly, and inextricably connected with the official duty, though it was done negligently, or in dereliction of duty or in excess thereof, Section 197 and similar provisions operate as a canopy against malicious, vexatious or frivolous accusation or prosecution at the hands of the aggrieved persons. It is well settled law that public servant can only be said to act or purported to act in the discharge of his official duty if his act or omission is such as to lie within the scope of his official duty.

32. In the instant case, the petitioner Siya Ram Saran Aditya along with other

petitioners, who was the then Senior Superintendent of Police, had reached at the place where the students and other people was sitting on Dharna and blocked the road. The petitioner tried to convinced them to vacate the road but the crowed stood aggravated and started pelting stones upon the police personnel. Some of them opened fire on the police personnel while they are discharging their official duty. In order to maintain law and order and on the defence, the police personnel on the direction of the petitioner Siya Ram Saran Aditya had also opened fire, as a result whereof, one died and some others are injured. It is crystal clear from the facts stated above that the petitioners were at the place of incident in his official capacity and during that time he was the Senior Superintendent of Police, therefore, being the senior most police officer at the place of incident, it was the duty of the petitioner Siya Ram Saran Aditya to maintain law and order of the said locality.

ISSUES NO.II & III

33. Whether court below has erred grievously in taking cognizance of the above case against the petitioners as the opposite parties/ prosecuting agency failed to obtain the sanction under Section 197 (1) of Cr.P.C. against the petitioners who had nexus to official duty only in complexity with their work as police official. In the absence of the valid sanction under Section 197 (1) of Cr.P.C., the case is void abinito.

34. Section 197 of Cr.P.C. reads as follows:

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

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

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

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

[Explanation.-- For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166-A, Section 166-B, Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 370, Section 375, Section 376, Section 376-A, Section 376-C, Section 376-D or Section 509 of the Indian Penal Code.]

(2). No Court shall take cognizance of any offence alleged to have been

committed by any member of the Armed Forces of the Union whole acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3). The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B). Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

35. The protection given under Section 197 of Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants.

36. The applicability of Section 197 of Cr.P.C. needs careful consideration. In ***Bakhshish Singh Brar Vs. Smt. Gurmej Kaur and another; AIR 1988 SC 257***, the Hon'ble Supreme Court while emphasizing on the balance between protection to the officers and the protection to the citizens observed as follows:-

"It is necessary to protect the public servants in the discharge of their duties. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section

196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."

37. In **P.K. Pradhan Vs. State of Sikkim; (2001) 6 SCC 704**, the Hon'ble Supreme Court held as follows:

"The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government, touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation."

38. The offences led in Section 197 of Cr.P.C. is that no court shall take cognizance of offence against a public servant alleged to have committed while acting or purported to act in the discharge of official duty, except with previous sanction of the appropriate Government. The object behind prior sanction is to prevent malicious, vexatious and unnecessary harassment to a public servant by laying false or frivolous accusation or prosecution. In other words Section 197(1) and related sections intended to immune a public servant who discharges his duties honestly and diligently from the threat of prosecution. Honest discharges of public duty would impinge adversely of the interests, acts or omissions of private persons who would be prone to harass in criminal proceedings and prosecution to demoralize a public servant.

39. In ***Yusofalli Mulla Vs. The King; AIR 1949 PC 264***, the Privy Council was examined whether failure to obtain sanction affected the competence of the Court to try the accused. A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law and the institution of a prosecution in the absence of a proper sanction. The Magistrate was no doubt competent to decide whether he

had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given, the Court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in ***Basdeo Agarwalla Vs. King Emperor; AIR 1945 FC 16*** that a prosecution launched without a valid sanction is a nullity.

40. The Federal Court in ***Basdeo Agarwalla's case (supra)***, summed up the legal position regarding the effect of absence of a sanction in the following words:

"In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started."

41. In the case of Budha Mal vs. State of Delhi [Criminal Appeal No.17 of 1952 disposed of on 3/10/1952], the Hon'ble Apex Court clearly ruled that absence of a valid sanction affected the competence of the Court to try and punish the accused.

42. The object of the provisions of Section 197 of Cr.P.C. is to prevent public servant from undue harassment. The sanction is in the nature of safeguard provided to public servant of his being illegally and falsely harassed, impleaded and then prosecuted. Therefore, on the reading of above provision of law, it can be gathered that the object of getting sanction from the competent authority is to protect the public servant from discharge of his official duty without fear and favour.

43. It is the duty of the prosecution to produce necessary record to establish that after application of mind and consideration thereof to the subject the grant or refusing to grant sanction was made by the appropriate authority. At any

time before the Court takes cognizance of the offence, the order of sanction could be made. It is settled law that issuance of the process to the accused to appear before the court is sine quo non of taking cognizance of the offence. The emphasis of Section 197(1) of Cr.P.C. or other similar provisions that "no court shall take cognizance of such offence except with the previous sanction" posits that before taking cognizance of the offence alleged, there must be before the court the prior sanction given by the competent authority. Therefore, at any time before taking cognizance of the offence, it is open to the competent authority to grant sanction and the prosecution is entitled to produce the order of sanction.

44. If the sanction is not valid and legal or not granted by the competent authority and even if the prosecution has not sought sanction to prosecute the accused for the offence punishable under the provisions of Indian Penal Code, it is fatal to the case of the prosecution. Therefore, if the Investigating Officer was not successfully get sanction against the accused as required under Section 197 of Cr.P.C., he may not chose to file charge-sheet against the accused for the commission of offences punishable under the provisions of Indian Penal Code.

45. Admittedly, in the present case on hand, the accused being a Police Officer while maintaining the law and order was discharging the official duty. Therefore for initiation of prosecution, the sanction under Section 197 of Cr.P.C. is required whereas in the present case the charge-sheet was filed against the accused persons in absence of any valid sanction.

ISSUES NO. IV & V

46. In the case of ***General Officer Commanding, RashtriyaRifles Vs. Central Bureau of Investigation and another; (2012) 6 SCC 228***, the Apex Court while dealing "Good Faith" has observed as under:

"69. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyalty and faith etc. He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him.

70. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not mala fide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalise. Good faith and public good are though the question of fact, it required to be proved by adducing evidence. (Vide: Madhavrao Narayanrao Patwardhan Vs. Ram Krishna Govind Bhanu; AIR 1958 SC 767, Madhav Rao Jivaji Rao Scindia Vs. Union of India; (1971) 1 SCC 85, Sewakram Sobhani v. R.K. Karanjiya; (1981) 3 SCC 208, Vijay Kumar Rampal v. Diwan Dev; AIR 1985 SC 1669, Deena v. Bharat Singh; (2002) 6 SCC 336 and Goondla Venkateswarlu v. State of A.P.; (2008) 9 SCC 613).

73. Performance of duty acting in good faith either done or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that

such a issue raised would be dependent on the facts of each case and cannot be a subject matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under a statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed.

74. Then comes the issue of such a duty being performed in good faith. ''Good faith' means that which is founded on genuine belief and commands a loyal performance. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed.

75. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or ill will. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the duty so performed are such for which an official stands excused by reason of his office or post.

76. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important.

77. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. The official may in his defence perform a duty which can be on account of some miscalculation or wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the discharge of any official duty. Thus, an act which may appear to be wrong or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, a duty in good faith should be presumed to have been done or purported to have been done in

exercise of the powers conferred under the statute."

47. Thus, in view of the above, the law on the issue of sanction can be summarized to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the Court. The Legislature has conferred "Absolute Power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation, the court would not proceed without sanction of the competent statutory authority.

48. From the facts of the case, in hand, the road was blocked by unsocial elements before Chaudhary Charan Singh P.G. College, Hewra which resulted into a heavy traffic jam, then Station Officer along with other police personnel reached there and tried to convince the people, who had created the blockage on the road, and tried to control the mob but everything is in vain. On the information received from the then Station Officer, the Additional Superintendent of Police reached there and tried to pacify the matter with the mob and requested to stop Dharna on the road but the mob become uncontrolled and started pelting stones on the police party. The mob had started firing on the police personnel and, therefore, the situation had become uncontrolled and then the competent police officers i.e. Senior Superintendent of Police and Additional Superintendent of Police, who are present at the time of incident on the spot, having no other effective option left directed for firing in self defence, as a result whereof, two persons were received injuries on their persons and out of which one died. The entire incident of firing by the police personnel was only in order to maintain law and order and while directing for firing, the Competent Officer has followed the procedure as prescribed in the Police Mannual. No extra force was applied and the said unfortunate incident has taken place only for the purpose of maintaining the law and order which were become serious at that time. The action had been taken place as per the procedure prescribed in law and the police mannual while discharging official duty.

49. As per the record, for the abovesaid incident, the Magisterial inqury

was conducted and in that Magisterial inquiry, it was found that none of the police officials are responsible for the said incident.

50. There are crucial question is whether the High Court, in exercise of its extra-ordinary jurisdiction under Section 482 of Cr.P.C., would interfere and quash the charge-sheet and the cognizance order of the trial court.

51. In the case of **Punjab Vs. Mohd. Iqbal Bhatti; (2009) 17 SCC 92**, the Hon'ble Apex Court while considering the question whether the State has any power of review in the matter of grant of sanction in terms of Section 197 of the Code has observed as under:

"6. Although the State in the matter of grant or refusal to grant sanction exercises statutory jurisdiction, the same, however, would not mean that power once exercised cannot be exercised once again. For exercising its jurisdiction at a subsequent stage, express power of review in the State may not be necessary as even such a power is administrative in character. It is, however, beyond any cavil that while passing an order for grant of sanction, serious application of mind on the part of the concerned authority is imperative. The legality and/or validity of the order granting sanction would be subject to review by the criminal courts. An order refusing to grant sanction may attract judicial review by the superior courts.

7. Validity of an order of sanction would depend upon application of mind on the part of the authority concerned and the material placed before it. All such material facts and material evidences must be considered by it. The sanctioning authority must apply its mind on such material facts and evidences collected during the investigation. Even such application of mind does not appear from the order of sanction, extrinsic evidences may be placed before the court in that behalf. While granting sanction, the authority cannot take into consideration an irrelevant fact nor can it pass an order on extraneous consideration not germane for passing a statutory order. It is also well settled that the superior courts cannot direct the sanctioning authority either to grant sanction or not to do so. The source of power of an authority passing an order of sanction must also be considered."

52. The Hon'ble Supreme Court in Mohd. Iqbal Bhatti's case (Supra) then noticed the opinion of the High Court which was recorded as follows:

"9. ..... Once the Government passes the order under Section 19 of the Act or under Section 197 of the Code of Criminal Procedure, declining the sanction to prosecute the concerned official, reviewing such an order on the basis of the same material, which already stood considered, would not be appropriate or permissible."

53. While affirming the above opinion of the High Court, Hon'ble Apex Court in paras 20 and 21 of the Mohd. Iqbal Bhatti's case (supra) has observed as under:

"20. It was, therefore, not a case where fresh materials were placed before the sanctioning authority. No case, therefore, was made out that the sanctioning authority had failed to take into consideration a relevant fact or took

into consideration an irrelevant fact. If the clarification sought for by the Hon'ble Minister had been supplied, as has been contended before us, the same should have formed a ground for reconsideration of the order. It is stated before us that the Government sent nine letters for obtaining the clarifications which were not replied to."

21. The High Court in its judgment has clearly held, upon perusing the entire records, that no fresh material was produced. There is also nothing to show as to why reconsideration became necessary. On what premise such a procedure was adopted is not known. Application of mind is also absent to show the necessity for reconsideration or review of the earlier order on the basis of the materials placed before the sanctioning authority or otherwise."

54. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorized to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise. In my opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course.

55. After perusal of the entire documents on record as well as the submissions made by learned Counsel for the parties, I find that there is no prima facie case is made out on merits and chances of ultimate conviction is bleak. It is settled law that when the documents relied on by the respondents demonstrate that no prima facie offence is made out on the face value of those materials, then the criminal prosecution should not be allowed to continue and, therefore, it should be quashed, and in such a situation and circumstances, the petitioner who had got a right under the Constitution for the protection of their liberty have rightly approached this Court and this Court in these circumstances has no option left except to grant the relief as prayed by the petitioner.

56. In view of above, the order dated 16.08.2013 passed by the Additional Sessions Judge/ Special Judge (SC/ ST

Act), Lucknow in Criminal Revision No.164 of 2012 and the order 26.03.2012 passed by the Special Judicial Magistrate (CBI), Lucknow in Case No.3/ 12, R.C. No.7(S)/ 2008, under Sections 147, 148, 302, 307, 342, 504, 506 IPC, Police Station CBI (ACB), Lucknow are quashed. The petitions under Section 482 of Cr.P.C. are allowed.

(2019)10ILR A 676

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2019

BEFORE

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

Writ-B No. 1545 of 1976

Thakur Prasad ...Petitioner
Versus
The D.D.C., Azamgarh & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.N. Singh, Sri P.N. Singh, Sri R.N. Pandey, Sri Ishir Sripat, Sri Rahul Sripat

Counsel for the Respondents:
S.C., Sri J.N. Sharma

A. U.P. Consolidation of Holdings Act- Sec. 23 – Allotment of Chak-Objection filed- incongruence between impugned order and adjustment chart-areaof land allotted to petitioner-not figured in adjustment chart-allotted plot no. 1460-given plot nos. 1660, 1263, 1264,1266,1473-all worst than original holding-plot no. 1460.

Held :- the Writ Petition succeeds and is allowed in part only to the extent that the adjustment chart enclosed to the impugned order shall be appropriately corrected to bring it in accord with the order under reference and include the area of the petitioner's holding, as directed in the substantive part of the order. To this extent, the impugned order stands modified.

Writ Petition allowed in part (E-8)

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

1. This Writ Petition is directed against an order of the Deputy Director of Consolidation, Azamgarh, dated 14.01.1976 passed in Revision no.428, Guru Granth vs. Naumi and others, and Revision no.583, Sant Kumar vs. Guru Granth and others. Also, under challenge, is a subsequent order dated 21.02.1976 passed by the Deputy Director of Consolidation, Azamgarh in Restoration Application no.111, Sant Kumar vs. Guru Granth and others, seeking to set aside the order dated 14.01.1976, in so far it relates to the two Revisions aforesaid, seeking to restore those Revisions to their original number, and determine them afresh.

2. At the outset, it must be remarked that the prayer clause in the Writ petition is rather vaguely worded, and reads thus:

"It is, therefore, prayed that Writ in the nature of Certiorari be issued to send for the records of the case and to quash the orders of the Deputy Director, and that any other suitable Writ, Order or direction be issued in the interest of Justice."

3. From the substance of the allegations in the Writ Petition, it is, however, clear that the petitioner has assailed the order of the Deputy Director of Consolidation, Azamgarh, dated 14.01.1976, in so far as it pertains to Revision nos.428 and 583, last mentioned. It is also clearly discernible that the

further order dated 21.02.1976 passed on the restoration application made to set aside the judgment and order dated 14.01.1976, is one that is made on the application referable to the two Revisions last mentioned, and not others. It further requires to be said in order to set the record straight that pointed reference to the two Revisions, where the impugned order dated 14.01.1976 has been passed, is made on account of the fact that by the said order the Deputy Director has disposed of some thirty-two Revisions, about the rest of which except the two above mentioned, there is no issue in this Writ Petition.

4. This Writ Petition was admitted to the hearing as long back as on 3rd August, 1976. Notice was sent out on 18.09.1976 returnable on 01.12.1976. A perusal of the order sheet shows the fact that between 18.09.76 and 02.02.1993, that is, a period of about little more than 16 years, the Writ Petition never came up before the Court; at least, there is no order scribed on the order sheet between these two dates. On 22.02.1993, a substitution application, seeking to bring on record the heirs of the sole petitioner, who has died in the meanwhile, was filed. This Writ Petition, which arises from a chak allotment matter, had a host of substitution applications, an abatement application, and, in between, a restoration application. All these were disposed of on 08.02.2019, whereafter decks were cleared for hearing. Vide office report dated 21.02.2019, and reiterated on 07.03.2019, the matter was posted for final hearing. The said report was reiterated again on 08.05.2019 and 02.07.2019. On 03.07.2019, the Writ Petition was heard in a single hearing and judgment was reserved.

5. Heard Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat, learned counsel appearing on behalf of the petitioner and Sri J.N. Sharma, learned counsel appearing on behalf of respondent nos.2 & 3.

6. The proceedings giving rise to this petition relate to consolidation operation, and were current in the district of Azamgarh in the year 1976. The dispute relates to land situate in Village Azmatgarh of district Azamgarh. The petitioner was proposed a single chak by the Assistant Consolidation Officer, that included, inter alia, khasra nos.1226(M), 1434(M), 1435(M), 2329(M) and 1330(M). The petitioner was satisfied with the said allotment, and did not file any objection from the proposal. A number of other tenure holders filed objections, but none of them related to the ACO's proposal, vis-a-vis, the petitioner's chak, 'directly' or 'indirectly', as the petitioner seeks to plead. The petitioner's chak is claimed to have become final, and also confirmed under Section 23 of the U.P. Consolidation of Holdings Act, 1953 (for short, 'the Act'). No appeal was carried from the order or the determination made in favour of the petitioner, as the petitioner would submit.

7. Guru Granth, respondent no.3 is said to have filed a revision to the Deputy Director of Consolidation, bearing Revision no.428, impleading the petitioner as a party. It is asserted by the petitioner that notice of this Revision was not served upon the petitioner, in consequence of which at the hearing, neither the petitioner had knowledge or did he appear or sign the order sheet. It is further pleaded that Revision no.583 of was filed by another co-tenure holder,

Sant Kumar. No notice of this Revision was issued or given to the petitioner, or did he otherwise acquire knowledge of these proceedings. In consequence, neither the petitioner or the learned counsel could appear at the hearing before the Deputy Director of Consolidation. It is also asserted in paragraph 3 of the Writ Petition that at the time of local inspection made by the Deputy Director of Consolidation, the petitioner's son was not present at the place of inspection. It is also claimed by the petitioner that the impugned order passed by the Deputy Director of Consolidation, disposing of the two Revisions, above mentioned, along with a host of others, has been passed behind the petitioner's back, without any opportunity of hearing to him, and further that by an ex parte determination done behind the petitioner's back, he has been given two chaks in the same sector and a third in another sector. The total holding of the petitioner is claimed to be about six bighas. It is asserted in paragraph 2 of the Writ Petition by the petitioner that Revision no.428, filed by Guru Granth, where he was impleaded as a party, no notice was issued to him. He did not appear at the hearing of the Revision, or sign the order-sheet of proceedings, or otherwise had knowledge. Likewise, it is asserted, that Revision no.583 filed by Sant Kumar, no notice was issued to the petitioner, and he had no knowledge of the proceedings. In consequence, he or his counsel did not appear at the hearing of Revision no.583 also.

8. There is an assertion in paragraph 3 of the Writ Petition by the petitioner, that at the time of inspection done by the Deputy Director of Consolidation, the petitioner's son was not present. It is then asserted that both these Revisions under reference, one filed by Sant Kumar, and the other filed by Guru Granth, came to be heard and allowed behind the petitioner's back. It is said that these Revisions have been decided without affording the petitioner any opportunity of hearing. These assertions regarding denial of opportunity have been boldly made in paragraphs 2, 3 and 4 of the Writ Petition. It is also asserted that both the Revisions were allowed, in consequence of which, the petitioner's chak, as proposed by the ACO, has been completely altered by the Deputy Director of Consolidation. The petitioner has been given bad quality land. It is also asserted, as already said by the petitioner, that he has been given two chaks in one sector, and a third in another sector. The total land in his hand, after determination of the Deputy Director of Consolidation, is six bighas.

9. It appears that the petitioner filed an application for restoration seeking to set aside the order of the Deputy Director of Consolidation, dated 14.01.1976 made in the two Revisions under reference, primarily on ground that these Revisions were decided behind his back without affording him opportunity of hearing, and that the decision rendered there, substantially prejudices the petitioner as already indicated. The said restoration application was rejected by the Deputy Director by means of an order dated 21.02.1976. It is asserted by the petitioner that the finding recorded by the Deputy Director of Consolidation that the petitioner was heard in the Revision filed by Sant Kumar, and that all Revisions were heard after being consolidated, is wrong. It is asserted that each Revision was heard separately as there were different parties and different plots. It is

also asserted that there was no counter affidavit filed on behalf of the opposite parties to the restoration application, on account of which the assertions made in the restoration application, that was filed to the Deputy Director of Consolidation, remained unrebutted at the instance of any of the respondents here. It is also asserted that the petitioner's son was not present at the hearing of the Revision, or at the time of local inspection, as already asserted. There is a particular assertion in paragraph 7 of the Writ Petition that the Deputy Director of Consolidation ordered that the petitioner be allotted land on his original holding bearing plot no.1460, but in the adjustment chart, plot not.1460 has not been given to him. Instead plot nos.1660, 1263, 1264, 1266 and 1473, have been entered in the petitioner's chak, that are far inferior than plot no.1460. It is also claimed in the paragraph under reference that earlier, the petitioner was given two chaks comprising his original holding, but now he has been given three chaks, and these do not carry his original holding. It is also asserted that Sant Kumar has been given the best quality land, whereas his original holding was of bad quality, mostly. There is an assertion in paragraph 8 of the Writ Petition that the Revision filed by Sant Kumar against the order of the Settlement Officer of Consolidation, dated 31.10.1974, was filed on 03.06.1975. It was barred by time, but the same has been entertained and allowed, without condoning the delay in filing the Revision.

10. Of the two respondents, that is to say, Sant Kumar, respondent no.2 and Guru Granth, respondent no.3, a counter affidavit has been filed on behalf of Guru Granth alone. It is an affidavit dated 12th July, 2009. No counter affidavit has, however, been filed on behalf of respondent no.2. Something that requires to be noticed regarding respondent no.3 evident from the counter affidavit filed on their behalf, is that the party described as Guru Granth in Revision no.428, Guru Granth vs. Naumi and others, decided by the impugned judgment and order dated 14.01.1976, is not a man in flesh and blood. Instead, the party referred as Guru Granth, is a Math of Guru Granth Ji Mahatam Swami, represented by its Mahanth, Mahanth Balak Dass. In the counter in paragraphs 4, 5 & 6, the petitioner's assertions that the two Revisions nos.583 and 428 filed by Sant Kumar and Guru Granth respectively, have been decided without notice or opportunity to the petitioner, have been specifically denied. The said fact has been refuted with reference to the findings recorded in the subsequent order of the Deputy Director of Consolidation, dated 21.02.1976, passed on the restoration application preferred by the petitioner. In paragraph 6 of the rejoinder affidavit, it is asserted amongst other things that the assertion in paragraph 4 of the counter affidavit about denial of opportunity, has not been specifically denied in the counter affidavit.

11. Since the question of the two Revisions being decided vitally affecting the petitioner's chak without opportunity of hearing to him as claimed, is a question that goes to the root of the matter, it is expedient to deal with and answer the issue in the first instance. Both, Sri Rahul Sripat, learned Senior Advocate and J.N. Sharma, learned counsel appearing for respondent nos.2 & 3 are firm in their respective stands about the issue.

12. The Court has considered the matter and, in particular, perused the order dated 21.02.1976, which is an order

passed by the Deputy Director of Consolidation, on the restoration application preferred by the petitioner, where the principal ground was denial of opportunity, and decision of the Revisions under reference against the petitioner without notice to him or within his knowledge. The Deputy Director has recorded a specific finding with reference to Revision no.428, that is, the Revision filed by respondent no.3, Guru Granth to the effect that the petitioner was issued notice of the said Revision, the record of which is appended to the Revision papers. It has further been recorded that the order-sheet of this Revision has been signed by the petitioner. A further finding has been recorded that the petitioner has also been heard in opposition to the Revision preferred by the revisionist, Sant Kumar, even though the order-sheet of that Revision, does not bear his signatures. There is a further specific finding recorded by the Deputy Director of Consolidation, that the petitioner's son was present at the time of spot inspection. Now, this Court thinks that the other contention of the petitioner that the spot inspection was done by the Deputy Director of Consolidation in his absence, particularly of his son, must also be disposed of here. The contention that the petitioner was not heard in opposition to the Revision, is essentially a question to be answered with reference to record. To the extent that it cannot be answered with reference to record, it can best be answered with reference to personal knowledge of the Presiding Officer who heard the matter, or the learned counsel who appeared in the proceedings. A perusal of the later order dated 21.02.1976 passed by the Deputy Director shows that it is an order recorded by Sri Ram Sahai Lal Srivastava, the then Deputy Director of Consolidation, Azamgarh. It is the said Officer who decided the two Revisions under reference, along with a host of others by his judgment and order dated 14.01.1976. Thus, the said Officer is in a pre-eminent position to certify as to whether the petitioner, in fact, appeared and was heard in the two Revisions or not. He has specifically recorded, in his order dated 21.02.1976, that the petitioner was heard in both the Revisions. It is also recorded by him that on the order-sheet of Revision no.428, the petitioner has appended his signatures. As regards Revision no.583 filed by Sant Kumar, the Deputy Director of Consolidation has remarked that though he has not signed the order-sheet, but in fact he was heard in opposition to the said Revision. There is no record or evidence to the contrary filed by the petitioner to show that in fact he was never served with notice of the Revision, or that he did not appear at the hearing of the two Revisions. Though the assertions by the petitioner are specific that he did not appear at the hearing of the two Revisions, but there is not the slightest evidence to displace the strong presumption that arises from the contents of the order dated 21.02.1976 passed by the Deputy Director of Consolidation, both with reference to record and his personal knowledge, that the petitioner was heard in answer to the Revisions. About one of the Revisions as already said, there are signatures of the petitioner on the order-sheet. The petitioner has not said anywhere that the signatures on the order-sheet of Revision no.428 filed by respondent no.3, are not his signatures. The order of the Deputy Director of Consolidation, dated 21.02.1976, was filed along with the Writ Petition, as one of the two impugned orders, or as one of the orders on record. The petitioner was

well aware of the finding there that the Deputy Director of Consolidation has said that the petitioner has signed the order-sheet of Revision no.428, but the petitioner has not asserted or averred anywhere in the Writ Petition, that those signatures on the order-sheet are forged, or in any way not his signatures. The petitioner has also not said anywhere that the findings in the order dated 21.02.1976, which says that the petitioner was heard in opposition to the Revision, has been falsely recorded on account of some malice of the Presiding Officer though he has said that the finding that he was heard in the Revision filed by Sant Kumar is incorrect. In the absence of allegations of mala fide against the Presiding Officer, the presumption of regularity that attaches to all official actions, more particularly, when they are done in a judicial capacity, also attaches to the remark of the Presiding Officer, who has certified that the petitioner was heard in both Revisions.

13. In this view of the matter, there is no substance in the contention of the petitioner that he was not heard while deciding the Revisions under reference by means of impugned order dated 14.01.1976.

14. Likewise, the other contention that the petitioner's son was not present at the time of spot inspection by the Deputy Director of Consolidation, is also not acceptable for the singular reason that it was canvassed before the same Officer who had gone about the exercise of inspection, and decided the Revision, but he did not accept the same. Instead, he specifically recorded it for a fact in his order dated 21.02.1976 that the petitioner's son was present during the spot inspection, whom he met at that time. This kind of a finding coming from the pen of the same Officer, who held the inspection and decided the Revisions under reference, cannot be disturbed by this Court in exercise of its jurisdiction under Article 226 of the Constitution.

15. It is no doubt true that the assertion in paragraph 4 of the Writ Petition that the Deputy Director of Consolidation by the orders impugned has given the petitioner bad quality land, has not been denied for a fact in paragraph 6 of the counter affidavit. However, in the assertions made in paragraph 4 of the Writ Petition, it has not been pleaded with sufficient precision as to how the land allotted to the petitioner by the order impugned, is of poor quality compared to what was proposed to him by the ACO. It has also not been averred in the said paragraph that land allotted by the Deputy Director of Consolidation, is of poor quality when compared to the petitioner's original holding, that is comprised of khasra no.1460. That assertion has figured in paragraph 7 of the Writ Petition, but in a different context of limited scope, that will be dealt with hereinafter.

16. The other grievance of the petitioner that he has been spread out in three chaks, instead of two, as proposed by the ACO, is also not in dispute. The question is whether on these grounds the consolidation scheme for the village is to be disturbed at the instance of the petitioner by interfering with the same in these writ proceedings. This Court does not think so. The framing of a provisional consolidation scheme and making it final is a wholesome exercise. It is not necessary for the Consolidation Authorities to weigh in golden scales the

rights of parties when they go about the exercise of consolidation. All that is required to be done is that the fundamental principles that the Act and Rules lay down, are not violated. The petitioner has not indicated in the case that he has taken in paragraph 4 as to what was the precise valuation and nature of land that comprised his original holding and that given to him by the impugned order. A vague assertion that he has been given bad quality land, that does not spell out, in what precise terms that land is bad when compared with the land that was his original holding, or the land proposed by the ACO, is not warrant enough for this Court to interfere on that ground. So far as the question that the petitioner has been placed on three chaks instead of two as proposed by the ACO, is in no way illegal, inasmuch as, it is only when chaks more than three are allotted to a tenure holder, that prior approval of the Deputy Director of Consolidation is required. Even that in the present case, would not apply as the allotment has been made here by the Deputy Director of Consolidation himself. In any case, the provisions of Section 19(1)(e) of the Act clearly indicate that allotment of three chaks to a tenure holder is regarded as nothing exceptionable or something which the Consolidation Authorities must go about with special care. The discretion, therefore, exercised by the Deputy Director of Consolidation on this score, cannot be faulted.

17. The last submission canvassed by Sri Rahul Sripat, learned Senior Advocate is to the effect that the Deputy Director of Consolidation has allotted land to the petitioner on his original holding bearing plot no.1460, but in the allotment, plot no.1460 has not been given to him. Instead, he has been given plot nos.1660, 1263, 1264, 1266, 1473, all of which are worse than his original holding, comprised of plot no.1460.

18. This Court has perused the impugned order which shows that respondent no.2, Sant Kumar has been given land from the petitioner's proposed chak, comprising plot no.1334, that is Sant Kumar's original holding, and to compensate the petitioner, the said land that has been taken out from the eastern part of the petitioner's chak, it has been ordered that land of equivalent value in plot no.1460, that is the original holding of the petitioner, be given. A perusal of the adjustment chart appended to the impugned order dated 14.01.1976, shows in Column 8 that the following plot numbers have been entered in the three chaks of the petitioner: 1263(M), 1264(M), 1266(M), 1463(M), 1473(M), 1463(M), 1616(M) and 1462(M). There is some more area of plot no.1463(m), that has been entered in the petitioner's chak, may be in a different chak out of the three allotted. What is apparent on the face of record, is that keeping in view the orders passed by the Deputy Director of Consolidation in Revision no.583, filed by Sant Kumar, the petitioner has not been given any part of his original holding in plot no.1460. There is, thus, clearly incongruence between the impugned order and the adjustment chart appended to it, in terms whereof plot numbers allotted to the petitioner are to be actually entered in the consolidation records. To this extent, the submission of Sri Rahul Sripat, learned Senior Advocate is well founded that there is incongruence between the impugned order dated 14.01.1976 and the appended chart where in the petitioner's chak, the area of land

allotted on his original holding, does not figure in the adjustment chart.

19. In the result, the Writ Petition succeeds and is allowed in part only to the extent that the adjustment chart enclosed to the impugned order dated 14.01.1976 shall be appropriately corrected to bring it in accord with the order under reference and include the area of the petitioner's holding in plot no.1460, as directed in the substantive part of the order. To this extent, the impugned order dated 14.01.1976 stands modified. Costs easy.

(2019)10ILR A 683

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2019

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ-B No. 11311 of 1995

Jai Prakash ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri G.N. Verma, Sri A.B. Paul, Sri A.N. Verma, Sri A.P. Paul, Sri Anuj Kumar Sharma, Sri Ashutosh Pandey, Sri B.B. Paul, Dr. H. N. Tripathi, Sri H.O.K. Srivastava

Counsel for the Respondents:
S.C., Alka Srivastava, Sri Anuj Kumar Sharma, Sri Ashok Kumar, Sri Avadhesh Kumar Upadhyay, Sri G.C. Sharma, Sri Kumar Anish, Sri Pradeep Chandra, Sri Radha Upadhyay, Sri Rohit Upadhyay, Sri Sankatha Rai, Sri Santosh Kumar Srivastava, Sri Syed Wajid Ali, Sri Rohit Kumar Upadhyay, Sri Pranshu Kaushal, Sri Jitendra Mohan Sharma

A. Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 - Section 229 B - evidence relied by BOR-not relevant to decide title of parties-findings of first appellate court could not be set aside-on ground that said evidence is not considered-BOR exceeded its jurisdiction u/s. 331(4) r/w s.100 CPC.

Held: - There was no perversity in the findings of the first appellate court empowering the Board of Revenue to interfere in the said findings exercising its powers under Section 331(4) of the Act, 1950 read with Section 100 CPC.

Writ Petition allowed (E-8)

(Delivered by Hon'ble Salil Kumar Rai, J.)

The application was filed in the Court on 3.4.2019 and was taken on record.

Office is directed to grant regular number to the application.

The application has been filed to record the word 'deceased' before the name of Smt. Santosh Sharma referred as petitioner no. 2/1 in the application and the wife of the deceased petitioner no. 2 - Mr. Manjul Kumar Sharma and also to record the fact that Sri Manish Sharma, the son of deceased petitioner no. 2 referred as petitioner no. 2/2 in the application is the heir and legal representative of Smt. Santosh Sharma and is already on record. The array of parties in the memorandum of writ petition reveals that Smt. Santosh Sharma was not substituted in place of deceased petitioner no. 2 and only Sri Manish Sharma, i.e., the son of petitioner no. 2 was substituted in his place as petitioner no. 2/1.

In view of the aforesaid, the application is misconceived and is dismissed.

1. The present writ petition arises out of proceedings registered under Section 229-B of the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as, 'Act, 1950').

2. The dispute between the parties relates to Khata No. 1430 which included Plot Nos. 3655, 3656, 3664, 3667, 3668, 3670 and 3671 (hereinafter referred to as, 'Suit Property'). It is admitted between the parties that one Durga Prasad had two sons, namely, Ram Swarup and Bal Mukund. Ram Swarup died in 1932 and his widow Sukhdei died in 1935. Bal Mukund died in 1960. From his first wife, Bal Mukund had one son, namely, Sagar Dutt and from his second wife, Bal Mukund had two sons, namely, Shyam Lal and Jai Prakash. Shyam Lal died in 1978. Sagar Dutt died during the pendency of the case in the courts below. The respondent nos. 2 to 7 are the legal heirs of Sagar Dutt and respondent nos. 8 to 11 are the legal heirs of Shyam Lal. Jai Prakash is the petitioner in the present writ petition. During his life time, Ram Swarup was recorded as the tenure holder of the suit property. It appears that after 1932, i.e., after the death of Ram Swarup, Sagar Dutt was recorded as the tenure holder of the suit property and continued to be so recorded in 1359 Fasli and in the subsequent revenue records prepared under the Uttar Pradesh Land Revenue Act, 1901. In 1983, the petitioner instituted a suit under Section 229-B of the Act, 1950 impleading Sagar Dutt and the descendants of Shyam Lal as defendants and prayed for a decree declaring him to be a co-tenure holder of the suit property having 1/3 share in the same and for a partition of the suit property. It appears from the records that the said case was re-numbered as Case No. 10 of 1994 and shall be referred as such in the present order. Case No. 10 of 1994 was filed by the petitioner alleging that Bal Mukund and Ram Swarup constituted a Hindu undivided family and the suit property was purchased by Ram Swarup from the joint family fund and Ram Swarup, being the 'head' of the family, was recorded in the revenue records as tenant of the suit property. It was stated in the plaint that the petitioner and the respondents are members of a Hindu undivided family and there had been no partition either between Ram Swarup and Bal Mukund or between the petitioner and the respondents. It was alleged that the suit property was part of the hindu joint family property and, therefore, the petitioner along with the respondents was a co-tenure holder of the suit property having 1/3 share and entitled to seek partition of the suit property.

3. Sagar Dutt contested Case No. 10 of 1994 and filed his written statement denying the averments made in the plaint that there was no partition between Ram Swarup and Bal Mukund. In his written statement, Sagar Dutt stated that the suit property was the self acquired property of Ram Swarup who purchased it from his independent income. It was stated in the written statement that after the death of Ram Swarup, Sagar Dutt became the sole tenure holder of the suit property on the basis of a family settlement and was recorded as such in the revenue records. It was further stated in the written statement that the defendant was in exclusive possession of the suit property since 1932 without any obstruction either by Bal Mukund or the petitioner and respondent nos. 8 to 11 and no objections were filed either by the petitioner or by Bal Mukund

after the enforcement of the Act, 1950 or during the different settlements made before the enforcement of the Act, 1950 and, therefore, the claim of the petitioner was barred by limitation as well as by the principle of estoppel and acquiescence.

4. On the pleadings of the parties, the trial court, i.e., the Assistant Collector / Additional City Magistrate, District Meerut framed eight issues. The issues framed by the trial court and relevant for a decision of the present writ petition were as to whether the plaintiff, i.e., the petitioner was a co-tenure holder of the suit property along with the defendant nos. 1 to 5, i.e., Sagar Dutt and respondent nos. 8 to 11, whether the suit property was self acquired property of Ram Swarup which Sagar Dutt got in a family settlement and whether the suit was barred by the principle of estoppel and acquiescence. During the proceedings in Case No. 10 of 1994, the petitioner filed different revenue records to show that there had been no partition between Bal Mukund and Ram Swarup and the mutation order dated 18.10.1932 to prove that Bal Mukund was the legal heir of Ram Swarup. Apart from the aforesaid, certain electricity bills and receipts of house tax as well as the voter list were filed by the petitioner to show that the sons of Bal Mukund, which included Sagar Dutt, were part of a Hindu undivided family and there had been no partition between them and Sagar Dutt was the head of the family. The petitioner also filed documents to show that in 1953, Bal Mukund installed a tube-well in the suit property and after the death of Bal Mukund, the tube-well was registered in the name of the three sons of Bal Mukund, i.e., the petitioner, Sagar Dutt and Shyam Lal who jointly paid its bill. In the trial court, respondents also filed revenue records to show that Sagar Dutt had been consistently recorded as the sole tenure holder of the suit property since 1932. The respondents also filed the statement of Bal Mukund recorded in Case No. 179-1366 registered under the Large Land Holdings Tax Act (hereinafter referred to as, 'LLHT Act') in which, according to the defendant Sagar Dutt, Bal Mukund had admitted that as a result of a family settlement Sagar Dutt became the sole tenure holder of the suit property after the death of Ram Swarup. It appears from the records filed before this Court that in his statement recorded by the trial court under Order X, Civil Procedure Code, 1908, Sagar Dutt stated that he became the sole tenant of the suit property as a result of a family settlement between Sukhdei (the widow of Ram Swarup), Bal Mukund and himself. The statement under Order X CPC is annexed as Annexure No. RA-1 to the rejoinder affidavit.

5. The trial court vide its judgment and order dated 16.3.1994 dismissed Case No. 10 of 1994. In its judgment dated 16.3.1994, the trial court held that the suit property was the self acquired property of Ram Swarup and was not purchased from the joint family fund. Relying on the statement of Bal Mukund recorded in proceedings under LLHT Act, the trial court held that Sagar Dutt was recorded as the sole tenure holder of the suit property as a result of a family settlement which was accepted by all members of the family and no objections were raised by any member of the family including Bal Mukund. On the basis of its aforesaid findings, the trial court held that the petitioner was not a co-tenure holder of the suit property and the suit was barred by the principle of estoppel and acquiescence.

6. Aggrieved by the judgment and decree dated 16.3.1994, the petitioner filed Appeal No. 104 of 1993-94 before the Additional Commissioner (Judicial), Meerut and the Additional Commissioner vide his judgment and decree dated 27.7.1994 allowed the appeal and decreed Case No. 10 of 1994. Relying on the receipts and bills relating to different municipal taxes and charges and the entries in the voter list, the first appellate court held that the petitioner, Sagar Dutt and Shyam Lal were part of a Hindu joint family. In its judgment and order dated 27.7.1994, the first appellate court also held that Ram Swarup and Bal Mukund constituted a Hindu joint family and it was not proved that the suit property was the self acquired property of Ram Swarup or that there was any partition between Ram Swarup and Bal Mukund. Relying on the document which showed that Bal Mukund installed the tube-well existing on the suit property and after the death of Bal Mukund, the said tube-well was registered in the name of the three sons of Bal Mukund who jointly paid its bill, the first appellate court held that the suit property was joint family property and the petitioner, Sagar Dutt and Shyam Lal and consequently their descendants were co-tenure holders of the suit property and the petitioner had 1/3 share in it. The first appellate court also reversed the findings of the trial court that the suit was barred by limitation and by the principle of estoppel and acquiescence.

7. Sagar Dutt died during the pendency of the first appeal and, therefore, aggrieved by the judgment and order dated 27.7.1994 passed by the first appellate court, respondent nos. 2 to 7 filed Second Appeal No. 124 of 1993-94 under Section 331(4) of the Act, 1950 before the Board of Revenue, Uttar Pradesh at Allahabad. Through its judgment and order dated 4.4.1995, the Board of Revenue, Uttar Pradesh at Allahabad allowed the second appeal and restored the order passed by the trial court. In its judgment and order dated 4.4.1995, the Board of Revenue held that the suit property was purchased by Ram Swarup from his independent income and relying on the admission of Bal Mukund, the Board held that Sagar Dutt was the sole tenant of the suit property and the petitioner had no share in it. The Board also held that as Sagar Dutt was recorded in the revenue records since 1932 and was in continuous possession, therefore, the claim of the petitioner was barred by limitation. In its order dated 4.4.1995, the Board of Revenue also took note of the different sales and purchases separately made by the parties. The judgment and order dated 4.4.1995 passed by the Board of Revenue has been challenged in the present writ petition.

8. Challenging the judgment and order dated 4.4.1995 passed by the Board of Revenue, the counsel for the petitioner has argued that the different revenue records filed by the petitioner before the trial court proved that Bal Mukund and Ram Swarup constituted a Hindu joint family and there was no partition either between Ram Swarup and Bal Mukund or after the death of Bal Mukund, between his sons and Sagar Dutt was the head of the family and the suit property was a joint family property and the petitioner had 1/3 share in it. It was argued that the findings recorded by the Board of Revenue that the claim of the petitioner was barred by limitation and by estoppel and acquiescence was contrary to law. It was further argued that the family

settlement pleaded by Sagar Dutt in his favour was not proved by the evidence on record. It was argued that the Board of Revenue had exceeded its jurisdiction in allowing the appeal without framing any substantial question of law which was mandatory under Section 331(4) of the Act, 1950 read with Section 100 of the Code of Civil Procedure, 1908 (as amended in 1976) and in reversing the findings of the first appellate court even though the findings of the first appellate court were based on evidence on record. It was argued that for the aforesaid reasons, the order dated 4.4.1995 passed by the Board of Revenue is contrary to law and is liable to be set-aside. In support of his arguments, the counsel for the petitioner has relied on the judgment of the Supreme Court in **Sita Ram Bhama Vs. Ramvatar Bhama 2018 (15) SCC 130.**

9. Rebutting the arguments of the counsel for the petitioner, the counsel for the respondents has argued that an oral family settlement is recognized under the law. It was argued that the family settlement pleaded by Sagar Dutt had been acted upon and neither the widow of Ram Swarup nor the father of Sagar Dutt, i.e., Bal Mukund ever objected to it. It was argued that the plaintiff/petitioner could not show the existence of any nucleus or source of income of the joint hindu family to prove that the suit property was purchased from the joint family fund. It was argued that from the evidence on record especially, the sale deed dated 31.8.1922, it was proved that Ram Swarup and Bal Mukund were living separately. It was further argued that Sagar Dutt was recorded as the sole tenure holder of the suit property even in 1342 Fasli, i.e., during the settlement of Mr. Waugh and was recorded as Sirdaar of the suit property under Section 18 of the Act, 1950. It was argued that under the Act, 1950, Sagar Dutt acquired new rights which had attained finality. It was also argued that from the admission of Bal Mukund, it was evident that Bal Mukund had no concern with the suit property and the said admission was binding on the petitioner who claimed through Bal Mukund. It was argued that the claim of the petitioner was barred by the principle of estoppel and acquiescence and the suit was barred by limitation. It was argued by the counsel for the respondents that there was no jurisdictional error in the order passed by the Board of Revenue because under Section 331(4) of the Act, 1950, the Board of Revenue was not required to frame any substantial question of law as the amendments in 1976 in Section 100 were not applicable while the Board of Revenue exercised its power as a second appellate court under Section 331(4) of the Act, 1950 and the powers of the Board under Section 331(4) of the Act, 1950 were governed by Section 100 CPC as it existed prior to the amendment. It was further argued that it was not a fit case for interference under Article 227 of the Constitution of India. In support of his arguments, the counsel for the respondents has relied upon the judgments of the Supreme Court in **Kale and Ors. Vs. Deputy Director of Consolidation and Ors. 1976 (3) SCC 119; Shalini Shyam Shetty and Anr. Vs. Rajendra Shankar Patil 2010 (8) SCC 329; State of Uttarakhand Vs. Mohan Singh and Ors. 2012 (13) SCC 281 and Marabasappa (Dead) by Lrs. and Ors. Vs. Ningappa (Dead) by Lrs. and Ors. 2011 (9) SCC 451.**

10. I have considered the rival submissions of the counsel for the parties.

11. It is not disputed that the suit property was purchased in the name of Ram Swarup through a sale deed executed by one Amba Prasad. It is also not

disputed that Ram Swarup died issueless leaving behind his widow Sukhdei. The issue whether Ram Swarup and Bal Mukund had separated or whether the suit property was purchased from the joint family fund or from the independent income of Ram Swarup is not relevant to decide the dispute between the parties and the present writ petition. The claim of Sagar Dutt is not dependent on a decision on the issue as to whether the suit property was a joint family property or the separate property of Ram Swarup. It is not the case of respondent nos. 2 to 7 that, through any recognised mode of transfer, Ram Swarup, during his lifetime, had transferred the suit property to Sagar Dutt or had executed any Will in favour of Sagar Dutt. Thus, after the death of Ram Swarup, by virtue of Section 24 of Agra Tenancy Act, 1926, the suit property devolved on Sukhdei, the widow of Ram Swarup and after the death of Sukhdei, the estate would have devolved on Bal Mukund, the brother of Ram Swarup. After the death of Bal Mukund, under Section 171 of the Act, 1950, the estate would devolve on his three sons. If Section 24 of Agra Tenancy Act, 1926 and Section 171 of the Act, 1950 operate, Sagar Dutt had no rights in the suit property during the lifetime of Sukhdei and Bal Mukund and was only a co-tenure holder of the suit property along with his brothers including the petitioner irrespective of whether the suit property was joint family property or self acquired property of Ram Swarup purchased by his independent income. In order to succeed in their case that Sagar Dutt was the sole tenant of the suit property, the respondent nos. 2 to 7 had to prove some event which excluded the operation of Section 24 of Agra Tenancy Act, 1926 or Section 171 of the Act, 1950. The said was necessary because when one co-heir is found to be in possession of the properties it is presumed to be on the basis of a joint title. (**See P. Lakshmi Reddy Vs. L. Lakshmi Reddy AIR 1957 SC 314).**

12. The case of respondent nos. 2 to 7 is that after the death of Ram Swarup, Sagar Dutt became the sole tenant of the suit property through a family settlement between Sukhdei, Bal Mukund and Sagar Dutt. Apparently, the case of respondent nos. 2 to 7 was that Bal Mukund or his other two sons never acquired any tenancy rights in the suit property. If the case of family settlement as pleaded by respondent nos. 2 to 7 is believed, Sukhdei relinquished her rights, title and interest in the suit property in favour of Sagar Dutt even though Sagar Dutt had no antecedent title in the property. In view of the law laid down by the Supreme Court in **Kale and Ors. Vs. Deputy Director of Consolidation and Ors. 1976 (3) SCC 119**, such a family settlement would be valid even if Ram Swarup had separated from Bal Mukund and was the sole tenure holder of the suit property and also even if the suit property was a joint family property and Ram Swarup was recorded as the tenure holder of the suit property only as the 'Karta' of the family and all the members of the family had not entered into the arrangement. At this stage, the observations of the Supreme Court in Paragraph No. 17 of Kale (supra) are reproduced below:

"In Krishna Beharilal v. Gulabchand, it was pointed out that the word "family" had a very wide connotation and could not be confined only to a group of persons who were recognised by law as having a right of succession or claiming to have a share.

The Court then observed: [SCC p. 843, paras 7-8]

"To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in Ram Charan Das v. Girjanandini Devi - the word "family" in the context of a family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement - see Ramcharan Das case.

The courts lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all."

13. The issue in the present case is whether the family settlement was proved by respondent nos. 2 to 7 and whether the findings recorded by the first appellate court accepting the case of the petitioner were based on evidence on record and further whether, under Section 331(4) of the Act, 1950 read with Section 100 of the Code of Civil Procedure, 1908, the Board of Revenue had exceeded its jurisdiction in reversing the findings of the first appellate court and record its own findings rejecting the claim of the petitioner.

14. The family settlement was set-up by respondent nos. 2 to 7 and, therefore, the burden was on respondent nos. 2 to 7 to prove the family settlement. To prove the family settlement, the respondent nos. 2 to 7 relied on the alleged admission of Bal Mukund made in proceedings under the LLHT Act and on the conduct of the petitioner and Bal Mukund in not filing any objections against the entries in the revenue records showing Sagar Dutt to be the sole tenant of the suit property. In this context, the respondent nos. 2 to 7 also argued that the claim of the petitioner was barred by the principle of estoppel and acquiescence. So far as the plea of respondent nos. 2 to 7 that the claim of the petitioner was barred by the principle of estoppel, it is sufficient to note that mere long standing revenue entries without any legal sanction or authority of law confer no right on the recorded person. A Division Bench of this Court in **Shri Ram and Ors. Vs. Deputy Director of Consolidation, Allahabad and Ors. 2011 (4) ADJ 289 (DB)** held, in the context of Section 49 of the Uttar Pradesh Consolidation of Holdings Act, 1953, that there was no public policy which prohibited a person to seek reversal of state of affairs continuing for scores of years if he had a right to do so. It was held that a person can claim his right to a property even after a lapse of considerable period, which right he had neither abandoned nor relinquished, provided the claim is not barred by any law of limitation.

15. The counsel for the respondents has not brought to the notice of the Court any statutory provision attaching finality to the settlement of Mr. Waugh in 1942 or entries in the revenue records as a result of Section 18 of the Act, 1950. The claim of the petitioner was also not barred by any law of limitation as it is not the case of respondent nos. 2 to 7 that Sagar Dutt had matured his rights by adverse possession.

16. In order to prove family settlement, the respondent nos. 2 to 7 have relied on the alleged admission of Bal Mukund. The statement of Bal Mukund has been annexed with the writ petition and I have perused the same. Interestingly, the statement of Bal Mukund was disbelieved by the Assessing Officer and the Appellate Authority in proceedings under the LLHT Act on the ground that Bal Mukund had not been able to establish any severance of joint family status between himself and Sagar Dutt. A perusal of the statement of Bal Mukund does not show that there was any admission by Bal Mukund of any family settlement between Bal Mukund, Sukhdei and Sagar Dutt. In his statement given in proceedings under the LLHT Act, Bal Mukund had stated that the suit property belonged exclusively to Sagar Dutt and was given to him by Ram Swarup. The said statement is not an admission of a family settlement as set-up by the respondent. An admission has to be clear and unambiguous and adverse to the interest of the maker. The proceedings under the LLHT Act were not between Sagar Dutt and Bal Mukund and the statement of Bal Mukund did not adversely affect his interest in the said proceedings. The statement of Bal Mukund only leads to the inference that the suit property was gifted or in any way transferred by Ram Swarup to Sagar Dutt. It is not the case of respondent nos. 2 to 7 that Sagar Dutt got the suit property directly from Ram Swarup either as gift or through any other mode of transfer. The statement of Bal Mukund in proceedings under the LLHT Act cannot be characterized as admission of a family settlement between himself, Bal Mukund and Sukhdei, i.e., the widow of Ram Swarup. Evidently, the statement of Bal Mukund in proceedings under LLHT Act did not prove the family settlement set-up by respondent nos. 2 to 7. Further, the statement of Bal Mukund cannot act as estoppel against the petitioner as there is nothing on record to show and there are no findings by the courts below that Sagar Dutt acted upon the said statement to his detriment.

17. The first appellate court, relying on the bills and the receipts relating to the municipal taxes and the electricity bills which showed that the bills were jointly paid by the three sons of Bal Mukund, held that there was no severance of joint family status between the three sons of Bal Mukund and their descendants. The first appellate court while accepting the case of the petitioner also took note of the fact that the tube-well installed on the suit property was initially registered in the name of Bal Mukund and after the death of Bal Mukund, the said tube-well was registered in the name of the three sons of Bal Mukund and the different charges relating to the said tube-well were jointly paid by the three sons of Bal Mukund and their descendants. The first appellate court, after considering the aforesaid evidence, held that the petitioner was a co-tenure holder of the suit property along with the respondents having 1/3 share in it. The aforesaid evidence does indicate that there was no ouster of Bal Mukund or the petitioner from the suit property. The findings of the first appellate court are supported by the evidence on record. It is true that while recording its finding, the first appellate court did not consider the alleged admission of Bal Mukund. However, as held earlier, the statement of Bal Mukund was not an admission of any family settlement and did not prove the family settlement set-up by respondent nos. 2 to 7.

18. The findings of the first appellate court were findings of facts and did not give rise to any question of law. The weight to be put on a particular piece of evidence is in the realm of appreciation of evidence and does not give rise to any question of law. Even under Section 100 CPC, as it existed prior to the amendment of 1976, a second appeal was maintainable only on a question of law. In **Sree Meenakshi Mills, Madurai Vs. Commissioner of Income Tax, Madras (AIR 1957 SC 49**), the Supreme Court referred, with approval, the decision of Privy Council in **Wadi Mohammed Vs. Mohd. Baksh AIR 1930 PC 1** wherein it was held that there is no jurisdiction to entertain a second appeal on ground of erroneous findings of facts, however, gross the error may seem to be and the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact (Para 21). A reading of the impugned order dated 4.4.1995 passed by the Board of Revenue shows that the Board of Revenue has substituted its own findings after reversing the findings recorded by the first appellate court which the Board of Revenue could not have done even under Section 100 CPC as it existed before the Amendment Act, 1976.

19. In its order dated 4.4.1995, the Board of Revenue has held that the first appellate court had ignored the relevant evidence and has referred to certain sales and purchases made separately by the parties to infer that there was a severance of joint family status. The counsel for the respondents has also handed over the statement given by the petitioner before the trial court to show that the petitioner had purchased certain properties. I have carefully gone through the order passed by the trial court and find that the different sale deeds referred as evidence by the trial court were executed either before the death of Ram Swarup or were executed by Bal Mukund. The sale deeds executed before the death of Ram Swarup have no evidentiary value to decide the rights of the parties regarding the suit property because, as held earlier, the said sale deeds only prove that Bal Mukund and Ram Swarup had separated and there was a severance of joint family status between Bal Mukund and Ram Swarup and the issue as to whether Bal Mukund and Ram Swarup continued as a hindu undivided family till the death of Ram Swarup is not relevant for deciding the dispute between the parties. So far as the sale deeds executed by Bal Mukund are concerned, the same also do not help the respondent nos. 2 to 7 because the said sale deeds, as evident from the order of the trial court were executed in 1953 or 1959. Under the Act, 1950, Bal Mukund had absolute right over his Bhumidhari plots including the right to transfer and the sale deeds would not adversely affect the rights of the petitioner in relation to the suit property. The sale deeds allegedly executed by the petitioner and referred in the statement of the petitioner handed over to this Court by the counsel for the respondents show that the petitioner had purchased certain plots from his independent income and has stated that the said plots were purchased by him and Shyam Lal from their independent income. A member of a hindu undivided family is not deprived of his right to purchase property from his independent income and in his own name and not mix-up the same with the joint family property.

20. In view of the reasons given above, the evidence relied upon by the Board of Revenue in its impugned order were not relevant to decide the title of the

parties in the suit property and the findings of the first appellate court could not have been set-aside on the ground that the said evidence were not considered by the first appellate court. There was no perversity in the findings of the first appellate court empowering the Board of Revenue to interfere in the said findings exercising its powers under Section 331(4) of the Act, 1950 read with Section 100 CPC. Evidently, the Board of Revenue had exceeded its jurisdiction under Section 331(4) of the Act, 1950 read with Section 100 CPC by interfering in the findings of the first appellate court and the impugned order of the Board of Revenue is contrary to law.

21. For the aforesaid reasons, the order dated 4.4.1995 passed by the Board of Revenue in Second Appeal No. 124 of 1993-94 is liable to be set-aside and is, hereby, quashed. The order dated 27.7.1994 passed by the first appellate court in Appeal No. 104 of 1993-94 is restored.

22. The writ petition is **allowed**.

(2019)10ILR A 692

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2019

BEFORE

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

Writ-B No. 4488 of 1987

Ram Dular ...Petitioner
Versus
D.D.C., Jaunpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri C.P. Srivastava, Sri Adarsh Bhushan, Sri Anil Bhushan

Counsel for the Respondents:
Sri Mahendra Pratap, Sri R.P. Ram, S.C.

A. U.P. Consolidation of Holdings Act, 1953 - Section - 9(A)(2) – W.P.- filed by Ram Dular - challenging an order of the DDC – restoring an order of the C.O- on an objection under Section 9A(2) of the U.P. C H Act- setting aside the order passed by the S.O.C –without considering the documents and evidences available on record-in an arbitrary way-remanded back to DDC for proper consideration.

Held: - petition succeeds in part and is allowed to the extent that the impugned order passed by the Deputy Director of Consolidation is hereby quashed. The matter is remanded to the Deputy Director of Consolidation where Revision shall stand restored to the file of the Deputy Director of Consolidation to be determined afresh.

Writ Petition allowed in part (E-8)

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

1. This writ petition has been filed originally by one, Ram Dular S/o Bharos a native of village Akkipur Post Chhatai Kala (Shahganj), District Jaunpur challenging an order of the Deputy Director of Consolidation dated 16.02.1987, whereby he has restored an order of the Consolidation Officer dated 05.05.1984 made on an objection under Section 9A(2) of the U.P. Consolidation of Holdings Act (for short the 'Act'), setting aside the order dated 21.08.1986, passed by the Settlement Officer of Consolidation.

2. Heard Sri Neelabh Srivastava, Advocate holding brief of Sri Adarsh Bhushan, learned counsel for the petitioner and Sri Ram Prakash Ram, learned counsel appearing on behalf of

respondent no. 3, Ram Lakhan, now represented by his heirs and legal representatives, numbering six.

3. These proceedings have commenced on an objection under Section 9A(2) of the Act filed by a third respondent before the Consolidation Officer. The dispute relates to khasra nos. 77 and 385 of Khata No. 100 that was entered in the name of the petitioner and the third respondent when Chakbandi operations commenced a second time in the year 1983-84. The objection of the petitioner was that he was entitled to be recorded as the sole tenure holder over the said plots, that are hereinafter referred to as the 'property in dispute', to the exclusion of third respondent. It was the third respondent's case that the name of the petitioner had been wrongly recorded and was liable to be expunged. The petitioner contested third respondent's objection and claimed that it was a joint holding that had been inherited from the parties' common ancestor one, Chikhur. According to the petitioner, Chikhur had two sons, Shivraj and Bujha. Bujha had a son, Bharos. The petitioner is the son of Bharos. He had two brothers, Matai and Satai, who died issueless. According to the petitioner, the property came from Chikhur and went by way of succession with a half share each in the branches of Shivraj and Bhuja. What came to the petitioner was the half share that went to the branch of Bujha. During the life time of the petitioner's brothers, Matai and Satai, the petitioner along with two brothers had a 1/6th share each. Since, Matai and Satai, the two brothers of the petitioner died during his life time and issueless, their share was inherited by the petitioner enlarging it to a complete half. It was urged that in the branch of Shivraj, his half share was inherited by his only son Hichhu, and from him by his son, Ram Lakhan (respondent no. 3). The contention of the petitioner is that in his reply to the objections of the third respondent was that half share over the land in dispute was rightly recorded in the basic year khatauni of the second round of Chakbandi operations, and that, that was the position which remained throughout. The first round of chakbandi operations commenced in the year 1955. He contended that during the first round of chakbandi operations, no issue about the petitioner's share was raised by Ram Lakhan or his predecessor-in-interest and those chakbandi operations were concluded with the de-notification under Section 52 of the Act. It was contended that the present chakbandi operations, that had commenced in the year 1983-84, therefore, correctly recorded in the basic year, a half share for the petitioner and the third respondent, regarding which no objections could now be raised. Bar of Section 49 of the Act was also pleaded on the basis of the first round of chakbadi operations, where this objection was not at all raised.

4. The Consolidation Officer, while deciding objection framed issues to the following effect:

1. Whether the name of Ram Dular, Satai and Matai are liable to be expunged from the khata in dispute?, and;

2. Whether the name of Ram Lakhan deserves to be recorded exclusively?

5. The third respondent in support of his objection filed a khatauni for the Fasli year 1334, which shows the name of Hichhu S/o Shivraj to be recorded there, exclusively. A further khatauni for the

fasli year 1309 was filed which shows the name of Chikhur to be recorded. In another khatauni for the Fasli year 1356, has been filed on behalf of the third respondent, where name of Hichhu finds record. There is a copy of the khatauni for the Fasli year 1362 filed by the objector-respondent no. 3, where the name of Hichhu, his father is exclusively recorded.

6. Lateron, during mutation, the name of Hichhu has been expunged, and in his place, the name of Ram Lakhan has been recorded as his heir. The Consolidation Officer has recorded that in the khatauni for the Fasli Year 1362 there is a note that the name of Ram Lakhan has been rubbed off and in the order of the ACO, dated 23.05.1956 the name of one, Bharos has been entered. The name of petitioner's father has been recorded as Sirdar and co-tenure holder along with Ram Lakhan. The aforesaid entry does not mention the case number wherein the ACO passed that order. CH Form 41 has also been noticed to be filed amongst other documents on behalf of third respondent. On behalf of the petitioner, by way of documentary evidence, a copy of khatauni for the Fasli year 1362 has been filed. CH Form 20 relating to the last chakbandi operations and the record of proceedings under Section 8 of the Act has been filed. There is also a copy of a judgment passed in Case No. 58/2971 "State vs. Ram Dular' decided on 16.12.1971, which the Consolidation Officer has noted, has been filed to show that a criminal litigation was persued between Ram Lakhan and Ram Dular, under Section 313 IPC. The Consolidation Officer has mentioned in the passing in his judgment that extracts of khatauni and the revenue recipets, have also been filed. It must be remarked here that the Consolidatin Officer has not elaborated as to what those khataunies are, or what is detailed there, or what the revenue receipts filed indicate. There is no reference to the contents of any of these documents, including the revenue receipts or the khatauni that have been filed on behalf of the petitioner. Oral evidence on behalf of Ram Lakhan figures as as the testimony of Ram Lakhan himself and his witness Vanshu that was recorded in the witness box, whereas in support of Ram Dular's case, Ram Dular himself and his witness Rampyare's deposition. The Consolidation Officer held that in the old khatauni for the Fasli year 1309, name of Chikhur finds record and, thereafter, in the khatuani for the fasli year 1334, name of Hichhu S/o Shivraj has been recorded. It has been observed by the Consolidation Officer during the course of his decision that the petitioner, Ram Dular has not filed any documentary evidence to show that Chikhur had two sons. He observed that in case Chikhur had two sons, names of both would have figured in the khatauni for the fasli year 1334. It has been reasoned that no documentary evidence has been brought on record to show that Hichhu was the only son of Chikhur or he had another son. The Consolidation Officer has also held that in the fasli year 1362, name of Hichhu finds record and after him, the name of Ram Lakhan has been entered on the basis of succession. From all this, the Consolidation Officer has inferred that Chikhur had no son by the name of Bujha; instead, it is inferable that he had one son, Shivraj, whose lone son is Hichchu. The Consolidation Officer further held that Ram Dular, his father Bharos and his father, Bhuja have nothing to do with the property in dispute.

7. The Consolidation Officer has addressed the question as to what is the effect of non objection during the previous chakbandi, Bharos being

recorded as a co-sharer. His name has entered in the khatauni for the fasli year 1362, but the mutation made under an order of the ACO does not mention any case number, which shows that the entry is fictitious. No copy of the decision rendered by the ACO, on the basis of which the said entry has been made, has been filed. The Consolidation Officer also recorded that during the old Chakbandi CH Form 4-7 would carry these kinds of orders but there is no certification of the said forms also.

8. The Consolidation Officer has also reasoned in support of his conclusions that in fasli year 1362, the mutation that has been made, there is an endorsement in red ink and also a note in red Ink, where the name originally entered has been erased, and, the name of Bharos has been added there. Nothing about this objection was said during the first round of Chakbandi. The Consolidation Officer has held that the third respondent was a minor at that time and that Bharos got his name recorded, illegally. In order to reassure himself about his conclusions, he has recorded the fact that the petitioner, Ram Dular would be aged about 36 years during the first round of Chakbandi in the year 1955-56, whereas third respondent would be aged about 8 years. As such, the Consolidation Officer has concluded that the name of first petitioner has been recorded without any basis, and, is the result of a fictitious entry on the foot of which the petitioner now claims a half share. Accordingly, the objections of third respondent were allowed and the name of the petitioner was ordered to be expunged with regard to his half share in the land in dispute.

9. The petitioner appealed the decision of the Consolidation Officer, under Section 11 of the Act to the Settlement Officer of Consolidation. The Settlement Officer of Consolidation undertook a plenary review of the evidence on record. A perusal of that judgment shows that the Settlement Officer of Consolidation took into consideration the khatauni for the fasli year 1309 in relation to which he has said that the said khatauni shows that on some part of the land in dispute, during the fasli year 1309, Chikhur is recorded for the past 26 years. From the said entry and its age relative to the point of time to which it relates, the Settlement Officer of Consolidation concluded that this entry relates to the time of the last bandobast, and, that it shows the property in dispute to be a self acquired property of Chikhur. The Appellate Court has then considered the khatauni for the fasli year 1354-1356, where the name of Hichhu S/o Shivraj is recorded. He has further taken note of the entry that finds place in 1362 fasli (basic year relating to the first round of chakbandi), where the land in dispute is recorded in the name of Hichhu S/o Shivraj. There is an order of the Sub Divisional Officer, dated 07.01.1955 where in place of Hichhu(deceased), the name of Ram Lakhan, respondent no. 3 is recorded as his heir. The Settlement Officer, Consolidation has gone on to note that on 19.03.1955, chakbandi operations were notified in the gazette and the Assistant Consolidation Officer passed an order dated 23.05.1956 on the basis of which the name of Bharos has been entered over the land in dispute (Khata no. 45), as a co-sharer along with the third respondent. It is also noted here that in relation to Khata no. 123 which is not the property in dispute, the name of Bharos has been recorded under orders of the Consolidation Officer, in fasli year

1362 as a co-sharer in that khata. The Consolidation Officer noted in the order impugned that in accordance with the rules applicable to chakbandi operations during that time, that is to say, when the first round of chakbandi operations went through, the Assistant Consolidation Officer did a partal (survey) under Section 8 of the Act. He verified in that exercise as to what the dispute between the parties was all about. He issued a provisional notice to both parties, that is to say, to Bharos, the predecessor-in-title of the petitioner on one hand and to Ram Dular, respondent no. 3, on the other.

10. Dealing with the third respondent's case that the entry claimed by the petitioner in the fasli year 1362 was the result of a forgery, the Settlement Officer of Consolidation took note of the draft khatauni, CH Form 30, relating to another khata no. 95, where names of Ram Lakhan and Bharos have been entered together as co-sharers. He has also taken note of like entries as co-sharers between the petitioner and the third respondent, in relation to the land at village Sadpur, where in CH Form 20, the name of both, Bharos and the the third respondent, Ram Lakhan find place. In particular, the Settlement Officer of Consolidation took into consideration, some 40 odd revenue receipts. The order of the Settlement Officer of Consolidation shows that the land was co-shared by Bharos and Ram Dular.

11. The Settlement Officer, Consolidation has specifically noted the fact that the pedigree propounded by Ram Dular in his written statement has not been dispelled by Ram Lakhan, respondent no. 3, on the basis of evidence led in the case. He has taken note of the family register relating to the year 1983, which shows that in the house no. 45, Ram Lakhan has been indicated to be the head of the family, living along with one Bhikaiya and another Bhagwandei. Bhikaiya is the widowed mother, whereas Bhagwandei is the third respondent's wife. The Court has recorded for a fact that on the basis of oral evidence of Ram Lakhan where he has testified himself, besides his witness, Vanshu, it has been acknowledged by Vanshu in his cross-examination that he does not know that Bujha and Shivraj were brothers, and the number of sons that Chikhur had. The witness has also said that he does not know about the family tree of parties. It is also said by him that land in dispute is very old. He does not know about the khata number. The witness also said that he has no animosity against Ram Dular. He has denied testifying in the criminal case on behalf of Ram Dular. The witness has been opined by the Settlement Officer of Consolidation to be one not acquainted with important and material facts. It is also observed by the Court that this witness has refuted documentary evidence. The Appellate Court has noticed that on the basis of proceedings of a criminal case between parties, the details of which have been recorded in the judgment, it has proven that criminal litigation between Ram Dular and Ram Lakhan at some point of time was there. The testimony of Ram Dular in the witness box has also been taken note of. It has been remarked by the Appellate Court that in his evidence Ram Dular has sought to prove the pedigree propounded by him with the aid of own evidence in the witness box and that of his witness, Rampyare. It is observed by the Trial Court that Ram Dular has supported the pedigree pleaded by him in his written

statement, whereas Ram Lakhan has said nothing about this pedigree in oral evidence, recorded in the witness box. Here, it is remarked by the Appellate Court that not only Ram Lakhan has not said anything to disprove the pedigree in his oral evidence, but he has also not disputed Ram Dular's pedigree in his oral evidence. This Court must remark here that by this the Appellate Court does not mean that Ram Lakhan has accepted for a case Ram Dular's pedigree, which he has disputed in all his objections, filed before the Court of first instance. All that, the Appellate Court has remarked is that in his evidence, Ram Lakhan has not disputed Ram Dular's pedigree, by words patent.

12. It is also remarked by the Settlement Officer of Consolidation that when the co-sharers were recorded in the basic year khatauni during the first round of chakbandi, Ram Lakhan was a minor, and, therefore, those entries do no bind him. He has perused the family register to find that the date of birth of Ram Lakhan, recorded there, is 12.07.1947. It is a matter of arithmetical calculation that going by the said date of birth, Ram Lakhan was a minor in the year 1956. In the year 1965, he would have turned a major. He did not object during the entire period of limitation from 1965 to 1968, which he could and ought to have done, if he were aggrieved by the entry made in the basic year, in the year 1962. It has also been recorded that Ram Lakhan has not filed in his documentary evidence, even a single receipt evidencing payment of land revenue paid by him whereas Ram Dular has filed numerous such receipts, which indicate him to be a co-tenure holder along with Ram Lakhan, since the previous round of chakbandi. It has been inferred from these facts that the land appears to be ancestral, where the name of Ram Dular's predecessor was left out, but recorded in the basic year, before commencement of first round of chakbandi operations. The Settlement Officer of Consolidation has also taken note of a submission advanced on behalf of the petitioner, Ram Dular that Ram Lakhan got a reference made by the Consolidation Officer, regarding his claimed rights to exclusive tenure of the land in dispute which was made to the Deputy Director of Consolidation, behind the petitioner's back. It was also accepted by the Deputy Director of Consolidation without notice to the petitioner. The submission of learned counsel for the petitioner also is that the Appellate Court took into account that this exercise of a reference being made and decided behind the petitioner's back, shows that Ram Lakhan knew well that the basic year entry in favour of Ram Dular was not wrong, and that these were only stray entries in his favour, that showed him as the exclusive bhumidhar. The Settlement Officer of Consolidation here also noticed that submission advanced on behalf of Ram Dular that both parties knew that the name of Bharos has been recorded as a co-tenure holder during the first round of chakbandi, but no steps were taken to undo that entry, while the said chakbandi was current. This feature made it clear that the case of the third respondent is hindered by an estopple, besides the statutory bar of Section 49 of the Act. Thus, the entries in the first round of chakbandi could now not be challeged. The Settlement Officer of Consolidation also took into account the submission of learned counsel for the third respondent, Ram Lakhan that during the last bandobast, once the name of Hichhu S/o

Shivraj has been recorded after the last bandobast in the fasli year 1334, that continued for a long period of time, in case Shivraj and Bhuja were brothers, Bhuja ought to have filed a suit under the U.P. Tenancy Act, seeking to get himself declared and recorded as a co-sharer. The Settlement Officer of Consolidation after going through all these evidence very carefully took note of the fact that during the last chakbandi in the CH Form 20 and 25, on the basis of valid orders, entries of co-sharer's rights were made in favour of the petitioner's predecessors' which Ram Lakhan or his predecessor never challenged. They have also not produced any revenue receipts to establish that they have been in exclusive possession of the land in dispute, paying land revenue to the Government in token of such exclusive possession. On the basis of all this analysis the Settlement Officer of Consolidation held the petitioner to be a validly recorded co-tenure holder, along with the third respondent, Ram Lakhan, to the extent of half share and allowed the appeal.

13. Aggrieved, the third respondent, Ram Lakhan preferred a revision to the Deputy Director of Consolidation. The Deputy Director of Consolidation by means of the impugned order set aside the order of the Settlement Officer, Consolidation and restored that of the Consolidation Officer. In doing so, the reasoning adopted by the Deputy Director of Consolidation is this. According to him chakbandi in the village had commenced, in the second round, in the fasli year 1309. The land in dispute was recorded in the name of Chikhur. Subsequently, in the khatauni for the years 1334, 1356 and 1362, Hichhu S/o Shivraj was recorded. In the fasli year 1362 that was the basic year for the first round of chakbandi, there were three mutation orders recorded. The first was a mutation under orders of the Sub Divisional Officer dated 07.01.1955, relating to the succession in favour of Ram Lakhan, whereby the name of Hichhu was mutated out and on the basis of inheritance, the name of Ram Lakhan was entered. The second and the third mutation orders were those of the Assistant Consolidation Officer, dated 23.05.1956, whereby over khata no. 439, the name of Bharos was recorded as a sirdar. By the second mutation order carried out over khata no. 45 (land in dispute), the name of Bharos was recorded as a sirdar. From these mutation orders, the Deputy Director of Consolidation has remarked that it is clear that during the previous round of chakbandi, the present dispute had been raised and these orders in relation to that dispute were passed and recorded. Here, he has noted the contention of the third respondent, Ram Lakhan that the order of Assistant Consolidation Officer dated 23.05.1956 relates to khata no. 439 alone, by which the name of Bharos has been directed to be entered as a sirdar over the said khata, whereas according to the petitioner, Ram Dular, by the order of the Assistant Consolidation Officer dated 23.05.1956, he has been directed to be recorded as a co-sharer over the land in dispute also. The Settlement Officer of Consolidation has identified the issue as one where he had to find out that out of the two orders, which of these are correct. In his reasoning, the Deputy Director of Consolidation has held that in the khatauni of 1362 fasli, it is clear that the mutation carried out pursuant to the order of the Assistant Consolidation Officer, does not bear signatures of the officials carrying out the mutation and verifying it.

The mutation entry also does not bear the case number. It is also recorded that the names of tenure holders also show that there is erasure somewhere and overwriting, all of which make it clear that these mutations are fictitious. It has then been remarked that this Court in its various authorities has expressed judicial opinion in favour of construing such fictitious entries as not conferring any title. The Deputy Director of Consolidation has then held that so far as the question of parties belonging to the same family is concerned, when the question was not raised or determined during the first round of chakbandi, the same cannot be raised now, in view of the bar under Section 49 of the Act. The order of the Settlement Officer, Consolidation has been held to be flawed and that of the Consolidation Officer to be valid. The entries in the khatauni of 1362 Fasli have been held to be fictitious by the Deputy Director of Consolidation.

14. Now, the question to be considered by this Court is whether truly speaking the Deputy Director of Consolidation is right in his conclusions, about the entries in favour of the petitioner being fictitious. A perusal of the order of the Deputy Director of Consolidation would show that he has gone straight to the entries made in the basic year, that is to say, 1362 fasli and viewed it in the same manner as the Consolidation Officer has done. Sitting as a Court of revision above the appellate determination made by the Settlement Officer of Consolidation, the Deputy Director of Consolidation has not dealt with or reversed well considered and reasoned findings, recorded by the Settlement Officer of Consolidation. These findings are based not only on documentary evidence, or the way the entries have appeared to the eyes of the Deputy Director of Consolidation and the Consolidation Officer, but also on the basis of other relevant documentary evidence, that prima facie corroborate the petitioner's case, besides oral evidence of parties, which the Settlement Officer of Consolidation has considered and evaluated in great detail to reach his conclusions.

15. No doubt, the Deputy Director of Consolidation with all his wide powers under Section 48 of the Act, that have become wider after the additon of explanation (3) could have reversed the Settlement Officer of Consolidation, but that he could do, provided he reversed all those findings that the Settlement Officer, Consolidation has recorded on the basis of evidence, and for prima facie good reasons assigned. Reversal also has to be made for cogent reasons, may be different from those recorded by the Settlement Officer of Consolidation. There could not be just reversal of the Settlement Officer's findings, without assigning reasons. These are various findings that the Settlement Officer Consolidation has recorded about the pedigree of the parties, the inheritance of the joint tenancy, the record of proceedings during the first round of chakbandi, and, particularly, non raising of objections during the first round of chakbandi, where entry in favour of the petitioner was made in the basic year relative to the first round of chakbandi. Here, it must be remarked that an entry that is forged and fictitious, no doubt can and ought to be ignored where it is found to be so and expugned, but at the same time, an entry that has not been objected to for years together and allowed to continue in the revenue records, so much

so that it was there at the commencement of the first round of chakbandi, and travelled to the second round of chakbandi, without any objection by the person who claims it to be forged now, is a circumstance which ought to be considered before an inference about that entry being forged is drawn. So far as the submission that during the first round of chakbandi the third respondent was a minor, the Settlement Officer of Consolidation has recorded detailed findings that evidence prima facie shows that though he was a minor at the time of commencement of those operations, pending those opereations, the third respondent came of age and could have very well raised this objection that the entries were forged, which he did not do. These are the factors which the Settlement Officer of Consolidation took into the consideration, but the Deputy Director of Consolidation while upturning the Settlement Officer of Consolidation's orders has not bestowed any consideration to this finding of the Settlement Officer of Consolidation. This and the other findings, as already said ought to have been reversed if the order had to be set aside by the Deputy Director of Consolidation, for cogent reasons assigned. There could be no upsetting of the appellate order by the order impugned scripted across two pages, but in substance, one that does not effectively reverse all those detailed findings that the Settlement Officer of Consolidation has recorded. Even if the reversal of the findings by the Deputy Director of Consolidation is to be inferred, it is no more than an ipse dixit of the Officer, without any reason assigned for the reversal. This Court at this stage makes it clear that there is no expression of opinion about the validity of the findings, either recorded by the Settlement Officer of Consolidation, or the Deputy Director of Consolidation. It is all about the manner in which the Deputy Director of Consolidation has reversed the order of Settlement Officer of Consolidation, without adhering to the fundamental requirements of writing a judgment of reversal. It is also made clear that Deputy Director of Consolidation, when he re-determines this matter, pursuant to the order being hereby made will be free to record his findings without being influenced by anything said in this order, but certainly in accordance with the standard and requirements of writing a judgment of affirmation, reversal, or a remand further down, whatever he determines. It goes without saying that while taking his decision Deputy Director of Consolidation will be guided by relevant evidence, and, of course, by the provisions of law that create or support rights of parties, such as the bar under Section 49 of the Act, if inferable, or the principle of estopple or the other well settled principles attracted.

16. In the result this petition succeeds in part and is allowed to the extent that the impugned order passed by the Deputy Director of Consolidation dated 05.05.1984 is hereby quahsed. The matter is remanded to the Deputy Director of Consolidation where Revision No. 1347 shall stand restored to the file of the Deputy Director of Consolidation to be determined afresh in accordance with law after putting both parties to notice. Since, both parties are represented before this Court, it is directed they will appear before the Deputy Director of Consolidation on 30.08.2019, whereafter the Deputy Director of Consolidation will fix a date for hearing. The Deputy

Director of Consolidation will proceed to determine the revision afresh, within a period of three months next from the date of first appearance by the parties.

17. Until decision by the Deputy Director of Consolidation the status-quo regarding possession over the land in dispute as exits today shall be maintained by both parties.

18. Costs easy.

(2019)10ILR A 701

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ-B No. 21737 of 2004

Lalloo & Ors. ...Petitioners
Versus
The Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashutosh Srivastava, Sri Prashant Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri A.L. Nigam, Sri Anuj Kumar, Sri N.B. Nigam, Sri N.K. Baranwal, Sri Rajesh Kumar, Sri Rajesh Kumar Dwivedi, Sri Shivajee Srivastava, Sri V.K. Baranwal

A. Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950- Sections 8(3) & 229 B - any transfer of immovable property by natural guardian-in contravention to S.8(1) & (2)-voidable-at instance of minors or any person claiming under him.

B. Section 229B of UP.Z. A & LR Ac t- suit for mere declaration of rights in agricultural land-not maintainable-as suit is based on transfer by guardian-without taking permission from competent court (District Judge).

Held :- suit for mere declaration of rights in respect of agricultural land under Section 229B of U.P.Z.A & L.R. Act is not maintainable as the same is based on transfer made by the guardians of the plaintiffs without taking the permission from the competent court (District Judge) and the said document is rendered voidable in view of Section 8 (3) of the Act of 1956 for which the suit for cancellation of said instrument is required to be filed before the competent court.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Punni Lal Vs. Rajender Singh & Anr. 1993 (SC) 1117

2. Prem Singh Vs. Birbal (2006) 5 SCC 353

3. Kamla Prasad & Ors Vs. Krishna Kant Pathak & Ors (2007) 4 SCC 213

4. Tej Bhan Singh Anr. Vs. IX ADJ Jaunpur & Ors. 1994 RD 496

5. Ram Awalamb Anr Vs. Jata Shanker & Ors AIR 1969 ALL 526 (F.B.)

6. Vishwambhar & Anr Vs. Laxmi Narayana (Dead) through Lrs. & Ors. AIR 2001 SC 2607

7. Sursati Devi Vs. Joint Director of Consolidation, Basti & Ors 1983 ALL L.J. 1473 (Parag 53)

8. Ram Padarath and Ors Vs. Second ADJ & Ors 1989 (1) AWC 290 (F.B.).

9. Smt. Bismilla Vs. Janeshwar AIR 1990 SC 504

10. Shri Ram & Anr. Vs. Ist Additional Judge, 2001 (92) RD 241 (SC)

(Delivered by Hon'ble Rajiv Joshi, J.)

1. The present writ petition under Article 226 of the Constitution has been

filed by the plaintiffs-petitioners challenging the validity of the order dated 16.4.2004 passed by the Board of Revenue U.P. At Allahabad in Second Appeal No. 06 of 2002-2003 (Dashrath & Ors Vs. Panna Lal & Ors) whereby the second appeal filed by respondent nos. 7 to 11 was allowed and the judgment and decree dated 7.6.2003 passed by the Commissioner, Vindhyachal Division Mirzapur as well as order dated 22.10.2002 passed by the Assistant Collector /Upziladhikari, Gyanpur, Badohi were set aside.

2. The relevant facts for consideration in the present case are; that plot no. 47 having area of 2 bighas situate in Village Bhatpura, Tehsil Aurai, District- Sant Ravidan Nagar is the disputed land and said land is also part of Khata No. 40.

3. The mother of the plaintiffs-petitioners namely Smt. Kalawati Devi and defendant -respondent no. 12 Panna Lal s/o Lalloo Yadav executed a registered sale-deed dated 10.7.1970 in favour of Ram Pyare Singh (father of respondent nos. 2 to 5) and Lal Pratap Singh, (father of defendant respondent no.6). On the strength of said sale-deed, the names of Ram Pyare Singh- father of respondent nos. 2 to 5 and Lal Pratap Singh- father of respondent no.6, were mutated in the revenue record. Subsequently, Shiv Ram Singh and others (Sons of Ram Pyare Singh and Late Lal Pratap Singh respondent nos. 2 to 6), executed a registered sale-deed dated 11.2.1988 in favour of respondent nos. 7 to 11 (Dashrath & Ors), who got their names mutated in the revenue record on the strength of said sale-deed.

4. The plaintiffs-petitioners filed a suit on 14.6.1988 being Suit No. 293 of 1989 under Section 229-B of U.P. Z.A & L.R. Act before the Assistant Collector/Upziladhikari, Gyanpur at Badohi, praying that decree be passed declaring the plaintiffs/petitioners and defendant-respondent No.12 (Panna Lal) as bhumidhar of the land in dispute and the sale-deed executed by their mother and their brother Panna Lal (respondent no.12) be declared to be a void document on the ground that on the date of execution of the said sale-deed, the plaintiffs were minors and said deed has been executed without taking prior permission from the District Judge in terms of the provisions of Hindu Minority & Guardianship Act, 1956 (hereinafter referred to as the "Act of 1956").

5. The suit filed by the plaintiffs-petitioners was contested by the father of respondent nos. 2 to 5, father of respondent no.6 and father of respondent nos. 7to 11 that the sale-deed has rightly been executed by the mother and brother of the plaintiffs in their favour and sale-deed dated 10.7.1970 is not void document and the suit filed by the plaintiffs-petitioners cannot be decreed by the revenue court and the same is also not maintainable.

6. Both the parties in support of their respective claims adduced the oral evidence and filed documentary evidence.

7. The trial court partly decreed the suit of the plaintiffs-petitioners vide judgment and decree dated 22.10.2002.

8. Aggrieved by the judgment and decree passed by the trial court, the defendants-respondents no. 7 to 11 filed an appeal registered as Appeal No. 87 of 2003 before the Commissioner, Vindhyachal Division, Mirzapur which

was dismissed by the Commissioner vide judgment and order dated 7.6.2003. The respondent nos. 7 to 11 filed a second appeal being Second Appeal No. 6 of 2002-03 before the Board of Revenue U.P. At Allahabad against the judgment and decree dated 22.10.2002 and 7.6.2003. The Board of Revenue vide judgment and order dated 16.4.2004 has allowed the second appeal filed by the respondent nos. 7 to 11, setting aside the judgment and decree dated 7.6.2003 and 22.10.2003 of the trial court and appellate court. It is the judgment and order dated 16.4.2004 which is impugned in the present writ petition.

9. I have heard Sri Ashutosh Srivastava, learned counsel for the petitioners and Sri N.B. Nigam, learned counsel for the respondents and perused the record.

10. Contention of learned counsel for the petitioners is that the Board of Revenue has committed manifest error in law while allowing the second appeal by holding that the sale-deed in question is not a void document and the suit filed by the plaintiffs-petitioners for declaration before the revenue court is not maintainable, in absence of any relief for cancellation of sale-deed. Learned counsel for the petitioner while elaborating his argument submits that the relief claimed in the suit is for declaration of rights by unrecorded tenure holder and the said declaration can only be made by the revenue court, even if it is admitted that the sale-deed is voidable in view of Section 8 (3) of the Act of 1956.

11. It is further argued by learned counsel for the petitioner that at the time of execution of the sale-deed, the petitioners were minors and in absence of natural guardians, de-facto guardians could not deal with the minors property in view of Section 11 and 12 of the Act of 1956. In support of his contention, he relied upon the following judgments in the cases of **Punni Lal Vs. Rajender Singh & Anr. 1993 (SC) 1117, Prem Singh Vs. Birbal (2006) 5 SCC 353, Kamla Prasad & Ors Vs. Krishna Kant Pathak & Ors (2007) 4 SCC 213 and Tej Bhan Singh Anr. Vs. IX ADJ Jaunpur & Ors. 1994 RD 496**

12. On the other hand, learned counsel for the respondents submits that in view of Section 8(3) of the Act, the sale-deed dated 10.7.1970 cannot be said to be a void document and it is merely a voidable document.

13. Counsel for the respondent further contends that since the sale-deed is a voidable document and admittedly the name of respondent no.7 to 11 have been mutated in the revenue records, therefore, the suit for declaration under Section 229-B of the U.P. Z.A. & L.R. Act is not maintainable, the remedy available to the plaintiffs-petitioners was to get the sale-deed cancelled. In support of his contention, he relied upon the following judgments in cases of **Ram Awalamb Anr Vs. Jata Shanker & Ors AIR 1969 ALL 526 (F.B.), Vishwambhar & Anr Vs. Laxmi Narayana (Dead) through Lrs. & Ors. AIR 2001 SC 2607, Sursati Devi Vs. Joint Director of Consolidation, Basti & Ors 1983 ALL L.J. 1473 (Parag 53) and Ram Padarath and Ors Vs. Second ADJ & Ors 1989 (1) AWC 290 (F.B.).**

14. I have considered the rival submissions so raised by the learned

counsel for the parties and perused the record.

15. The suit for declaration of title under Section 229-B of U.P. Act No.1 of 1951 in respect of agricultural land was filed by the plaintiffs-petitioners on the ground that the petitioners were minor at the time of execution of sale-deed dated 10.7.1970 and same was executed without taking permission from the competent authority (District-Judge of the concerned District) and therefore, the said deed is void ab initio having no binding effect upon the petitioners and therefore, the declaration be made in their favour.

16. The Board of Revenue vide impugned judgment and decree had formulated the following substantial questions of law:

(a) Whether sale-deed of agricultural land executed by the natural guardian on behalf of minors requires a necessary permission of the competent authority (District-Judge).

(b) Whether sale-deed executed by guardian of the minors without permission or with permission is void or voidable.

(c) Whether the suit for mere declaration is maintainable in revenue court unless the voidable sale deed executed by the guardian of the minor is cancelled by the competent civil Court and whether without the prayer of setting aside the sale deed the suit is maintainable.

(d) Whether after the expiry of limitation of three years a minor can sue for setting aside a voidable sale deed and regain property and whether in case of two sons/respondents having attained majority more than three years ago and have not filed suit within three years, the suit to the extent of those sons/respondents is barred by limitation.

17. The Board of Revenue came to the conclusion that no permission is required under Section 8 of Guardianship and Wards Act in respect of sale of agricultural land of minors by his guardians and the sale-deed executed by the mother and brother of the petitioners is not void but a voidable document. Secondly, the suit was filed on 14.6.1988 i.e. after 18 years from the date of execution of the sale-deed and all the petitioners attained the majority as provided in Article 60 of the Schedule of Indian Limitation Act, the limitation for minors for filing the suit for cancellation of sale-deed is three years appears to be barred by limitation and thirdly, the name of the respondents have already mutated in the revenue record and said mutation has not been challenged by the petitioners after they had attained majority and further in view of Section 31 of Specific Relief Act 1966 the suit without seeking the cancellation of the sale-deed dated 10.7.1970 is not maintainable.

18. In the present petition, the questions that arises for consideration are as under;

(1) Whether the sale-deed dated 10.7.1970 executed by the mother and brother of the petitioners is void or voidable instrument.

(2) Whether the suit is cognizable by the Revenue Court or the Civil Court.

19. So far as the first question is concerned, Section 8 of the Hindu Minority and Guardianship Act,1956 (for short "Act of 1956") is relevant which reads thus:-

"8. Powers of natural guardian.--

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,--

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or by any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in the case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular--

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section "court" means the city civil court or a district court or a court empowered under section 4A of the Guardian and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate...."

20. From the perusal of the aforesaid section, it is apparent that the previous permission of the competent authority (District-Judge of the concerned district) is required in case of transfer of immovable property by the natural guardian. Admittedly, as per the plaint, no permission was taken by the natural guardian of the petitioners while making the transfer and, hence, in view of Section 8 (3) of the aforesaid Act of 1956 any disposal of immovable property by natural guardians in contravention sub-section (1) or sub-section (2), of the the Act is voidable at the instance of minors or any person claimed under him and therefore, the sale-deed dated 10.7.1970 is voidable document and even the learned counsel appearing on behalf of the petitioners conceded the said position.

21. Now coming to the second question, whether the suit is cognizable by the civil court or the revenue court a suit for cancellation of instrument, is based on provisions of Section 31 of Specific Relief Act which is quoted as under:-

"31. When cancellation may be ordered.--

(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."

22. Thus, the Section 31 of Specific Relief Act refers to both void and voidable instrument and it is the discretional relief.

23. It is true that as per the Full Bench decision of this Court in the case of Ram Padarat (supra) even a suit for cancellation of void sale-deed in respect of agricultural land may be maintainable before the civil court. The decision of the said Full Bench decision has been upheld by the Hon'ble Apex Court in the case of S**mt. Bismilla Vs. Janeshwar AIR 1990 SC 504**; the Hon'ble Apex Court has held that if the plaintiff is of opinion that without getting the offending deed set aside, he cannot get proper reliefs, then the bar is not attracted and the plaintiff is at liberty to file suit before the Civil Court.

24. In **Shri Ram & Anr. Vs. Ist Additional Judge, 2001 (92) RD 241 (SC)**, the Apex Court also held that the recorded tenure holder is not required to approach the Revenue Court for declaration of rights and can challenge the sale-deed purported to have been executed before the civil court.

25. The paragraphs Nos. 7 and 41 of the Full Bench decision of this Court in the case Ram Padarat (supra) which has been approved by the Apex Court in the Case of Smt. Bismilla (supra) read as under:

"7. So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without its cancellation. But a void document is not required to be cancelled necessarily. Its legal effect if any can be put to an end to by declaring it to be void and granted some other relief instead of canceling it. Once it is held to be void it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority would be a void document. In case it is in excess of authority it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts mentioned in the same, but the said

presumption is not conclusive and be dislodged.

"41..... Suit or action for cancellation of void document will generally lie in the Civil court and a party cannot be deprived of his right getting this relief permission under lad except when a declaration of right or status of a tenure holder is necessarily needed in which even relief for cancellation will be surplusage and redundant. A recorded tenure- holder having prima facie title in his favour can hardly be directed to approach the Revenue Court in respect of Seeking relief for cancellation of a void document which made him to approach the Court of law and in such case he can also claim ancillary relief even through the same can be granted by the Revenue Court."

26. In view of the aforesaid decision of the Full Bench of this Court as well as Hon'ble Apex Court; a person who question the sale deed executed or purported to be executed by him in respect of agricultural land can file a suit for its cancellation before the civil court if the sale is void or voidable on the ground of fraud coercion, undue influence, misrepresentation or impersonation.

27. This Court in the case of **Sursati Devi (supra)**, has also taken a similar view to the effect that in view of provision contained in sub section (3) of Section 8 of the Act of 1956, any alienation made by the guardians of the minor rendered it voidable and the said alienation cannot be ignored by the revenue/consolidation courts. Paragraph 53 of the said judgment is quoted hereunder:

"53. The sale deed in question has not been dubbed as a void document. Opposite party No. 4 had asserted that since no permission of the District Judge was obtained as was required by S. 8 of Act No. 32 of 1956 while making transfer of the land in question by his father and as such he was not bound by the said transfer being void in law. Learned counsel for the opposite party No. 4, however, conceded that on the aforesaid ground the impugned sale deed cannot be said to be void but he asserted that it was voidable in view of the provisions contained under Sub-sec (3) of S. 8 of the H. M. & G. Act. The consolidation authorities, therefore, could not ignore the said document while treating it to be a void document as has been held by them. The impugned orders passed by the consolidation authorities thus suffer from a manifest error of law."

28. The Apex Court in the case of **Vishwambhar (supra)** has also taken same view, which applies in the present case on its four corners. Relevant portion of the said judgment i.e. paragraph nos. 9 and 10, are quoted hereunder:

"9. On a fair reading of the plaint, it is clear that the main fulcrum on which the case of the plaintiffs was balanced was that the alienations made by their mother-guardian Laxmibai were void and therefore, liable to be ignored since they were not supported by legal necessity and without permission of the competent court. On that basis the claim was made that the alienations did not affect the interest of the plaintiffs in the suit property. The prayers in the plaint were inter alia to set aside the sale deeds dated 14.11.1967 and 24.10.1974, recover possession of the properties sold from the respective purchasers, partition of the properties carving out separate

possession of the share from the suit properties of the plaintiffs and deliver the same to them. As noted earlier, the trial court as well as the first appellate court accepted the case of the plaintiffs that the alienations in dispute were not supported by legal necessity. They also held that no prior permission of the court was taken for the said alienations. The question is in such circumstances are the alienations void or voidable? In Section 8 (2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the Court, transfer by sale any part of the immovable property of the minor. In sub-section (3) of the said section it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-section (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold then a suit without such a prayer was of no avail to the plaintiffs. In all probability realising this difficulty the plaintiffs filed the application for amendment of the plaint seeking to introduce the prayer for setting aside the sale deeds. Unfortunately, the realisation came too late. Concededly, plaintiff no.2 Digamber attained majority on 5th August, 1975 and Vishwambhar, plaintiff no.1 attained majority on 20th July, 1978. Though the suit was filed on 30th November, 1980 the prayer seeking setting aside of the sale deeds was made in December, 1985. Article 30 of the Limitation Act, prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. Therefore, the trial Court rightly dismissed the suit filed by Digamber. The judgment of the trial court dismissing the suit was not challenged by him. Even assuming that as the suit filed by one of the plaintiffs was within time the entire suit could not be dismissed on the ground of limitation, in the absence of challenge against the dismissal of the suit filed by Digambar the first appellate court could not have interfered with that part of the decision of the trial court. Regarding the suit filed by Vishwambhar it was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December, 1985) by introducing such a prayer by amendment of the plaint

the prescribed period of limitation for seeking such a relief had elapsed. In the circumstances the amendment of the plaint could not come to the rescue of the plaintiff.

10. From the averments of the plaint it cannot be said that all the necessary averments for setting aside the sale deeds executed by Laxmibai were contained in the plaint and adding specific prayer for setting aside the sale deeds was a mere formality. As noted earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were ab initio void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seeking setting aside the alienations of the property by the guardian. In such circumstance the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that."

29. The proposition of law as per the aforesaid judgment are thus:

(i) the alienation made by the mother, the natural guardian of the minor are voidable at the instance of plaintiffs;

(ii) the plaintiffs are required to get the alienation set aside, if they wanted to avoid such transfer and regain the property from its purchasers;

(iii) the plaintiffs were also required to get the sale deed set aside before making any claim in respect of properties sold by them and the suit without setting aside the alienation was of no avail;

(iv) when there were more than one minor and some of them had attained the majority, the prescribed period has lapsed by the date of presentation of plaint for some of them and even for setting aside the suit, alienation would be barred by limitation as prescribed under Article 60 of the Limitation Act, which prescribes the limitation period of three years for filing the suit for setting aside the deed; and

(v) if the suit was not filed within the prescribed period of three years from the date of attaining the majority by the plaintiffs, the other relief for declaration of their rights or possession would not be maintainable.

30. In view of the above, it is clear in the present case that suit for mere declaration of rights in respect of agricultural land under Section 229B of U.P.Z.A & L.R. Act is not maintainable as the same is based on transfer made by the guardians of the plaintiffs without taking the permission from the competent court (District Judge) and the said document is rendered voidable in view of Section 8 (3) of the Act of 1956 for which the suit for cancellation of said instrument is required to be filed before the competent court.

31. The judgment cited on behalf of the petitioners are distinguishable in view of the above proposition of law as the same relates to the void instrument and which does not give any help to the petitioners.

32. I do not find any merit in the writ petition. The Board of Revenue vide impugned order has considered each and every aspect of the matter in detail while allowing the appeal filed by the respondent nos. 7 to 11.

33. Writ petition lacks merit and is, accordingly, dismissed.

34. No order as to costs.

(2019)10ILR A 710

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 1052 of 1991

Nageshwar Prasad & Anr.
...Plaintiffs/Appellants
Versus
Santosh Kumar ...Defendant/Respondent

Counsel for the Appellants:
Sri R.N. Upadhyay, Sri A.K. Bind, Sri A.N. Verma, Dr. Madhu Tandon, Sri G.N. Verma, Sri H.N. Shukla, Sri H.O. Khare, Sri R.K. Bind, Sri Rahul Mishra, Sri S.K. Yadav, Sri S.K. Tyagi, Sri S.R. Yadav, Sri U.N. Shukla

Counsel for the Respondent:
Sri Sankatha Rai, Dr. Vinod Kumar Rai, Sri Siddharth Niranjan

A. Registration of Births and Death Act, 1969 - Section 17 - read with Indian Evidence Act,1872 - Section 76 - Generally Certified copies of public documents carries presumption of correctness of its entries - but if there is tampering and overwriting there can be no presumption of genuineness and correctness of entries of "Birth Register".

Since the very basis of entry of Birth Register about death of Nawal Kishor on 27.09.1984 is not proved in view of tampering in 'Death Certificate' the presumption of correctness of certified copy of 'Birth Register' duly issued under section 17 (2) of Birth Act may not be drawn under Section 76 of Evidence Act. (Para 17)

B. Practice and Procedure - Plaintiff's application - for obtaining report of fingerprint and handwriting expert – for comparison of thumb impressions of Nawal Kishor over the sale deed in favour of defendant, with his thumb impression over other exemplar sale deed filed by plaintiff - Rejected - *Held* - No illegality as No relief for cancellation of sale deed was sought and despite specific plea about execution of sale deed on 19.10.84 by Nawal Kishor in favour of defendant in written statement, there are no pleadings by plaintiff by amendment of plaint or by filing replication, that sale deed has been obtained by impersonation after death of Nawal Kishor. (Para 19)

Second Appeal Dismissed (E-5)

(Delivered by Hon'ble Harsh Kumar, J.)

1. The instant second appeal has been filed against impugned judgment and decree dated 13.2.1991 passed by Additional District Judge, Allahabad in Civil Appeal No.267 of 1987, arisen out of Civil Suit No.770 of 1986 "Nageshwar Prasad and another Vs. Santosh Kumar".

2. The appeal was admitted vide order dated 10.4.2007 on following two substantial questions of law:-

"1.Whether the Courts below having admitted three documents namely, Papaer No.10/Ga, 15/Ga and 16/Ga by written orders of Sri Chandra Prakash, XIth Additional District Judge, Allahabad dated 18.04.1999 and the said documents were 'Janm Evam Mrityu Register' regarding family of Nawal Kishor deceased the date of death is shown as 27.09.1984, Mst. Sonpatti, Widow of deceased Nawal Kishor. The second is the 'Kutumb Register' of Nawal Kishor which shows Sonpatti is his widow, Gulab Kali W/o Nageshwar Prasad (Appellant), Phool Kali W/o Prem Shanker, Smt. Anar

Kali W/o Santosh who admittedly are three daughters of Nawal Kishor. The third documents is the family register of Trivedi Prasad who appeared as witness for Defendant. The name of witness was given by him was Ram Baran in fact he was not Ram Baran but in fact he was Trivedi Prasad R/o Village-Sansarpur, Tehsil-Koraon, District-Allahabad. The family register of Ram Baran witness the question and answering regarding him obtained by the Appellant and reply given by the department from which it is admitted that witness who said that his name is Ram Baran S/o Jagat Dhari born on 25.02.1954 and is illiterate. In fact his name is Trivedi Prasad mentioned above. It has been filed to say that Ram Baran who was a witness to the sale deed of the Defendant, in fact never signed before the Registrar as witness and that said Ram Baran is not the son of Jagat Dhari instead he dubbed the Court. In fact his name is Trivedi Prasad S/o Jagat Dhari. The above said documents have not been considered in the judgment of the Lower Appellate Court, and whether the Lower Appellate Court were justified in ignoring the above said material documentary evidence?

2. Whether the Courts below were justified in accepting the sale deed which was not proved according to law in as much as none of the marginal witnesses have proved the said sale deed"

3. During hearing, the parties counsel submitted that the substantial questions of law framed earlier on 10.04.2007, at the time of admission of appeal are very lengthy and also ambiguous to some extent. It was found appropriate to reframe substantial questions of law for just and appropriate disposal of appeal and upon submissions made by parties counsel following three substantial questions of law were framed, replacing the earlier framed two substantial questions of law:-

"1.Whether the courts below acted wrongly and illegality in disbelieving death certificate of Nawal Kishore as well as entries in the Birth and Death Register and Family Register with regard to his death, from which it is fully proved that Nawal Kishore had died on 27.09.1984.

2. Whether the lower appellate court acted wrongly in not relying on the additional evidence filed under Order XLI Rule 27 of CPC per list 11/C as paper No.12C, 13C and 14C viz., (i) copy of Family Register, (ii) question-answer regarding Ram Baran and (iii) Life Insurance Policy of plaintiff appellant no. 2.

3. Whether the courts below acted wrongly and illegally in relying on the sale deed dated 19.10.1984 in favour of defendent-respondent, though it was not proved in accordance with law."

4. The brief facts relating to the case are that plaintiffs-appellants Nageshwar and Gulabkali (hereinafter referred as plaintiffs) filed Civil Suit No.770 of 1986 against defendant-respondent Santosh Kumar (hereinafter referred as defendant) for obtaining a decree of permanent injunction restraining the defendant from interfering in peaceful possession of plaintiffs over land in suit Plot No.287, area, 11 Bigha, 17 Biswa and 13 Dhur situated in Mauja Bhaluha Tappa Manda, Pargana-Kheragarha, District-Allahabad, with the allegations that Nawal Kishor son of Ram Sunder the original tenure holder of land in suit, died on 27.9.1984 leaving behind him his widow Smt. Sonapatti as his legal heir who succeeded

him and became owner/bhumidhar in possession of land in suit and executed two registered sale deeds of land in suit in favour of plaintiffs on 5.6.1985, hence plaintiffs are owners/bhumidhars in possession of the property in suit. It was also contended that on 4.8.1986, without any right, title or interest defendant attempted to take forcible possession over the property in suit, hence, arose cause of action for filing suit for injunction.

5. The sole defendant filed written statement denying all the allegations of plaint and contended that Nawal Kishor was Bhumidhar in possession of the land in suit till 19.10.1984, when he executed a registered sale deed of land in suit in favour of defendant for a valuable consideration of Rs.40,000/- and handed over actual physical possession over the land to defendant; that Nawal Kishor had three daughters out of whom Ist the eldest one Gulabkali, the plaintiff no.2 was married to plaintiff no.1 Nageshwar Prasad, IInd one Phoolkali was married to Prem Shankar and IIIrd the youngest one Anarkali was married to defendant; that Nawal Kishor died much after execution of the registered sale deed dated 19.10.1984 in favour of defendant and plaintiff no.1 has dishonestly got executed two sale deeds from his mother-in-law Smt. Sonpatti on 5.6.1985, in favour of himself and his wife, which are without consideration, illegal, ineffective and without authority as Smt. Sonpatti never succeeded land in suit and never became bhumidhar in possession.

6. On parties' pleadings, learned trial Court framed as many as five issues viz. "(1) whether suit is under valued and Court fee paid is insufficient, (2) whether suit is barred by provisions of Section 331 of U.P. Z.A. & L.R. Act, (3) whether plaintiffs are owners in possession of the disputed property, (4) whether Nawal Kishor died on 27.9.1984 as alleged in para 2 of plaint, and (5) to what reliefs, if any, are the plaintiffs entitled"

7. After taking evidence of parties, trial Court decided issue no.1&2 in negative in favour of plaintiffs and holding that plaintiffs have failed to prove actual date of death of Nawal Kishor or his death having taken as copy of Birth Register having not been countersigned as per provisions of Section 109-A of Panchayat Raj Act, is inadmissible in evidence and place on 27.9.1984, decided issue no.4 in negative against the plaintiffs. On issue no.3, trial Court came to the conclusion that plaintiffs have failed to prove their right, title and possession over land in suit and deciding issue no.3 in negative against the plaintiffs, dismissed plaintiffs' suit for injunction.

8. Feeling aggrieved, plaintiffs preferred Civil Appeal No.267 of 1987 before District Judge, Allahabad which was dismissed by XIth Additional District Judge, Allahabad by impugned judgment and decree dated 13.2.1991, hence, the plaintiffs have approached this Court by way of instant second appeal which has been admitted on 10.4.2007 on two substantial question of law mentioned above, which were replaced with three substantial questions of law reframed during hearing of appeal on 5.8.2019.

9. Heard Shri Rahul Mishra, Advocate for appellants and Shri Dharam Pal Singh, Senior Counsel assisted by Dr. Vinod Kumar Rai for respondent at length on substantial questions of law framed

and reframed and perused the record as well as lower court record summoned in appeal.

10. Learned counsel for plaintiff/appellant submitted that trial Court as well as lower appellate Court have acted wrongly and illegally in not relying on public documents viz. the copy of "Birth and Death Register" (hereinafter referred as "Birth Register") as well as copy of Family Register duly corroborated by death certificate issued by medical officer at the time of death of Nawal Kishor; that duly attested true copies of "Birth Register" and "Family Register" of Nawal Kishor on record show that Nawal Kishor died on 27.9.1984 and the entry about his death was made in "Birth Register" on 5.10.1984; that copy of "Birth Register" issued under provisions of Section 17 of Registration of Births and Death Act, 1969, hereinafter referred as "Birth Act", was a public document which carries presumption of correctness of its entries under provisions of Section 76 of Indian Evidence Act; that all the witnesses of plaintiff consistently stated on oath that Nawal Kishor died on 27.9.1984; that there is no iota of evidence to the contrary, to disbelieve the uncontroverted on oath statements of plaintiffs' witnesses and for believing that Nawal Kishor died after 19.10.1984; that the defendant who was none other than son-in-law of Nawal Kishor could not dare to give any other specific date of death of Nawal Kishor; that the learned courts below acted wrongly and illegally in disbelieving the entry of "Birth Register" regarding death of Nawal Kishor on 27.9.1984 merely on the basis of copy of application paper no.49(c) dated 18.3.1987 (filed by defendant) allegedly given by village Pradhan Tribhuvan Singh at P.S. Koraon with averments that his signatures were obtained by Ram Kishor, Lekhpal, Ram Ji Tiwari, Secretary, Nyay Panchayat and Prem Shankar Tiwari on 20.2.1987 on certain blank papers (at the time of obtaining signatures on official papers in ordinary course of business) and suspecting that above blank papers may be used to show death of Nawal Kishor as on 27.9.1984 instead of 27.10.1984; that defendant could not dare to produce Tribhuwan Singh or any other person to witness box to prove paper no.49(c) and the same is inadmissible in evidence; that courts below acted wrongly in relying on paper no.49(c) and in discarding the public documents filed by plaintiffs-appellant; that the contention of defendant about execution of sale deed by Nawal Kishor on 19.10.1984 in favour of defendant is absolutely false and incorrect as Nawal Kishor was not at all alive on 19.10.1984 and sale deed appears to have been obtained by defendant by impersonating some other person in place of Nawal Kishor (deceased); that undisputedly Gulabkali, the eldest daughter of Nawal Kishor, is wife of plaintiff-appellant no.1 and the courts below acted wrongly and illegally in disbelieving the plaintiffs' case on mere slip of tongue by PW-3 Smt. Sonpatti wherein in place of Gulabkali she stated that Phoolkali is married to plaintiff Nageshwar; that in para 17 of written statement denying the execution of impugned sale deeds dated 6.8.1985 by Smt. Sonpatti in favour of plaintiff-appellant Nageshwar and his wife, the defendant has specifically stated that plaintiff no.2 Smt. Gulabkali is wife of plaintiff no.1 Nageshwar; that it is fully proved from the copies of family register on record that Nawal Kishor (deceased)

left behind him his widow Smt. Sonpatti and three daughters Gulabkali (eldest), Phoolkali (middle) and Anarkali (youngest) who were married respectively to Nageshwar Prasad (plaintiff no.1) Prem Shankar (not party to suit) and Santosh Kumar (defendant); that it was fully proved from the evidence on record that plaintiffs were bhumidhars in possession over the property in suit by virtue of registered sale deeds dated 5.6.1985 executed by Smt. Sonpatti in their favour, after death of Nawal Kishor, her husband; that impugned judgments and decrees passed by two courts below are liable to be set aside and by allowing present appeal, suit of plaintiffs for a decree of permanent injunction is liable to be decreed with costs throughout.

11. Per contra, learned counsel for defendant supported the concurrent findings of fact recorded in impugned judgments and decrees passed by two courts below and contended that learned courts below have rightly disbelieved the contention of plaintiffs regarding death of Nawal Kishor on 27.9.1984; that as per copy of "Birth Register" paper no.18 C on record issued on 11.7.1985, the entry about death of Nawal Kishor was made on 5.10.1984 regarding his death on 27.9.1984; that in villages where people do not care for getting the death or birth registered, such a prompt registration of death of Nawal Kishor, which is in contradiction with oral evidence, creates great suspicion on the correctness and genuineness of above entry; that as per plaint case, on death of Nawal Kishor, the medical officer issued a death certificate paper no.17-A on lower court record, wherein there is deliberate overwriting and tampering over date 27.9.84 wherever it has been mentioned, at all the three places, in the digits of month and year and it is crystal clear that date of death of Nawal Kishor 27.01.85, has been tampered by overwriting and converting 01 to 9 and 85 to 84, so that it may appear and may be read as 27.9.84 i.e. prior in time to the date of execution of impugned sale deed dated 19.10.84; that entry of date of death in "Birth Register" is alleged to have been made on written request/application, but neither Sonpatti nor any other person could dare to state that he/she had sent written information of death of Nawal Kishor to the authorities concerned, rather Sonpatti in her statement on oath before Court has stated that she did not make any written application in this regard, as has been observed by Courts below; that it is proved from the evidence on record, that after obtaining signatures of Tribhuwan Singh the then village Pradhan over blank papers by Secretary, Nyay Panchayat, Ram Ji Tiwari, Lekhpal, Ram Kishor and Prem Shankar Tiwari, in collusion with plaintiffs, by misusing that paper, false entry has been got made in "Birth Register" in back date by mentioning date of death of Nawal Kishor as 27.9.1984; that amongst above persons, Prem Shankar Tiwari was in collusion with plaintiffs is being none other than husband of Phoolkali, sister of plaintiff no.2; that there is presumption of genuineness and correctness about execution of registered sale deed dated 19.10.1984 by Nawal Kishor in favour of defendant-respondent unless proved otherwise; that copy of "Family Register" showing death of Nawal Kishor on 27.9.1984 as well copy of "Birth Register" are copies of forged and fictitious records/entries and are not admissible in evidence; that since there is tampering and overwriting in dates

mentioned in 'Death Certificate' of deceased, paper no.17A filed by plaintiffs there can be no presumption of genuineness and correctness of entries of "Birth Register"; that entry of the name of plaintiff no.1 Nageshwar in the "Family Register" of Nawal Kishor (deceased) creates doubt over its genuineness as name of Nageshwar, the son-in-law (DAMAD) of Nawal Kishor (deceased) may not find place in the family register of his father-in-law Nawal Kishor; that the concurrent findings of fact recorded by two courts below may not be interfered with in this second appeal, in absence of any illegality and perversity; that no substantial question of law is involved or arises in this second appeal and the substantial questions of law framed and reframed are liable to be decided against plaintiffs-appellants; that the appeal has been filed with absolutely false and incorrect allegations and is liable to be dismissed with costs throughout.

12. Upon hearing parties counsel and perusal of record as well as lower court record summoned in appeal, I find that as per plaintiff, erstwhile owner and bhumidhar of land in suit Sri Nawal Kishor died on 27.09.1984 and after his death the land in suit succeeded by his widow and was purchased from her by plaintiffs through two registered sale-deeds dated 05.06.1985. On the other hand, defendant contends that Nawal Kishor did not die on 27.09.1984 rather he executed a registered sale deed of land in suit on 19.10.84 in favour of defendant for a valuable consideration of Rs. 40,000/- and died thereafter, upon which, in mutation proceedings his widow Sonpatti filed reply admitting execution of sale deed dated 19.10.1984 while the eldest daughter and son-in-law of Nawal Kishor, in order to usurp the land in suit obtained two sale-deeds from Smt. Sonpatti (widow of Nawal Kishor) and got recorded a false and forged entry of death of Nawal Kishor on 27.09.1984 in 'Birth Register' in order to avoid registered sale deed dated 19.10.84 in favour of defendant and since Nawal Kishor had sold his land in suit in his lifetime, so the plaintiffs did not get any right, title or interest in the land in suit and the sale deeds obtained from Smt. Sonpatti are wrong, illegal, without consideration, without authority and null and viod ab-initio.

13. The plaintiffs have filed original "Death Certificate" of Nawal Kishor paper no.17-A issued by Dr. A.K. Mishra, MBBS, I/c Medical Officer of Primary Health Centre Korao, District Allahabad, certifying death of Nand Kishore due to "Acute respiratory failure due to pulmonary oedema" at Mauja Bhaluha Tehsil Meza. The copy of Birth Register 18c on trial Court shows that entry of death of Nawal Kishor on 27.9.1984 has been made on 05.10.1984 on the basis of written report, but there is no evidence on record to show that any written information was ever given to authorities concerned regarding death of Nawal Kishor on 27.9.84 by his widow Sonpatti or any other family member on 5.10.1984 or at any other date. In any case, the basis of above entry in "Birth Register" or "Family Register" is the death certificate paper no. 17A issued by Dr. A.K. Mishra, genuineness of which is of much importance.

14. During arguments the learned counsel for the respondent taken the Court to records of trial court and paper no. 17A 'death certificate' filed by plaintiffs. In

above 'death certificate' date 27.9.1984 has appeared at 3 places; (i) on the left lower side of certificate (ii) below signatures of Medical Officer and (iii) in the body of certificate. It is noteworthy that at all the three places date '27' is clear and untampered (without any tampering or overwriting thereon) but in the digits of month '9' as well as second digit of year '84', there is repeated overwriting and deliberate tampering at all the three places, which indicates that deliberate tampering has been committed in above 'Death Certificate' in order to change the actual date of death of Nawal Kishor. From bare perusal of 'Death Certificate paper' No. 17A, it is crystal clear that the person who has committed tampering, has tried his best that original digits may not be visible at all. I find force in the submissions made by learned counsel for the respondent, that above 'Death Certificate' appears to have been issued on 27.01.1985, but by way of tampering two digits of month "01" have been converted to "9"and similarly by tampering in digit 5 in the year "85" it has been converted to "84" so that it may be read as "8"4 and date may be read as 27.9.84 instead of 27.01.1985. In the date mentioned below signatures of Medical Officer, year 85 is better visible in comparison to other two places, because stroke of digit "5" is visible at this place despite tempering. Since the tampering in date of death in "Death Certificate 17A" is visible by bare eyes, the courts below rightly disbelieved plaintiff's case and considering the contradictory evidence of plaintiff rightly held that plaintiffs failed to prove that Nawal Kishor died on 27.9.84.

15. The 'Death Certificate 17-A' of Nawal Kishor certifying his death on 27.9.84 may not be believed as (i) the Medical Officer was not authorized to issue 'Death Certificate', (ii) the Medical Officer who issued certificate was not produced to prove it, (iii) there is tampering in date 27.9.84 at all the 3 places, (iv) there is no evidence on record to show that Nawal Kishor deceased was under treatment of Dr. A.K. Misra who issued 17-A while plaintiff Nageshwar in his on oath statement as PW1 as stated 'that 15-20 days before death Dr. Achyutanand Pandey attended Nawal Kishor and on death day also he was attended by Dr. Pandey'. In view of above facts on record, whatever may be the date of death of Nawal Kishor, but in view of tampering in date of death mentioned in 'Death Certificate 17-A', there is sufficient reason to disbelieved his death on 27.9.1984.

16. It is also pertinent to mention that in copy of family register of Nawal Kishor 43C on trial Court record or 12C filed in first appeal, it has also been mentioned that he died on 27.09.1984. The above entry has also no evidentiary value as (i) the entry about death of Nawal Kishor in the family register is not primary entry and (ii) in copy of family register paper no. 43-C on lower court record or 12C filed during first appeal, name of Nageshwar also finds place as member of the family though admittedly he is son-in-law (DAMAD) of Nawal Kishor, who may not be considered to be member of family of his father-in-law.

17. In view of the above, since the very basis of entry of Birth Register about death of Nawal Kishor on 27.09.1984 is not proved in view of tampering in 'Death Certificate' the presumption of correctness of certified copy of 'Birth Register' duly issued under section 17 (2) of Birth Act

may not be drawn under Section 76 of Evidence Act while trial Court has held that it has not been issued in accordance with provision of Section 109 A of Panchayat Raj Act.

18. The Court is of considered view that there is no incorrectness or perversity in concurrent findings recorded by courts below, in holding that plaintiffs failed to prove death of Nawal Kishor on 27.09.84, before execution of sale deed dated 19.10.84 in favour of defendant. There is no cogent, reliable or independent evidence on record so as to believe that Nawal Kishor died on 27.09.1984 or died before 19.10.84. The argument of plaintiffs that the defendant who is DAMAD of deceased did not give any specific date of death of Nawal Kishor so date of death given by plaintiff must be accepted, has no force rather Court finds force in arguments of learned counsel for defendant that Nawal Kishor appears to have died at some time in the year 85 or so. Learned trial court rightly disbelieved the contention of plaintiffs about death of Nawal Kishor on 27.09.1984 for not producing Medical Officer in evidence and upon finding the false and forged entries in Birth register and Family register to be doubtful.

19. I do not find any force in the arguments advanced by learned counsel for the appellant that lower appellate court acted wrongly in not allowing appellant's application for obtaining report of fingerprint and handwriting expert for comparison of thumb impressions of Nawal Kishor over the sale deed dated 19.10.1984 in favour of defendant, with his thumb impression over other exemplar sale deed filed by plaintiff in view of the fact that no relief for cancellation of sale deed was sought and despite specific plea about execution of sale deed on 19.10.84 by Nawal Kishor in favour of defendant in written statement, there are no pleadings by plaintiff by amendment of plaint or by filing replication, that sale deed has been obtained by impersonation after death of Nawal Kishor.

20. The two sale deeds were obtained by plaintiffs from Sonpatti on 05.06.85 each of which is alleged to be executed for a sale consideration of Rs. 40,000/- paid by each plaintiff, however, in contradiction to above plaintiff no.1 as P.W.1 has stated on oath that the sale consideration of Rs. 48,000/- was paid by each plaintiff which indicates that sale deeds were obtained without payment of any consideration. Since Nawal Kishor had sold land in suit to defendant during his lifetime, so on his death the land in suit could not have devolved upon his widow and since she had no right title or possession over land in suit, the sale deeds dated 05.06.1985 obtained by plaintiffs are without authority wrong, illegal and null and void ab-initio and plaintiffs did not acquire any right, title or possession over the property in suit and had no locus standi to file suit and obtain a decree for injunction.

21. Learned counsel for appellants also addressed the Court on substantial questions of law initially framed vide order dated 10.4.2007 apart from questions framed during arguments on 5.8.2019. He pointed out that paper nos.10-Ga, 15-Ga and 16-Ga have been wrongly mentioned in substantial questions of law no.1 framed on 10.4.2007 and in fact above documents are Janm and Mrityu Register and Kutumb Register respectively paper

no.18-C and 43-C and another family register paper no.13-C. Referring the family register 13-C of Mantoria as well as Triveni Prasad and in view of question-answer filed during first appeal, he contended that D.W.-2 Ram Baran who was examined as marginal witness of sale deed dated 19.10.1984 by Naval Kishore in favour of defendant Santosh Kumar, was in fact Triveni Prasad and so the sale deed in favour of defendant was not duly proved by its marginal witness.

22. The above contention has no force and above paper "Question-Answer" has no evidenciary value as it was never suggested by plaintiffs to D.W.-2 Ram Baran, in his lengthy cross examination, that he is Triveni Prasad and not Ram Baran or is giving false evidence by impersonating himself as Ram Baran.

23. The Courts below rightly held that plaintiffs failed to prove that Naval Kishore died on 27.9.1984 prior to execution of sale deed dated 19.10.1984 of land in suit in favour of defendant, or that upon death of Naval Kishore the land in suit devolved on his widow Smt. Sonpatti and she had any right, title or authority to execute valid sale deeds in favour of plaintiff and the above sale deeds were for valuable consideration. The findings of courts below are well considered and based on correct and proper appreciation of evidence on record and cogent reasonings and in recording concurrent findings. The Court is of considered view that the Courts below have not committed any error, mistake or perversity in disbelieving the contention of plaintiffs-appellants regarding death of Nawal Kishor on 27.09.1984 and did not acted wrongly or illegally in disbelieving the Death Certificate as well as entries of 'Birth Register' as well as 'Family Register'. The lower appellate Court did not ignore any material documentary evidence on record of trial Court or filed in appeal and committed no mistake in relying the sale deed 19.10.1984 in favour of defendant which was fully proved in accordance with law.

24. The Court is of the considered view that there is no illegality, irregularity, incorrectness or perversity in the concurrent findings recorded by both the courts below. The substantial questions of law framed and reframed are decided in negative against plaintiffs. No other substantial question of law arises or was raised.

25. The appeal is devoid of merits and is liable to be dismissed.

26. The appeal is dismissed with costs throughout. The impugned judgment and decree are affirmed.

27. Interim orders, if any, stand vacated.

28. Let the lower court record be transmitted back to the court below along with a copy of this judgment, for necessary action, after preparation of decree in the appeal.

(2019)10ILR A 718

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

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

Second Appeal No. 1392 of 1998

Ram Nihore & Ors. ...Appellants
Versus
Aiyab Lal ...Respondent

Counsel for the Appellants:
Sri N.D. Kesari, Sri K.M. Garg, Sri P.K. Kesari

Counsel for the Respondent:
Sri A.N. Mishra, Sri Rohit Verma

A. General Clauses Act - Section 27 - Meaning of expression *'ordinary course of post'* – At the end of 30 days, with a few days of variation on either side, presumption of service by post would arise. (Para 38)

B. Contract Act - Section 55 - Whether time essence of contract or not - True intention of parties to be gathered from the terms of the contract / covenant - In contracts relating to immovable property - mere fixation of time within which contract must be performed would not make time the essence of contract - however if the language employed is couched in specific terms - that completion of transaction should be done within specified term - intention to make time the essence may be inferred.

C. Specific Relief Act, 1963 - Section 20 – Discretion as to decreeing specific performance - Plaintiff's conduct / inaction for a long period of time on the part of the plaintiff in bringing the suit and substantial rise in prices of properties - a relevant factor to refuse specific performance. (Para 60)

Held: -No plausible explanation as to why the suit that should have been filed shortly after 02.02.1981, came to be filed as late as on 10.08.1983, with a delay of two years and six months. During this period of time, the defendant executed a sale deed conveying the suit property in favour of the purchasers on 03.08.1983. It is indeed reflective of conduct certainly not bona fide on the plaintiff's part that he brought this suit within seven days of the aforesaid sale deed being executed by the defendant in favour of the purchasers - By his utter inaction to bring a suit during all the long period of time of two years and six months and doing that when rights in favour of the purchasers were created under a sale deed executed for valuable consideration by the defendant, most certainly makes equity work against the plaintiff and in favour of the defendant. (62 & 65)

Decree of specific performance set aside and substituted by a decree for refund of the earnest money – defendant shall refund to the plaintiff the earnest money of Rs. 1800/- together with interest @ 14% per annum, past and pendentelite; future interest would be payable @ 6% per annum in accordance with the provisions of Section 34 C.P.C.

Appeal allowed in part (E-5)

List of cases cited: -

1. M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L. R's Vs St. of Mah. AIR 1979 SC 720

2. Smt. Chand Rani (dead) by LRs Vs Smt. Kamal Rani (dead) by LRs AIR 1993 SC 1742

3. Govind Prasad Chaturvedi Vs Hari Dutt Shastri (1977) 2 SCC 539

4. Govind Lal Chawla Vs C.K. Sharma & ors. AIR 1978 All 446

5. M/s. Madan & Co. Vs Wazir Jaivir Chand (1989) 1 SCC 264

6. Basant Singh & Anr. Vs Roman Catholic Mission AIR 2002 SC 3557

7. N.P. Thirugnanam Vs R. Jagan Mohan Rao (Dr) (1995) 5 SCC 115

8. Azhar Sultana Vs B. Rajamani & ors. (2009) 17 SCC 27

9. V. Pechimuthu Vs Gowrammal (2001) 7 SCC 617

10. Jiwan Lal (Dr) Vs Brij Mohan Mehra (1972) 2 SCC 757

11. R. Lakshmikantham Vs Devaraji 2019 SCC Online SC 907

12. Madhukar Nivrutti Jagtap & ors. Vs Smt. Pramilabai Chandulal Parandekar & ors. 2019 SCC Online SC 1026

13. Ramathal Vs Maruthathal & ors. 2017 SCC Online SC 1100

14. Dr. Jivanlal & ors. Vs Brij Mohan Mehra & anr. AIR 1973 SC 559

15. Parakunnan Veetill Joseph's son Mathew Vs Nedumbara Kuruvila's Son AIR 1987 SC 2328

16. Satyanarayana Vs Yellogi Rao AIR 1965 SC 1405

17 K.S. Vidyanadam Vs Vairavan AIR 1997 SC 1751

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

1. This second appeal by the defendant is directed against a judgment and decree of Shri Subodh Kumar, the then XIIth Additional District Judge, Allahabad, dated 31.08.1998 passed in Civil Appeal no.139 of 1985, allowing the said appeal by the plaintiff and reversing an original decree of Shri B.B. Singh, the then Munsif (East), Allahabad, passed in Original Suit no.572 of 1983, dismissing the plaintiff-respondent's suit for specific performance of contract and alternate relief for refund of earnest money with interest.

2. The facts giving rise to this appeal are these: that the plaintiff-respondent, Ajayab Lal, who shall hereinafter be referred to as the plaintiff, instituted Original Suit no.572 of 1983 with averments to the effect that Ram Nihor, defendant-appellant no.1, since deceased, and now represented before this Court by his heirs and legal representatives, appellants nos.1/1 to 1/5, was the owner of the property as detailed at the foot of the plaint. The original defendant-appellant, Ram Nihor will hereinafter be referred to as the defendant, and for the sake of convenience, would be construed to bear reference to his five heirs and legal representatives, now on record in his stead. It was averred by the plaintiff that the defendant executed a registered agreement to sell, dated 02.07.1980 in favour of the defendant agreeing to convey property as detailed at the foot of the plaint (for short the suit property) for a total sale consideration of Rs.8060/-. It was further pleaded that at the time of execution of the suit agreement, the defendant accepted by way of earnest, a sum of Rs.1800/-, leaving a residue of Rs.6260/- that the plaintiff covenanted to pay the defendant at the time of execution of the sale deed. It was further specifically pleaded that the suit agreement carried a term that the sale deed would be executed upto 02.02.1981.

3. It was averred further that in accordance with the terms of the suit agreement, the plaintiff always remained ready and willing to get a sale deed executed, and that he requested the defendant a number of times, verbally, to execute a conveyance as contracted. It is then pleaded that on 24.01.1982, he caused a notice to be sent to the plaintiff to come forward and execute a sale deed in terms of the suit agreement, accepting the balance of sale consideration, and for the purpose to appear in the office of the Sub-Registrar, Karchhana on 02.02.1981. It is averred that the defendant on the scheduled date did not appear to execute the agreed conveyance. It is pleaded that thereafter the plaintiff sent further notices, dated 30.03.1981 and 19.04.1982, calling upon the defendant to discharge his obligations in terms of the suit agreement, both of which were duly served upon the defendant. It is averred that despite service of these notices, the defendant did

not come forward to fulfill his obligations. It is then pleaded that defendant nos.2 to 6 to this appeal, who shall hereinafter be referred to as the purchasers, despite knowledge of the suit agreement, got a registered sale deed dated 03.08.1983, executed in their favour by the defendant.

4. The plaintiff has described the sale deed as one executed by conspiracy between the defendant and the purchasers, which has no binding effect on the rights of the plaintiff. It was on the basis of these facts that the plaintiff instituted the present suit on 10.08.1983, seeking to enforce the suit agreement against the defendant and the purchasers, by way of relief of specific performance; in defeasance of the plaintiff not being found entitled to specific performance, alternate relief by way of refund of the earnest money of Rs.1800/- together with interest at the rate of 2% per mensem was sought, payable for the period past, pendente lite and future. The defendant filed his written statement dated 20.12.1982, whereas purchasers filed a written statement together, also dated 20.12.1982, independent of the defendant.

5. The stand taken by the defendant in his written statement was to the effect that he acknowledged execution of the suit agreement dated 02.07.1980 for an agreed sale consideration of Rs.8060/-. He, however, pleaded that the plaintiff did not have with him the balance sale consideration to get a sale deed executed as covenanted. The defendant further averred that he was in dire need of funds, and on that account, he had executed the suit agreement in favour of the plaintiff. It was also averred that considering his dire need for money, a specified date i.e. 02.02.1981 was covenanted, by which the plaintiff was obliged to get the sale deed executed. The defendant has also said that upon the plaintiff failing to get a sale deed executed as contracted, he sold the suit property by executing a sale deed in favour of the purchasers on 03.08.1982, forfeiting the earnest paid by the plaintiff. The defendant has also averred that on 02.02.1982, he remained present in the office of the Sub-Registrar, Karchhana from 10 a.m. to 5 p.m. in order to execute a sale deed in terms of the suit agreement, but the plaintiff did not come forward. He has also averred in his written statement that he never received any notice from the plaintiff.

6. The purchasers in their separate written statement have averred that they are purchasers of the suit property. It is pleaded that in accordance with the suit agreement dated 02.07.1980, the plaintiff had a right to get the sale deed executed by 02.02.1981, and that on account of his failure to do so by 02.02.1981, the suit agreement got discharged, putting an end to obligations inter se the plaintiff and the defendant on the suit agreement. The other pleadings put forward by the purchasers are to like effect as the defendant.

7. The Trial Court, on the basis of the pleadings of parties, struck the following issues (translated into English from Hindi vernacular):

(1) Whether defendants nos.2 to 6 are bhumidhars in possession of the property in dispute?

(2) Whether notices sent by the plaintiff were duly served upon the defendant? If so, its effect?

(3) Whether the agreement to sell dated 02.07.1980 after 02.02.1981 is enforceable in law?

(4) Whether defendant no.1 executed an agreement to sell dated 02.07.1980 in favour of the plaintiff?

(5) Whether the plaintiff is entitled to any other relief?

(6) Whether the instant suit is barred by time?

(7) Whether the agreement to sell dated 02.07.1980 can be specifically enforced on the basis of grounds pleaded in the plaint?

8. The Trial Court held on issue no.1 that the factum of execution of the sale deed dated 03.08.1983 is acknowledged to the purchasers, and so is their possession on the basis of the sale deed aforesaid. As such, the Trial Court held that the issue was not required to be adjudicated. Regarding issue no.4, it was opined by the Trial Court that the execution of the suit agreement was admitted to the parties, and the issue between the parties was limited to the extent, whether the suit agreement remained enforceable in law, after 02.02.1981. And, if it was, whether it can be specifically enforced. It was, therefore, held by the Trial Court on the said issue that the same also did not call for a decision. The Trial Court proceeded to determine issues nos.2, 3 & 7, taking them up together and decided all of these in favour of the defendant and the purchasers. He held in conclusion that the suit agreement was not capable of being specifically enforced or any relief could be granted on its basis to the defendant as prayed. Issue no.6 that relates to limitation and is a defendant's issue was decided in favour of the plaintiff, holding the suit within time. Upon the findings substantially recorded on issues nos.2, 3 & 7, the Trial Court dismissed the suit with costs.

9. That plaintiff appealed to the learned District Judge vide Civil Appeal no.139 of 1985, under Section 96 of the Code of Civil Procedure (for short, the Code). The appeal came up for determination before the learned XIIth Additional District Judge, Allahabad, who by means of his impugned decree, reversed the Trial Court and decreed the plaintiff's suit for specific performance, ordering the defendant and the purchasers together to execute the sale deed in terms of the suit agreement, in favour of the plaintiff after accepting the balance sale consideration, within a period of one month. It was further decreed that in case the defendants do not execute a sale deed, as ordered, despite the plaintiff paying the balance sale consideration within a month, the plaintiff would be entitled to get the sale deed executed through process of Court.

10. Aggrieved, the defendant and the purchasers have joined in the present appeal preferred under Section 100 of the Code. This Appeal was admitted to hearing on 24.09.1998, on the following substantial questions of law:

"(1) Whether the time was the essence of the agreement for sale in question and non-compliance of the terms of the suit agreement by the plaintiff-respondent would result in revocation of the agreement for sale by the appellant No.1?

(2) Whether the agreement for sale in question was voidable at the option of the appellant no.1 in view of Section 55 of the Indian Contract Act?

(3) Whether the judicial discretion exercised by the learned trial Court in refusing to decree the suit for specific performance could be interfered with by the lower appellate Court ignoring the provisions of Section 10, 16 and 20 of the Specific Relief Act?"

11. This Appeal was heard across a number of days. It was heard on 20.02.2019, 25.02.2019, 28.02.2019, 07.03.2019, 08.03.2019, 11.03.2019 and 27.03.2019 when judgment was reserved. On 11.03.2019, during the course of hearing, a further substantial question of law was framed, that reads:

"Whether a suit for Specific Performance instituted by a vendee after the vendor has executed a sale deed in favour of a third party can be decreed without there being a relief seeking cancellation of the sale deed executed in favour of the third party?"

12. Sri K.M. Garg, learned Advocate has been heard on behalf of the Defendant and the purchasers (the appellants) and Sri C.S. Agnihotri, learned Advocate on behalf of the plaintiff (respondent).

13. The first submission advanced on behalf of the defendant to assail the judgment of the lower Appellate Court is that the finding of the learned Judge in Appeal to the effect that time was not essence of the contract is not the case of either party, which according to the learned counsel for the defendant, could never have been arrived at on the pleadings and the evidence of parties.

14. Learned counsel for the defendant has, in this connection, invited the attention of the Court to the dock evidence of PW-1, where on 08.01.1985, he has testified as under:

"०२.०७.१९८० को मैंने राम निहोर को १८००/- रुपया देकर इकरार नामा लिखाया था और इस इकरार नामा में यह लिखा गया था कि बाकी ६२६०/- रुपया देकर के विवादित भूमि का बैनामा करा लेंगे। यदि २-२-८१ बैनामा की रजिस्ट्री नहीं करा लूगा या २-८-८० का माहदया बय इकरारनामा रद्द समझा जावे।"

15. In order to further buttress his contention that time was of the essence, learned counsel for the defendant has drawn the attention of the Court to the following recital in the suit agreement:

"मुझको मुबलिग 1800/- एक हजार आठ सौ रुपया आज नकद रुबरु सब रजिस्ट्रार साहब करछना के श्री अजायबलाल महाजन मजकूर से बतौर जर बयाना के मिल गया बाकी मुबलिग 6260/- छ: हजार दो सौ रुपया बरवक्त बैनामा रुबरु सब रजिस्टार साहब करछना के लूँगा यह तय पाया है लेहाजा बखुशी व रजामन्दी अपनी व बिला दबाव किसी दूसरे के मैं एकरार करता हूँ कि दो फरवरी सन 1981 ई० तक मे जब भी मजकूर के पास पूरा रुपया हो जायेगा और महाजन इसकी सूचना मुझे लिखित या मौखिक जैसे ही देगे मैं उनकी सुविधानुसार निम्नलिखित जायदाद का बैनामा उनके हक मे कर दूँगा और अगर महाजन अन्दर मियाद मुकर्ररा के बैनामा नहीं करवा लेते तो उनका जर बयाना रद्द समझा जायेगा और मै जायदाद निम्नलिखित को दूसरे के हाथ बेचने का अधिकारी हूँगा।"

16. Learned counsel for the defendant has urged that from the aforesaid recital in the agreement and the

testimony of the plaintiff in the witness box extracted above, the intention of the parties on a true construction of the suit agreement about time being of the essence is indisputable. He submits that determining a date in the agreement coupled with a covenant to the effect if by that date the plaintiff fails to get a sale deed executed, the suit agreement would be deemed to be cancelled and further that the defendant would be free to alienate the suit property in favour of any third party, is clearly indicative of the intent that time was of essence. In support of his contention, learned counsel for the defendant has placed reliance on a decision of the Hon'ble Supreme Court in **M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.R's vs. State of Maharashtra**1, where in paragraph 7 of the report, it has been held:

"7. The first question that arises for our consideration, therefore, is whether time was of the essence of the contract that was executed between the parties on July 12, 1955 (Ex. 34). It cannot be disputed that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. ....."

17. Sri K.M. Garg, learned counsel for the defendant has further depended on the decision of the Supreme Court in Smt. Chand Rani (dead) by LRs vs. Smt. Kamal Rani (dead) by LRs2, where in paragraphs 12, 18, 19, 20, 24, 25, 26 and 28 of the report, it has been said thus:

"12. The Division Bench of the High Court erred in its construction of clause (1) of the suit agreement. In the case of an agreement for sale of immovable property time is never regarded as the essence of the contract. It would be an essence of the contract only when it is specifically stipulated or it clearly emerges by way of implication. That is not the case here. The word "only" occurring under clause (1) of the suit agreement would qualify only the amount and not the time for payment. In support of this argument the learned counsel relied on Gomathinayagam Pillai v. Pallaniswami Nadar [(1967) 1 SCR 227 : AIR 1967 SC 868], Hind Construction Contractors v. State of Maharashtra [(1979) 2 SCC 70 : (1979) 2 SCR 1147] and Jamshed Khodaram Irani v. Burjorji Dhunjibhai [AIR 1915 PC 83].

18. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.

19. We will now refer to the decisions of this Court. In Gomathinayagam Pillai case[(1967) 1 SCR 227 : AIR 1967 SC 868] it was held at pages 231 to 233:

"... Section 55 of the Contract Act which deals with the consequences of

failure to perform an executory contract at or before the stipulated time provides by the first paragraph:

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.'

It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai [ILR 40 Bom 289] the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed:

"Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time .... Their Lordships are of opinion that this is the doctrine which the section of Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas [(1867) 3 Ch App 61] :

"The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry [(1853) 3 De GM &G 284]) there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds ... mentioned by Lord Justice Turner "express stipulations' requires no

comment. The "nature of property' is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances' must depend on the facts of each particular case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time-limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. "Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified.'"

20. In Govind Prasad Chaturvedi v. Hari Dutt Shastri [(1977) 2 SCC 539] following the above ruling it was held at pages 543-544: (SCC para 5)

"... It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai v. Pallaniswami Nadar [(1967) 1 SCR 227 : AIR 1967 SC 868] (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."

(emphasis supplied)

24. From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

1. From the express terms of the contract;

2. from the nature of the property; and

3. from the surrounding circumstances, for example: the object of making the contract.

25. In the above legal background, we will now look at the terms of the suit contract dated August 26, 1971. The agreement reads as under:

"Now, therefore this agreement to sell witnesseth and the parties hereto have agreed as follows:

1. That in pursuance of the said agreement, the 1st party has received a sum of Rs 30,000 (rupees thirty thousand only) from the second party as earnest money the receipt whereof the 1st party hereby separately acknowledges. Rs 98,000 (rupees ninety-eight thousand only) will be paid by the second party to

the 1st party within a period of ten days only and the balance of Rs 50,000 (rupees fifty thousand only) at the time of registration of the sale deed before the Sub-Registrar, New Delhi.

2. That the 1st party has completed the house with all fixtures and fittings and it has been agreed to between the parties that the 1st party shall take necessary steps for immediate redemption of the said property from the said mortgagee and shall inform the second party in writing about the completion of the said redemption.

3. That the 1st party shall apply immediately for the permission to sell to the income tax authorities and after getting the permission to sell by getting an income tax clearance certificate in respect of the said property the sale deed of the same shall be executed by the 1st party in favour of the second party or her nominee/nominees on or before October 31, 1971.

4. That in case 1st party fails to execute and get the sale deed registered within the period stipulated in para 3 above, the 2nd party shall have the right to get this agreement enforced by specific performance through the court of law.

5. That if the second party fails to pay the balance sale consideration and get the sale deed executed and registered within the specific period mentioned in para 3 above, the earnest money of Rs 30,000 (rupees thirty thousand only) shall stand forfeited to the 1st party and this agreement deemed null and void.

6. That the 1st party shall pay all taxes, rates municipal taxes up to the date of registration of the sale deed and that the previous deeds and other documents pertaining to the said plot No. 30, Block "K' sanctioned place and completion certificate from the Municipal Corporation, Delhi in respect of the super-structure built on the said plot shall be handed over along with the vacant possession of first floor by September 30, 1971 and the front portion of the property by the first party to the second party at the time of registration of the sale deed."

26. Then comes the question as to the payment of Rs 98,000. The question is as to what is the meaning of the words "within a period of 10 days only"? Does it apply to the amount or the time-limit of 10 days from August 26, 1971. The trial court was of the view that the word "only" was meant to stress and qualify the amount of Rs 98,000 and cannot be read to mean as if payment within 10 days was the essence of the contract. On this aspect, the appellate court takes the contrary view and holds that the amount of Rs 98,000 ought to have been paid on or before September 6, 1971. Failure to do so would constitute a breach committed by the defendant. We are of the considered view that the Division Bench is right in its conclusion. As rightly pointed out in the judgment under appeal, the word "only" has been used twice over

(1) to qualify the amount of Rs 98,000 and

(2) to qualify the period of 10 days.

28. The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income tax clearance certificate had not been obtained the sum of Rs 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The

income tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under clause (1) of the suit agreement. From this point of view, we are unable to see how the case in Nathulal [(1969) 3 SCC 120 : (1970) 2 SCR 854] could have any application to the facts of this case."

18. Sri C.S. Agnihotri, learned counsel for the plaintiff countering the submission of Sri Garg, learned counsel for the defendant, submits that what is evident from the decision relied upon by the की नहीं प्राप्त हुई defendant, is that in cases relating to sale of immoveable property, the Rule is that time is not of the essence, even if a specific date for performance is specified. The presumption is always in favour of the time not being of the essence where the contract is about sale of immoveable property. In particular, he has submitted that the principles laid down by their Lordships in M/s. Hind Construction (supra) would not at all be attracted to the question involved in this case, inasmuch as, M/s. Hind Construction (supra) related to a works contract, and not a contract regarding sale of immoveable property. He has emphasized that contracts for the sale of immoveable property stand on a very different pedestal. So far as the question of time being of the essence is concerned, he submits that the other decision relied upon by the learned counsel for the defendant in Chand Rani (supra) is more than eloquent in itself, and by reference to other authority noticed there, it is apparently a well settled principle of law that in transactions of sale of immoveable property, time is not of the essence.

19. In order to appreciate the submissions on this question advanced by the learned counsel for parties, reference to the terms of the suit agreement are of prime importance. It has been noticed above that the covenant in the suit agreement, that has decisive bearing on the issue whether time is of essence, is encapsuled in the words that say, that the defendant agrees to execute a sale deed in favour of the plaintiff upto 02.02.1981 whenever the plaintiff has the whole money ready on him, and he conveys information to the defendant to this effect, written or verbal, whereupon the defendant as per convenience of the plaintiff, would execute the sale deed. If within the period of time agreed the plaintiff does not get a sale deed executed, the said agreement would stand avoided, and the defendant shall have the right to alienate the suit property in favour of any third party. The fact that the parties, indeed, had covenanted in the aforesaid terms is affirmed by the dock evidence of the plaintiff, who deposing as PW-1, has said that in case by 02.02.1981, sale deed was not got executed by him, it was agreed that the suit agreement would be deemed to be avoided. It, therefore, turns upon the true intention of parties to be gathered from a discernible construction to be placed upon the covenant regarding time in the suit agreement.

20. The decision in Chand Rani (supra) indicates that mere stipulation of a date, or the fixation of a period of time within which the contract must be

performed would not make it the essence of contract, in cases governing contracts relating to immoveable property. At the same time, if the language employed is couched in such unmistakable and specific terms, that leave no doubt about the matter that completion of transaction should be done within the specified time, or within a reasonable time, that intention to make time the essence may be inferred. The decision in Chand Rani (supra) would further indicate that the Court quoted with approval the principle in an earlier decision of their Lordships in Govind Prasad Chaturvedi vs. Hari Dutt Shastri and another3 to the effect that even if not regarded as the essence of the contract, inference as to time for its performance within a reasonable time period may be drawn under conditions enumerated in paragraph 24 of the report in Chand Rani (supra): (1) the express terms of the contract; (2) the nature of the property; and (3) the surrounding circumstances, for example: the object of making the contract.

21. Here, time being essence of the contract falls to be examined under the category where the express terms of the contract make it so. The question about time being of the essence flows from Section 55 of the Indian Contract Contract Act. Section 55 of the Contract Act, reads thus:

"55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."

22. What is relevant in the context of the question that arises here is the first part of Section 55 (supra). It embodies a statutory principle that where time is specified for certain acts or things to be done by one party, who is the promisor in relation to that part, failure to do that act or thing at or before the time specified, renders the obligation voidable at the option of the other party, that is to say, the promisee in relation to the act or thing to be done. This principle, however, is applicable in relation to the contract where it is the intention of parties that time should be of the essence. Now, Section 55 of the Contract Act is to be found in Chapter IV entitled 'OF THE PERFORMANCE OF CONTRACTS'; the Rule, therefore, embodied in Section 55 Part I belongs specifically to substantive law governing performance of contracts. If one were to go strictly by the terms of the statute, at least the one that is substantive law about it, violation of the time limit where the contracting parties

have intended time to be of the essence, would render the contract voidable at the option of the party, who is the promisee. It is quite another thing that where under the second part of Section, parties did not intend time to be of the essence, different principles would apply. Likewise, under third part of Section 55 even in cases where time is of the essence, but the promisee accepts performance at a later time, the option to avoid the contract is not available. The Rule, however, that in cases of immovable property where a particular time is mentioned by parties for the performance of a contract, the presumption is strongly against time to be of the essence, appears to have origin in the conditions prevailing in England at the time when Courts of Equity there evolved this principle. Mention about the origins of this principle or Rule of presumption against time being of the essence in contracts relating to immovable property, is to be found in the celebrated treatise, **Indian Contract and Specific Performance Act (Tenth Edition) by Pollock and Mulla**, where the Learned Authors have described the origin of the Rule, thus:

"In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and accordingly Courts of Equity have introduced a presumption, chiefly, if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction."

23. The aforesaid principle, that was evolved by the Courts of Equity in England in the historical background of problems of the time relating to ascertainment about good title of the vendor made its way to a statutory provision in India by virtue of Explanation (I) appended to Section 10 of the Specific Relief Act, 1963. Section 10 of the Act last mentioned reads thus:

"10. [12(b) & 12(c)] Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done in such that compensation in money for its non-performance would not afford adequate relief.

Explanation.-Unless and until the contrary is proved, the court shall presume--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

(Emphasis by Court)

24. It was on this account that the consistent position of law governing contracts of sale of immovable property is that in these cases mere stipulation of a time limit or the fixation of a period within which a contract must be performed, would not make it the essence of contract. This as already referred to hereinbefore in **Chand Rani (supra)**, has been reiterated by their Lordships of the Supreme Court consistently in subsequent decisions. However, the rule that time is not of the essence in contracts relating to sale of immovable property is subject to the three exceptions, also enumerated in Chand Rani (supra). Since the words employed in the contract have been mooted to be express terms, that make time essence of the contract, it would be profitable in the matter of construction of terms of the contract here to do a comparison with some authorities, where terms limiting time in the contract were not regarded of the essence.

25. A sound guide about the construction of a term limiting performance in point of time is to be found in the decision of the Supreme court in Govind Prasad Chaturvedi vs. Hari Dutt Shastri (supra). In this connection paragraphs 5 & 6 of the Report, which carries salient terms of the contract as well as construction placed on it by their Lordships is apposite:

"5. The first question that arises for consideration is whether time is of the essence of the contract. In order to determine this question it is necessary to set out the suit agreement which is marked as Ex. 23 at page 137 of the papers. It runs as follows :-

"Dear Pandit Govind Prasad Ji Chaturvedi,

Sir.

A litigation has been going on between you and us with respect to the Kothi of Bima Nagar, of which you are a tenant on behalf of us. The said dispute has been decided today through the mediation of Sri Chand Doneriya, on the terms and conditions given below which shall be fully binding on you as well as us.

1. That you are agreeable to purchase our Kothi of which you are a tenant and a transaction between you and us has been finally settled today; at Rs. 24,000 (rupees twenty four thousand), with respect to the said Kothi.

2. That you are paying us, at present, a sum of Rs. 4000 in cash, as earnest money, the receipt whereof has been acknowledged by us by affixing a revenue stamp at the foot of this letter, and that the remaining sum of Rs. 20,000 shall be paid by you to us at the time of registration.

3. That the expenses relating registration and cost of stamps etc. shall be borne by you and we shall be entitled to get a sum of Rupees 24,000 (rupees twenty four thousand) net.

4. That you must get the sale deed executed within two months i. e. upto 24th May, 1964, and in case you do not get the sale-deed registered within two months then the earnest money amounting to rupees four thousand, paid by you shall stand forfeited without serving any notice.* But in case we in some way evade the execution of the sale deed, then you will be entitled to compel us to execute the sale deed legally and we shall be liable to pay the costs and damages incurred by you.

5. That we shall furnish you a guarantee of good title in respect of the property which is free and immune from all sorts of disputes.

6. That you shall be liable to pay the rent till the date you get the sale-deed registered and you shall clear off all amount due to us before registration.

7. That both the parties shall withdraw their respective cases or get the same dismissed and shall bear their own costs.

8. That neither party shall take any fresh legal steps during this period of two months by which any hindrance may be caused in execution of our sale deed.

In confirmation of the agreement which has been made between you and me through this letter, you too have affixed your signature on this letter.

Yours,
Signature of Hari Dutt Shastri
24-3-1964
Signature of Bhavbhooti Sharma
24-3-64
x x x x x"

The relevant clause is clause 4 which provides that the appellant must get the sale deed executed within two months i. e. upto 24th May, 1964, and in case the appellant did not get the sale deed registered within two months then the earnest money amounting to Rs. 4000 paid by the appellant shall stand forfeited without serving any notice. The clause further provides that in case the respondents in some way evade the execution of the sale deed then the appellant will be entitled to compel them to execute the sale deed legally and the respondents shall be liable to pay the costs and damages incurred by the appellant. It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract.**(Vide Gomathinaya-gam Pillai v. Palaniswami Nadar, 1967-1 SCR 227 at page 233 = (AIR 1967 SC 868 at p. 871).

It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.**

6. Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract. In the plaint the allegation was that the appellant has always been ready and willing to perform his part of the contract and he did all that he was bound to do under the agreement while the respondents committed breach of the contract. The respondents did not set up the plea that the time was of the essence of the contract. In paragraph 32 of the Written Statement all that was stated was that the appellant did not perform his part of the contract within the stipulated time and that the contract thereafter did not subsist and the suit is consequently misconceived. The parties did not go to trial on the basis that time was of the essence of the contract for no issue was framed regarding time being the essence of the contract. Neither is there any

discussion in the judgment of the trial Court regarding this point. The trial court after considering the evidence came to the conclusion that the appellant was always ready and willing to perform his part of the contract while the respondents were not. In the circumstances therefore the High Court was in error in setting as one of the points for determination whether time was of the essence of the contract.** The High Court after referring to the agreement was of the view that the agreement was entered into between the parties during the course of a litigation between the appellant and the respondents and in pursuance of the agreement the parties were directed to withdraw their cases and were directed further not to take fresh legal steps during the period of the two months within which the sale deed was to be executed. On taking into account the circumstances of the case and the conduct of the parties of serving on each other notices, counter notices and telegrams the High Court inferred an intention on the part of the parties to treat the time as of essence of the contract. We will refer to the terms of the contract and the correspondence between the parties in due course but at this stage it is sufficient to state that neither the terms of the agreement nor the correspondence would indicate that the parties treated time as of essence of the contract. In fact, according to the agreement the sale deed ought to have been executed by the 24th May but it is the admitted case that both the parties consented to have the document registered on the 25th May. On the question whether the time is of the essence of the contract or not we are satisfied that the High court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raided before the trial Court and when the case of time being the essence of the contract was not put forward by the respondents in the trial Court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents that the time was of the essence of the contract.**

*(Emphasis by Court)

**(Emphasis Supplied)

26. Again, a question of construction of a covenant in the agreement limiting the obligation in time fell for consideration of this Court in **Govind Lal Chawla vs. C.K. Sharma and others**4, where the Court was called upon to gather from the terms of the contract involved there, whether time was of the essence. The third and fourth paragraphs of the contract involved in the said decision carried clauses limiting obligation of parties in time, for the performance of it. This Court in **Govind Lal Chawla** (supra) also did not find it to be a case where time was of the essence. In paragraph 7 of the report (which also embodies the relevant terms of the compromise) reads thus:

"7. I now proceed to examine whether the time was of the essence of the contract under the agreement in question. The vendors in this case had executed an agreement in favour of one Madanlal on 10-1-1966. The terms of the agreement Ex. B-20 have to be construed. The agreement was executed by Mrs. M. Lucas and Mrs. C. Gordon who claim to be the owners of 20, Muir Road. The agreement was executed in favour of Madanlal. According to the agreement the sale deed was to be executed in favour of Madanlal and/or his nominee or nominees. The consideration for sale was to be Rupees 16,000/-. The sum of Rs.

500/- was paid as earnest money. The stipulations in the deed of agreement were as below :-

"1. That in pursuance of the said agreement and in consideration of the said sum of Rs. 16,000 (Rupees sixteen thousand only), to be paid by the second party and/or the nominee or nominees of the second party, the first party shall transfer by way of absolute sale, the said premises No. 20, Muir Road, Allahabad, together with all the rights of the First Party in the land, and constructions to the Second Party and/or the nominee or nominees of the Second Party free of encumbrances."

2. That, out of the said sum of Rupees 16,000/- the First Party has this day been paid a sum of Rs. 500/- (Rupees five hundred only) by way of earnest money, and the balance of Rs. 15,500/- (Rupees fifteen thousandand five hundred only) shall be paid to the First Party onthe execution of the sale-deed, before the Sub-Registrar, Allahabad.

3. That the said property is subject to a mortgage in favour of Mr. G. Alphanzo and thedues of the mortgagee will be cleared and paid by the First Party before the execution of the sale-deed.

4. That the First Party shall execute the sale deed within a period of six weeks from this date and in case of failureon his part to do so, the Second Party may adopt legal proceedings for specific performance or refund of his earnest money, as he may choose.

5. That in case the second party commits a default, the earnest money shall be forfeited."

Conditions 3 and 4 are quite important. According to Condition 3, the mortgage deed in favour of Sri G. Alphanzo was to be cleared and paid by the vendors before the execution of the sale-deed. According to Condition 4, the vendors were to execute the sale deed within a period of six weeks from the date of the agreement and in case of his failure to do so, the Second Party was to adopt legal proceedings, and, according to the fifth condition in case of default of the vendees, the earnest money was to be forfeited. These stipulations show that before the sale deed could be executed the mortgage of Sri G. Alphanzo was to be satisfied and the sale deed was to be executed by the vendors within six weeks. Thus, in a case like the one before me the time could not be the essence of the contract. So far as the vendee in this case is concerned, he had to be satisfied about the fact that mortgage was cleared. It is also stated that before the sale deed could be executed the vendors had to get their names mutated over the property. These conditions had therefore to be satisfied, and, till they were satisfied the sale deed could not be executed. In Govind Prasad v. Hari Dutt (AIR 1977 SC 1005) following Gomathinayagam Pillai v. Palaniswami Nadar (AIR 1967 SC 868) it was held that, it is settled law that, " the fixation of the period within which the contract has to be performed does not make the stipulation as to time of the essence of the contract. If the contract relates to sale of immoveable property it would normally be presumed that time is not of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract." The lower appellate court has committed a grievous error by ignoring the basic rule laid down in these two cases, about presumption that

in cases of immovable property time is not the essence of the contract. It has therefore to be inferred from the terms of the agreement and circumstances whether the time was the essence of the contract or not. So far as this case is concerned, as I have observed above, the time could not be the essence of the contract."
(Emphasis Supplied)

27. Now, the terms of contract limiting obligations of parties in time that were involved in the decision of their Lordships in **Govind Prasad Chaturvedi (supra)** obliged the vendee to get the sale deed executed within two months and also indicate the date by which execution of the sale deed was to be secured by the vendee. This time limiting clause was attended with a consequence that in case of the vendee's failure to get the contracted sale deed registered within two months, the earnest money would stand forfeited without service of any notice. This kind of language employed in the contract was not construed by their Lordships to indicate in unmistakable terms that time was of the essence. Of course, the intention of parties to make time the essence of the contract was also examined, where their Lordships noticed that neither was a plea taken in the written statement that time as of the essence or was there any discussion on the point in the judgment of the Trial Court. The Supreme Court concluded that apart from absence of pleadings to raise a plea regarding time being of the essence, there was no basis for the respondent to raise that kind of a plea. The latter part would refer to the employment of language in the contract, that was not found by their Lordships to be in unmistakable terms that parties intended time to be of the essence.

28. Again, the decision of this Court in **Govind Lal Chawla (supra)** had a term in the contract which said that a sale deed was to be executed within a period of six weeks from the date of the agreement, and that in case of the vendor's failure to do so, the vendee could sue for specific performance, or refund of his earnest money according to his election. The Court in construing the terms of paragraphs 3 and 4 of the contract concluded that clause (3) of the contract envisaged mortgage of the suit property in favour of a certain Alphanzo to be redeemed first by the vendors, before execution of the sale deed. Clause (3) was then read together with time limiting clause (4), that obliged the vendor to execute a sale deed within a period of six weeks from the date of the suit agreement. This Court concluded that the stipulations in the contract that required the prior discharge of a mortgage before performance, could not lead to an inference that the time was of the essence of contract.

29. In the present case, what is of prime importance is the fact that the parties have just not covenanted to the effect that the obligations under the suit agreement are to be performed by 02.02.1981, but have further provided that in the event the plaintiff within the agreed time does not get the sale deed executed, the contract shall be deemed to be repudiated and the defendant shall be free to sell the suit property in favour of any third party. The consequences stipulated in the suit agreement in the contingency of a sale deed not being executed within the specified time being repudiation of the contract, coupled with an express release of the defendant's right to sell the suit property in favour of any third party, is all

that makes the difference about the suit agreement. It is these conditions ensuing upon a failure of the plaintiff to secure execution of the sale deed by the date as covenanted, that makes time essence of the contract in this case. It, thus, has to be held that time is essence of the contract, so far as the suit agreement is concerned. It must also be held, therefore, that time being essence of the suit agreement, non-compliance with terms of the same as to date of performance by the plaintiff would entitle the defendant to repudiate the contract at his option, so far as the terms of the suit agreement go. Substantial question no.(1) is, therefore, answered in the affirmative.

30. Time being held to be the essence of the contract, the next question that arises is to determine rights of parties on the foundation of this premise, whether the plaintiff did all that was within his power, within time limited by the suit agreement, to secure execution of a sale deed in his favour. It is pointed out by learned counsel for the defendant that the earliest that the plaintiff caused a notice to be issued to the defendant to come forward and execute a sale deed, in accordance with the latter's obligation under the suit agreement, was on 24.01.1982. According to learned counsel for the defendant, two further notices that are said to be issued are those, dated 30.03.1981 and 19.04.1982. It is urged that in terms of the suit agreement, sale deed was to be executed at any time, before 02.02.1981. The subsequent notices dated 30.03.1981 and 19.04.1982, according to the learned counsel for the defendant, do not count as these were admittedly issued after 02.02.1981, when obligations of the defendant contracted under the suit agreement, stood open to be avoided by lapse of time. So far as the notice dated 24.01.1982 is concerned, it is also pointed out by Sri Garg, learned counsel for the defendant that the plaintiff failed to perform his part of the contract that required him to appear on 02.02.1981 before the office of the Sub Registrar, Karchchana that was on the construction placed upon the covenant in the suit agreement about time, was the last date by which obligation could be enforced, time being the essence of it.

31. Learned counsel for the appellant submits that this notice that was issued allegedly during time when obligations under suit agreement were intact and binding was never served upon the defendant. It is argued by Shri Garg that the plaintiff has failed to prove by his pleadings and evidence that the notice dated 24.01.1982 was served upon the defendant at all. In this regard, learned counsel has invited the attention of the Court to paragraph 12 of the written statement where denial of receipt of this notice is pleaded, besides the others said to be issued later. In paragraph 12 of the written statement, the denial figures in the following words (in Hindi vernacular):

"12. यह कि प्रतिवादी मुजीब की वादी की कोई नोटिस दि0 24.1.1981 ई0 दि0 30.3.1981 ई0व 19.4.1982 की नहीं प्राप्त हुई।"

32. Learned counsel for the appellant submits that the said stand taken in the pleadings of the defendant is corroborated by an admission of the plaintiff in his dock evidence, recorded on 08.01.1985, where in his cross examination he has said thus about service of the notice dated 24.01.1981

(which also mentions the other two notices). The relevant part of the plaintiffs evidence where he testified as PW-1 is recorded by the Trial Court as follows:-

".....मैंने 2-2-81 के पहले नोटिस मैंने दे चुका था। 24-1-81 को और 30-3-81 को 19-4-82 को नोटिस दिया था। और हर बार मैं प्रयास करता रहा

24-1-81 की नोटिस का मुझे कोई Acknowledgment नहीं मिला था।

यह मुझे नहीं मालूम कि 24-1-81 की नोटिस राम निहोर को प्राप्त हुई कि नहीं। जो नोटिस मैंने 30-3-81 व 19-4-82 को राम निहोर के पास भेजी थी उसका Acknowledgment मुझे मिला था उसे मैंने अदालत में दाखिल किया है।"

33. Learned counsel for the appellant has urged that there being a clear admission by the plaintiff that he did not know whether the notice dated 24.01.1981 was served upon the defendant or not, coupled with the fact that he did not admittedly receive an acknowledgment, would lead to an inference that the said notice was not served upon the defendant at all. About the presumption of service in ordinary course of post to be raised by virtue of Section 27 of the General Clauses Act, learned Counsel for the defendant has relied upon the decision of the Supreme Court in **M/s. Madan & Co. vs. Wazir Jaivir Chand**5. He has relied upon paragraph 6 of the report in M/s Madan & Co. (Supra) to submit that presumption of good service can only be raised if it is pleaded and proved that the registered cover bears the correct address; and, also that there was prepayment of the requisite postal charges by affixation of stamps. Their Lordships of the Supreme Court in **M/s Madan & Co. (Supra)** on which learned counsel for the defendant relied have held thus:-

"6. .....All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgment due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities

of serving the summons of a court under Order V of the CPC. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, an addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as "not found", "not in station", "addressee has left" and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word "served" as "sent by post", correctly and properly addressed to the tenant, and the word "receipt" as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant."

34. Learned counsel for the plaintiff on the other hand has argued that it is admitted by the defendant that he met the plaintiff two days ahead of 02.02.1981. It is urged that this came about as a result of service of registered notice dated 24.01.1981 that had been sent on the correct address of the defendant and would, therefore, be deemed to have been served. It is urged that the fact about the notice being sent to the correct postal address by the plaintiff, burden was on the defendants to show that the said notice was not served. In this connection, learned counsel for the respondent has placed reliance upon the decision of the Supreme Court in Basant Singh and another vs. Roman Catholic Mission6, where regarding presumption of good service of communications sent by the registered post (in the case before their Lordship there was service of summons) it has been held thus in paragraph 9, 10,11 and 12 of the report:-

"9. Order 5, proviso to sub-rule (2) of Rule 19-A CPC provides that where the summons are properly addressed, prepaid and duly sent by registered post with acknowledgment due, notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the court within thirty days from the date of the issue of the summons, the court shall presume that

notice is duly served. Further, Section 27 of the General Clauses Act, 1897 (in short "the Act") provides similar provision. The presumptions are rebuttable. It is always open to the defendants to rebut the presumption by leading convincing and cogent evidence.

10. It is nobody's case that the postal addresses of the defendants are not properly addressed and, therefore, the registered summons could not be served. It is also nobody's case that the registered summons are not prepaid and not duly sent. In fact the registered summons, bearing Receipts Nos. 875 and 876 dated 24-4-1986, were issued is borne out from the record.

11. Once it is proved that summons were sent by registered post to a correct and given address, the defendants' own conduct becomes important. Before the trial court, the appellants were allowed to lead evidence in support of their contentions. An order to this effect was passed by the trial court on 11-1-1991. The premises in question are occupied by two defendants jointly -- Hari Singh and Basant Singh. Hari Singh appeared and examined himself stating that he did not receive the registered letter. However, the defendant Basant Singh did not appear and no evidence whatsoever, on his behalf, has been led to rebut the presumption in regard to service of summons sent to him under registered post with acknowledgment due. His own conduct shows that the registered summons had been duly served on him. As already noticed, Hari Singh appeared and save and except the bald statement that registered letter was not tendered to him, no evidence whatsoever was led to rebut the presumption. He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the statute. This apart, it is inherently improbable that the registered summons were duly served on Basant Singh but not on Hari Singh when they occupied the tenanted premises jointly.

12. As noticed above, the registered summons were sent to Basant Singh and Hari Singh vide Postal Receipts Nos. 875 and 876 dated 24-4-1986 on the correct and given address, is borne out from the record. Ex parte proceedings were ordered on 22-8-1986 and ex parte decree was passed on 30-9-1986."

35. So far as service of notice dated 24.01.1981 is concerned, no doubt no acknowledgment relating to the same being served upon the defendant has been filed in evidence by the plaintiff, but on the principles stated, as urged by the learned counsel for the defendant, it is not a case where presumption of service may be displaced due to failure by the plaintiff to establish that it was not properly addressed or not pre-paid and duly sent by registered post, acknowledgment due. In fact, the two other notices dated 30.01.1981 and 19.04.1982 were, likewise, sent by registered post on the same address as that mentioned on the notice dated 24.01.1981, and the service of those notices upon the defendant is established by acknowledgment cards filed in evidence. There is no good reason to believe that when the subsequent notices sent by the plaintiff at the same address by registered post, were delivered to the defendant proven by acknowledgment cards, the notice dated 24.01.1981 would also not be likewise served. But, in the case of this notice since there is no acknowledgment card,

indicating the date of service on record, the issue would certainly be as to when the notice dated 24.01.1981 was served. Since the date of actual service of this notice is not proven by evidence aliunde, like the acknowledgment card relative to the said notice, or a certificate from the Post Office affirming the fact of delivery of this notice on a particular date, service has to be presumed under Section 27 of the General Clauses Act, 1897. Section 27 of the General Clauses Act is to the following effect:

"Meaning of service by post.--Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."
(Emphasis by Court)

36. It would be noticed that under Section 27 of the General Clauses Act, the presumption is not only about service in the case any document served by post, even in the absence of evidence of its actual service, but the presumption is also about the time during which the document so sent would have been served. In the present case, what is of relevance is time when the notice dated 24.01.1981 would have been served upon the defendant. This issue of time when the said notice was served, or more specifically saying it, deemed to be served assumes special significance in view of the fact that this notice was sent by the plaintiff to the defendant on the margin of time, when the period limited by the contract to a specified date over the covenanted performance of the suit agreement was running out. In fact, going by what has been held hereinabove on the issue of time being essence of the contract, 02.02.1981 was a watershed beyond which obligations of the defendant would stand determined, vis-a-vis, the plaintiff by efflux of time. The question, therefore, would be whether the notice dated 24.01.1981 sent by registered post to the defendant can be presumed to be served before 02.02.1981, or it can be presumed to be served, but beyond 02.02.1981. And if beyond that date, how much beyond it, working out on the basis of presumption in Section 27 of the General Clauses Act.

37. There is no guide about the period of time that the expression 'ordinary course of post' occurring in Section 27 of the Act last mentioned would mean. The best answer to it is to be found in the provisions of Order V, Rule 19-A [since omitted by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) w.e.f. 01.07.2000]. The said provision has now ceased to exist on the statute book, but during time to which the transaction as well as the impugned judgments by the Courts below relate, it was firmly there. The provisions of Rule 19-A of Order V of the Act (as it stood before its repeal) read as under:

"19-A. Simultaneous issue of summons for service by post in addition to personal service.--(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in Rules 9 to 19 (both

inclusive), also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent, actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of the issue of the summons."
(Emphasis by Court)

38. Rule 19-A of Order V was about simultaneous issue of summons for service by posts, in addition to personal service. Though the Rule was applicable in the specific context of additional service of summons by registered post upon the defendant to a suit, it clearly provided for the period of time at the end of which presumption of service by registered post would arise in cases where the acknowledgment was lost or not available for any other reason. It fixed the period of time for this presumption to arise at 30 days. The period of time envisaged by the legislature based upon the conditions of the time is certainly a good guide about what period of time would constitute 'ordinary course of post', also under Section 27 of the General Clauses Act. Even in a case to which Rule 19-A of Order V did not apply, the period of time mentioned there may be taken as a rough estimate about what 'ordinary course of post' would imply in relation to a case like the present one. It could lead to the presumption being raised with a few days of variation, on either side of 30 days. In this case, the time between the date of the registered notice dated 24.01.1981 and the outer date for covenanted performance in the suit agreement i.e. 02.02.1981 is a short period of 10 days (inclusive of the terminal days), that reckons to be one-third of the period of time which was stipulated by the proviso to sub-rule (2) of Rule 19-A aforesaid. It was, indeed, too short a period of time during which presumption of good service could be drawn by the Court.

39. In fact, the Trial Court has dealt with this issue punctiliously recording the following finding about it (in Hindi vernacular):

"इस सम्बन्ध में यह स्पष्ट है कि वादी ने क्रमश: दिनांक 24-1-81, 30-3-81, तथा 19-4-82 को नोटिस देने का कथन किया है तथा कथित नोटिस से संबंधित रसीद एवं नकल नोटिस क्रमश: कागजात संख्या 24(क),

25(ग), 20(क), 27(क), 28(क), 29(क) तथा 30(ग) दाखिल किया है, जिससे यह स्पष्ट होता है कि वास्तव में वादी ने प्रतिवादी संख्या-1 को विक्रय निष्पादित करने हेतु अपने आशय की सूचना दिया था। प्रथम नोटिस दिनांक 2-2-81 के पूर्व दिनांक 24-1-81 को देना स्पष्ट की गयी हैए इस संबंध में कागज संख्या-24(क) का अवलोकन किया जाय, तो यह संबंधित डाकखाने की रसीद है जो प्रतिवादी संख्या-1 रामनिहोर के नाम दिनांक 24-1-81 को भेजी गयी थी, जिसके जरिये नोटिस कागज सं0-25(ग) का भेजना स्पष्ट किया गया है, कागज सं0 25(ग) में भी दिनांक 24-1-81 डाली गयी है अत: इससे इतना स्पष्ट होता है कि एक नोटिस वादी ने दिनांक 24-1-81 को प्रतिवादी रामनिहोर को भेजा था, लेकिन यह भी स्पष्ट है कि यह तथ्य साबित नहीं होता कि वास्तव में यह पत्र प्रतिवादी रामनिहोर को कब मिलाए अनुबन्ध के निष्पादन का अन्तिम दिनांक 2-2-81 नियत किया गया था और 24-1-81 एक ऐसा दिनांक हैए जिससे यह निष्कर्ष निकाला जा सकता है कि इतने अल्प समय में दी गयी वह पत्र प्रतिवादी के प्राप्त न हुआ होगा यह एक ऐसा प्रश्न है कि जिसके बावत कोई साक्ष्य पत्रावली पर उपलब्ध नहीं है। अतरू यह कहा जा सकता है कि वादी की ओर जो भी पत्र दि0 24-1-81 को भेजा गया उसमें समय की इतनी कमी रखी गयी जिससे इसका लाभ प्रतिवादी को ही मिलेगा।"

40. While it is true that it is not proved that the notice dated 24.01.1981 sent by registered post calling upon the defendant to appear before the Sub-Registrar, is not proved to be served in accordance with law before the date fixed in the notice, that is 02.02.1981, there is a categorical finding by the lower Appellate Court on the issue that on 02.02.1981, both the plaintiff and the defendant, remained present at the office of the Sub-Registrar, where the plaintiff got his attendance marked, but the defendant did not. The defendant has been noticed to have said in his evidence that the plaintiff had asked him to see him at the Sub-Registrar's office. It is further recorded by the lower Appellate Court that the defendant, indeed, remained present at the Sub-Registrar's office and waited for the plaintiff, sitting with one Balram Munshi. The lower Appellate Court has held from all this evidence of parties that once the defendant has acknowledged that the plaintiff had asked the defendant to see him at the Sub-Registrar's office, there is no ostensible reason for the defendant to have gone to the Sub-Registrar's office, but waited there for the plaintiff at the seat of Balram Munshi. The lower Appellate Court has inferred from this finding that the defendant did not deliberately appear at the Sub-Registrar's office to execute the sale deed. This finding has been recorded by the lower Appellate Court in the context of answering the issue of readiness and willingness, and not with reference to the question whether time being of the essence, the plaintiff was entitled to exercise his option to avoid the contract under Section 55 of the Contract Act. This Court, however, finds that the lower Appellate Court has drawn a reasonable conclusion from the evidence on record that the defendant was aware, through oral information conveyed to him, that he is to appear before the Sub-Registrar on 02.02.1981 to execute the sale deed in favour of the plaintiff. According to the defendant's version, he did go to the Sub-Registrar's office, but perched himself in some corner of the precincts where Balram Munshi has his seat for the

discharge of his professional duties. As to the question involved here, it is not relevant whether the plaintiff did go to the Sub-Registrar's office, or he did not; what is relevant is that through an oral communication he was called upon by the plaintiff to visit the Sub-Registrar's office, which the defendant acknowledges. The fact that he did not or could not meet the plaintiff, because he spent time there at an unseemly location, or that he did not get his attendance marked with the Sub-Registrar, as held by the lower Appellate Court, go to show that the plaintiff had invoked the contract within the date specified, that is to say, 02.02.1981, asking the defendant to come forward and execute a sale deed in its terms on the said date i.e. 02.02.1981. The fact that service of the written notice that was sent calling upon the defendant, may not have been proved to have been effected before the date fixed, but on findings of fact recorded by the lower Appellate Court, in relation to the issue of readiness and willingness, it is firmly established that the plaintiff on admission of the defendant, called him over to the Sub-Registrar's office on 02.02.1981, clearly for the purpose of execution of a sale deed. Thus, time though essence of the contract, it must be held that the contract was invoked before the time limited thereunder, if not by proof of service of the notice said to have been issued on 24.01.1981, that is before 02.02.1981, it was certainly invoked by an oral communication which the defendant has acknowledged. Under the terms of the agreement extracted hereinabove, the contract could be invoked at any time before the last date fixed i.e. 02.02.1981 by the plaintiff calling upon the defendant to execute a sale deed, either through a written information, or oral communication. The fact of an oral communication being made by the plaintiff invoking the contract before 02.02.1981, that required the defendant to appear before the Sub-Registrar's office on 02.02.1981, the outer limit fixed for performance, otherwise found to be of essence, is well established on record and concluded by a finding of fact recorded by the lower Appellate Court based on a plausible view of the evidence on record. Thus, notwithstanding the fact, that time is held to be essence of the contract, it cannot be said that the contract was not invoked before the outer time limit expired. As such, it must be held a fortiori that the defendant is not entitled to exercise his option under the first part of Section 55 of the Contract Act to avoid the same. **Substantial question no.(2) is, therefore, answered in the negative.**

41. It next falls for consideration whether the lower Appellate Court has recorded a reasonable finding regarding readiness and willingness of the plaintiff to perform his part of the contract, that is sine qua non of a party's right to successfully establish his claim to a decree for specific performance. The obligations to establish that the plaintiff has always been ready and willing, and remained ready and willing, all through to get a sale deed executed in terms of the contract ever since the performance fell due and throughout the course of the suit until decree was passed is the requirement of Section 16(c) of the Specific Relief Act, 1963. Section 16(c) of the Specific Relief Act, as it stood before its amendment by Amending Act 18 of 2018, reads as under:

"16. Personal bars to relief.--Specific performance of a contract cannot be enforced in favour of a person--

(a) xxxxxx
(b) xxxxx or
(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."

42. It is submitted by the learned counsel for the defendant that the lower Appellate Court has not said by as much as a whisper anything regarding proof by the plaintiff of his case under Section 16(c) (supra) by saying that he remained always ready and willing to perform his part of the suit agreement. It is to the contrary submitted that post execution of the suit agreement, there was total inaction on the plaintiff's part for two and a half years. He points out that the date of the suit agreement is 02.07.1980, where there was a covenant to get a sale deed executed in terms thereof by the plaintiff by 02.02.1981. The earliest that the defendant acted is when he got a notice issued to the plaintiff to execute a sale deed on 24.01.1981. It was just ten days before the date by which parties had agreed that the contract must be performed or not at all. Learned counsel points out that the plaintiff, after the notice dated 24.01.1981 was issued followed it up by two further notices, dated 30.01.1981 and 19.04.1982. But, he did not bring any action until 10.08.1983, when the present suit was filed. This suit was filed after the defendant had sold the suit property by way of a registered sale deed in favour of the purchasers on 03.08.1983. Learned counsel submits that the suit was filed within a week of the defendant transferring the suit property in favour of the purchasers, but two and a half years after the suit agreement was executed on 02.07.1980. It is urged by the learned counsel for the defendant that the uneventful two and a half years, after execution of the suit agreement, without any action taken except for issue of a notice through registered post on the fringes of time before the stipulated date after which in terms of the covenant carried in the suit agreement, the defendant would be free to transfer the suit property in favour of any third party, clearly shows that the plaintiff has not at all proved his readiness and willingness to get a sale deed executed.

43. In support of his contention about the obligation of the plaintiff to demonstrate continuous readiness and willingness from the date of agreement till a decree is passed, as a condition precedent to the grant of relief of specific performance, learned counsel for the defendant has relied on the decision of the Supreme Court in N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)7, and has in the context of his submission referred to what their Lordships have held in paragraph 5 of the report. It reads thus:

"5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short "the Act"). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which

are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

44. Learned counsel for the defendant further placed reliance on the decision of the Supreme Court in **Azhar Sultana vs. B. Rajamani and others**8 to submit that the relief of specific performance not only requires proof of a continuous readiness and willingness on part of the plaintiff, but also enjoins the Court to exercise its discretion in the matter of grant of that relief. Learned counsel for the defendant has also placed reliance on paragraphs 28, 29, 30 & 32 of the report in **Azhar Sultana (supra)**, where their Lordships have held:

"28. Section 16(c) of the Specific Relief Act, 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract. The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard-and-fast law can be laid down therefor. The conduct of the parties in this behalf would also assume significance.

29. In Veerayee Ammal v. Seeni Ammal [(2002) 1 SCC 134] it was observed: (SCC p. 140, para 11)

"11. When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Chand Rani v. Kamal Rani [(1993) 1 SCC 519] held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."

It was furthermore observed: (Veerayee Ammal case [(2002) 1 SCC 134], SCC pp. 140-41, para 13)

"13. The word "reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of "reasonable time' is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's Law Lexicon it is defined to mean:

"A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than "directly"; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.' "

30. It is also a well-settled principle of law that not only the original vendor but also a subsequent purchaser would be entitled to raise a contention that the plaintiff was not ready and willing to perform his part of contract. (See Ram Awadh v. Achhaibar Dubey [(2000) 2 SCC 428], SCC p. 431 para 6.)

32. Furthermore, grant of decree for specific performance of contract is discretionary. The contesting respondents herein are living in the property since 1981 in their own right. There is absolutely no reason as to why they should be forced to vacate the said *property at this juncture."*

45. Learned counsel for the plaintiff on the other hand submits that the plaintiff has clearly averred in the plaint, and proved to the hilt that he has been ready and willing to perform his part of the suit agreement. At complete variance to what learned counsel for the defendant has submitted that the lower Appellate Court has not recorded any finding as to readiness and willingness, mandatorily required under Section 16(c) of the Specific Relief Act, learned counsel for the plaintiff submits that the lower Appellate Court has recorded a clear finding as to readiness and willingness, being established by the plaintiff. He has, in particular, invited the attention of the Court to averments in the plaint, in this regard. He has relied upon paragraphs 4 & 5 of the plaint, in particular, that read thus:

"4. यह कि वादी हमेशा - हमेशा मुताविक माहिदा विवादित भूमि का बैनामा प्रतिवादी नं० 1 वकिया जर समन लिखाने को तैयार रहे और अब भी हैं परन्तु प्रतिवादी नं० 1 कोई न कोई बहाना करके टालता चला आ रहा है।

5. यह कि मजबूरन वादी ने जरिए वकील प्रतिवादी नं० 1 को नोटिस दिनांक 24-1-81 को तथा वादहू दिनांक 30-3-81 तथा दिनांक 19-4-82 को भेजी और प्रतिवादी नं० 1 को मुताविक माहिदा बय दिनांक 2-2-81 को सब रजिस्ट्रार कार्यालय में हाजिर आकर

बैनामा लिखाने की इत्तला दी परन्तु प्रतिवादी नं० 1 उक्त तिथि पर हाजिर नहीं आया जब कि वादी हाजिर रहे।"

46. Learned counsel for the plaintiff has also referred to the following part of the finding recorded by the lower Appellate Court, which reads:

"प्रतिवादी का कथन प्रथम दृष्टया विश्वसनीय नहीं हैए क्योंकि वादी ने दि० 2.2.81 को उप निबन्धक करछना के समक्ष अपनी उपस्थिति का शपथ पूर्वक कथन के अतिरिक्त अभिलेखीय साक्ष्य भी प्रस्तुत किया है। इसके विपरीत प्रतिवादी सं० 1 का उपरोक्त तिथि को अपनी उपस्थिति अंकित कराने का कोई अभिलेखीय साक्ष्य प्रस्तुत नहीं किया गया है। स्वाभाविक रूप से प्रतिवादी सं० 1 यदि उप निबन्धक करछना के कार्यालय में उपस्थित था तब वह अपनी उपस्थिति अंकित कराने हेतु प्रार्थनापत्र दे सकता था। इस संबंध में राम निहोर ने अपने बयान में कथन किया है कि दि० 2ण्2ण्81 को रजिस्ट्री आफिस में आने से दो दिन पूर्व वादी से मिला था तथा तय हुआ था कि रजिस्ट्री आफिस में आ जाये। यह तथ्य भी वादी के कथन के समर्थन करता है कि वादी दि० 2.2.81 को बैनामा कराने के लिए तैयार था तथा नोटिस देकर दि० 2.2.81 को बैनामा करने के आग्रह किया था। प्रतिवादी का कथन है कि वह उस दिन बलराम मुंशी के पास बैठकर इन्तजार करता रहा। प्रतिवादी स्वयं यह कथन करता है कि वादी ने सब रजिस्ट्रार आफिस में मिलने के लिए कहा थाए तब ऐसी दशा में प्रतिवादी को रजिस्ट्री आफिस में मिलना चाहिए था तथा बलराम मुंशी के पास बैठने का कोई कारण नहीं था। यह तथ्य इस बात का परिचायक है कि प्रतिवादी जानबूझ कर उप निबन्धक के कार्यालय में बैनामा करने हेतु उपस्थित नहीं हुआ तथा वादी विक्रय अनुबन्ध की शर्तों के अनुपालन में सदैव तत्पर, इच्छुक व तैयार रहा था तथा इसी आशय से दि० 2.2.81 को उप निबन्धक के कार्यालय में पहुँचा था।"

47. Learned counsel for the plaintiff has placed reliance on the decision of the Supreme Court in **V. Pechimuthu v. Gowrammal**9, where it has been held:

"*20. Coming to the facts of the case, there is no dispute that the appellant sent a legal notice to the respondent offering to pay the entire amount of Rs 19,990 to the respondent well within the period specified in the agreement. The suit was also filed before 3-5-1979. Nothing further remained to be done by the appellant under the agreement. As far as the deposit of the balance consideration was concerned under Explanation (i) to Section 16(c) [Explanation.--For the purposes of clause (c),--(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;] of the Specific Relief Act, 1963 the appellant could wait for an order of the court to do so. That is what he did. Both the trial court and the first appellate court on a consideration of all the evidence therefore rightly came to the conclusion that the appellant was ready and willing to perform his obligations under the agreement and was entitled to specific performance of it."*

48. He has further placed reliance on the decision of the Supreme Court in **Jiwan Lal (Dr) v. Brij Mohan Mehra**10. He has invited the attention of the Court to paragraph 13 of the report in Jiwan Lal (Dr.) (supra), which reads thus:

"13. In his written statement Brij Mohan Mehra pleaded only waiver and not also that he would be prejudiced by specific performance. There was considerable correspondence between the parties between February 11, and April 27, 1960. In their letters the prospective vendees repeatedly asked Brij Mohan Mehra to execute a sale-deed in accordance with the agreement. They also said that they were ready and willing to pay the sale consideration stipulated in the agreement. But Brij Mohan Mehra persisted in his refusal to execute the sale-deed. Eventually on April 17, 1960 one Sardari Lal Sachdev, Advocate, gave notice on behalf of the prospective vendees to Shri Hans Raj Mittal, Advocate, for Brij Mohan Mehra. It is said in that notice that the prospective vendees would attend the office of the Sub-Registrar, Amritsar on April 30, 1960 between 10 a.m. and 12 noon and that Brij Mohan Mehra should reach there to get the sale-deed registered. As April 30, 1960 was a holiday, the prospective vendees later sent a telegram to Brij Mohan Mehra to appear before the Sub-Registrar and produced before him a sum of Rs 1,12,500. The money was counted by the clerk of the Sub-Registrar. Brij Mohan Mehra did not appear before the Sub-Registrar o की नहीं प्राप्त हुई n that date. The Sub-Registrar has supported this version of the plaintiffs. Dr Jiwan Lal, one of the plaintiffs, has deposed that even after April 29, 1960, he had been asking Brij Mohan Mehra to execute a registered sale-deed but he had been evading. One Mr Ranbir Mehta went along with him to Brij Mohan Mehra for the same purpose. But Brij Mohan Mehra told him that as the premises had been attached by the Rani of Kashmir he should wait for some time. Dr Jiwan Lal then added: "Thereafter I went and asked him to complete the same but he continued to evade." There appears to be no cross-examination on this part of his statement on behalf of Brij Mohan Mehra. Dr Jiwan Lal denied in his cross-examination that the plaintiffs had abandoned their claim. It is not possible to believe that the plaintiffs, who were so insistent on the execution of the sale-deed in their favour and who had actually appeared before the Sub-Registrar with the requisite amount of money for payment to the vendor, would abandon their claim after April 29 or August 1, 1960. There is no reason to disbelieve Dr Jiwan Lal's statement that even after April 29, 1960, he had been pressing upon Brij Mohan Mehra to execute a registered sale-deed. In our opinion the plaintiffs did not abandon their rights under the agreement. The institution of the suit after two years does not appear to have caused any disadvantage to Brij Mohan Mehra. As already stated earlier, there is no such allegation in his written statement nor is there any evidence to that effect. Brij Mohan Mehra has admitted in his cross-examination that the prices of properties started depreciating in or about October, 1962 when there was Chinese aggression on India. The suit was instituted after the Chinese aggression. So it cannot be said that the specific performance of the agreement was likely to cause any prejudice to Brij Mohan Mehra on the date of the institution of the suit. The suit cannot accordingly be dismissed on account of delay. In view of our earlier findings, it is not necessary to decide whether the requisitioning of the premises was a manoeuvre of Brij Mohan Mehra to slide back from the agreement."

49. It is urged on the basis of the aforesaid decision that mere delay in filing the suit, without proof of prejudice occasioned to the defendant is no ground to refuse specific performance.

50. This Court has considered the rival submissions advanced by the learned counsel on both sides. So far as this Court is concerned, it would settle down to a consideration whether in principle the lower Appellate Court has dealt with the issue of the plaintiff's establishing his readiness and willingness as mandated by Section 16(c) of the Specific Relief Act, and if the answer be in the affirmative, whether the lower Appellate Court has drawn conclusions about it on facts, evidence and the law applicable, that may be termed as perverse. The finding recorded by the lower Appellate Court regarding readiness and willingness, that has been extracted hereinabove, indeed, shows that the lower Appellate Court has considered the matter with reference to the pleadings and the law. It has recorded a definitive finding in the judgment that the plaintiff has been always ready and willing to perform his part of the suit agreement. It is not a case where the lower Appellate Court has not touched the issue of readiness and willingness at all, as urged by the learned counsel for the defendant.

51. Turning to the question as to whether the conclusions drawn by the lower Appellate Court on the question of readiness and willingness are perverse bearing in mind the facts of the case, the evidence on record and the law applicable, this Court must take due note of the fact that the question of readiness and willingness has recently engaged the attention of the Supreme Court in **R. Lakshmikantham vs. Devaraji**11, wherein it has been held:

"10. The High Court order is not correct in stating that readiness and willingness cannot be inferred because the letters dated 18.12.2002 and 19.12.2002 had not been sent to the defendant. The High Court also erred in holding that despite having the necessary funds, the plaintiff could not be said to be ready and willing. In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the plaintiff to state that he was not ready and willing. In India, it is well settled that the rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff - See Mademsetty Satyanarayana v. G. Yelloji Rao AIR 1965 Supreme Court 1405 (paragraph 7) which reads as under:

"(7) Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises." "

(Emphasis by Court)

52. The question fell more recently for consideration of their Lordships of the Supreme Court in **Madhukar Nivrutti**

Jagtap and Others vs. Smt. Pramilabai Chandulal Parandekar and Others12, where considering the decisions, inter allia, in **Azhar Sultana (supra),** and the very recent decision in **R. Lakshmikantham (supra**), it has been held by their Lordships, thus:

"44. So far the period between the year 1966 to the year 1968 is concerned, when the plaintiffs had the limitation of three years for filing the suit for specific performance, it cannot be said that during the aforesaid period, the plaintiffs were required to show overt act by them in furtherance of the agreement in question. The principles stated in the decisions in Azhar Sultana, Veerayee Ammal and Pushparani S. Sundaram (supra), as relied upon by the learned counsel for the appellants, are not of any doubt or debate but each of the said cases had proceeded on its own facts. We may also observe that in the case of Azhar Sultana, the Court found that as against the agreement dated 04.12.1978, the suit for specific performance was filed on 07.12.1981, after the property was sold on 31.10.1981; and that the plaintiff failed to show that she was not having notice of the subsequent sale. However, in the said case, the Court directed monetary payment to the tune of twice the amount advanced by the plaintiff. In Veerayee Ammal, this Court pointed out that the expression "reasonable time' for performance on the part of plaintiff would depend on the circumstances of the case, including the terms of contract. In Pushparani S. Sundaram,the basic requirements of Section 16 of the Act of 1963 were reiterated. In contrast to what is suggested on behalf of the appellants, we may point out that recently, in the case of R Lakshmikantham v. Devaraji : Civil Appeal No. 2420 of 2018, decided on 10.07.2019, this Court has again explained that when the suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff. This Court has said:--

"....*In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the plaintiff to state that he was not ready and willing. In India, it is well settled that the rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the plaintiff - See Mademsetty Satyanarayana v. G. Yelloji Rao AIR 1965 Supreme Court 1405(paragraph 7) which reads as under:--*

"(7) Mr. Lakshamaihan cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises.""

45. In the present case too, when the plaintiffs had the limitation of three years for filing the suit and have indeed filed the

suit well within limitation; and looking to the overall circumstances of the case, no aspect of delay operates against them."

53. It must be remarked that though time has been found to be of the essence on a construction of the terms of the suit agreement here, it has been found also that within the time limited by the agreement, the plaintiff invoked the agreement requiring the defendant's presence at the office of the Sub-Registrar on 02.02.1981 to execute the sale deed. The fact that after 02.02.1981, the plaintiff brought the present suit on 10.08.1983, post lapse of two years and six months of the date on which the cause of action had accrued would not ipso facto lead to the inference that the plaintiff was not ready and willing to perform his part of the contract. It has figured in evidence that apart from the notice dated 24.01.1982 through which the defendant along with a verbal communication had invoked performance of the contract before the date agreed between parties, the plaintiff also sent two further notices dated 30.03.1981 and 19.04.1982, calling upon the defendant to discharge his obligations by executing a conveyance in his favour. While service of notice dated 24.01.1982 before the date fixed in the contract as the limiting event of obligations has not been proved, invocation of the contract has been held proved on the basis of oral evidence on admission of parties before the due date; service of two subsequent notices, dated 30.03.1981 and 19.04.1982 is established by sterling evidence. The service of these two subsequent notices is established by postal acknowledgments filed by the plaintiff that have been marked as evidence at the trial. In these circumstances, it is evident that the plaintiff's readiness and willingness during the period of limitation prescribed by law of filing a suit cannot be doubted. There is no such evidence by which either readiness or willingness may be inferred out. The fact that he waited for a period of two years and six months to institute a suit after he had invoked the contract, has been held by the decision of the Supreme Court in **R. Lakshmikantham** (supra) as a circumstance wherefrom an inference about lack of readiness or willingness could not be drawn; at least that inference could not be drawn in the absence of any evidence aliunde to show that the plaintiff during the period of limitation was not ready and willing. Though, in their Lordship's decision in **R. Lakshmikantham** (supra), the delay in filing the suit is described as a short one, it has been laid down as a rule that in India, the rule of equity that obtains in England against delay in bringing an action, does not apply in seeking specific performance so long as a suit for specific performance is filed within limitation. The finding of the Lower Appellate Court regarding readiness and willingness is based on a plausible view of the evidence which the law does not disapprove. This being so, the view of the Lower Appellate Court that the plaintiff has been ready and willing throughout cannot be said to be perverse. The finding of the Lower Appellate Court, on the question of readiness and willingness is, therefore, affirmed.

54. But, a finding that on the evidence available on record and the standards of law laid down, the plaintiff has been ready and willing throughout is a matter that may have no bearing at all on the question whether the Lower Appellate Court has exercised discretion to grant

specific performance on reasoning that may not be found flawed for its perversity.

55. In the present case, notwithstanding the finding that the plaintiff throughout the period of limitation was rightly found by the last Court of fact to be ready and willing throughout, the standards regarding exercise of discretion to grant specific performance as spelt out by Section 20 of the Specific Relief Act too have been reasonably adhered to, requires scrutiny. The law about it generally is that specific performance is not to be granted merely because it is lawful to do so. Various factors that emerge from the facts of the case and evidence on record would go into a valid decision being arrived at, whether to grant specific performance or refuse the same by opting for some alternative relief to remedy the breach of contract, otherwise found in favour of the plaintiff. Again, so far as this Court is concerned, so long as the discretion that has been exercised by the last Court of fact, that is to say, the Lower Appellate Court, is not perverse, in the sense that no reasonable person under the circumstances could have taken the view under challenge, it is not for this Court to interfere with the exercise of that discretion.

56. It would again be profitable to look into the authority guiding exercise of discretion under Section 20 of the Specific Relief Act. Learned counsel for the plaintiff has drawn the Court's attention in this regard to the decision of the Supreme Court again in V. Pechimuthu (Supra), where dealing with the issue of rise in prices of land and holding it to be a relevant factor in denying relief of specific performance by Courts of fact, it was held by their Lordship's thus:

25. Counsel for the respondent finally urged that specific performance should not be granted to the appellant now because the price of land had risen astronomically in the last few years and it would do injustice to the respondent to compel her to reconvey property at prices fixed in 1978.

26. The argument is specious. Where the court is considering whether or not to grant a decree for specific performance for the first time, the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. (See K.S. Vidyanadam v. Vairavan [(1997) 3 SCC 1].) But in this case, the decree for specific performance has already been passed by the trial court and affirmed by the first appellate court. The only question before us is whether the High Court in second appeal was correct in reversing the decree. Consequently the principle enunciated in K.S. Vidyanadam [(1997) 3 SCC 1] will not apply.

57. Reliance has further been placed by the learned counsel for the plaintiff on the same point on a decision of the Supreme Court in **Ramathal vs. Maruthathal & Ors.**,13, which again was a case where the issue of escalating prices of property was considered in the context of exercise of discretion under Section 20 of the Specific Relief Act. In this case, the consideration was outrightly rejected to be relevant by the their Lordship's holding thus:

23. The buyer has taken prompt steps to file a suit for specific performance as

soon as the execution of the sale was stalled by the seller. From this discussion, it is clear that the buyer has always been ready and willing to perform his part of the contract at all stages. Moreover it is the seller who had always been trying to wriggle out of the contract. Now the seller cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would be inequitable. Escalation of prices cannot be a ground for denying the relief of specific performance. Specific performance is an equitable relief and granting the relief is the discretion of the court. The discretion has to be exercised by the court judicially and within the settled principles of law. Absolutely there is no illegality or infirmity in the judgments of the courts below which has judicially exercised its discretion and the High Court ought not to have interfered with the same.

58. Learned counsel for the plaintiff has relied on another authority of their Lordship's of the Supreme Court in **Dr. Jivanlal and others vs. Brij Mohan Mehra and another**14. In that case, considering the exercise of discretion to grant or refuse specific performance, their Lordship's considered the prejudice that would be involved in granting that relief on account of the delay by the plaintiff in instituting the suit. In the case before their Lordship's, the suit had been instituted two years after performance fell due. The evidence and the circumstances obtaining in the case were very minutely considered to hold that by mere delay in instituting the suit, no prejudice was caused to the defendant. The suit for specific performance was, therefore, decreed by their Lordship's, which had been decreed by the Trial Court but reversed on appeal by the High Court. The reasoning in Dr. Jivanlal (supra) to hold in favour of specific performance by discounting delay of two years is enmeshed in the facts there that serve as a guiding light to the exercise of discretion under Section 20. It has been held in paragraph 12 and 13 of the report in Dr. Jivanlal (supra) thus:-

12. The agreement was made on December 9, 1959. The premises were requisitioned by an order, dated January 23, 1960. Brij Mohan Mehra filed an appeal against the order of requisition. It was dismissed on August 1, 1960. The suit was instituted on November 5, 1962. As the appeal was pending, the plaintiffs could reasonably wait until August 1, 1960 in the hope that the order of requisition might be set aside in appeal. So no legitimate objection can be taken on the score of delay until August 1, 1960. The suit was instituted within two years, three months and four days of the dismissal of appeal on August 1, 1960. It is now to be seen whether this delay is such as would disentitle the plaintiffs to the relief of specific performance of the contract. InLindsay Petroleum Co.v.Hurd[(1874) LR 5 PC 221 at 239] . Lord Selborne said:

"The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

13. In his written statement Brij Mohan Mehra pleaded only waiver and not also that he would be prejudiced by specific performance. There was considerable correspondence between the parties between February 11, and April 27, 1960. In their letters the prospective vendees repeatedly asked Brij Mohan Mehra to execute a sale-deed in accordance with the agreement. They also said that they were ready and willing to pay the sale consideration stipulated in the agreement. But Brij Mohan Mehra persisted in his refusal to execute the sale-deed. Eventually on April 17, 1960 one Sardari Lal Sachdev, Advocate, gave notice on behalf of the prospective vendees to Shri Hans Raj Mittal, Advocate, for Brij Mohan Mehra. It is said in that notice that the prospective vendees would attend the office of the Sub-Registrar, Amritsar on April 30, 1960 between 10 a.m. and 12 noon and that Brij Mohan Mehra should reach there to get the sale-deed registered. As April 30, 1960 was a holiday, the prospective vendees later sent a telegram to Brij Mohan Mehra to appear before the Sub-Registrar and produced before him a sum of Rs 1,12,500. The money was counted by the clerk of the Sub-Registrar. Brij Mohan Mehra did not appear before the Sub-Registrar on that date. The Sub-Registrar has supported this version of the plaintiffs. Dr Jiwan Lal, one of the plaintiffs, has deposed that even after April 29, 1960, he had been asking Brij Mohan Mehra to execute a registered sale-deed but he had been evading. One Mr Ranbir Mehta went along with him to Brij Mohan Mehra for the same purpose. But Brij Mohan Mehra told him that as the premises had been attached by the Rani of Kashmir he should wait for some time. Dr Jiwan Lal then added: "Thereafter I went and asked him to complete the same but he continued to evade." There appears to be no cross-examination on this part of his statement on behalf of Brij Mohan Mehra. Dr Jiwan Lal denied in his cross-examination that the plaintiffs had abandoned their claim. It is not possible to believe that the plaintiffs, who were so insistent on the execution of the sale-deed in their favour and who had actually appeared before the Sub-Registrar with the requisite amount of money for payment to the vendor, would abandon their claim after April 29 or August 1, 1960. There is no reason to disbelieve Dr Jiwan Lal's statement that even after April 29, 1960, he had been pressing upon Brij Mohan Mehra to execute a registered sale-deed. In our opinion the plaintiffs did not abandon their rights under the agreement. The institution of the suit after two years does not appear to have caused any disadvantage to Brij Mohan Mehra. As already stated earlier, there is no such allegation in his written statement nor is there any evidence to that effect. Brij Mohan Mehra has admitted in his cross-examination that the prices of properties started depreciating in or about October, 1962 when there was Chinese aggression on India. The suit was instituted after the Chinese aggression. So it cannot be said that the specific performance of the agreement was likely to cause any prejudice to Brij Mohan Mehra on the date of the institution of the suit. The suit cannot accordingly be dismissed on account of delay. In view of our earlier findings, it is not necessary to decide whether the requisitioning of the premises was a manoeuvre of Brij Mohan Mehra to slide back from the agreement.

59. Learned counsel for the defendant on the other hand relied upon the decision of the Supreme Court in **Parakunnan Veetill Joseph's son Mathew vs. Nedumbara Kuruvila's Son**15, in support of the proposition that

where conduct or neglect of the plaintiff induces the defendant to change his position to his prejudice, it would be a relevant factor to refuse relief. The said part of the reasoning is to be found in the decision of their Lordship's in **Parakunnan Veetill Joseph's Son Mathew (supra)** by way of a quotation with approval to an earlier authority of the Supreme Court in **Satyanarayana v. Yellogi Rao**16. It has been further held that the discretion to exercise specific performance should be exercised after meticulous consideration of all facts and circumstances. Specific performance is not to be granted merely because it is lawful to do so. It has also been held that the court should take care to see as to what is the motive behind the litigation. Paragraphs 13 and 14 of the report in Parakunnan Veetill Joseph's Son Mathew (supra) are enlightening, where it held:

13. In Satyanarayana v. G Yellogi Rao [AIR 1965 SC 1405 : (1965) 2 SCR 221, 230] this Court observed:

"But as in England so in India, proof of abandonment or waiver of a right is not a precondition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the court would arise. We have used the expression "waiver' in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action: it is an agreement to release or not to assert a right': see Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha [1935 LR 62 IA 100, 108] . It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for sale Exhibit A-1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance.

60. Learned counsel for the defendant has in support of his contention that inaction for a long period of time on the part of the plaintiff in bringing the suit and substantial rise in prices of properties, would be a relevant factor to refuse specific performance has placed reliance on the decision of the Supreme Court in **K.S. Vidyanadam vs. Vairavan**17. In the said case, notice through counsel was issued by the plaintiff, two and a half years after performance fell due and during this time no action was taken by the plaintiff. In the aforesaid context, it

has been held in K.S. Vidyanadam (supra) by their lordship's thus:

*13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices -- according to the defendants, three times -- between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.**

*14. Shri Sivasubramaniam then relied upon the decision in Jiwan Lal (Dr) v. Brij Mohan Mehra [(1972) 2 SCC 757 : (1973) 2 SCR 230] to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench in Chand Rani [(1993) 1 SCC 519] . Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.***

**(Emphasis supplied)*

***(Emphasis by Court)*

61. The principles that emerge from the above decisions are well settled but at the same time there is no straight-jacket formula that may serve as a ready reckoner to answer the issue whether discretion to exercise specific performance has been rightly exercised. Moreover, when the Court is seized of the matter not as a Court of fact but one hearing an appeal from an appellate decree, it is not an open question for the Court to decide whether on facts and evidence on record, the law has been correctly applied regarding exercise of discretion to grant specific performance; or for that matter to refuse it. This Court is limited in its appraisal of the issue to see whether the discretion under Section 20 has been perversely exercised. This is particularly true of the consideration about rise in prices of land subject matter of the suit as a relevant factor in guiding the discretion under Section 20. There the difference in scale of appraisal or the freedom to decide on all facts and evidence have been noticed by their Lordship's of the **Supreme Court in V. Pechimuthu (supra).**

62. Turning to the facts of the present case, this Court finds that proceeding on the premise that the defendant was asked by the plaintiff to appear before the Sub-Registrar's Office on 02.02.1981 that was the limiting date to perform his part of the contract and that the defendant despite being aware of the demand avoided performing his obligations under the suit agreement, there is no plausible explanation forthcoming in evidence as to why the suit that should have been filed shortly after 02.02.1981, came to be filed as late as on 10.08.1983, with a delay of two years and six months. During this period of time, the defendant executed a sale deed conveying the suit property in favour

of the purchasers on 03.08.1983. It is indeed reflective of conduct certainly not bona fide on the plaintiff's part that he brought this suit within seven days of the aforesaid sale deed being executed by the defendant in favour of the purchasers. The plaintiff waited from 02.02.1981 when the defendant did not appear to execute a sale deed and get it registered before the Sub-Registrar for all the time of two years and six months, but moved to bring the suit within a week of the sale deed last mentioned, being executed in favour of the purchasers. This conduct of the plaintiff in the considered opinion of this Court is such that no other view of the matter can be taken but one that dis-entitles the plaintiff to relief of specific performance. The fact that by his utter inaction to bring a suit during all the long period of time of two years and six months and doing that when rights in favour of the purchasers were created under a sale deed executed for valuable consideration by the defendant, most certainly makes equity work against the plaintiff and in favour of the defendant; more strongly, in favour of the purchasers who are also parties to the suit, and, of course, this appeal. The equity works more strongly so far as the purchasers are concerned as they have contested the suit.

63. In this view of the matter this Court finds that the Lower Appellate Court went so wrong in granting specific performance that its view about the exercise of discretion under Section 20 of the Specific Relief Act is clearly perverse. **Substantial question no.(3) is, thus, answered in the negative in so far as it relates to Section 20 of the Specific Relief Act; with regard to Sections 10 and 16 it is answered in the affirmative.**

64. It requires mention that the added substantial question of law that was framed by this Court during the course of hearing on 11.03.2019 was based on a decision of the Supreme Court in **B.Vijaya Bharathi vs. P. Savitri and others**18, where Sri K.M. Garg, learned counsel for the appellant relying on the remarks in paragraph 70 of the report, had pressed that the said question be framed. Now, that this Court has concluded that relief of specific performance is not to be granted, there is no good reason to go into the aforesaid substantial question of law and decide the same. The said substantial question of law is, therefore, not required to be answered. The plaintiff has asked for the alternative relief of earnest money advanced, that is to say, Rs. 1800/- with interest @ 2% per mensem. There is no relief claimed by way of compensation, in terms of Section 21 of the Specific Relief Act.

65. In the present case, breach of contract has been found established, as also readiness and willingness on the plaintiff's part. It is another matter that for reasons assigned, it has been held that the relief of specific performance is one that is ruled out. In this view of the matter, the decree of specific performance is liable to be set aside and substituted by a decree for refund of the earnest money together with interest @ 14% per annum, past and pendentelite; future interest would be payable @ 6% per annum in accordance with the provisions of Section 34 C.P.C. Looking to the circumstances that parties have met with partial success, it is a case where costs should go easy.

66. In the result, the appeal succeeds and is allowed in part. The impugned decree passed by the Lower Appellate Court is set aside and substituted by a decree in terms that the defendant shall

refund to the plaintiff the earnest money of Rs. 1800/-, together with interest @ 14% per annum past and pendentelite; and future interest @ 6% per annum. Parties shall bear their own cost throughout.

67. Let a decree be drawn up, accordingly.

(2019)10ILR A 758

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2019

BEFORE

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

Second Appeal No. 545 of 1992

Bansh Raj & Ors. ...Appellants
Versus
Moti & Ors. ...Respondents

Counsel for the Appellants:
Sri V.K. Singh, Sri M.N. Singh

Counsel for the Respondents:
Sri V. Singh, Sri M.K. Singh, Sri Manoj Kumar Singh, Sri Namwar Singh, Sri Sanjiv Singh

A. U.P. Zamindari Abolition and Land Reform Act, 1950 - Section 331 - Where a suit is held barred by the provisions of Section 331 of the UP ZA & LR Act at any stage of the proceedings, be it in appeal or revision - the suit cannot be dismissed but has to be dealt with by an order directing return of the plaint to be presented to the proper Court.

Appeal partly allowed (E-5)

List of cases cited: -

1. Ram Padarath & ors. Vs Second Addl. District Judge & ors. 1989 AWC 290 All

2. Smt. Bismillah VS Janeshwar Prasad & ors. (1990) 1 SCC 207

3. Shri Ram & anr. Vs Ist Addl. Distt. Judge & ors. (2001) 3 SCC 24

4. Ram Jas Singh Vs Babu Nandan Singh AIR 1922 Ald. 424 (1): ILR (1922) 44 All 686

5. Kallu vs. Phundan AIR (33) 1946 Ald. 488: ILR 1946 All 702

6. Dr. Purshottam Vithal Vs Dr. G.V. Pandit AIR 1950 Nag 212

7. T. Krishnaveni Ammal Vs The Corporation of Madras AIR 1957 Mad 671

8. Chittaruvu Radhakrishna Murty Vs Bollapalli Chandrasekhara Rao AIR 1966 AP 334

9. Sri Athmanathaswami Devasthanam Vs K. Gopalaswami Ayyangar AIR 1965 SC 338

10. Kailash Chandra Agarwal Vs Subhash Chand Satish Chand Viyopari AIR 1982 All 112

11. Gulab & ors. Vs Jaggan Ram Singh & ors. AIR 1983 All 145

12. Mst. Ananti Vs Channu AIR 1930 All 193

13 Lal Bahadur Singh & anr. Vs Bagesara & ors. AIR 1984 All 231

14 R.S.D.V. Finance Co. Pvt. Ltd. Vs Shree Vallabh Glass Works Ltd. (1993) 2 SCC 130

15. Mattukki & ors. Vs Rajwanti (2009) 3 AWC 2771 (All)

16. Suryakant Gupta Vs B.L. Saraf & anr. 2011 SCC OnLine Chh 333

17. Prithvi Raj Jhingta Vs Gopal Singh AIR 2007 H.P. 11

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

1. This is a plaintiffs' second appeal from a judgment and decree of Sri K.N. Pandey, the then Third Additional District Judge, Jaunpur, dated 21.01.1992, dismissing Civil Appeal no.236 of 1982 with costs, and affirming an original

decree of Sri Ashok Kumar Tiwari, the then Third Additional Munsif, Jaunpur, dated 17.09.1982, passed in Original Suit no.517 of 1980, dismissing the said suit for reliefs of permanent prohibitory injunction and cancellation. This appeal was admitted to hearing on the substantial question of law, whether the suit is barred under Section 331 of the U.P. Z.A. & L.R. Act.

2. This Appeal was heard on the said question of law on 27.02.2019 and judgment was reserved. This Court felt that some other questions of law, relative to the question last mentioned, but framed in more specific terms, that would enable parties to better address the Court on their respective case, were required to be framed. Accordingly, this Appeal was posted for further hearing on 01.05.2019. On the said date, the following substantial questions of law were framed:

"(i) Whether a suit held barred by the provisions of Section 331 of the U.P. Z.A. & L.R. Act would entail a decree of dismissal of the suit, or an order for return of the plaint to be presented to a Court of competent jurisdiction?

(ii) Whether the rights and title of parties to land concluded in terms of an order passed by the Consolidation Authorities and recorded as such in the Revenue Records can be re-agitated by the said parties in a suit before the Civil Court notwithstanding the provisions of Section 49 of the U.P. Consolidation of Land Holdings Act?

(iii) Whether an order of the Consolidation Courts deciding rights of parties in terms of a compromise, not set aside on ground of fraud or otherwise within the prescribed period of limitation is relevant evidence in a subsequent suit inter partes relating to the same land litigating under the same title under Section 44 of the Indian Evidence Act?"

3. The first question of law as rephrased takes in its fold the substantial question law, on which this Appeal was admitted to hearing. Question nos.2 & 3 are added questions with reference to different issues. The learned counsel for the parties were, accordingly, heard afresh on 01.05.2019, and judgment was reserved.

4. Heard Sri Anmol Ranjan, holding brief of Sri M.N. Singh, learned counsel for the appellants and Sri V. Singh along with Sri Manoj Singh, learned counsel appearing on behalf of the defendant-respondent.

5. It may be indicated at the outset that the suit was filed by the two plaintiffs, Heera and Jawahir, both sons of Vishwanath Kushwaha against four defendants, to wit, Moti, Rambali, Nandlal and Ram Palat. Pending appeal before the lower Appellate Court, of the two plaintiffs, Heera died and was substituted by his heirs and legal representatives, to wit, Bansraj and Hansraj. Before this Court, the Appeal was filed by Bansraj and Hansraj, and the then surviving one of the two original plaintiffs, Jawahir. Pending this Appeal, Jawahir, plaintiff/ appellant no.3 has passed away, and is represented by his heirs and legal representatives, numbering five. Likewise, amongst the original defendants, defendant/ respondent no.1, Moti and defendant/ respondent no.2, Nandlal, have died pending this Appeal and are represented on record by their respective heirs and legal representatives. The appellants in this Appeal, shall

hereinafter be referred to as the plaintiffs whereas the respondents shall be called the defendants, except where they are individually referred to.

6. The suit in this case was instituted on 06.12.1980 seeking reliefs of permanent prohibitory injunction to the effect that the defendants be restrained from interfering with the plaintiffs' possession in the suit property as detailed in Schedule-A to the plaint, and to refrain in any manner from interfering with their possession or disturbing the same. By a separate relief, a decree was sought claiming cancellation of sale deed dated 11.11.1980 A.D. executed by defendant no.1 in favour of defendant nos.2 & 3, in so far as it relates to half of the area of land detailed in Schedule-A to the plaint.

7. A reference to some facts that have given rise to the present appeal is necessary. The first to be mentioned, are the two pedigrees, one being of the plaintiffs, and, the second, being of defendant no.1, Moti as propounded by the plaintiffs through an amendment to the plaint, permitted by the Court vide order dated 01.04.1981.

The pedigree of the plaintiff:
Dhannu Mallah
Kanhai
Vishwanath

Heera
Jawahir
(plaintiff no.1)
(plaintiff no.2)
The pedigree of defendant no.1:
Gannu Mallah
Mittu - Mst. Biranji @ Viyau
Natthu (Tarayal son)
Moti

8. It must be noticed here that the plaint as originally drawn had set out a pedigree very different from that brought through the amendment referred above. The pedigree prior to its amendment has shown the plaintiffs and the defendants to be descendants of a common ancestor, Gannu Mallah. Through the amendment brought, however, the plaintiffs and the defendants, have been claimed to be strangers, with Gannu Mallah being the predecessor-in-title of the defendants and Dhannu Mallah to be that of the plaintiffs. The pre-amended pedigree of parties, of which both Courts below have taken due note, is depicted below:

Gannu Mallah
Kanhai Mittu - Biranji

Vishwanath Natthu (Tarayal)

Moti
Heera Jawahir

Chandra Shekhar Subhash

9. The case of the plaintiffs is that they are the descendants of one Dhannu Mallah, who had one son Kanhai and no other. It has been emphasized that Kanhai had no brother. Kanhai too had one son, Vishwanath. The two original plaintiffs, Heera and Jawahir are sons of Vishwanath. It has further been pleaded that the defendants' ancestor was Gannu Mallah, whose son was Mittu. Mittu was unmarried. He settled with a widow named Biranji in some kind of a relationship (may be recognised by custom, but did not marry her). Biranji had brought along her son, Natthu, begotten of her deceased husband. Natthu last mentioned is described in his relationship to Mittu, or the family that

his mother became part of, as "Tarayal', which is a word of local usage. According to the plaintiffs, the property detailed in Schedule A to the plaint was in the agricultural tenure of Kanhai, the plaintiffs' grandfather whereas property detailed in Schedule B to the plaint, was holding of Mittu, the predecessor-in-title of the defendant. It is the plaintiffs' case that Mittu did not beget a son from the relationship that he had with Biranji, and he died in the lifetime of Biranji, issuless. Biranji came to be recorded as the tenure holder of land detailed in Schedule B as Mittu's widow, after his decease. After some passage of time, Smt. Biranji passed away. It is pleaded by the plaintiffs that their grandfather, Kanhai had passed away before Smt. Biranji's death. In consequence, the tenure that was holding of Kanhai, detailed in Schedule A, devolved upon his son, Vishwanath. At the time when Biranji passed away, Vishwanath, the plaintiffs' father, in addition to the property detailed in Schedule A, that had devolved upon him from Kanhai, also took possession of the property shown in Schedule B to the plaint. All this happened before the abolition of Zamindari, as it appears from the pleadings of parties (though not specifically said so in the plaint). The Zamindar acknowledged rights of Vishwanath, vis-à-vis land detailed in Schedule B to the plaint and admitted him as a tenant/ kashtkar of land last mentioned, also. In consequence, the plaintiffs' father, Vishwanath was admitted by the Zamindar to be the tenant of both plots of lands comprising Schedule A and Schedule B to the plaint, and in possession of the same. It is also pleaded that the plaintiffs' grandfather, Vishwanath's name came to be recorded over land detailed both in Schedule A and Schedule B to the plaint. Lands comprising all that is in Schedule A and Schedule B, thereupon was registered as one Khata with the plaintiffs' grandfather as the recorded tenant.

10. It is further pleaded by the plaintiffs that Vishwanath passed away when the plaintiffs were children/ minors, whereupon the two original plaintiffs, Heera and Jawahir, sons of Vishwanath became tenure holders in possession of all property that is shown in Schedule A and Schedule B to the plaint. After Vishwanath's decease, Natthu who had no connection with the earlier recorded tenure holder, Mittu's family, laid his claim to land comprising Schedule B to the plaint. It is pleaded that in connivance with the local Patwari, Natthu last mentioned in a clandestine manner got his name recorded by falsely portraying himself to be the son of Mittu, not only over the land comprised of Schedule B, but the entire suit property detailed at the foot of the plaint, along side the plaintiffs as a co-sharer. This fraud came to light when the plaintiffs' mother went to deposit ten times the land revenue in order to enlarge the plaintiffs' right into bhumidhari (as they were minors at that time) under the provisions of The United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949. The plaintiffs' mother discovered the collusive entry in Natthu' name at that time, insofar as the plaintiffs' rights over land comprising Schedule A to the plaint are concerned. The aforesaid dispute was resolved with the intervention of Zamindar, and it is the plaintiffs' case that a compromise was entered into, by which the plaintiffs were acknowledged to be bhumidhars of plot no.2788, admeasuring 54 decimals, and Natthu became the

bhumidhar of the land comprising Schedule B to the plaint. It is also pleaded that in accordance with the aforesaid compromise, both parties, that is to say, the plaintiffs' mother acting on their behalf and Natthu for himself deposited ten times the land revenue and a bhumidhari sanad each was issued in favour of the plaintiffs and Natthu, respectively. By the said bhumidhari sanad, the plaintiffs became the exclusive bhumidhars of all that land comprised in Schedule A to the plaint whereas Natthu became bhumidhar of all land, comprising Schedule B to the plaint.

11. At this juncture, it would be profitable to describe all that land, that is comprised in Schedule A and Schedule B to the plaint. Schedule A to the plaint bears khasra no.2788, admeasuring 54 decimals whereas land comprising Schedule B to the plaint bears khasra no.2787, admeasuring 20 decimals. The new number of khasra no.2787 (20 decimals) is 2695, and that of khasra no.2788 (54 decimals) is 2696. Though much is said about the rights of parties in property detailed in both Schedules A and B to the plaint, that is all part of the transaction giving rise to the present cause of action, as would be seen hereinafter, there is no issue in the suit about the land detailed in Schedule B to the plaint, which has been given to detail the entire background of facts and the transaction that has led to the suit. The property in dispute in the present suit is confined to that detailed in Schedule A to the plaint alone. So much for the description of the property and its detail that is the subject matter of action between parties.

12. Reverting back to the manner in which the rights of parties came to be asserted in conflict over time leading to the present suit, it was an event in that direction when Natthu passed away and his son, Moti became the sole bhumidhar of khasra no.2787, admeasuring 20 decimals (Schedule B to the plaint). Moti, unknown to the plaintiffs, sold a claimed half share of land comprised of khasra no.2788 (54 decimals) to defendants nos.2 & 3 to the suit, Rajbali and Nandlal vide registered sale deed dated 11.11.1980. The said sale deed in favour of defendants nos.2 & 3 was executed through their father, defendant no.4, Ram Palat, as defendants nos.2 & 3 to the suit last mentioned, at the time of execution of the sale deed, were minors. No sooner than the sale deed was executed by Moti in favour of the then two minor defendants, which was effectively in favour of their father, Ram Palat, that Ram Palat made a show of his right and title towards the end of November, 1980. He asserted title to a half share in property comprised of Schedule A to the plaint, and threatened to interfere with the plaintiffs' exclusive possession of the same. It is then that the plaintiffs came to know for the first time ever, as they allege, about the sale deed dated 11.11.1980 executed by defendant no.1 in favour of defendants nos.2 & 3. It is the plaintiffs' further case that defendant no.1, Moti had no interest in land comprising Schedule A to the property as that was exclusively in their bhumidhari whereas the rights of defendant no.1 were confined to land comprised in Schedule B. This clear delineation of rights came about in terms of a compromise before the Zamindar already mentioned, and in accordance with that compromise, the plaintiffs and the defendants, each had paid ten times the land revenue, in order to secure bhumidhari sanad relating to the lands

comprised in Schedules A and B, respectively. It asserted, therefore, that there was no case for the first defendant to have staked claim to a half share in the property comprised in Schedule A, and on that basis, execute a sale deed in favour of defendants nos.2 & 3, then minors, through their father, defendant no.4. It is asserted in the plaint that the plaintiffs are sole owners, or more properly bhumidhars of land detailed in Schedule A to the plaint, and are in exclusive possession of the same as asserted in the plaint. It was on that basis that a relief of permanent injunction restraining the defendants from interfering in the peaceful possession and use of khasra no.2788 (now renumbered as 2696) admeasuring 54 decimals, was claimed. In addition, a further relief for cancellation of the sale deed dated 11.11.1980, executed by the defendant no.1 in favour of defendants nos.2 & 3 was also sought.

13. The written statement filed by Moti denies the plaint case, and comes up with a version that he was co-sharer in the entire property mentioned at the foot of the plaint, both Schedule A and Schedule B. He was in service in Kolkata since childhood. The property in suit, comprising both Schedules, was joint Hindu family property, of which the plaintiffs and defendant no.1, both were a part since the time of their predecessor-in-title. The plaintiffs and the party's predecessors-in-title were managing the family and its property. As such, it was not known to the first defendant, Moti about all those proceedings through which bhumidhari sanad was secured by the plaintiffs regarding Schedule A property exclusive to their names. It is also asserted that the land detailed in Schedules A and B to the plaint, is located quite far off from the defendants' house, abadi and chak, which had made it rather unviable for the first defendant to cultivate the said land. At the same time, the first defendant got a good bargain of land in the adjoining chak of another native of the village, Chandra Dev Singh, that he had purchased through a sale deed. The first defendant required funds to pay off some balance sale consideration due to Chandra Dev Singh, on account of which he sold his half share in the property described in Schedule A to the plaint in favour of defendants nos.2 & 3 vide registered sale deed dated 11.11.1980. The aforesaid sale deed was executed for a total sale consideration of Rs.7000/-. Contemporaneously, the first defendant bargained sale of his half share in land comprising Schedule B to the plaint in favour of the plaintiffs, and both sale deeds relating to the half share of defendant no.1, that is to say, the first defendant's half share in land shown in Schedule A and Schedule B to the plaint, were executed on 11.11.1980; the half share in Schedule A being sold in favour of defendants nos.2 & 3 whereas the half share comprising property detailed in Schedule B, being sold in favour of the plaintiffs. It has been further asserted in the written statement of the first defendant that both sale deeds dated 11.11.1980 were drafted under instructions of the respective vendees, including the plaintiffs, and he does not know if any manipulation in the recitals there, to suit his case have been scripted in the sale deed executed in the plaintiffs' favour. It has further been specifically averred in the written statement, in affirmation of the stand taken throughout that it is incorrectly asserted by the plaintiffs that the first defendant is bhumidhar of the entire land comprised of property in

Schedule B to the plaint. Rather, the first defendant had a half share in the property described in both Schedules, both of which he has sold; one to the plaintiffs vide registered sale deed dated 11.11.1980, as detailed hereinbefore.

14. Defendant no.4, Ram Palat too filed a written statement and more or less affirmed the case of his vendor, defendant no.1. Amongst others, two pleas were raised: one about the transaction being entered into in good faith and for valuable consideration, that he contracted after making necessary inquiries in the Revenue Records, where he found defendant no.1 recorded with a half share over land detailed in Schedule A; and, the second on behalf of both defendants, a plea taken that the objections raised by the plaintiffs to impeach the title of defendant no.1 is barred by Section 49 of the U.P. Consolidation of Holdings Act (for short the Consolidation Act), inasmuch as, chakbandi operation had intervened and during that time, the name of defendant no.1, that was recorded over land detailed in Schedule A to the plaint to the extent half share was not objected to. Pleas of bar under Section 115 of the Indian Evidence Act, besides Sections 38 and 41 of the Specific Relief Act, were also raised, saying that no relief could be granted.

15. The aforesaid pleadings of parties led the Trial Court to frame the following nine issues:

"1. Whether the plaintiffs were the sole owner in possession of the land in suit?

2. Whether the sale deed dated 11.11.80 is liable to be cancelled?

3. Whether the suit is barred by Section 49 of U.P. C.H. Act?

4. Whether the suit is barred by Section 115 of Indian Evidence Act?

5. To what relief, if any, the plaintiffs are entitled?

6. Is the suit barred by Section 38 and 39 of Specific Relief Act?

7. Is the suit is barred by time?

8. Had the Civil Courts no jurisdiction?

9. Are defendants 2 to 4 are entitled to the benefit of section 41 of Transfer of Property Act?"

16. The Trial Court dealt with issues nos.1, 2 & 9 together and returned findings on evaluation of evidence, in the manner that in answer to issue no.1, it was held that defendant no.1, Moti and the plaintiffs, each had a half share in land comprising both khasra plot numbers shown in Schedules A and B to the plaint. On the second issue, it was held that since the first defendant, Moti had a half share in land comprising khasra no.2596 (54 decimals), the said defendant had a right to execute the impugned sale deed dated 11.11.1980 in favour of defendants nos.2 & 3. In consequence, it was further held that the sale deed was not liable to be cancelled. During the course of these findings on issues nos.1, 2 & 9, amongst many facts noticed and relevant facts decided, besides the facts in issue, the Trial Court held that Kanhai and Mittu were brothers, that is to say, sons of the same father. In reaching this finding, the Trial Court has taken due note of the fact that the pedigree propounded in the plaint as originally framed, clearly showed Mittu to be a brother of Kanhai and the parties descended of a common ancestor. Lateron, the plaintiffs projected the first defendant as a stranger, and then a rank

trespasser through an amendment to the plaint made specifically. The Trial Court in conclusion finding for the defendant on issues nos.1, 2 & 9, dismissed the suit. It must be remarked, however, that issue no.8, that is, whether the Civil Court has jurisdiction to try the suit, was decided in the affirmative and in favour of the plaintiffs, holding that the Civil Court had jurisdiction.

17. The lower Appellate Court went into a very detailed analysis of evidence on merits concurring with the Trial Court, holding for added reasons that the plaintiffs and the defendants, each had a half share in both khasra nos.2787 (20 decimals) and 2788 (54 decimals), which the first defendant was competent to transfer. It is not the jurisdiction of this Court to look into the validity of those findings of fact, that have been recorded for good and sufficient reason based on evidence, from which conclusions drawn by the lower Appellate Court are quite plausible. The matter would have ended at that, in case the lower Appellate Court, like the Trial Court, had not gone into the issue of the jurisdiction of the Civil Court to try the suit. However, the lower Appellate Court did that and came to a conclusion contrary to that of the Trial Court. It was held by the lower Appellate Court that the Civil Court had no jurisdiction to try the suit, which would be exclusively cognizable by the Revenue Court.

18. Concerning the issue of jurisdiction, the lower Appellate Court has done a commendable job of marshalling facts and evidence, and drawing conclusions tested on well supported propositions of law to conclude on the issue of jurisdiction in favour of ouster of the Civil Courts. The relevant part of the findings recorded by the lower Appellate Court would be best expressed in the words of that Court as they occur in the impugned judgment, which read thus:

"The fact of the present case is some what dissimilar as the plaintiff is seeking cancellation of the sale deed on the ground that the vendor has got no right to transfer the land as the plaintiffs are exclusive owner of the land in suit. Whereas, the name of defendant's vendor have been recorded in revenue records from 1347F up till now and even in consolidation operation no protest was made by the plaintiff nor any protest application was made in revenue court after consolidation operation for correction of records. Therefore in the garb of cancellation of sale deed plaintiffs are seeking declaration that they are exclusive owner of the land in suit. It is not possible to cancel the sale deed before finding that the defendant no.1 has been wrongly entered as co-sharer with the plaintiff on the land in suit and the plaintiffs are exclusive owner in possession of the land in suit. This act is within the jurisdiction of revenue court, under Section 229B of the Z.A. & L.R. Act.

Learned counsel for the appellant has cited 1991 Supreme Court page 2234 and argues that the compromise decree signed by counsel and not by parties in person is binding, executable and operates as resjudicata, even if it extends beyond subject matter of suit. But this ruling is not applicable in the present case because no compromise was entered into between the plaintiffs and defendant-1 in consolidation operation and the compromise entered into by the mother of the plaintiffs and Motii has been

challenged and after attaining the age of majority of plaintiffs their mother had got no right to enter into compromise. Learned counsel for the appellant has cited 1984 A.L.J. page 1132 and argues that the suit for cancellation of a sale deed would lie in Civil court and the court can go into the question of title. But this ruling is applicable where some fraud had been committed to deprive real owner of his property. He has also cited 1976 A.W.C. page 585 and argues that it is open to a person to show that the entries in the record of rights prepared in accordance with sec.27(1) of C.H. Act showing some other person as Bhumidhar were not true. In the same ruling it has been held that the decision of Consolidation Authority that a person was Bhumidhar became final and such Bhumidhar transferred the land. Suit for cancellation of such deed is not barred by section 49 if the plaintiff alleges that she was in actual possession of the land in suit in lieu of maintenance. But here the fact is different where there is continuous entries in the revenue records of the name of Natththu and after his death his son Moti. In consolidation operation no protest petition was moved by the plaintiff and finally Moti was recorded as co-bhumidhar with the plaintiffs. Learned counsel for the appellant has cited AIR 1974 Supreme Court page 1657 and argues that the bar of section 49 of C.H. Act is only where the question arises out of the consolidation proceedings, but where the question is whether ''B' was the heir of ''A' which was involved in the suit such case is not barred by Section 49.

In the above circumstances seeing the fact of the present case, the pith and substance of the suit is to declare that Moti and Naththu were never Sah Khatedar co-Bhumidhar with the plaintiffs of old plot no.2788 which is nothing but declaration of title and barred by Section 331 Z.A. & L.R. Act and 49 of C.H. Act."

19. So far as this Court is concerned, this appeal was admitted to hearing primarily on the substantial question of law concerning ouster of jurisdiction of the Civil Court, which if ousted, the appropriate course to follow for the Court in accord with the law. There is also a question about the jurisdiction of the Civil Court being barred by Section 49 of the Consolidation Act.

20. This Court may remark at once that the lower Appellate Court in returning its findings about the issue of jurisdiction of the Civil Court being barred, has held it barred, both under Section 331 of the U.P. Z.A. & L.R. Act and Section 49 of the Consolidation Act. In case it were to be held that the Civil Court has no jurisdiction to try the suit in view of the bar under Section 331 of the U.P. Z.A. & L.R. Act, this Court is of opinion that there would be no further necessity for the lower Appellate Court to opine about the bar under Section 49 of the Consolidation Act. This is for more than one reason. In the event, the suit is held barred under Section 331 of the U.P. Z.A. & L.R. Act, the moment the Civil Court has reached that conclusion, it should have laid its hands off from opining about the suit being barred under Section 49 of the Consolidation Act. The Civil Court, once it holds its jurisdiction ousted, recording any other finding about the bar to that suit under some other provision of law, would be of no consequence. The Civil Court having found itself to be a Court, not competent to try the suit, all its findings on any other

or further issues, would also be without jurisdiction. It is not that, that the Civil Court would on the one hand hold that it has no jurisdiction to try the suit vis-à-vis its subject matter and at the same time pronounce upon other issues of fact and law. The issue whether the plaintiffs' claim is barred under Section 49 of the Consolidation Act, is a question of law affecting the rights of the plaintiffs. It can be decided by a Court of competent jurisdiction alone; not by a Court that holds itself out of jurisdiction.

21. There is a more fundamental reason why the lower Appellate Court ought not to have decided the issue of the declaration sought by the plaintiffs being barred by Section 49 of the Consolidation Act. That reason is this. The bar under Section 331, that has been upheld by the lower Appellate Court, is a bar properly so called one as to jurisdiction of the Civil Court to try the suit. It is about the forum that would be competent, but in no way does it bar the plaintiffs' right. Once the plea of bar of the Civil Court's jurisdiction is accepted, all that happens is that instead of the Civil Court, it is the competent Revenue Court that has jurisdiction. That finding does not defeat the plaintiffs' claim, but only sends them to another forum. The bar under Section 331, therefore, is properly speaking a bar as to subject matter, which in no way defeats the plaintiffs' claim. The bar of Section 49 of the Consolidation Act that the lower Appellate Court has held attracted to the plaintiffs' suit is not a bar to the jurisdiction of the Court regarding subject matter, pecuniary or territorial. It is a bar in its nature to the plaintiffs' claim itself; it is a bar if held to apply would prevent the plaintiffs from enforcing their claim before any other Court or forum. The bar under Section 49 of the Consolidation Act destroys the plaintiffs' right and the remedy both, to enforce their claim. It is not a bar to the jurisdiction of the Court, like that under Section 331 of the U.P. Z.A. & L.R. Act. The lower Appellate Court, having found that the Civil Court had no jurisdiction, ought not have pronounced upon the bar pleaded under Section 49 of the Consolidation Act, that has the effect of destroying the plaintiffs' right and remedy. In this appeal also, **by extension of the principle that a Court that holds against its jurisdiction to decide, ought not to decide anything more, this Court would refrain from answering substantial question of law no. (ii), but with the remark that the Court in a suit where it holds no jurisdiction in itself to decide, ought not to decide the question about the bar under Section 49 of the Consolidation Act.** It must also be said here that the conclusions and the answer to question no. (ii) is in keeping with the conclusions and answer rendered by this Court, in reference to substantial question of law no. (i) recorded during the course of this judgment, a little later.

22. Now, turning to the issue whether the Civil Court's jurisdiction is, indeed, barred under Section 331 of the Consolidation Act, it must be remarked that the thin line of distinction between the jurisdiction of the Civil Court to cancel a document, which power alone the Civil Court enjoys, and a case where behind the façade of cancellation what is substantially claimed, is a declaration of title to agricultural land by one of the parties, is all that would make a difference about the forum. This has always been a tricky ground for Courts to tread in individual cases, but the law about it is

well settled. It would be profitable to do a survey of authority about the issue that has classically engaged the attention of Courts over a long period of time, including this Court and their Lordships of the Supreme Court. The controversy about the proposition as to circumstances in which a given suit styled as cancellation would be cognizable by the Civil Court, and where notwithstanding the form of relief, the Civil Court's jurisdiction would be ousted under Section 331 of the U.P. Z.A. & L.R. Act in favour of the Revenue Court, came up before a Full Bench of this Court in Ram Padarath and Ors. vs. Second Addl. District Judge and Ors1. Their Lordships of the Full Bench after an extensive review of authority held:

"41. We are of the view that the case of Indra Deo v. Smt. Ram Piari 1982 (8) ALR 517 has been correctly decided and the said, decision requires no consideration, while the Division Bench case, Dr. Ayodhya Prasad v. Gangotri, 1981 AWC 469 is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void document will lie in the revenue court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting (his relief permissible under law except when a declaration of right or status of a tenure-holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void document which made him to approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue court."

23. The issue fell for consideration of the Supreme Court in S**mt. Bismillah vs. Janeshwar Prasad and others**2, where it was held thus:

"7. It is settled law that the exclusion of the jurisdiction of the civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. The provisions of a law which seek to oust the jurisdiction of civil court need to be strictly construed. Section 331 of the Act has been the subject of series of pronouncements of the High Court as to the circumstances and the nature of the suits in which its exclusionary effect operates. Distinction was sought to be drawn between the class of cases where the binding effect of a deed had had to be got rid of by an appropriate adjudication on the one hand and the class of cases in which a transaction could be said to be void in law where what the law holds to be void, there is nothing to cancel or set aside on the other. In the former case, it was held, a suit was cognisable by the civil court while in the latter, it was not, it being open to the statutory authority to take note of the legal incidents of what was non est.

8. In the instant case, the High Court has construed, in our opinion not quite correctly, appellant's pleadings to amount to a plea of nullity of the sales and has held that the prayer for cancellation of the sale deeds was "simply illusory' and that such a relief was neither necessary nor appropriate in the context of a plea of nullity. The High Court has further held that the relief of possession, though

appearing to be a consequential relief, was really the main relief and would fall within the statutory jurisdiction.

9. It is true that the question of jurisdiction depends upon the allegations in the plaint and not the merits or the result of the suit. However, in order to determine the precise nature of the action, the pleadings should be taken as a whole. If as, indeed, is done by the High Court the expression "void' occurring in the plaint as descriptive of the legal status of the sales is made the constant and determinate and what is implicit in the need for cancellation as the variable and as inappropriate to a plea of nullity, equally, converse could be the position. The real point is not the stray or loose expressions which abound in inartistically drafted plaints, but the real substance of the case gathered by construing pleadings as a whole. It is said "Parties do not have the farsight of prophets and their lawyers the draftsmanship of a Chalmers".

11. The assumption underlying the reasoning of the High Court is that if the action had really been one based on the need for the cancellation of the deeds, without which possession could not be granted, the civil court would have had jurisdiction. The cause of action in the appellant's suit does admit of being brought within this class of cases.

12. The common law defence of non est factum to actions on specialities in its origin was available where an illiterate person, to whom the contents of a deed had been wrongly read, executed it under a mistake as to its nature and contents, he could say that it was not his deed at all. In its modern application, the doctrine has been extended to cases other than those of illiteracy and to other contracts in writing. In most of the cases in which this defence was pleaded the mistake was induced by fraud; but that was not, perhaps, a necessary factor, as the transaction is "invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law never did sign, the contract to which his name is appended" [Chitty on Contracts, 25th edn., p. 341].

13. Authorities drew a distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. It was held that the defence was available only if the mistake was as to the very nature or character of the transaction.

14. In Foster v. Mackinnon [(1869) LR 4 CP 704 : 38 LJCP 310], Mackinnon, the defendant was induced to endorse a bill of exchange on the false representation that it was a guarantee similar to one he had signed on a previous occasion. He was held not liable when sued even by an innocent endorsee of the bill. Byles, J. said:

"... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the "actual contents' of the instrument."

15. This decision was referred to with approval by this Court in Ningawwa v. Byrappa [(1968) 2 SCR 797 : AIR 1968 SC 956]. It was observed: (SCR pp. 800-01)

"It is well established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is

avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded."

This would be a voidable transaction. But the position was held to be different if the fraud or misrepresentation related to the character of the document. This court held: (SCR p. 801)

"The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable."

(emphasis supplied)

However the House of Lords in Saunders v. Anglia Building Society [1971 AC 1004 : (1970) 3 All ER 961] reviewed the law and held that the essential features of the doctrine, as expressed by Byles, J. in Foster v. Mackinnon [Chitty on Contracts, 25th edn., p. 341] , had been correctly stated. Lord Reid, however, observed: (AC headnote at p. 1005)

"The plea of non est factum could not be available to anyone who signed without taking the trouble to find out at least the general effect of the document. Nor could it be available to a person whose mistake was really a mistake as to the legal effect of the document. There must be a radical or fundamental difference between what he signed and what he thought he was signing."

16. However the distinction based on the character of the document and the contents of the document was considered unsatisfactory. The distinction based on the character and contents of a document is not without its difficulties in its practical application; for, in conceivable cases the "character' of the document may itself depend on its contents. The difficulty is to be resolved on a case by case basis on the facts of each case and not by appealing to any principle of general validity applicable to all cases. Chitty on Contracts ["General Principles" 25th edn, para 343, page 194] has this observation to make onSaunders decision [(1968) 2 SCR 797 : AIR 1968 SC 956] :

"....It was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. But it was nevertheless held that in exceptional circumstances the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have concentrated on the disparity between the effect of the document actually signed, and the document as it was believed to be (rather than on the nature of the mistake) stressing that the disparity must be "radical", "essential", "fundamental", or "very substantial."

In the instant case, prima facie appellant seems to proceed on the premises that she cannot ignore the sales but that the sales require to be set aside before she is entitled to possession and other consequential reliefs."

24. In **Smt. Bismillah (supra)**, their Lordships of the Supreme Court approved the decision of the Full Bench of this

Court in **Ram Padarath (supra)** though with the remark that "In any view of the matter, the present action would be covered by the pronouncement of the Full Bench. It is not necessary to go into the correctness of the view of the Full Bench as its correctness was not assailed before us."

25. The point involved here is well illustrated on the facts involved in the decision of their Lordships of the Supreme Court in **Shri Ram another vs. Ist Addl. Distt. Judge and others**3, where the dispute was to the effect that the plaintiff had filed a suit for cancellation of the sale deed involved there before the Civil Court to the extent of half share claimed by the plaintiff, together with recovery of possession of that half share. In that context, which is more or less similar to the context on facts here, it was held thus:

"6. The said decision is distinguishable and is of no help to the case of the respondents. The observation quoted above has to be understood in the context of the fact of the case. In the case, the plaintiff had filed a suit for cancellation of the sale deed to the extent of half-share claimed by the plaintiff and also an award of possession of the plaintiff's share. In the suit, it was alleged that the vendor had no title to the extent of half-share in the land and, therefore, the sale deed to that extent is void. In the said case there was no prima facie title in favour of the plaintiff and his title to the land and delivery of possession was required to be adjudicated.

7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

26. From the aforesaid decisions what emerges is that where a tenure holder is in recorded possession of the property relating to which a conveyance or instrument executed is sought to be cancelled on grounds like fraud, coercion or undue influence - anything that would vitiate a contract rendering the same voidable or even void, a suit in the Civil Court would be maintainable. But, in a case where in order to seek the relief of cancellation, the plaintiff has to establish his right or title to the suit property, as in the present case, where the plaintiffs claim to be the owners of the whole of the suit property detailed in Schedule A to the plaint, whereas the defendants claim a half share there and are recorded to that extent, the jurisdiction of the Civil Court would certainly be ousted in favour of the statutory jurisdiction of the Revenue Court under Section 331. In a case like the one in hand where on facts the defendants have been found recorded to

the extent of a half share over the suit property detailed in Schedule A, along with the plaintiffs, the principal relief that the plaintiffs seek is to establish that they are owners of the whole of it, and not just half of Schedule A property, as the defendants assert. This is essentially a declaration of rights and title to the said property to the complete exclusion of the defendants, which the Revenue Court alone can grant. The relief of cancellation sought in the suit would be a necessary incident of an appropriate declaration in tune with the substance of the relief which the plaintiffs seek. Once relief in accordance with the substance of the plaintiffs' claim is sought before the competent Court of revenue jurisdiction, the relief of cancellation would be incidental and may be just a surplusage. In this view of the matter, this Court is in agreement with the lower Appellate Court that the suit is not maintainable before the Civil Court.

27. This takes the matter directly to the issue that where the Civil Court holds the suit barred by Section 331 of the U.P. Z.A. & L.R. Act, what would be the proper disposition of the suit. Would it lead to a decree dismissing the suit on merits, while answering other issues referable to the merits of the plaintiffs' claim, or the Civil Court ought just return the plaint under Order VII Rule 10 CPC for presentation to the competent Court?

28. Proceeding on the well settled principle that a Court which has no jurisdiction to determine a suit ought not decide it, there is no difficulty to hold that once it is found that the Court has no jurisdiction to decide the suit, it ought not to dismiss for that reason; the plaint should instead be ordered to be returned for presentation to the competent Court. It is also not that this course is open to the Trial Court alone, or that it is confined to early stages of the Trial. The words of Order VII Rule 10 CPC express with great felicity the clear intent of the legislature that the power to return a plaint can be exercised at any stage of the suit. The explanation added to Rule 10 of Order VII CPC vide CPC Amendment Act no.104 of 1996 has made the position explicit that a Court of appeal or revision, may also direct return of the plaint after setting aside the decree passed in a suit, in the exercise of powers under the said Rule. In this connection, the provisions of Order VII Rule 10 CPC may be quoted:

"10. Return of plaint.--(1) Subject to the provisions of Rule 10-A, the plaint shall] at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Explanation.--For the removal of doubts, it is hereby declared that a court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.

(2) Procedure on returning plaint.--On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

29. There is, thus, apparently no difficulty to conclude that at whatever stage of the suit, be it in appeal from the original decree, or in appeal from the appellate decree, or in revision at an interlocutory stage, wherever the Court in seisin of those proceedings finds that the suit is not cognizable by the Court, it can and must at once set aside the decree or

order, and direct return of the plaint. This is most true in cases where any Court finds lack of jurisdiction with reference to subject matter of the suit. There could be some different principles in case of objection as to territorial or pecuniary jurisdiction, particularly, territorial, if it be not raised at the earliest stage, but with regard to subject matter of the suit if the Court at any stage of the proceeding, or a higher Court in appeal or revision finds that the suit is not cognizable by the Court which has determined it on merits, the determination of a Court sans jurisdiction must be nullified with an order for return of the plaint to the Court of competent jurisdiction

30. This view of the law has been preponderant except for a few decisions where the view expressed has classified cases into those where objection is taken at the earliest or considered at the earliest, and those where the entire trial of the suit has gone through. In the former class of cases, there is no discordant view expressed in any decision that a suit held to be not cognizable by the Court, must lead to a return of the plaint provided that there is a Court competent to entertain the suit. In the other class of cases where the entire trial has gone through, and may be the matter is in appeal or second appeal where all issues of law and fact have been decided, it is also found that the Court had no jurisdiction over the subject matter of the suit, the view expressed in certain authorities is that in such a case, the suit must fail. However, this line of decisions are in marginal minority, and not certainly in accord with the view of their Lordships of the Supreme Court. It would be profitable to do a survey of authorities on the point.

31. One of the earliest decisions about this issue is of a Division Bench of this Court in **Ram Jas Singh vs. Babu Nandan Singh**4, where the question was that the suit that was instituted by the plaintiff/ appellant in that case before the Assistant Collector, was styled as a suit under Section 160 of the Agra Tenancy Act. The Assistant Collector trying the suit, however, found it to be a suit for contribution by one judgment-debtor against others for the excess share which he had paid to the creditors. The Assistant Collector held that he had no jurisdiction to decide that suit and dismissed it. It figures in the judgment of this Court there that no evidence was recorded. The decree was affirmed by the District Judge, where the ground urged was that if the Deputy Collector found that he had no jurisdiction, he ought to have ordered return of the plaint instead of dismissing the suit. The same ground was urged before this Court, where it was held by **Ryves and Stuart, JJ.:**

"..... In second appeal the plaintiff presses the third ground taken in his memorandum of appeal namely that the court should have returned the plaint for presentation to the proper proper court. It seems to us that the trial court could certainly have returned the plaint to the plaintiff on finding that it had no jurisdiction to try the suit but did not do so. In the same way the appellate court we think could have done what the trial court could have done and we think under the circumstances that this was the proper procedure for the court to have adopted. Under the circumstances we allow the appeal and direct the learned District judge to order the plaint to be returned to the plaintiff for presentation to the proper court. ....."

32. The same view was expressed by another Division Bench of this Court in

Kallu vs. Phundan5, where a suit for partition of a grove was dismissed by the Munsif, but on appeal by the plaintiff, the decree of dismissal was set aside with an order of remand to the Trial Court. The said order of remand was challenged in appeal to this Court by the defendant. Here, it was the defendant's case that the plaintiff had no right or title to the grove, and therefore, the Munsif held that he had no jurisdiction to entertain the suit. It was noticed that despite holding that he had no jurisdiction, the Munsif went on to record a finding on merits that the plaintiff had no title to the grove. It was also recorded by this Court that the learned Judge in appeal rightly held that the Munsif having held that the Civil Court had no jurisdiction, ought not to have determined other issues on merits. The learned Judge in appeal, however, differed from the finding of the learned Munsif that the suit was not cognizable by the Civil Court. He, therefore, remanded the suit to the Munsif to try it afresh on merits regarding question of title etc. Before this Court, the Appellate Judge's view that the suit was cognizable by the Civil Court was assailed. It was contended that the plaintiffs were not grove holders, but mere tenants according to the plaint case. This Court on consideration of the plaintiffs' case and evidence found that the parties cannot be held to be grove-holders. Their status can only be that of a tenant. It was held that the suit was one for the division of a tenant's holding, which was under the fourth Schedule to the Tenancy Act, cognizable by the specified Court. It was, therefore, not cognizable by the Civil Court. It was maintainable in the Revenue Court. The order of the lower Appellate Court remanding the case to the learned Munsif was, therefore, set aside, but agreement was expressed with the learned Judge by their Lordships of the Division Bench that the learned Munsif having held the suit not cognizable by the Civil Court should not have tried issues on merits. This Court in the circumstances held that the proper order to make was one for return of the plaint for presentation to the proper Court. The relevant part of the decision in **Kallu vs. Phundan (supra)** reads thus:

"6. It is not denied that a suit for the division of a tenant holding is a suit of the nature specified in sch. 4, Tenancy Act. That being so, the civil Court cannot take cognisance of such a suit. Thus the present suit, if it is maintainable (a question on which we express no opinion), can be only in the revenue Court. We are, therefore, unable to uphold the finding of the lower appellate Court that the suit was cognisable by the civil Court. We agree with the learned Judge, however, -- as we have already stated-- that the Munsif should not have recorded any finding on issue No. 2 which related to the title of the plaintiff. We also agree with him that, instead of dismissing the suit, the Munsif should have returned the plaint to the plaintiff for presentation to the proper Court. ....."

33. The question again figured before the Nagpur High Court in **Dr. Purshottam Vithal vs. Dr. G.V. Pandit**6, where the issue was whether an Election Petition under Section 20-A of the C.P. and Berar Municipalities Act, 1922, that was cognizable by the Civil Judge (Class I), but had been filed in the Court of the First Additional District Judge, could be dismissed by that Court. It was held by the High Court that the proper order to make was one for return of the petition to be presented to the Court

that had jurisdiction. The order of dismissal passed by the Additional District Judge was not approved. The relevant part of the decision in **Dr. Purshottam Vithal (supra)** reads thus:

"9. Both the petitions under consideration were presented in the Court of the First Additional District Judge and the deposits were also made in the same Court. But the Civil Judge (Class I) alone was empowered to deal with the petitions. The petitioners expressly invoked the jurisdiction of the Court of the First Additional District Judge and the petitions presented by them were received by the Judge quathe First Additional District Judge, Yeotmal. In fact the learned Civil Judge could not have dealt with the petitions which were originally on the file of the Court of the First Additional District Judge as Civil Judge (Class I) from 18th December 1947. The procedure in the Court below went wrong from that date. The corrections in the order sheets were presumably made on that date. The petitions were never presented to the Civil Judge (Class I), the original petitions were not amended and the petitioners never invoked his jurisdiction. The ptitions should first have been disposed of in the same capacity in which they were received before they could be dealt with in another capacity. So the proper order which the learned Judge could have passed on the petitions was not one of dismissal. The learned Judge felt some difficulty on the ground that there is no provision for returning the petitions to be presented to the Judge with jurisdiction to deal with them. Though O. 7, R. 10 of the CPC, does not in terms apply, that rule has to be read with S. 141 of the Code. Where a Court finds that it has no jurisdiction to deal with an application in circumstances like those present here, the order should be not one of dismissal but of returning the application for presentation to the Judge having jurisdiction to deal with the matter: see Ram Jas Singh v. Babu Nandan Singh, 44 ALL. 686 : (A.I.R. (9) 1922 ALL. 424) and Secretary of State v. Natabar Mangraj, 6 Pat. 358 : (A.I.R. (14) 1927 Pat. 254)."

34. Echoing the same principle that where the Court does not find itself possessed of jurisdiction, the proper course is not to dismiss the suit, but to make an order for return of the plaint, a Division Bench of the Madras High Court in **T. Krishnaveni Ammal vs. The Corporation of Madras**7, held:

"As observed by the learned Judges in Immandi Appalasami v. Rajah of Vizianagaram, 25 M.L.J. 50, the definition of rent in S. 3, Cl. 11 of the Madras Estates Land Act does not require that the raiyat in possession should actually use the land for the purpose of agriculture. We agree with the learned Judge on a reading of the plaint that the suit should be treated as one for recovery of rent due from ryoti land. The suit should have been filed in a revenue Court and not in a civil Court. As we have found that the civil Court has no jurisdiction to entertain the suit, the proper course is to direct the return of the plaint to the plaintiff for presentation in the proper Court. We allow the appeal, set aside the decree of dismissal passed by the learned Judge, and direct that the plaint be presented to the proper Court, namely, the revenue Court. There will be no order as to costs in this appeal. Costs of the suit will abide the result. The court fee paid on the memorandum of appeal will be refunded to the appellant."

35. Similarly, in **Chittaruvu Radhakrishna Murty vs. Bollapalli Chandrasekhara Rao**8, a learned Judge of the Andhra Pradesh High Court held in the context of the Court finding lack of territorial jurisdiction, thus:

"10. The lower Court therefore was obviously wrong in stating that Section-20 C.P.C. has no application to the facts of this case. Section 20(c), as stated above, applies. In the view which I have taken, it is not necessary to consider in this case whether the common law principle that the debtor must seek the creditor applies to a negotiable document or not. Consequently, the case cited in the judgment of the court below, S. Eshwarayya v. Devi Singh[1953 Hyd. 289.] need not be considered. That case decides that the principle that the debtor must seek the creditor does not apply to a negotiable document. Since I have held that a part of the cause of action, because of transfer arose at Vijayawada, it is unnecessary to consider that principle in this case. In any case the lower Court was wrong in dismissing the suit. Even assuming that the court at Vijayawada had no jurisdiction, the court ought to have returned the plaint for its presentation to the proper Court. The suit could not be dismissed on that ground."

36. The most authoritative pronouncement on the issue is by a three Judge Bench of their Lordships of the Supreme Court in **Sri Athmanathaswami Devasthanam vs. K. Gopalaswami Ayyangar**, where their Lordships were concerned with a suit for recovery of rent and ejectment filed against a ryot by a landholder under the Madras Estates Land Act, that was triable by the Collector, but had been wrongly filed before the Civil Court. The Trial Court on the issues arisen between parties had determined the suit on merits and dismissed it. The High Court, however, also held that the suit could be instituted only in the Revenue Court, and therefore, set aside the decree with an order for return of the plaint to the plaintiff/ appellant for presentation to the proper Court. At the same time, however, the High Court proceeded to decide the cross-objection on merits and dismissed it. It was in the context of the aforesaid facts and lack of jurisdiction in the Civil Court vis-à-vis subject matter of the suit found by the High Court in appeal that their Lordships of the Supreme Court approved the order of the High Court ordering return of the plaint ruling out dismissal of the suit on merits. However, the order deciding the cross-objection on merits was set aside. It was held, thus, by their Lordships in **Sri Athmanathaswami Devasthanam (supra):**

"14. The last point urged is that when the civil court had no jurisdiction over the suit, the High Court could not have dealt with the cross-objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. This contention is correct. When the Court had no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint."
(Emphasis by Court)

37. This question again arose before a Judge of this Court in **Kailash Chandra Agarwal vs. Subhash Chand Satish Chand Viyopari**10, where in a most eloquent statement of the law, it was held

by this Court on facts in that case the question of jurisdiction could alone be decided at the end of the trial, but at the conclusion of trial, the Court having found it had no jurisdiction, could not have proceeded to dismiss the suit. It should have ordered return of the plaint. It was held by this Court, thus, in Kailash Chandra Agarwal (supra):

"3. I must also observe that this was one of those cases where the question of jurisdiction could not be decided as a preliminary issue in view of the fact that it could be decided only after recording the oral evidence of the parties, and evidence cannot be recorded piecemeal. The question of jurisdiction could thus be decided only after the entire trial had been gone through and the fact that it was thus decided along with the decision of the other issues, could not be a ground for dismissing the suit instead of ordering the return of the plaint on arriving at the finding that the court had no jurisdiction to try the suit. Under the circumstances, the only just and proper order to pass was to direct the return of the plaint for presentation to the proper court having jurisdiction to entertain the suit. For the fault of bringing the suit in wrong court the plaintiff could be penalised by making him liable to pay the defendants' costs in the trial court."

38. The aforesaid issue again came up before this Court in **Gulab and others vs. Jaggan Ram Singh and others**11, where this Court held that an old Full Bench Decision reported in **Mst. Ananti vs. Channu**12 (to which reference has been made in the context of the authority next considered in this judgment) is no longer good law in view of the authority of the Supreme Court in Sri Athmanatha-swami Devasthanam (supra). It was held by this Court in Gulab and others (supra) that the jurisdiction can be challenged anywhere, at any stage, and once it is held that the Court has no jurisdiction, it could neither decree the suit or dismiss it. It was held by this Court in Gulab and others (supra) thus:

"4. I am of the opinion that in view of Athmanathaswami Devasthanam's case (supra) decided by the Supreme Court, the Full Bench case of Mst. Ananti was no more good law. It has been held in AIR 1954 SC 340Kiran Singh v. Chaman Paswan where an order was passed without jurisdiction it could be challenged anywhere at any stage. As the Courts below have given a finding that they have no jurisdiction to entertain the suit any further finding or decision given by them would be without jurisdiction. They could neither decree the suit nor dismiss it.

5. Under the circumstances I am bound to follow the law laid down by AIR 1965 SC 338 in case of Athmanathaswami (supra).

6. The learned counsel for the respondent argued that the case of that Athmanathaswami (supra) was considered by the learned single Judge in the case of Devi Dutt Sharma (1979 All LJ 1086) (supra). From the judgment it appears that the learned single Judge referred to that case in para 3 of the judgment but how that case was not applicable is not indicated in the judgment. Consequently I hold that the Courts below were not justified in dismissing the suit."

39. This Court, however, in **Lal Bahadur Singh and another vs.**

Bagesara and others13, went into the distinction between cases where the question as to lack of jurisdiction is raised and decided at the earliest, and those cases where parties go to trial completing the entire course, or may be in appeal where it is found that the Court had no jurisdiction to try the suit. This distinction appears to have its genesis in the Full Bench decision of this Court in **Mst. Ananti vs. Channu (supra)**, where it was held that in cases where after trial of the suit on all issues, the Court also holds that it had no jurisdiction, the suit must be dismissed and the plaint not returned. In **Lal Bahadur Singh and another (supra)**, the case arose out of an order of the Appellate Court where the Trial Court framed as many as eight issues in a suit for declaration that the plaintiffs were bhumidhars of the land, and the revenue entry in favour of the defendants was wrong. The Trial Court decided all issues and also held that the Civil Court had no jurisdiction to try the suit. The suit was dismissed. In appeal, the lower Appellate Court did not examine the findings on other issues, but merely dealt with the issue of jurisdiction. Expressing agreement that the suit was not triable by the Civil Court, the Appellate Court set aside the decree of dismissal, and substituted it by an order for the return of plaint for presentation to the proper Court. Two appeals, both by the plaintiffs and the defendants, were carried to this Court from the order for return of the plaint. It was in the context of the said facts that this Court in Lal Bahadur Singh and another (supra) held thus:

"6. The question that has been canvassed before me is about the form of the order that ought to be passed by the Court in such cases. No difficulty arises when an order for return of the plaint under Order 7, Rule 10, C.P.C., or of rejection of the plaint under Rule 11, is passed. The real difficulty arises in the other cases. According to Sri R.N. Singh, when once the Court enters upon adjudication of all the controversies of merit, the Court has no option left but to finally determine all these issues and if it finds that it has no jurisdiction in the matter, it must dismiss the suit instead of ordering return of the plaint for presentation to the proper Court. Sri Sankatha Rai, on the other hand, contended that once the Civil Court finds that it had no jurisdiction, it must stay its hands at once and should order return of the plaint without further venturing to decide any other issue or to express its opinion on merits. According to the following rule laid down in Athmanath Swami Devasthanam v. K. Gopalaswami Ayyangar, AIR 1965 SC 338:--

"When the Court had no jurisdiction over the subject matter of the suit, it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint." He contended that return of the plaint was the only proper course for the Court.

7. This case was referred to by the learned single Judge who decided the case of Devi Datt Sharma (1979 All LJ 1086) (supra) also. According to the learned Judge where the Court, as a matter of caution, records all findings on issues touching merits of the controversy in addition to the issue of jurisdiction, the order has to be of return of plaint because the other findings in such a case have no legal effect. These are recorded only for facilitating the higher Courts and avoidance of a remand in case they come

to a different conclusion on the question of jurisdiction. After briefly referring to the above Supreme Court decision, the learned Judge proceeded to consider an earlier Full Bench decision of this Court in Smt. Ananti v. Chhannu AIR 1930 All 193 and held that if after going to the trial of the suit on all the issues the Court ultimately holds that it had no jurisdiction in the matter, it must result in an order of dismissal of the suit. It may, however, be mentioned here that in Smt. Ananti's case, the controversy was raised in an altogether different manner and the facts were also quite different. There a suit had been filed in the Civil Court and after the written statement had been filed, the Munsif entertained a serious doubt as to whether the Civil Court could take cognizance of the suit. He, therefore, framed two questions and made a reference to the High Court. It was while answering the reference that the Full Bench had made the following observations which are also quoted by the learned Judge in his decision (1979 All LJ 1086).

"The plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts, he will get his relief from the forum chosen. If he framed his suit in a manner not warranted by facts and goes for his relief to a Court which cannot grant him relief, on the true facts, he will have his suit dismissed. Then there will be no question of returning the plaint for presentation to the proper Court, for the plaint, as framed, would not justify the other kind of Court to grant him the relief. But we are told that although the plaintiff has chosen his forum rightly, the defendant, if he so wishes, may, merely by saying something in his defence-something the correctness of which he need not take the trouble to establish, oust the jurisdiction of the Court and compel the plaintiff to go to another Court."

8. What has been decided by the Supreme Court in Devasthanam's case (AIR 1965 SC 338) (supra) is that while holding that the Court had no jurisdiction to decide the particular suit, no decision on merit on any point involved therein should be made. It, however, does not lay down that if the Court has no jurisdiction then it had no right to dismiss the suit and must necessarily direct return of the plaint for presentation to the proper Court. The view taken to the contrary in 1983 Rev. Dec. 185 : (AIR 1983 All 145), therefore, does not appear to be wholly correct. In every case, it has to be seen whether on the allegations made in the plaint the suit was not maintainable in the Civil Court if so, the plaint had to be returned. But if the question of jurisdiction depends on decision of other questions on merit, then it is not necessary that the Court should always return the plaint. The Court has a discretion either to dismiss the suit after recording a finding that it had no jurisdiction and may in appropriate cases also direct return of the plaint without dismissing the same. It will depend upon the facts of each case and the broad principles have been rightly laid down in the Full Bench decision inSmt. Ananti's case(supra). Applying the principles laid down therein to the facts of the present case, I find that the order passed by the Court below was eminently justified and it was not incumbent on the Court to have dismissed the suit. The lower appellate Court has rightly directed that the plaint should be returned for presentation to the proper Court after recording a finding that the Civil Court had no jurisdiction in the matter."

(Emphasis by Court)

40. The point again arose before their Lordships of the Supreme Court in **R.S.D.V. Finance Co. Pvt. Ltd. vs. Shree Vallabh Glass Works Ltd**14. The said decision arose on an Appeal by Special Leave from a Division Bench of the Bombay High Court in a summary suit brought for recovery of money on the original side. Dealing with the defendant's plea as to lack of territorial jurisdiction with the Court at Bombay, the learned Single Judge held that the suit was maintainable at Bombay on reasoning given in the learned Judge's judgment. On Letters Patent Appeal to the Division Bench, an Application seeking to amend the plaint appears to have been brought in order to give up some part of the cause of action, that was beyond the territorial jurisdiction of the Court at Bombay. The said Application was rejected and the appeal allowed dismissing the suit. On the plaintiff's Appeal by Special Leave, it was held, thus, by their Lordships:

"7. ..... Even if there was any doubt in the mind of the Division Bench, the learned counsel for the plaintiff had made a request for allowing him to amend the plaint but such request was wrongly refused by the learned Division Bench. The Division Bench was totally wrong in passing an order of dismissal of suit itself when it had arrived to the conclusion that the Bombay Court had no jurisdiction to try the suit. The only course to be adopted in such circumstances was to return the plaint for presentation to the proper court and not to dismiss the suit. ....."
(Emphasis by Court)

41. There is still another decision of this Court in **Mattukki and Ors. vs. Rajwanti**15, where again classification of cases into two categories was approved; one where the suit has been tried on all issues the entire way, one of these being about jurisdiction, which is not found with the Court, and the other category being of cases where the issue about jurisdiction is considered at the earliest stage, looking to the allegations in the plaint. This Court held falling back on the Full Bench decision in **Mst. Ananti vs. Channu** (supra) and distinguishing the decision of their Lordships in Sri Athmanatha-swami Devasthanam (supra), that suits where the entire course of trial has gone through, it would not be the proper course to order return of the plaint, but to dismiss the suit as done by the first Appellate Court. Of course, to those conclusions, has been added a further dimension that this categorization of cases would be applicable to those causes where the plea is based on lack of jurisdiction as to subject matter, and not where it relates to territorial or pecuniary jurisdiction. It was held in **Mattukki and Ors. vs. Rajwanti** (supra) thus:

"15. The present case falls in the second category where the first appellate court upon deciding an issue between the parties about their status which question had a direct bearing on the question of jurisdiction has found that the class of Courts in the civil court would not have Jurisdiction to entertain the suit. It was not the case where the territorial limits or the pecuniary limits or the class of the Court within civil court was involved. It was a case where cancellation of the Will deed at the instance of a plaintiff who was not recorded in the revenue records and had not filed any evidence or substantial evidence to prove an interest in the property that the civil court held that the class of civil courts had no jurisdiction because the plaintiffs interest and title was

under a cloud and it required a declaration from the competent court. Therefore, under these circumstances the discretion was exercised by the civil court when the first appellate court dismissed the suit of the plaintiff on the issue of lack of jurisdiction and did not return the plaint for presentation before the competent court because even the plaint as it stood for cancellation of a Will deed could not be entertained by the revenue court.

16. The decision cited by Sri R. N. Singh in the case of Athmanathaswami Devasthanam (supra) relates to a case where the suit was filed for recovery of damages for use and occupation of the land. The respondent therein was given possession of the land by the previous trustees of the Devasthanam trust and he started claiming acquisition of the status of ryot under Section 3(15) of the Madras Estates Land Act and acquired permanent rights of occupancy under Section 6 of the said Act. In appeal the High Court disagreed with the trial court and found that the suit as presented could be instituted only in the revenue court and civil court had no jurisdiction to entertain the same and, therefore, it ordered the return of the plaint for presentation to the proper Court. The Hon'ble Supreme Court was considering such a dispute and held that when the Court has no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. The question that can be decided is only a question of jurisdiction and if it comes a conclusion that it had no jurisdiction over the matter it had to return the plaint which was on the plain averments made therein cognizable by another Court competent to entertain the suit.

17. The decisions cited on behalf of the respondents is with respect to the two circumstances when the Court has to return a plaint for presentation or exercise its discretion to dismiss the suit on the ground of having no jurisdiction. The present case is one of the second category where the question of jurisdiction depends upon the averments in the plaint and other questions on merit and the Court proceeded to decide the other issue relating to the claim of the plaintiff as not maintainable before the civil court due to reasons given therein and when the plaint as such could not be maintainable before the revenue court.

18. Once having decided the locus of the plaintiff Phekani in relation to the property and relationship of Gajadhar and Smt. Sugani it found that the suit for cancellation of the Will filed by the plaintiff was not maintainable before the civil court because the plaintiff first required a declaration of her interest which was possible only by the revenue courts. The first appellate court dismissed the suit in toto and did not order return of the plaint. It has, therefore, to be seen whether the plaint ought to have been returned under Order VII, Rule 10 of C.P.C. in the facts and circumstances or the discretion exercised by the first appellate court by dismissing the suit in toto without directing return of plaint is proper or not.

19. As has already been indicated above there are two categories of cases when a jurisdictional issue is involved and the Courts have to decide the same on the facts averred in the plaint. The discretion is only in the second category and in case the plaint allegations are such as falls in the second category where no issue of territorial limits or pecuniary limits or class of Courts within the civil courts is concerned the Court is free to exercise its discretion. Therefore when in the present case there was no issue of territorial limits

or pecuniary limits or the class of Courts in the hierarchy of civil courts where the plaint could be maintainable the issue falls squarely where the Court has to consider the question of its jurisdiction on the averments in the plaint only after deciding the competence of the plaintiff to maintain the suit. This was a suit for cancellation of the Will deed by the plaintiff who was not recorded in the revenue records nor had filed any substantial evidence to indicate any interest in the property in question. Therefore, the plaintiff required to get a declaration of her title and remove the cloud over her relating to any right title or interest in the property in question. Hence, the plaint as it stood could not be returned since it would not be cognizable by the revenue court."

42. The question has also been the subject matter of a decision by the Chhattisgarh High Court in **Suryakant Gupta vs. B.L. Saraf and another**16, where in unequivocal terms, the learned Judge has held that at any stage of the proceeding once it is held that the Court had no jurisdiction, the proper course is to make an order for return of the plaint. In the aforesaid decision, N.K. Agarwal, J. relied upon a Full Bench decision of the Himachal Pradesh High Court in **Prithvi Raj Jhingta vs. Gopal Singh**17. The decision of the Supreme Court in R.S.D.V. Finance Co. Pvt. Ltd. (supra) was also relied on by His Lordship. It was held in Suryakant Gupta (supra) thus:

"10. The Full Bench of the High Court of Himachal Pradesh in case of Prithvi Raj Jhingta v. Gopal Singh, [AIR 2007 Himachal Pradesh 11.] considering the amended provision of Order XIV has held, to eliminate delay and to ensure expeditious disposal of the suits, both at the stage of trial as well as at the appeal stage, the legislature decided to provide for a mechanism whereby, subject to all exception created under sub-rule (2), all issues, both of law and fact were required to be decided together and the suit had to be disposed of as a whole, of course based upon the findings of the Trial Court on all the issues, both of law and fact.

11. Order XTV of C.P.C. has to be read along with Order VII, Rule 10 of C.P.C. As per explanation of Order VII, Rule 10(I), the Court of Appeal or Revision may direct, after setting aside the decree passed in a suit, return of the plaint. Even if the Court had recorded findings on all issues including the issue of jurisdiction, proper course open for the Court is to return the plaint for its presentation to proper Court. Therefore, ratio of law laid down by the High Court of Himachal Pradesh inPrithvi Raj Jhingta's (supra) case is of no help to the respondents in the facts and circumstances of the present case. For the reasons mentioned hereinabove, in the considered opinion of this Court, the judgment and decree of the Trial Court is not sustainable in law. Therefore, the appeal is allowed. The judgment and decree impugned is set aside. The matter is remitted back to the Trial Court for return of plaint to the plaintiff in terms of provisions contained in Order VII, Rule 10 of C.P.C. Parties are directed to appear before the Trial Court on 2.5.2011. Record of the Trial Court shall be sent back forthwith."

43. A consideration of all the authorities on this seemingly debatable point are preponderant that in a case where the Court at any stage of the proceeding finds that the suit is not triable

by it, the proper order to make is one for return of the plaint under Order VII Rule 10 CPC, and not one of dismissal of the suit, or any kind of a decision on merits. The guidance of their Lordships of the Supreme Court, and as already said preponderant authority, certainly not in consensus, is that it does not matter whether the suit has gone through trial the whole way, or has reached the stage of appeal or second appeal. What is relevant is that lack of jurisdiction once determined at any stage, ought to lead to an order for return of the plaint with no determination on merits made. The other view which seems to be not largely subscribed is based on the Full Bench decision in Mst. Ananti vs. Channu (supra). It would be well to remember that the statutory context in which the Full Bench in **Mst. Ananti vs. Channu (supra)**, decided way-back in 1930, was a differently phrased provision of the Code of Civil Procedure, much different from the way it is now worded after the Amendment Act of 1976. The most significant change that the 1976 Amendment has brought about is the addition of the explanation. The added explanation makes it explicit that the power to return can be exercised by virtue of the added explanation by the Court of appeal or revision, after setting aside the decree passed in the suit and by substituting it with an order for return of the plaint. The addition of the explanation brought about by CPC Amendment Act 104 of 1976 is of great significance. The purpose of an explanation is clarificatory. It is expressive of the legislative intent, where doubt has arisen in the application of a statute.

44. Amongst the various purposes that an explanation serves, one that is relevant to the context here has been referred to in Principles of Statutory Interpretation, by Justice G.P. Singh, 13th Edition (page 214) as follows:

"It is also possible that an Explanation may have been added in a declaratory form to retrospectively clarify a doubtful point in law and to serve as a proviso to the main section or ex abundanti cautela to allay groundless apprehensions."
(Note: The aforesaid statements of principle is based on the decisions of the Privy Council in Abdul Latif Khan vs. Abadi Begum (Mrs.), AIR 1934 PC 188 and the Supreme Court in Keshavji Raoji and Co. vs. Commissioner of Income-tax, AIR 1991 SC 1806).

45. A reading of the phraseology of Rule 10 which speaks about the exercise of power to return a plaint at any stage of the suit, and then the explanation clarifying that it can be exercised also by a Court of appeal or revision, in the opinion of this Court postulates that there is absolutely no class of cases or stage of proceeding where the power to return a plaint ought not to be exercised, once the Court finds that it has no jurisdiction. The fact that the power can be exercised by the Court of appeal or revision, that has been clarified through an explanation, logically takes within its fold those cases where trial has gone through the whole way. The principle that where a plaintiff moves a wrong Court that does not have jurisdiction to try the action that he has brought, must be penalized with a dismissal of his suit does not seem to fit into the scheme of things. The question of jurisdiction at times may be quite debatable, or jurisdictional facts may depend upon determination of the Court

to be made during trial subject to evidence, or at times upon an application of the law which the parties did not understand to be that what the Court has concluded. If any of these contingencies where the Court finds itself to be without jurisdiction, there is simply no reason to penalize a litigant with the dismissal of his suit. Looked at from another angle, a Court that opines not to have any jurisdiction over the subject matter of the suit does not have jurisdiction to decide anything about it; a fortiori it has no jurisdiction to dismiss the suit.

46. In this view of the matter, this Court is of considered opinion that where a suit is held barred by the provisions of Section 331 of the UP ZA & LR Act at any stage of the proceedings, be it in appeal or revision, the suit cannot be dismissed but has to be dealt with by an order directing return of the plaint to be presented to the proper Court. **Substantial question of law no.(i) is answered accordingly.** Substantial questions of law no.(ii) has already been answered hereinabove. In view of the answers to questions nos. (i) and (ii), question no.(iii) is not required to be answered.

47. In the result, this appeal succeeds partly and allowed to the extent that the decree of dismissal of the suit passed by the lower Appellate Court is set aside, and shall stand substituted by an order directing return of the plaint for presentation in accordance with law to the proper Court. The Trial Court shal0.79 "l carry out the aforesaid order immediately upon receipt of records. The defendants shall be entitled to their costs from the plaintiffs throughout.

48. It is, accordingly, ordered.

(2019)10ILR A 784

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 64 of 2013

Upendra Kumar ...Appellant
Versus
Sangeeta alias Babli ...Opp. Party

Counsel for the Appellant:
Sri M.K. Gupta, Sri Pankaj Agarwal, Sri Sandeep Saxena, Sri Ved Mani Sharma

Counsel for the Opp. Party:
Sri Divakar Rai Sharma

A. Maxim - *'NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA'* - No man can take advantage of his own wrong. (Para 16)

B. Hindu Marriage Act, 1955 - Section 13 - Husband Divorce Petition - Husband himself was responsible for the breakdown of marriage and therefore could not take advantage of his own wrong.

Held:-There was not even an iota of evidence to show that the wife was responsible for any desertion or cruelty - Irretrievable breakdown of marriage had occurred because of the plaintiff/husband himself. He himself was responsible for the breakdown and therefore could not take advantage of his own wrong. The principle enunciated in the maxim *'NULLUS COMMODUM CAPERE POTEST* wholly applies in this case. Husband could not take advantage of his own wrong. (Para 17)

Appeal dismissed (E-5)

List of cases cited: -

1. Statish Sitole Vs Ganga (Smt.) (2008) 7 SCC 734

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

3. Mamta Dubey Vs Rajesh Dubey (2009) 5 ADJ 516 (DB)

4. Sandhya Singh Vs Major Sandeep Singh (2009) 6 ADJ 189

5. Manisha Tyagi Vs Deepak Kumar (2010) 4 SCC 339

6. Arti Pandey Vs Vishnu Kant Tiwari (2012) 10 ADJ 619 (DB)

7. Rattan Singh Vs Manjit Kaur AIR 2010 Punj. & Har. 72

8. Ram Babu Babeley Vs Smt. Sandhya (2006) 1 AWC 183

9. Dutt Sharma Vs Manju Sharma (2009) 7 JT 5 Vishnu

(Delivered by Hon'ble Siddhartha Varma, J.)

1. This second appeal has been filed against the judgement and decree dated 23.11.2012 passed by the Additional District Judge Court No.1 Muzzaffar Nagar in Civil Appeal No. 52 of 2011. It has been prayed that after the judgement and decree dated 23.11.2012 is set aside, the judgement and decree dated 18.5.2011 passed by the Additional Civil Judge (S.D.) Court No. 3 Muzzaffar Nagar in Petition No. 872 of 2005 be restored.

2. A petition under Section 13 of the Hindu Marriage Act, 1955, was filed by the appellant Upendra Kumar, the husband. It was stated in the petition that after the appellant i.e. Upendra Kumar had got married to the respondent Smt. Sangeeta on 10.4.1994 the latter came to her husband's house at Alavalpur, Mazra, where her two sons who were aged about 8 years and 6 years at the time of the filing of the petition were born. It was contended in the Divorce petition that there was no compatibility between the husband and the wife as their intellectual levels did not match. The wife, it was stated, did not like her husband and she always wanted to stay with her mother in Village - Johra. The wife, it was stated in the petition, never agreed with anything the husband desired to do. At the time of marriage, the husband was doing a private job in Delhi. For some time, he had also worked privately in Faridabad. It was stated that the wife never wanted stay in the rented accommodation where the husband was staying and she always wanted to stay with her mother at Johra. There were always fights between the two of them and the neighbours used to witness the fights. There were times when for days together the wife never used to prepare food for the plaintiff-husband and he had to cook for himself.

3. It has further been stated in the plaint that when in 1997, the plaintiff husband became a Junior Engineer in the Railways and was posted in Bhusawal, District - Jalgaon, Maharashtra then the defendant-wife stayed with him for a very short period of time and in September 1998 when she entered into a fight with him she came back to her Mayaka. When she did not come back to him, he filed an Application for the restitution of conjugal rights. However, with the intervention of some known and respected people of the area, namely, Sri Tilak Ram, Sri Veersain and Sri Ram Swaroop, a compromise was entered into and the couple began to live together. This, however, did not restore normalcy. When the husband came to know that the wife was all the time asking his friends as to whether if the husband died would she be getting a job in his place and when the plaintiff husband suspected the character of his wife things again reverted to the original state. The

wife again left the house of her husband and went to her mother's house.

4. It has still further been stated in the plaint that on 15.4.2004, the plaintiff-husband went to the maternal home of the wife but she refused to come along with him. On 1.5.2004, the plaintiff husband went back to Bhusawal. In the plaint, it has been stated, that on 18.7.2004 the defendant wife alongwith her brother Mintu and her two sons reached Bhusawal and left her two sons behind and came to her mother's house. On 3.12.2004, the plaintiff-husband came back to Delhi and started living with his children over there. In the plaint he has narrated an incident which occurred on 31.8.2005 whereby according to him, he was criminally intimidated at the instance of his wife. With regard to this criminal intimidation, he had also got a complaint lodged at Thana - Nazafgarh. He further stated that on 8.9.2005 even his father was threatened.

5. However, the wife in reply to the petition for divorce filed by the husband/plaintiff had denied the allegations made therein. She also stated that she had filed an application under Section 9 of the Hindu Marriage Act being Suit No. 779 of 1999 for the restitution of conjugal rights. She denied the fact that she had left the children with the husband and stated that, in fact, he had taken away the children forcibly and had forsaken the wife i.e. the defendant. The defendant wife had also denied any kind of adulterous living and she had stated that only to malign her reputation, the plaintiff-husband was stating that she was living with other men. She has stated that no other person had been arrayed as a party in the Divorce Petition by name. The suit for divorce was decreed on 18.5.2011. However, the First Appeal which was filed by the wife (the respondent here) was allowed and the suit was dismissed. The point for determination before the First Appellate Court was as to whether the conduct of the wife could be termed as being cruel towards the husband and because of the cruelty was it not possible for the two to live together as husband and wife.

6. A perusal of the judgement of the First Appellate Court shows that while deciding the point which it had determined for decision, the Court also decided as to whether there was desertion from the side of the wife. It also appears that the First Appellate Court looked into the fact as to whether the wife was responsible for the irretrievable breakdown of the marriage. The First Appellate Court while deciding the Appeal found that there was no desertion from the side of the wife and it was also found that there was no cruelty from her side and, thereafter, allowed the first appeal.

7. The instant second appeal was initially admitted on 20.10.2016. On various occasions i.e. on 20.10.2016, and thereafter efforts were made for re-conciliation. When no re-conciliation appeared possible, this Court on 22.5.2019 framed two questions of law which are being reproduced here as under:-

I. Whether the allegations made in the plaint amount to cruelty?

II. Whether the acts alleged would mean desertion?

8. The further question of law which was argued by the parties, though was not

formulated, was whether divorce could be granted on the ground of irretrievable breakdown of marriage because of the fact that the parties were not living together for a very long time.

9. Learned counsel for the appellant submitted that the defendant wife was not staying with the plaintiff-appellant ever since May, 2004, and, therefore, there was no chance of them living together as husband and wife. He reiterated the various grounds which he had taken in the plaint for divorce. He also took the Court through the various evidence which could make the Court believe that the wife i.e. the defendant had forsaken the plaintiff and, therefore, there was a desertion. He also submitted that acts which were committed by the wife, the defendant, amounted to cruelty. He still further submitted that her staying with other men amounted to adulterous living. Therefore, he prayed that ths second appeal be allowed. The judgement and decree of the first appellate court be set aside and the decree of divorce as was passed by the Trial Court be restored.

10. Learned counsel relied upon the testimony of the plaintiff-appellant and one Sri Virendra Singh to substantiate his case.

11. Learned counsel for the appellant also relied upon certain decisions, namely, **2008 (7) SCC 734 : (Statish Sitole vs. Ganga (Smt.), 2013 (5) SCC 226 : (K. Srinivas Rao vs. D.A. Deepa), 2009 (5) ADJ 516 (DB) : (Mamta Dubey vs. Rajesh Dubey), 2009 (6) ADJ 189 : (Sandhya Singh vs. Major Sandeep Singh)** and submitted that separate living for a very long time amounted to an irretrievable break down of marriage and a decree of divorce be granted.

12. Learned counsel for the plaintiff-appellant also submitted that divorce could be granted if there was only a single act of cruelty and relied upon **2010 (4) SCC 339 : (Manisha Tyagi vs. Deepak Kumar), 2012 (10) ADJ 619 (DB) : (Arti Pandey vs. Vishnu Kant Tiwari), AIR 2010 Punjab and Haryana 72 : (Rattan Singh vs. Manjit Kaur)**.

13. Learned counsel for the respondent Sri Diwarkar Rai Sharma, in reply, however, submitted that the First Appellate Court had after looking into the evidence as was available on record had definitely come to a conclusion that there was no desertion from the side of the defendant wife and, in fact, had arrived at a definite conclusion that it was the plaintiff-husband who had managed things in such a manner that the separation of the two had resulted.

14. Learned counsel for the respondent took the Court through the various evidence and also the judgement of the First Appellate Court and stated that so far as any adulterous living was concerned, no finding could be arrived at as per the Hindu Marriage and Divorce Rules, 1956, as no name had been provided of anyone with whom the wife might have tried to live an adulterous life. In fact, the learned counsel of the respondent-wife drew the attention of the Court to the various findings which had been arrived at by the First Appellate Court and tried to convince the Court that the abandoning of the children, the fighting between husband and the wife and the criminal intimidation from the side of the wife were a figment of the

imagination of the husband. Learned counsel also drew the attention of the Court to the evidence led by the wife regard to the case she had filed for the restitution of conjugal right. He also drew the attention of the Court to the application which the wife had filed for custody of the children.

15. In the end learned counsel for the respondents vehemently argued that when the husband himself was responsible for the irretrievable breakdown of the marriage then he could not seek divorce on that ground. Learned counsel for the respondent relied upon **2006 (1) AWC 183** : **Ram Babu Babeley vs. Smt. Sandhya**, and stated that the appellant-plaintiff could not take advantage of his own fault and say that the marriage had irretrievably brokendown and that a decree of divorce be granted. Learned counsel relying upon **2009 (7) JT 5 : Vishnu Dutt Sharma vs. Manju Sharma** argued that irretrievable breakdown was not a ground provided in Section 13 of the Hindu Marriage Act, 1955.

16. The counsel for the respondents relied upon the maxim of law 'NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA' and submitted that no man can take advantage of his own wrong. He submitted that the husband who had filed the petition himself, as per the evidence on record and as per the findings arrived at by the First Appellate Court, was responsible for the breakdown in the marriage. Learned counsel, therefore, submitted that the findings of fact as had been arrived at by the First Appellate Court could not be interfered with and the Second Appeal may be dismissed as such. He submitted that the substantial questions of law as were framed could not be called substantial questions of law which arose in this case and the findings were crystal clear in the judgement of the First Appellate Court. Regarding the question that separation would amount to irretrievable break down of marriage, learned counsel for the respondents submitted that the husband himself was responsible for the separation of the husband and the wife and this ground was not available to the appellant-plaintiff.

17. Having heard the learned counsel for the appellant and the learned counsel for the respondents, this Court is of the view that the findings as have been arrived at by the First Appellate Court had definitely found that there was not even an iota of evidence to show that the wife was responsible for any desertion or cruelty. From the findings as have been arrived at by the First Appellate Court it is clear that the plaintiff himself was responsible for the separate living of the husband and the wife and, therefore, irretrievable breakdown of marriage had occurred because of the plaintiff/husband himself. He himself was responsible for the breakdown and therefore could not take advantage of his own wrong. The principle enunciated in the maxim 'NULLUS COMMODUM CAPERE POTEST wholly applies in this case. The plaintiff-appellant could not take advantage of his own wrong.

18. Under such circumstances, the appeal is dismissed. The substantial questions of law as were framed by this Court need not any further be answered.

(2019)10ILR A 789

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 183 of 1998

Mohammad Shakil & Anr. ...Appellants
Versus
Girish Chandra & Ors. ...Respondents

Counsel for the Appellants:
Sri G.R. Jain, Sri Mukesh Kumar, Sri Shyam Srivastava

Counsel for the Respondents:
Sri S.K. Misra

A. Code of Civil Procedure, 1908 - Section 96 and Section 104 read with Order XLIII - Partition Suit - Appeal lies only against final decree and not against partition scheme - Appeal not maintainable against order merely disposing of Amin report

Held:-In a partition suit, unless a partition scheme is finalized and final decree is prepared, no appeal lies as appeal lies only against final decree and not against partition scheme – Order of disposal of Amin report and Commissioner report is not an order which may be termed as decree and no appeal against such order is legally maintainable under Section 96 or 104 or order XLIII of Code of Civil Procedure. (Para 4)

Appeal dismissed (E-5)

List of cases cited: -

1. Phanindra Nath Banerji Vs Labanya Mayee Banerji 1950 Ald. Weekly Reporter 28

(Delivered by Hon'ble Harsh Kumar, J.)

Civil Misc. (Delay Condonation) Application No.7 of 2019, Civil Misc. Application No.8 of 2019 & Civil Misc. (Substitution) Application No.9 of 2019

1. Heard Shri Dinesh Rai, Advocate, holding brief of Shri Mukesh Kumar, learned counsel for appellant and Shri S.K. Misra, learned counsel for respondent.

2. In reply to abatement application no.172533 of 2015 filed by respondent on 14.5.2015, applications have been moved by appellant for condonation of delay, setting aside abatement and substitution of legal representatives of deceased-respondent nos.2 & 5 to which counter affidavit has been filed on 30.7.2019.

3. At the very outset, it was pointed out that present second appeal has been filed against impugned judgment and decree dated 23.1.1998 in First Appeal No.695 of 1987, passed by IVth Additional District Judge, Farrukhabad against the order dated 25.8.1987 passed by IInd Additional Civil Judge, Farrukhabad in proceedings of execution i.e. for preparation of partition scheme in a partition suit, disposing of the report and map of Amin as well as report of commissioner and objections thereto arising out of Civil Suit No.152 of 1982. By above order dated 25.8.1987, the learned trial Court has disposed of the objections and amended/modified the report Amin against which, First Appeal No.695 of 1987 was preferred by defendants/judgment debtors which has been dismissed by impugned order. Hence the defendants have preferred this second appeal, which has been admitted without framing any substantial question of law, which is mandatory under provisions of Section 100 (5) C.P.C.

4. Undisputedly, the order dated 25.8.1987 passed by trial Court is in order

of disposal of report Amin and Commissioner which is not an order which may be termed as decree and no appeal against such order is legally maintainable under Section 96 or 104 or order XLIII of Code of Civil Procedure. In a partition suit, unless a partition scheme is finalized and final decree is prepared, no appeal lies as appeal lies only against final decree and not against partition scheme. This legal position could not be disputed either by learned counsel for appellant.

5. My above view is supported by the judgment passed by this Court in the case of "***Phanindra Nath Banerji Versus Labanya Mayee Banerji 1950 Allahabad Weekly Reporter 280***" wherein it was held that-

"mere order giving directions for preparation of final decree is not appealable. A decree for partition, to be operative, must be engrossed on stamped paper required by Stamp Act, and until the judge signs the decree so engrossed it cannot be said that the suit has terminated".

6. In view of above facts and legal position, the final appeal no.695 of 1987, though decided on merits, was legally not maintainable and against the impugned order dated 23.1.1998 passed in above mentioned final appeal (which is not a decree), no second appeal is legally maintainable. Accordingly, the second appeal is also not maintainable irrespective of the fact that it has been admitted on 20.2.1998 without framing any substantial questions of law in contravention of provision of Section 100 (5) of Code of Civil Procedure.

7. In the circumstances, the appeal itself is not maintainable and is liable to be dismissed.

8. The appeal is dismissed accordingly with no order as to costs.

9. Substitution applications are disposed off accordingly without prejudice to the rights of parties who may seek remedy as available to them.

10. Interim order, if any, stands vacated.

11. Let the lower Court record, if any, has been received be sent back forthwith to court below alongwith a copy of this order.

(2019)10ILR A 790

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE HARSH KUMAR, J.

Second Appeal No. 121 of 2002

Shri Ram Krishna Puri ...Appellant
Versus
Smt. Gurpyari Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Some Narayan Mishra, Sri S.N. Mishra

Counsel for the Respondents:
Smt. Usha Kiran, Sri Abhijeet Mukherji, Mamta Singh, Sri N.K. Srivastava, Pratima Srivastava, Sri B.K. Shukla, Sri S.K. Mehrotra

A. Banking Law Regulation Act, 1949 - Section 45ZA of - Indian Contract Act, 1872 - Section 45 - Rights of 'Survivor' in view of mandate of 'Former or Survivor' mentioned over the Fixed Deposit Receipts (FDRs), as mode of payment - *held* - survivor gets limited rights to

receive money as trustee of heirs - like a nominee nominated by "Former".

Mandate "Either or Survivor" or "Former or Survivor" with regard to mode of payment deals only with valid discharge of Banks and has nothing to do with the law of succession or right of successors/legal heirs/legatee of deceased-depositor - If Bank makes full payment to nominee or survivor, it gets a valid discharge of dues and has no obligation to seek discharge from other legal heirs of deceased - Survivor or nominee, has only a limited right to receive the amount as a trustee of the legal heirs of deceased-depositor and such payment to survivor/nominee, does not affect the rights or claims, which any person may have against survivor or nominee to whom the payment has been made - On Such payment survivor/nominee would not become absolute owner of the amount so received by her - rather would be only a trustee of the legal heirs of deceased - depositor including her legatee. (Para 33, 34)

B. Indian Succession Act - Section 372 - Application for Succession certificate - Mere availability of remedy of an application (miscellaneous proceedings) under Section 372 of Indian Succession Act, does not bar jurisdiction of Civil Courts to entertain regular civil suit for declaration.

Lower Appellate Court illegally dismissed the suit of plaintiff on the ground that suit for declaration is not maintainable in view of provisions of Section 42 of Specific Relief Act or in view of provisions of Sections 372 or 213 of Indian Succession Act. (Para 19)

Held:-Sahodara Bibi brought up plaintiff, as his mother, died during his infancy - Sahodara Bibi held four fixed deposit receipts and also got name of defendant no.1 Gurpyari Devi added in the fixed deposit receipts with the remark "Payable to the former or Survivor" - Sahodara executed her last will in favour of plaintiff in respect of impugned fixed deposit receipts - After death of Sahodara -- defendant no.1 disputed the rights of plaintiff – Plaintiff instituted suit for a decree of declaration to the effect that he is entitled to the amount due under the four fixed deposit receipts – Trial decreed the suit – Lower Appellate Court dismissed suit of plaintiff

Second Appeal Allowed (E-5)

List of cases cited: -

1.Smt. Bimla Gaindhar Vs Smt. Usha Gaindhar & anr. AIR 2004 Ald. 329 (Para 18)

2. Ram Chander Talwar Vs Devendra Kumar Talwar & ors. (2010) 10 SCC 671

3. Smt. Sarabati Devi 7 anr. Vs Smt. Usha Devi 1984 SCC (1) 424

4.Dalavayi Nagarajamma Vs S.B.I. AIR 1961 A.P. 320

5. Padmanabhan Bhavani Vs Govindan AIR 1975 Ker 83

(Delivered by Hon'ble Harsh Kumar, J.)

1. The instant appeal has been filed against judgment and decree dated 18.1.2002 passed by Additional District Judge, Kanpur Nagar in Civil Appeal No.264 of 2001 arising out of judgment and decree dated 4.9.2001 passed by Additional Civil Judge (Senior Division), Kanpur Nagar in Civil Suit No.193 of 1986.

2. The brief facts relating to the case are that Shri Ram Krishna Puri filed Civil Suit No.193 of 1986 in the Court of Civil Judge, Kanpur Nagar against Smt. Gurpyari Devi, Sri Kashi Nath Khatri and Allahabad Bank for a decree of declaration to the effect that plaintiff is entitled to the amount due under the four fixed deposit receipts each for Rs.10,000/- dated 16.1.1981 for a period of 63 months and plaintiff be awarded cost of suit against defendant-respondent nos.1 and 2, with the averments that Smt. Sahodara @

Sahodara Bibi had brought up plaintiff as his mother had died during his infancy and that she held four fixed deposit receipts each for Rs.10,000/- dated 16.1.1981 for a period of 63 months and was sole owner of the amount and had got name of defendant no.1 Gurpyari Devi added along with her in the fixed deposit receipts with the remark "Payable to the former or Survivor"; and since Smt. Sahodara died on 30.1.1985 after executing her last will dated 18.1.1983 in favour of plaintiff in respect of impugned fixed deposit receipts and defendant no.1 is disputing the rights of plaintiff, hence suit.

3. The defendant no.1 filed a written statement denying the allegations of plaint and claiming herself to be entitled to full and final payment of maturity amount under the impugned fixed deposit receipts and that the suit is barred by provisions of Section 213 of Indian Succession Act.

4. Defendant no.2 also filed separate written statement denying the allegations of plaint.

5. On parties pleadings the trial court framed as many as six issues viz.,

(i) Whether Smt. Sahodara executed a will deed dated 18.1.1983?

(ii) What if any is the effect of entries of the name of Smt. Gurpyari Devi and Smt. Sahodara over the fixed deposit receipts?

(iii) Whether Smt. Sahodara had a right to execute will deed in respect of fixed deposit receipts?

(iv) Whether the suit is barred by provisions of Section 213 of Indian Succession Act?

(v) Whether suit is under valued and court fee paid is insufficient?

(vi) To what relief if any, is the plaintiff entitled?

6. After recording parties evidence and hearing arguments, the learned trial court held that plaintiff has succeeded in proving execution of will deed dated 18.1.1983 by Smt. Sahodara and decided issue no.1 in favour of plaintiff. On issue nos.2 and 3 trial court gave a finding in favour of plaintiff against the defendant and also decided issue no.4 in favour of plaintiff and against defendant while issue no.5 had been previously decided on 10.9.1991 against defendant. In view of above findings on issue no.6 trial court held that plaintiff has succeeded in proving his case and decreed the suit vide judgment and decree dated 4.9.2001.

7. Feeling aggrieved defendant no.1 Smt. Gurpyari Devi preferred Civil Appeal No.264 of 2001 before District Judge, Kanpur Nagar which was transferred for disposal to the court of Additional District Judge, Court No.8, Kanpur Nagar. The lower appellate court vide impugned judgment and decree dated 18.1.2002 allowed appeal and set aside the judgment and decree passed by trial court in Civil Suit No.193 of 1986 dismissing the suit of plaintiff.

8. Feeling aggrieved the plaintiff has preferred instant second appeal.

9. The instant second appeal has been admitted vide order dated 8.2.2002 on following two substantial questions of law :-

(1) Whether the first appellate court has erred in dismissing the suit on the ground that the suit for declaration is not maintainable?

(2) Whether the first appellate court has erred in carving out a new case itself regarding the maintainability of the suit?

10. Heard Shri Some Narayan Mishra, learned counsel for plaintiff-appellant hereinafter referred as plaintiff and Shri Abhijeet Mukherji, learned counsel for defendant-respondent no.1 hereinafter referred as defendant and perused the record as well as lower court record summoned in this second appeal.

11. Learned counsel for plaintiff contends that judgment and decree passed by lower appellate court is bad on facts and law; that lower appellate court acted wrongly in allowing the appeal without displacing the findings recorded by trial court in favour of plaintiff- appellant; that trial court acted wrongly in holding that suit was barred by provisions of Section 213 of Indian Succession Act; that impugned fixed deposit receipts were obtained by Smt. Sahodara which were issued in the name of Smt. Sahodara and Smt. Gurpyari Devi with the endorsement by bank on top of it mentioning "Payable to Former or Survivor"; that undisputedly Smt. Sahodara died on 30.1.1985; that since Smt. Sahodara had executed a registered will dated 18.1.1983 in favour of plaintiff-appellant, in respect of the fixed deposit receipts in question, the plaintiff-appellant has a right to get the maturity amount mentioned in the fixed deposit receipts; that survivor Smt. Gurpyari Devi has no right or title over the amount mentioned in fixed deposit receipts and her position will be that of nominee only; that nominee can only receive payment from bank but may not change the rights of successors rather will be bound to make payment of amount so received to the successors of deceased; that since the plaintiff-appellant was legatee of the will deed executed by Smt. Sahodara she was rightful owner of maturity amount under the impugned fixed deposit receipts; that the findings of trial court on issue no.1 with regard to execution of registered will dated 18.1.1983 by Smt. Sahodara in favour of plaintiff-appellant has not been set aside by lower appellate court and without setting aside the findings of trial court, the impugned judgment and decree allowing the appeal and setting aside the judgment and decree of trial court is absolutely wrong, illegal and against law; that lower appellate court has erred in dismissing the suit on the ground that suit for declaration is not maintainable; that lower appellate court had no jurisdiction in carving out a new case itself regarding maintainability of suit while there was no such plea taken by defendant-respondent; that the impugned judgment and decree are liable to be set aside and the judgment and decree passed by trial court are liable to be restored.

12. Per contra learned counsel for defendant-respondent no.1 supported the impugned judgment and decree passed by lower appellate court and contended that learned trial court acted wrongly and illegally in decreeing the suit of plaintiff-appellant and lower appellate court very rightly held the suit to be barred by provisions of Section 213 of Indian Succession Act and in the alternative by provisions of Section 372 of Indian Succession Act; that the suit for seeking a declaratory decree for declaration of his rights to receive the payment under the disputed fixed deposit receipts is virtually a relief for seeking mandatory injunction, directing the bank to make payment of maturity amount under the impugned

fixed deposit receipts; that upon death of Smt. Sahodara, her niece defendant-respondent no.1 Smt. Gurpyare Devi becme exclusive and rightful owner and to get payment under the impugned fixed deposit receipts being mentioned as survivor in the fixed deposit receipts; that no substantial question of law is involved in this appeal and appeal is liable to be dismissed with costs.

13. Upon hearing parties counsel and perusal of record as well as record of lower court summoned in appeal, I find that undisputedly Smt. Sahodara Bibi obtained four fixed deposit receipts (hereinafter referred to as 'FDRs') for Rs.10,000/- each on 16.1.1981 from Allahabad Bank for a period of 63 months, which were issued by Allahabad Bank in the name of Smt. Sahodara and Smt. Gurpyari Devi (hereinafter referred to as "S' & "G', respectively) with mandate of mode of payment as "Payable to Former or Survivor". "S' died on 30.1.1985 and Ram Krishna Puri (hereinafter referred to as "R') filed Civil Suit No.193 of 1986 claiming to be a legatee under the last Will executed and registered by "S' in his favour on 18.1.1983 and sought a declaratory decree, seeking declaration that he is entitled to get the amount due under four FDRs detailed in prayer clause, impleading Allahabad Bank as Defendant No.3, who did not file any written statement and did not contest the suit. The Trial Court holding that plaintiff has succeeded in proving the Will as well as his case, decreed the suit, against which Civil Appeal No.264 of 2001 filed by defendant "G' was allowed by lower Appellate Court and plaintiff 'R' has preferred instant second appeal.

14. The lower Appellate Court has framed two points for determination of appeal (i) who is legally entitled to get amount under the impugned FDRs and whether in view of the mandate mentioned over the FDRs "S' had a right to execute Will in respect of the amount mentioned in FDRs and (ii) whether suit was barred by provisions of Section 213 of Indian Succession Act.

15. On point no.1, the lower Appellate Court held that in view of the mandate of "Payable to Former or Survivor", upon death of "S' only "G' was entitled to operate the account or receive the amount payable under the impugned FDRs and the Trial Court has committed mistake of facts and law in not considering the wordings of mandate mentioned over all the impugned FDRs. It further held that in the circumstances, question of execution and proof of Will deed dated 18.1.1983 lost its relevance, because the survivor "G' was exclusively entitled to get the amount under impugned FDRs and legal heirs or the legatee of "S', under impugned Will deed dated 18.1.1983 may not be getting any legal right to receive the amount of impugned FDRs. On point no.2 it held that though "R' claims execution of Will by "S' in his favour, but since he did not obtain Probate or Succession Certificate, the suit was barred by provisions of Section 213 of Indian Succession Act and in view of mandate mentioned over FDRs as well as provisions of Section 42 of Specific Relief Act, the Civil Court had no jurisdiction to try suit and pass declaratory decree in respect of money under impugned FDRs.

16. Substantial question of law No.1 is as under :-

"(1) Whether the first appellate court has erred in dismissing the suit on the ground that the suit for declaration is not maintainable?"

17. The substantial question of law No.1 relating to maintainability of suit for declaration has been dealt with by lower Appellate Court under point No.2 framed by it. It is pertinent to mention that Section 42 of Specific Relief Act, 1963 has no application to the case and suits for declaration. Specific Relief Act, 1877 was replaced by new Specific Relief Act, 1963, which came into force w.e.f. 13th January, 1964, Section 42 of which deals with provisions relating to "Injunction to perform negative agreement". Section 34 of Specific Relief Act, 1963 which is equivalent to Section 42 of old Specific Relief Act, 1877 with certain changes, contains provisions with regard to Declaratory decrees and discretion of Court, as to declaration of status or right. In the instant case, undisputedly the amount under the impugned FDRs has not been paid by Bank to "G', the survivor, and suit seeking decree for declaration about his entitlement only, was competent without seeking any further relief. Hence the Court finds that lower Appellate Court acted wrongly and illegally in holding the suit to be barred by provisions of Section 42 of Specific Relief Act, without even considering the repeal of old Act of 1877 and provisions of Sections 34 and 42 of new Act.

18. As far as provisions of Sections 213 and 372 of Indian Successions Act with regard to Probate and Succession certificate are concerned, in view of the law laid down by Division Bench of this Court in the case of ***Smt. Bimla Gaindhar Vs. Smt. Usha Gaindhar and another, AIR 2004 Ald 329***, and provisions of Section 57 of the Act, plaintiff 'R' was not at all required to obtain a Probate on the basis of Will deed dated 18.1.1983 executed by "S'.

19. In above case, it was also held that though probate will not be required in such cases, but an application under Section 372 of the Act would be maintainable. It is noteworthy that mere availability of remedy of an application (miscellaneous proceedings) under Section 372 of Indian Succession Act, does not bar jurisdiction of Civil Courts to entertain regular civil suit for declaration.

20. In view of discussions made above, this Court is of considered view that lower Appellate Court committed manifest error of law and acted wrongly and illegally in allowing appeal and dismissing the suit of plaintiff on the ground of non maintainability of suit in view of provisions of Section 42 of Specific Relief Act or in view of provisions of Sections 372 or 213 of Indian Succession Act. Substantial question of law No.1 is accordingly decided in affirmative in favour of plaintiff against the appellant.

21. The substantial question of law no.2 is as under:-

"(2) Whether the first appellate court has erred in carving out a new case itself regarding the maintainability of the suit?"

22. The matter relating to this substantial question of law has been discussed by lower Appellate Court under point no.1 framed by it and in paras 7 to 11 of the impugned judgment observing that on all impugned FDRs, mandate "Payable to Former or Survivor" is mentioned. Considering the meaning and effect of above mandate regarding mode of payment, by giving an example, it held that where an account is in the names of "A' and "B' with mandate of Former or

Survivor, "A' holds right to operate the account throughout his life time and after his death, right to operate account goes to "B' but "B' has no right to operate the account during life time of "A', and in case 'B' dies in life time of "A', the legal heirs of "B' will not be entitled to operate the account or receive the amount and so only upon death of "A', "B' may be entitled to operate the account and receive the amount in which case legal heirs or legatee of "A', will not have any legal right to operate the account or receive the amount.

23. It was contended by plaintiff that lower Appellate Court acted wrongly and illegally in ignoring the duly proved Will deed and in dismissing suit of plaintiff without displacing the findings of Trial Court on issue no.1 in favour of plaintiff 'R' regarding execution of Will deed dated 18.1.1983 by "S' and committed manifest error in holding that in view of mandate "Payable to Former or Survivor", the survivor "G' acquired absolute rights of receiving the maturity amount to the exclusion of legal heirs or legatee of "S'. It was contended that being survivor, position of "G' was only that of a nominee, who had a limited right, only to receive the amount under the impugned FDRs, as trustee of legal heirs of former "S' deceased.

24. Now the main point to be considered is that, as to what will be the rights of 'Survivor' defendant 'G', in view of mandate of 'Former or Survivor' mentioned over the impugned FDRs, as mode of payment and whether the survivor will get absolute rights to get maturity value as claimed by defendant 'G' and held by lower Appellate Court, OR will get only limited rights to receive money as trustee of heirs of Former, like a nominee nominated by Former as claimed by plaintiff 'R', the legatee and legal heir of Former 'S'.

25. Before proceeding on this question, I find it expedient to reproduce the provisions of Section 45 of Indian Contract Act, 1872 and Section 45ZA of The Banking Law Regulation Act, 1949, which are as under:-

*"**Section 45 of Indian Contract Act, 1872.***

***45. Devolution of joint right**. -When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with representatives of all jointly.*

Illustration

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C, with the representatives of B and C jointly.

Section 45ZA of The Banking Law Regulation Act, 1949.

45ZA. Nomination for payment of depositors' money.-

(1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together,

may nominate, in the prescribed manner, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(3) Where the nominee is a minor, it shall be lawful for the depositor making the nomination to appoint in the prescribed manner any person to receive the amount of deposit in the event of his death during the minority of the nominee.

(4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company of its liability in respect of the deposit:

Provided that nothing contained in this sub-section shall affect the right or claim which any person may have against the person to whom any payment is made under this section."

26. In the case of ***Ram Chander Talwar Vs. Devendra Kumar Talwar and others, 2010 (10) SCC 671***, the Apex Court held that

Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed."

27. In the case of **Smt. Sarabati Devi and another Vs. Smt. Usha Devi, 1984 SCC (1) 424**, the Apex Court interpreting the provisions of Section 39 of Insurance Act held that :-

"1.1 A mere nomination made under Section 39 of the Insurance Act, 1938 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the accused. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

1.2 An analysis of the provisions of Section 39 of the Act clearly established that the policy holder continues to hold interest in the policy during his life time and the nominee acquires no sort of interest in the policy during the life time

of the holder. If that is so, on the death of the policy holder the amount payable under the policy becomes part of his estate which is governed by the law of succession applicable to him, such succession may be testamentary or intestate. The tenuous character of the right of a nominee becomes more pronounced when one contrasts the provisions of Section 39 with that of Section 38.

Section 39 of the Act was not intended to act as a third mode of succession provided by the stature and incorrectly styled as "statutory testament" by the Delhi High Court.

1.3 The language of Section 39 of the Act is neither capable of altering the course of succession under law nor can be said to have equated a nominee to an heir or legatee."

"**Modern Law Publications**" published an exhaustive commentary on Banking Law with new developing areas like MICR technology etc. under the name of "**Banking Law and Practice by R.K. Gupta"**, Joint Legal Advisor, Reserve Bank of India, Legal Department, Central Office, Mumbai, with a foreword by Hon'ble Mr. Justice G.P. Mathur, Judge Supreme Court in two volumes. In above commentary on "Banking Law and Practice", Volume I published in the year 2012 in Chapter 7 at page 1.513 rights of survivor regarding joint accounts have been described as under :-

"Joint Account payable to former or survivor. - When the fixed deposit is payable to Former or Survivor, the deposit is payable to the former so long he is alive and after his death, the deposit is payable to the survivor. The survivor cannot claim the amount on maturity, if the former is alive. In such cases, the legal representatives of the account holder who had died have no claim against the bank.

The survivor does not become absolute owner of the maturity proceeds. He holds the said amount in trust for the legal heirs of the account holder who has died. In Guran Ditta V. Ram Ditta (AIR 1928 Privy Council 172), where the deposit was held by a person with his wife on the terms that it is payable to either or survivor, the court held that on the death of the husband, it does not constitute a gift by him to his wife and there is a resulting trust in her favour in the absence of proof and contrary intention, there being no presumption in India of an intended advancement in favour of his wife."

28. The Vth Edition of 2010 of The Banking Law - in Theory and Practice, by S.N. Gupta, Advocate, narrates the consequences on death of one of the joint holder, at page 237 as under :-

"'Former or Survivor' or 'Either or Survivor' accounts are opened which are operated by the 'Former or Survivor' or 'Either or Survivor'.

What will happen if there is death of one of the joint account holders whether the bank can get the proper discharge by paying in account of survivor. Another question will arise as to what is the liability of the survivor and whether he has to make some payments to the heirs and legal representatives of the deceased joint holder.

In such cases so far as the bank is concerned we can say that the bank will get a proper discharge by paying to the survivor. However, the survivor will be accountable to the heirs of the deceased

joint holder. In the absence of a proof of the intention of the deceased to make the survivor the owner."

29. Reserve Bank of India issues guidelines, instructions, directions to its 'Scheduled Commercial Banks' from time to time in order to improve quality of customer service. Parties counsel brought before the Court "Circular Letter of Reserve Bank of India" dated 9th June, 2005 issued by it to 'Scheduled Commercial Banks' in ordinary course of business, which is being reproduced hereunder highlighting the details mentioned in its paras 1 and 2, which are relevant to the facts of the case :-

"RBI/2004-05/490
DBOD.No.Leg.
BC.95/09.07.005/2004-05
June 09, 2005

To
The Chairman/CEOs of All the Scheduled Commercial Banks
(Excluding RRBs)

Dear Sir,

Settlement of claims in respect of deceased depositors - Simplification of Procedure

Pursuant to the announcement in the Mid-Term Review of the Annual Policy of the RBI on November 3, 2003, the Committee on Procedure and Performance Audit on Public Services (CPPAPS) was constituted by the RBI with a view to improving the quality of public services to the common person. The Committee in its Report No.3 on 'Banking Operations : Deposit Accounts and other Facilities Relating to Individuals (Non-Business)', observed that the tortuous procedures, particularly those applicable to the family of a deceased depositor, caused considerable distress to such family members. While the instruction regarding settlement of claims of the deceased depositors had been issued to the banks vide our circular No.DBOD.BC.148/09.07.007/99-2000 dated March 14, 2000 and BC.56/09.07.007/2000-01 dated December 6, 2000, the present dispensation has been reviewed in the light of the recommendations of the CPPAPS and the following instructions are being issued, in supersession of all the earlier instructions on the subject, to facilitate expeditious and hassle-free settlement of claims on the death of a depositor.

2. ACCESS TO BALANCE IN DEPOSIT ACCOUNT

(A) Accounts with survivor/nominee clause

2.1 As you are aware, in the case of deposit accounts where the depositor had utilized the nomination facility and made a valid nomination or where the account was opened with the survivorship clause ("either or survivor", or "anyone or survivor", or "former or survivor" or "latter or survivor"), the payment of the balance in the deposit account to the survivor(s)/nominee of a deceased deposit account holder represents a valid discharge of the bank's liability provided :

(a) the bank has exercised due care and caution in establishing the identity of the survivor(s)/nominee and the fact of death of the account holder, through appropriate documentary evidence;

(b) there is no order from the competent court restraining the bank from

making the payment from the account of the deceased; and

(c) it has been made clear to the survivor(s)/nominee that he would be receiving the payment from the bank as a trustee of the legal heirs of the deceased depositor, i.e., such payment to him shall not affect the right or claim which any person may have against the survivor(s)/nominee to whom the payment is made.

2.2 It may be noted that since payment made to the survivor (s)/nominee, subject to the foregoing conditions, would constitute a full discharge of the bank's liability, insistence on production of legal representation is superfluous and unwarranted and only serves to cause entirely avoidable inconvenience to the survivor(s)/nominee and would, therefore, invite serious supervisory disapproval. In such case, therefore, while making payment to the survivor(s)/nominee of the deceased depositor, the banks are advised to desist from insisting on production of succession certificate, letter of administration or probate, etc., or obtain any bond of indemnity or surety from the survivor(s)/nominee, irrespective of the amount standing to the credit of the deceased account holder.

3. Premature Termination of term deposit accounts .....

4. Treatment of flows in the name of the deceased depositor .....

5. Access to the safe deposit lockers/safe custody articles .....

6. Time limit for settlement of claims .....

7. Provisions of the Banking Regulation Act, 1949 .....

8. Simplified operational systems/procedures .....

9. Customer Guidance and Publicity .....

10. These instructions should be viewed as very critical element for bringing about significant improvement in the quality of customer service provided to survivor(s)/nominee(s) of deceased depositors.

11. Please acknowledge receipt.

Yours faithfully,
(Anand Sinha)
Chief General Manager-in-Charge"

30. A photo copy of the Circular letter dated 9th June, 2005 of Reserve Bank of India is being placed on record as part of record.

"In the case of ***Dalavayi Nagarajamma Vs. State Bank of India AIR 1961 Andhra Pradesh 320***, the High Court of Andhra Pradesh held that

"Where A deposits his own money in the joint names of himself and B (who may be his wife, daughter or any other person) on the terms that it is payable to either or survivor, the deposit on A's death does not constitute a gift by him to B. The burden of proof lies upon B in whose name the deposit is jointly taken to prove that a gift was intended or made. The mere fact that it is taken in the joint names does not lead to the conclusion that a gift was made to the other person."

31. In the case of ***Padmanabhan Bhavani Vs. Govindan AIR 1975*** Ker 83, considering above mentioned decision of Andhra Pradesh High Court in case of ***Dalavayi Nagarajamma*** (supra) wherein "one Ramaswamy deposited Rs.10,000/- in the joint names of himself and his

concubine, who was the appellant, payable to either or survivor and after Ramaswamy's death, the appellant claimed the balance at the credit of the account on the ground that he had intended to make a gift of the amount of Rs.10,000/- to her, it was held that the appellant had not discharged the onus which was on her of proving the gift and that the mere fact that the deposit was made in the joint names does not lead to the conclusion that Ramaswamy gifted the amount to her", the High Court of Kerala formulated following propositions in para 6 of judgment :-

"(i) A deposit made by a Hindu of his money in the joint names of himself and his wife or any other person, on the terms that it is payable to either or survivor, does not on his death constitute a gift by him to the other person.

(ii) In such a case without any declaration of trust, there is a resulting trust in favour of the depositor in the absence of any contrary intention or unless it can be proved that an actual gift of the amount was intended.

(iii) The principle of English Law that a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in her name or where a deposit is made, in the joint names of both husband and wife has no application in India. In other words, there is no presumption in India of an intended advancement as there is in England.

(iv) The burden of proving a contrary intention or gift is on the person who seeks to rebut the resulting trust in favour of the person, who makes the deposit.

(v) This burden could be discharged either by proving that there was a specific gift or that the owner of the money had a general intention to benefit the claimant and that it was in pursuance of that intention that he made the deposit in the claimant's name or transferred the deposit to the joint names of himself and the claimant.

(vi) In the absence of such proof the amount under the deposit will form part of the owner's estate on his death and will be partible among the heirs."

32. Admittedly 'S' died issue-less and plaintiff 'R' and defendant 'G' both claims that she was their 'Bua'. Undisputedly, there is absolutely no iota of evidence on record to show that Former 'S' had any intention to gift the amount of impugned FDRs in favour of Survivor 'G'.

33. It can be safely held that mandate "Either or Survivor" or "Former or Survivor" with regard to mode of payment deals only with valid discharge of Banks and has nothing to do with the law of succession or right of successors/legal heirs/legatee of deceased-depositor. In such case, if the Bank makes full payment of amount due to nominee or survivor, it gets a valid discharge of dues and has no obligation to seek discharge from other legal heirs of deceased, before making such payment. As per clear instructions mentioned in circular of R.B.I. Dated June 9th, 2005, issued to all the Commercial Banks (reproduced hereinabove), and also in view of various decisions discussed earlier, the survivor or nominee, has only a limited right to receive the amount as a trustee of the legal heirs of deceased-depositor and such payment to survivor/nominee, does not affect the rights or claims, which any person may have against survivor or nominee to whom the payment has been made. No

doubt above Circular Letter has been issued by Reserve Bank of India in the year 2005, subsequent in time to the dispute, which arose between the parties on death of 'S' on 30.1.1985, but it contains only instructions or guidelines to Commercial Banks for improvement in quality of customer service and clarifies the legal position, hence is equally relevant in instant case.

34. In view of discussions made above, the Court is of the considered view that position of survivor "G' upon death of depositor/former "S' is only that of a nominee, to whom even if the payment of amount due had been made by Bank (though admittedly has not been made as yet), would have been only in due discharge of bank obligation and on such payment defendant would not have become absolute owner of the amount so received by her, as survivor/nominee, rather would have been only a trustee of the legal heirs of "S' including her legatee "R' the plaintiff. Issue no.1 was decided by Trail Court in affirmative holding due execution of registered Will deed of her all movable/immovable properties including impugned FDRs by 'S' in favour of her nephew plaintiff 'R'. The lower Appellate Court did neither disagree with, nor displaced above findings. The contention of learned counsel for defendant that Former 'S' had no right to execute Will in respect of impugned FDRs, is bogus having no force and the findings of lower Appellate Court about Will being ineffective, in view of mandate mentioned over impugned FDRs, is wrong, illegal and perverse, as the lower Appellate Court failed to consider that survivor does not acquire absolute rights, rather his/her rights are that of a nominee or trustee of legal heirs of Former.

35. The Court is of the considered view that lower Appellate Court has committed grave and manifest error and acted wrongly and illegally in carving out a new case itself with regard to Will being ineffective in view of mandate mentioned over impugned FDRs as well as non maintainability of suit on this Count. The substantial question of law no.2 is, therefore, decided in affirmative in favour of plaintiff against the appellant.

36. In view of discussions made above, the Court has come to the conclusion that learned lower Appellate Court has committed grave and manifest error of law and acted wrongly and illegally in allowing the first appeal by setting aside judgment and decree passed by Trial Court, without displacing the findings recorded by Trial Court. The impugned judgment and decree do not deserve to stand and are liable to be set aside and appeal is liable to be allowed.

37. The appeal is allowed accordingly. The impugned judgment and decree dated 18.1.2002 passed by Additional District Judge, Kanpur Nagar, the lower Appellate Court in Civil Appeal No.264 of 2001, Smt. Gurpyari Devi Vs. Ram Krishna Puri and others are set aside and the judgment and decree dated 4.9.2001 passed by Additional Civil Judge (Senior Division), Kanpur Nagar, the Trial Court decreeing the Civil Suit No.193 of 1986 are restored.

38. In the circumstances of the case, parties shall bear own costs of the litigation throughout.

39. Interim order, if any, stands vacated.

40. Let the lower court record be transmitted back to Court below along

with a copy of this judgment for necessary action, if any, after preparation of decree.

(2019)10ILR A 803

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Second Appeal No. 554 of 2005

Jageshwar Dayal & Ors. ...Appellants
Versus
Rajjan Lal ...Respondent

Counsel for the Appellants:
Sri B. Dayal, Sri V. Sahai, Sri Aman Mehrotra

Counsel for the Respondent:
Sri A.N. Bhargava, Bharti Kashyap, Rajni Ojha

A. Court Fees Act, 1870 - Section 6(2) - Deficiency of court fees - In the presence of deficiency of court fees - Court cannot proceed with the suit.

Held: - Court can enter into the merits and proceed with the suit only after full court fee is paid - Adjudication of the claim - cannot be proceeded if there is Deficiency of court fee. (Para 34)

B. Code of Civil Procedure, 1908 - Order XXIII Rule 3 CPC - Compromise of suit - Provision is mandatory.

Held: -Satisfaction of the Court, should be duly recorded, in regard to the willingness of the parties to compromise the suit, and lawful nature of the agreement. The identities of the parties, as well as their signatures should be fully established before the court – Satisfaction of these conditions precedent to a valid compromise should be reflected in clear findings of the court. (Para 41)

Omission to return independent findings regard to the willingness of the parties to compromise the suit, and lawful nature of the agreement makes the order perverse. Findings on the identities of parties, identification of signatures and the respective counsels, lack material particulars and are vague. (Para 42 & 47)

Second Appeal allowed (E-5)

Cases relied upon: -

1.Mt. Asghari Begum Vs Fasihuddin AIR 1934 All. 989

2.Pradeep Kumar & anr. Vs Vishnu Kumar & ors. 2018 All. C.J. 2560

3.Hamid Hussain Khan Vs Masood Hussain Khan & ors. AIR (39) 1952 All. 279

4.Harmndeep Singh Vs Swaran Singh 2009 Law Suit (P&H) 640

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

1. This second appeal, arises out of the judgment and decree dated 10.05.2005, rendered by the learned Additional District Judge, Anupshahar, District Bulandshahar in Civil Appeal no. 2 of 2004 (Jageshwar Dayal and others Vs Rajjan Lal), which affirms the judgment and decree dated 04.12.2003, entered by the learned Civil Judge (Junior Division), Bulandshahar, in Original Suit no. 231 of 2001, Jageshwar Dayal and others Vs Rajjan Lal.

2. This second appeal is instituted by the plaintiffs in the Original Suit no. 231 of 2001, Jageshwar Dayal and others Vs Rajjan Lal.

3. The following genealogical table, depicts the respective positions of parties, to the litigation:

Nannamal (deceased)
Shyo Prasad Gulab Dei Rajjanmal Shanti Devi
(deceased) (deceased) (defendant-respondent)
Suman Kumari Manorama Devi Gayatri Jageshwar Dayal
(deceased)

4. The plaintiffs-appellants brought civil action, against the defendant-respondent, by instituting a suit for declaration and injunction. The suit was registered as Original Suit No. 231 of 2001, Jageshwar Dayal and others Vs Rajjan Lal before the learned Civil Judge (Junior Division), Bulandshahar. The plaintiffs-appellants in the suit claimed to be true owners in possession of the property in dispute and sought a declaration to that effect. It was further prayed, that the defendant-respondent be injuncted, from interfering with the peaceful possession, of the plaintiffs-appellants, over the property in dispute. The third relief, sought by the plaintiffs-appellants, was to restrain the defendant-respondent, from alienating the disputed property in favour, of a third party.

5. Before the issues were framed, a written compromise, purportedly executed between the parties on 30.05.2001, was filed in the learned trial court. The defendant-respondent, by application 27Ga-2, denied the compromise.

6. The learned trial court vide order dated 24.09.2002 rejected the application 27Ga-2 of the defendant-respondent. The order dated 24.09.2002, found that the compromise is only a document in the record, and till the court passes appropriate orders, the compromise is ineffective and cannot be acted upon.

7. The trial court framed the following issues;

"(i) Whether the plaintiff is the owner of the entire property in dispute?

(ii) Whether the plaint was under valued and there was a deficiency in court fee?

(iii) Whether disputed property is a joint property of the parties in which all parties are entitled to an equal share?

(iv) Whether the plaintiff is entitled to any relief?

8. The issues were framed i.e. on 07.08.2003, and the issue no. 2 was decided, on date. By order dated 07.08.2003, the learned trial court, found that the valuation of the property in dispute was Rs. 10,000/-. The learned trial court, by the said order, directed the plaintiffs-appellants, to amend the valuation of the plaint and deposit the deficient court fee, within a period of one week. Additional time was granted by the court, since the defects were not rectified in time.

9. However, the plaintiffs-appellants did not carry out the necessary amendment, nor did they deposit the deficient court fee. On 28.10.2003, an application registered as Paper No. 34-A/1 was moved by the plaintiffs-appellants, for enlargement of time to cure the deficiencies.

10. The ordersheet of the learned trial court goes silent thereafter, on whether the amendment was carried out or not, and whether the plaintiffs-appellants had deposited the deficient court fees.

11. The original records, of the learned trial court, are before this Court.

Learned counsel for both the parties perused the record. The learned counsels for both the parties, confirm that the plaintiffs-appellants did not carry out the amendment in the plaint, and failed to deposit the deficient court fees. No orders were passed on application marked as Paper No. 34A/1. These undisputed facts, lie at the core of the controversy, in this appeal.

12. An application, numbered as Application no. 35-A/2 was filed, by the defendant-respondent, before the learned trial court on 04.12.2003, to decree the suit, in light of the compromise agreement, dated 30.05.2001. The application, bears an endorsement of the counsel of the plaintiffs-appellants, seeking time to file an objection, to the said application.

13. The learned trial court decided the Application no. 35-A/2 and the suit on the foot of the compromise dated 30.05.2001 and entered a judgment and decree on 04.12.2003. The judgement dated 04.12.2003, passed by the learned trial court, records that a compromise agreement, was executed between the parties on 30.05.2001, and the same is in the record of the court. The learned trial court, in the judgement dated 04.12.2003, thereafter finds that "by the compromise agreement (Paper No. 22-A/1) the parties are ready to compromise". The judgement dated 04.12.2003, finally decreed the suit, in terms of the compromise deed and the compromise was made part of the decree. The judgment of the learned trial court did not consider the objection of the plaintiff-appellant to the application no. 35A-2, tendered by the defendant-respondent.

14. The plaintiffs-appellants carried in appeal, the judgment and decree, of the learned trial court dated 04.12.2003, before the learned Additional District Judge, Bulandshahar. The appeal was registered, as Appeal No. 2 of 2004, Jageshwar Dayal and others Vs Rajjan Lal. Various grounds, against the judgment and decree of the learned trial court, were stated in the memo of appeal. The grounds relevant at this stage, specifically emphasized the objection taken by the plaintiffs-appellants on 04.12.2003, and endorsed on the application no. 35-A/2, submitted by the defendant-respondent, to decree the suit in terms of the compromise. The omission of the trial court to consider the said objection, was also a ground in the memo of appeal.

15. The learned Appellate Court framed one issue for determination, "Whether the learned trial court while entering its judgment and decree dated 04.12.2003, over looked the material in the record, and misdirected itself in law, by passing an arbitrary order?"

16. The learned appellate court in its judgment dated 10.05.2005, found that the compromise dated 30.05.2001, was filed by both the parties in the court. The judgment of the learned appellate court, thereafter records, that no objection was tendered by the plaintiffs-appellants, in regard to the compromise. The only objection to the compromise came from the defendant-respondent which was rejected by the learned trial court.

17. The learned appellate court thus concurred with the learned trial court, that no objection had been tendered by the plaintiffs-appellants to the compromise. In its narration of facts, though, the appellate court noticed the objection made

by the plaintiffs-appellants before the trial court seeking time to enter its opposition, to the application No. 35-A submitted by the defendant-respondent. However, no finding in that regard was returned by the learned appellate court. The appellate court was in agreement, with the trial court, to decree the suit on the foot of the compromise.

18. The appellate court in its judgment dated 10.05.2005, also dealt with the issue, regarding deficiency in payment of court fees, and failure of the plaintiffs-appellants, to make the amendments to the plaint. The appellate court judgment, held that in view of the compromise between the parties, issue of deficiency in court fee was irrelevant.

19. In this manner, the learned appellate court, as well as the learned trial court, abstained from deciding the objection of plaintiffs-appellants to the compromise. The learned courts also opined that deficiency in court fees and failure to amend the plaint on merits, had lost relevance, in light of the compromise between the parties.

20. In the wake of such findings, the appeal filed by the plaintiffs-appellants, came to be dismissed and the judgment & decree of the learned trial court was affirmed, by the learned appellate court, in its judgment and decree dated 10.05.2005.

21. Sri B. Dayal, learned counsel for the appellants, submits that the judgments and decrees of the learned trial court, as well as learned appellate court, respectively decreeing the suit in terms of the compromise, was in the teeth of Section 6(2) of the Court Fees Act, 1870. The judgments of both the learned courts, are in excess of jurisdiction. The courts could not enter into the consideration of the compromise, in the face of admitted deficiency in the court fee.

22. Learned counsel for the plaintiffs-appellants, further submits, that the impugned judgements, completely over looked the objection by the plaintiffs-appellants to the application, filed by the defendant-respondent, to decree the suit, in terms of the compromise. The judgments & decrees impugned are in violation of Order XXIII Rule 3 CPC.

23. In opposition, Mrs. Rajni Ojha, learned counsel for the defendant-respondent, submits that the appeal before the learned appellate court, as well as the instant second appeal, are not maintainable in view of the bar in Section 96(3) CPC. Elaborating her submissions, she contends, that findings of fact, had been returned by the learned courts of earlier instance, that the compromise was duly arrived at, and hence the bar in Section 96 (3) CPC read with Order XXIII Rule 3 CPC, will apply in full force to the facts of this case. Secondly, the issue of court fees ceases to be relevant, after the parties arrived at a compromise.

24. The parties agreed during the arguments, that following substantial questions of law arise for determination in this second appeal.

(i) Whether the learned appellate court and the learned trial court erred in law by proceeding with the suit and decreeing it in terms of the compromise, even in the admitted presence of deficiency of court fees, and lack of

incorporation of amendment to the plaint in regard to valuation of the suit?

(ii) Whether the judgment of the learned trial court as well as learned appellate court are rendered perverse and illegal, on account of omission on the part of the learned both courts, to return independent findings on the objection endorsed by the plaintiffs-appellants on the application no. 35A filed by the defendant-respondent?.

(iii) Whether the learned appellate court erred in law by affirming the judgment of the learned trial court, without finding the compliance of Order XXIII Rule 3 C.P.C.?

(iv) Whether the appeals before the learned first appellate court as well as this Court are maintainable?

25. The levy of court fee, is governed and regulated by the Court Fees Act, 1870 (hereinafter referred to as "Act of 1870"). The Act of 1870 is a complete code. The consequences of short payment of court fee, and failure to rectify the defect by making good the deficiency in court fee, are provided in Section 6(2) of Court Fees Act, 1870. The provision bears relevance to the instant controversy, and it would be apposite to extract the same before proceeding further;

"6. Fees on documents filed, etc in Mufassil Courts or in Public Offices- (1).....

(2) Notwithstanding the provisions of sub-section (1), a Court, may receive plaint or memorandum of appeal in respect of which an insufficient fee has been paid, but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court."

26. Answers to two of the substantial questions of law, framed herein above, will turn largely, on the interpretation, of the above said provision.

27. A perusal of Section 6(2) of the Act of 1870, discloses that even on insufficient payment of fee, the court may receive a plaint or a memorandum of appeal. The second part of Section 6(2), creates an embargo on further action, to be taken on a plaint or memorandum of appeal, which is deficient in court fee. However the disability imposed is not permanent, and shall stand removed, once the plaintiff or the appellant, as the case may, be makes good the deficiency in court fee, within the time fixed by the court. The defect is curable and can be rectified by payment of court fee in full.

28. Section 6(2) of the Act of 1870 and in particular the phrase therein "shall be acted upon" fell for consideration, on more than one occasion, before this Court.

29. The consequences of the deficiency in payment of court fee, on the suit action, were determined by this Court in **Mt. Asghari Begum Vs Fasihuddin** reported at **AIR 1934 Allahabad 989**, wherein it was ruled:

"There would be no proper suit before the Court till the deficiency in court-fee had been paid. The only order that could be passed by the learned Subordinate Judge was one rejecting the plaint. No order permitting the plaintiff to withdraw the suit and to bring a fresh suit could have been made on the basis of an insufficiently stamped plaint, which was

liable to be rejected. In this view of the case, the plaintiff has paid what was due by her, and she is not entitled to get back the money. The application in revision is accordingly dismissed with costs."

30. In **Pradeep Kumar and another Vs Vishnu Kumar and others,** reported at **2018 All. C.J. 2560**, this Court, interpreted the expression "no such plaint or memorandum of appeal shall be acted upon" as occurring in Section 6(2) of the Court Fees Act, 1870. This Court in **Pradeep Kumar (supra)** held:

"In so far as sub-section (3) of section 6 is concerned, it restricts the right of the court to proceed further with the suit or appeal, if a question of deficiency in court-fee in respect of any plaint or memorandum of appeal has been raised by an officer mentioned in Section 24-A. Proceeding further in a suit or an appeal would mean proceeding further on the claim made in the suit or in the appeal or on the applications seeking interim relief to serve that claim. It does not take away the right of the plaintiff to abandon any part of his claim. When a plaintiff abandons part of his claim, he does not proceed further with his claim made in the suit. The process /act of abandonment of a part of the claim made in a suit does not amount to proceeding further in the suit."

31. The consequences of deficiency of court fees and the scope of expression "proceeding with the suit" in Section 6(3) of the Court Fees Act, 1870 were also considered in **Hamid Hussain Khan Vs Masood Hussain Khan and others reported at AIR (39) 1952 Allahabad 279**. The determination of this Court of the aforesaid legal question is as follows;

"29. Under Section 6(3) Court-fees Act, as amended in U. P. when a question of deficiency in court-fee is raised by the Inspector of Stamps, the Court is directed, before proceeding further with the suit or appeal, to record a finding whether the court fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff to make good the deficiency within such time as it may fix and in case of default shall reject the plaint; provided that the Court may, for sufficient reasons to be recorded proceed with the suit, if the plaintiff gives security to the satisfaction of the Court for payment of the deficiency in court-fee within such further time as the Court may allow.

30. As stated above, the Court does not appear to have decided the question of court-fee before proceeding with the receivership application. The question is whether proceeding with the receivership application amounts to "proceeding with the suit" I thick that it does. A application for the appointment of a receiver is made in the suit and is part of the proceedings of the suit. It is true that it does not raise a question upon the merits of the suit itself but it is certainly an interim matter connected with the suit. The words 'proceeding with the suit', as mentioned in Section 6(a) must be read in the context of Section 28 Court fees Act which provides that no document shall be of any validity unless and until it is properly stamped. If the plaint is not properly stamped, the Court ought not to take any action upon it so as to give relief to the plaintiff by way of an interim injunction or an order of appointment of a receiver, or otherwise.

31. The fact that the defendant's application in revision against the order of the lower Court directing the hearing of the receivership application before the

issue of court-fee was decided was dismissed by this Court does not debar this Court from considering in this appeal the question whether in the circumstances the Courts below bad jurisdiction to proceed with the hearing of the receivership application. The reason is that the revision was dismissed not on the merits, but on a preliminary point that the revision was not maintainable."

32. The preceding findings of facts, the case law in point, and the bare words of the statute, will enable us to distill the import of Section 6(2) of the Act of 1870, and its impact on this case.

33. The words "no plaint or memorandum of appeal shall be acted upon" essentially places a jurisdictional fetter on the court. Jurisdiction, is the authority conferred by law upon a court, to try a lis. Before proceeding to try any lis, or pronouncing any judgment on the claim or part thereof, courts have to see that all jurisdictional pre-requisites, are satisfied.

34. A court can enter into the merits of a controversy, and/or proceed with any aspect of the claim, only after full court fee as determined by the court, is paid. The suit proceedings become dormant, when deficiency in court fee is found. But the jurisdiction of the court to process the claim revives, once the deficiency is removed. Failure to remove the deficiency after opportunity, may entail dismissal of the suit. In any case, the adjudication of the claim or part thereof, which is subject of the suit, cannot be proceeded with, in the wake of deficient court fee.

35. The plaintiff had not amended the plaint, and there was deficiency in payment of court fee, despite orders of the trial court.

36. In these facts, the learned trial court as well as the learned appellate court, did not have the jurisdiction, to enter into an exercise under Order XXIII Rule 3 CPC, return any findings in regard to the compromise, and pass a judgment and decree on the foot of such compromise. The learned trial court as well as learned appellate court, exceeded their jurisdiction, and acted contrary to a statutory embargo created by Section 6(2) of the Court Fee Act, by acting upon the compromise dated 30.05.2001, and entering their respective judgments and decrees, on the foot thereof, in the face of admitted deficiency in payment of court fee and failure of the plaintiff-appellant to amend the plaint.

37. The first question of law is accordingly answered as follows:

"The learned appellate court and the learned trial court erred in law by proceeding with the suit and decreeing it in terms of the compromise, even in the admitted presence of deficiency of court fees, and lack of incorporation of amendment to the plaint in regard to valuation of the suit".

38. Compromise, between the parties to a lis, is an act of litigative repose, which terminates the litigation. Compromise is an act of which parties to a lis, to settle the dispute on acceptable terms with mutual consent . Legislature has accorded sanctity, to act of the parties to settle their dispute, by compromise agreements. The procedure for effecting a valid compromise, provided in Order XXIII Rule 3 CPC, is summary in detail but substantive in content.

39. Order XXIII Rule 3 CPC. is reproduced here under, for ready reference:

3. Compromise of suit - Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties] or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction in the same as the subject-matter of the suit:]

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation-An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule;]

40. Compromise not only brings the parties to a litigative terminus, but also bars further litigation, by prohibiting any appeal against a compromise decree. The parties are barred from agitating the matter any further, after the compromise decree is passed. The parties cannot be rushed into a compromise. The essence of a compromise, is in a voluntary agreement, between the parties, to settle the matter by mutual consent. The procedure prescribed under Order XXIII Rule 3 CPC, rules out all elements of fraud, misrepresentation, coercion and anything which makes a compromise non voluntary.

41. Hence, there has to be strict compliance of the procedure prescribed in Order XXIII Rule 3 CPC. The provision is mandatory, and has to be scrupulously adhered to. The satisfaction of the Court, should be duly recorded, in regard to the willingness of the parties to compromise the suit, and lawful nature of the agreement. The identities of the parties, either in person, or through their counsel as well as their signatures should be fully established before the court with full material particulars. Satisfaction of these conditions precedent to a valid compromise should be reflected in clear findings of the court.

42. In the instant case, the findings of the trial court and the appellate court, on the identities of parties, identification of signatures and the respective counsels, lack material particulars and are vague.

43. The learned trial court as well as learned appellate court under the judgments dated 10.05.2005 and 04.12.2003 respectively, have not recorded their satisfaction on the basis of the material in the record, in regard to the willingness of the parties to the compromise and the lawful nature of the agreement.

44. The mandate of Order XXIII Rule 3 CPC, as stated in the preceding paragraphs, was not observed by the learned trial court, as well as the first appellate court. The compromise decree

was passed by the trial court in violation of the provisions of Order XXIII Rule 3 CPC.

45. This requirement assumes greater importance, in this case, in view of some peculiar facts. The plaintiffs-appellants had endorsed an objection to the compromise on the application, filed by the defendant-respondent, dated 04.12.2003, registered as Paper No. 35A-2. The learned trial court took no account of the aforesaid objection. The learned trial court did not return a finding on the said objection made by the plaintiff-appellant. This omission by the learned trial court was a ground in the memo of appeal before the first appellate court. The learned appellate court, noticed the objection of the plaintiffs-appellants, to the compromise, but neglected to make a finding on the same.

46. True it is, that the plaintiffs-appellants had on earlier occasion, affirmed the compromise, in response to the application dated 04.07.2001 by the defendant-respondent, denying the compromise. On different occasions, both parties had reversed their stands on the compromise before the trial court. In such situation, it was imperative to determine the nature of the objection. The judgments assailed in this second appeal have been rendered in violation of Order XXIII Rule 3 CPC.

47. The findings of the learned trial court, and the learned appellate court, that the appellant did not object to the compromise are perverse and contrary to the record.

The second and third questions of law are accordingly answered as follows;

(2) The judgment of learned appellate court was rendered perverse and illegal, by its agreement with the learned trial court that the plaintiffs-appellants had no objection to the compromise, since it overlooked the admitted fact in the record, that the plaintiffs-appellants had endorsed an objection to the application 35-A, before the learned trial court and duly reiterated the same in the memo of appeal.

(3) The learned appellate court erred in law, by affirming the judgment and decree of the learned trial court, which was passed in violation of Order XXIII Rule 3 CPC.

48. The legislature has vested sanctity in a mutual settlement by according finality to a compromise agreement. Of course the compromise has to be entered into lawfully before a court of law. The Courts acknowledge, the quietus to the controversy, brought about by such compromise. Appeals, against a judgment and decree, passed on the foot of a compromise are barred. Section 96(3) of CPC prohibits any appeal, against a decree passed on a compromise, between the parties. The intent of the legislature is not far to seek. Creating successive avenues of appeal, against a judgment and decree passed on the foot of a compromise, would defeat the purpose of settlement by compromise. Successive avenues of appeal, would draw the parties, into an endless orbit of litigation, which they seek to end by the compromise.

49. Considering the issue of maintainability of an appeal and a second appeal, arising out of a judgment and decree passed on a compromise the Hon'ble Punjab & Haryana High Court in

Harmndeep Singh Vs Swaran Singh reported at 2009 Law Suit (P&H) 640, answered the aforesaid question as under:

"24. The judgment and decree passed by the learned lower appellate Court was on the basis of compromise, which is again not appealable. The prerequisite for permitting the assignee to file an appeal in this Court, the judgment/decree should be appealable to the High Court. Once it is proved, that the decree is not appealable, the application or the appeal filed by the applicant-appellant cannot be entertained."

50. The argument of Smt. Rajini Ojha, learned counsel for the respondent regarding non maintainability of the appeals, before the first appellate court as well as this Court, seems attractive at first sight, and settled both by statute and authority. However, in light of the established facts of this case and legal narrative rendered in the earlier part of the judgment, the arguments do not stand up to judicial scrutiny.

51. Admittedly, there is a legislative bar, against taking a judgment and decree, passed on the foot of a compromise, in appeal. Such bar is however, is premissed on two facts. Firstly, the trial court, had the jurisdiction to render the judgment and decree on the foot of a compromise. Secondly such judgment and decree had been rendered in strict adherence to the provisions of Order XXIII Rule 3 CPC. In case, the trial court was not vested with the jurisdiction, to enter a judgment on the foot of a compromise, the bar of Section 96(3) CPC will not apply. There can be no two ways about it. In the event, any other interpretation is adopted, an absurdity would be a sure consequence. In that case, a judgment passed by a court, without jurisdiction, would become final. The aggrieved party, would not have any legal recourse, even against a judgment, which was beyond the jurisdiction of the court. Consent of parties cannot confer jurisdiction on courts.

52. It has already been found, in the earlier part of the judgment, that the learned trial court had exceeded its jurisdiction and its judgment violated Order XXIII Rule 3 C.P.C. The appeal before the first appellate court, was maintainable to determine among other issues, the issue of excess of jurisdiction and compliance of Order XXIII Rule 3 C.P.C. The instant second appeal is maintainable on like grounds.

53. Smt. Rajini Ojha, learned counsel for the respondents has relied upon various judgments, relating to estoppels created against the parties, on account of compromise, and a consent decree passed on the basis thereof. However, the judgments are not applicable, to the facts of the instant case, in view of the findings the preceding part of this judgement.

54. The second question of law is answered as follows;

"The appeal before the first appellate court as well as the second appeal before this court are maintainable, since the trial court acted in violation of Order XXIII rule 3 CPC did not have the jurisdiction to pass the judgment and decree assailed before the first appellate court and this Court."

55. The judgment and decree dated 04.12.2003, passed by the learned Civil Judge

(Junior Division), Bulandshahar, in Original Suit no. 231 of 2001, Jageshwar Dayal and others Vs Rajjan Lal, and the judgment and decree dated 10.05.2005, passed by Additional District Judge, Anupshahar, District Bulandshahar in Civil Appeal no. 2 of 2004 (Jageshwar Dayal and others Vs Rajjan Lal), are illegal and unsustainable.

56. The judgment and decree dated 04.12.2003, passed by the learned Civil Judge (Junior Division), Bulandshahar, in Original Suit no. 231 of 2001, Jageshwar Dayal and others Vs Rajjan Lal, and the judgment and decree dated 10.05.2005, passed by Additional District Judge, Anupshahar, District Bulandshahar in Civil Appeal no. 2 of 2004 (Jageshwar Dayal and others Vs Rajjan Lal), are set aside.

57. The matter is remitted to the learned trial court.

58. The suit proceedings commence forthwith before the learned trial court upon receipt of a certified copy of this order. The learned trial court shall grant one month and no more time to the plaintiffs-appellants to amend the plaint and make good the deficiency in the court fee. The learned trial court shall decide the suit within a period of six months thereafter. The learned trial court shall proceed on day to day basis, if necessary to adhere to the stipulated time line. The learned trial court shall not grant any adjournment to the parties. The learned trial court shall finally decide the suit, in accordance with law and consistent with the observations made in this judgment.

59. In case an appeal is filed against the judgment & decree of the trial court, the appellate court shall decide the appeal within two months.

60. Second appeal is allowed to the extent indicated above.

(2019)10ILR A 813

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 264 of 2012
connected with
First Appeal No. 3 of 2016

Bulandshahr Khurja Development Authority, Bulandshahr ...Appellant
Versus
Smt. Amir Kuwar & Ors. ...Respondents

Counsel for the Appellant:
Sri B. Dayal

Counsel for the Respondents:
Sri D.K. Mishra, Sri B.B. Paul, Sri B.K. Solanki

A. Land Acquisition Act, 1894 - Market Value - Determination of market value has to be made as per market rate, prevailing on the date of publication of notification under section 4 (1) of Act, 1894. (Para 33)

B. Land Acquisition Act, 1894 - Market Value vis-à-visCircle rates - For the purposes of determining market value, under Section 23 of Act, 1894 - circle rate fixed by Collector for the purposes of stamp duty, under Stamp Act, 1899 - would not be a relevant material unless such determination is under a statutory obligation and after following the prescribed procedure. (Para 36 & 38)

C. Land Acquisition Act, 1894 - Market Value - '*comparable sales method of*

valuation' **- Exemplar sale deed - Sale deeds, if any, executed in the close proximity of the relevant date which is genuine and shows a voluntary and open transaction between the parties - Sale must be a genuine transaction - sale deed must have been executed at the time, proximate to the date of issue of notification under Section 4- land covered by the sale must be in the vicinity of acquired land – land covered by the sales must be similar to acquired land - size of plot of the land covered by the sales be comparable to the land acquired - Where land subject matter of exemplar sale deed is smaller or larger suitable adjustment by applying plus and minus factors and also appropriate deduction can be made by the Court.** (Para 39 & 67)

D. Land Acquisition Act, 1894 - Market Value - Number of Exemplar Sale deed- It is not the number of exemplars which is important but it is the genuity, authenticity and creditworthiness of the documents - If the document is found most suitable and appropriate for determining compensation in respect of acquired land, even a single instance/exemplar cited by Land Owner may be relied and it can be said that Claimant-Land Owner has succeeded in discharging his burden. (Para 48)

E. Land Acquisition Act, 1894 - Market Value - ***Size of land & Deduction*** **- Small size plot attract a large number of persons being within their reach - which will not be possible in respect of large block of land wherein incumbent will have to incur extra liability in preparing a lay out and carving out roads, etc - In such matters, factors can be discounted by making deduction by way of an allowance at an appropriate rate ranging between 20% to 75%, to account for land, required to be set apart for carving out road etc. and for plotting out small plots.** (Para 41)

F. Land Acquisition Act, 1894 - Market Value – Potentiality - "Potentiality" means, capacity or possibility for changing or developing into state of actuality - Potentiality of land should be on the date of acquisition i.e. existing potentiality - Further, potentiality has to be directly relatable to capacity of acquired land to produce agricultural products, or its market value relatable to method of compensation. If there exist crops, trees or fruit bearing trees, the same can be taken into consideration, but extent of benefit cannot go to the extent that fruits grown in agricultural land would be converted into processed food like jam or any other eatable products. (Para 59 & 67)

G. Land Acquisition Act, 1894 - ***Deductions*** **- Generally a deduction is given taking into consideration the expenses required for development of the larger tract to make smaller plots within that area in order to compare with the small plots dealt with under the sale transaction - Deduction can be made where the land is acquired for residential and commercial purpose with regard to roads and civic amenities, expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price, the profits on the venture etc.** (Para 44 & 54)

H. Land Acquisition Act, 1894 - ***Deductions*** **- Quantum of deduction towards development is on account of two components - "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure - "second component" may conveniently be referred to as deductions for developmental expenditure /expense under the head of "development", the applied deduction should not exceed 67 percent. That should be treated as the upper benchmark.** (Para 73)

I. Land Acquisition Act, 1894 - No Deduction case – Where the acquired

land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of `no deduction' – exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of `no deduction' may be applied. (Para 93)

J. Land Acquisition Act, 1894 - Belting system - When a large extent of land under acquisition comprises of lands of several persons and some lands are abutting the main road and some lands are in the interior, the same would not have the uniform rate of market value - Reasonable demarcation/classification should be made before determination of the compensation - i.e. where nature, extent, size, surrounding and location of acquired land greatly varies, Courts have applied "belting system" for determination of market rate of acquired land - It is applied in appropriate cases when different parcels of land with different survey numbers belong to different owners and having different locations are acquired – Such chunk cannot be taken as a compact block – In Belting System, acquired land is usually divided in two or three belts. (Para 88 & 94)

K. Land Acquisition Act, 1894 - Market Value- Valuation of immovable property - Factors - Factors such as the nature and position of land to be acquired, purpose for which the land can be used, its potential value, locality, situation, size and shape of the land, rise of depression in the value of land in the locality consequent to acquisition etc., are relevant factors to be considered - Other factor - Existing geographical situation of land, Existing use of land, Already available advantages, like proximity to National or State Highway or road and/ or developed area, Market value of other land situated in the same locality/ village/ area or adjacent or very near the acquired land. (Para 68 & 79)

L. Land Acquisition Act, 1894 - Fair Market Value - Burden - Burden to establish as to what is the reasonable and adequate market value and that the offer made by Collector is inadequate, is on the Land Owners/ claimanats at whose instance Reference has been made to District Judge under Section 18 of Act, 1894 - If initial burden in that behalf is discharged, the burden would shift to State to justify the compensation offered by SLAO. It is for Claimants to ascertain as a matter of fact - location, potential and quality of land for establishing its fair market value. (Para 49 & 59)

M. Land Acquisition Act, 1894 - Section 18 (Reference) - Reference Court does not sit in appeal over the Award of Land Acquisition Officer – Material used by Land Acquisition Officer is not open to be used by Court suo motu unless such material is produced by the parties and proved independently before Reference Court. (Para 33)

First Appeal dismissed (E-5)

Case relied upon: -

1.Chimanlal Hargovinddas Vs Special Land Acquisition Officer (1988) 3 SCC 751

2.Jawajee Nagnatham Vs Revenue Divisional Officer (1994) 4 SCC 595

3.Land Acquisition Officer Vs Jasti Rohini (1995) 1 SCC 717.

4.U.P. Jal Nigam Vs M/s Kalra Properties (P) Ltd. (1996) 3 SCC 124

5.Krishi Utpadan Mandi Samiti Vs Bipin Kumar (2004) 2 SCC 283

6.Lal Chand Vs Union of India & anr. (2009) 15 SCC 769

7.Ramesh Chand Bansal Vs D.M./Collector (1999) 5 SCC 62

8.R Sai Ram Bharathi Vs J Jayalalitha (2004) 2 SCC 9

9.Kausalya Devi Bogra & ors. Vs Land Acquisition Officer, Aurangabad & anr. (1984) 2 SCC 324

10.Bhagwathula Samnna & ors. Vs Special Tehsildar & Land Acquisition Officer, Visakhapatnam Municipality (1991) 4 SCC 506

11.V.M. Salgoacar & brother Ltd. Vs Union of India (1995) 2 S.C.C 302

12.Shakuntalabai (Smt.) & anr. Vs St. of Mah. (1996) 2 S.C.C 152

13.Gafar Vs Moradabad Development Authority (2007) 7 SCC 614

14.Basavva (Smt.) & ors. Vs Special Land Acquisition Officer & anr. (1996) 9 SCC 640

15.D. Vasundara Devi Vs Revenue Divisional Officer (1995) 5 SCC 426

16.Land Acquisition Officer, Kammarapally Village Vs Nookala Rajamallu & ors. AIR 2004 SC 1031

17.Udho Dass Vs St. of Har. & ors. (2010) 12 SCC 51

18.Anjani Molu Desai Vs St. of Goa & anr. (2010) 13 SCC 710

19.Nelson Fernandes & anr. Vs Special Land Acquisition Officer, South Goa & ors. AIR 2007 SC 1414

20.Special Land Acquisition Office Vs Karigowdo & ors. 2010 (5) SCC 708

21.Mohinder Singh & ors. Vs St. of Har. (2014) 8 SCC 897

22.Union of India Vs Raj Kumar Baghal Singh (dead) through legal representatives & ors. (2014) 10 SCC 422

23.Shaji Kuriakose & anr. Vs Indian Oil Corporation Ltd. & ors. (2001) 7 SCC 650

24.Kasturi & ors. Vs St. of Har. (2003) 1 SCC 354

25.Valliyammal & ors. Vs Special Land Acquisition (2011) 8 JT 442

26.Bhule Ram Vs Union of India & anr. JT (2014) 5 SC 110

27.Bhupal Singh & ors. Vs St. of Har. (2015) 5 SCC 801

28.Chandrashekhar Vs L.A. Officer (2012) 1 SCC 390

29.Subh Ram Vs St. of Har. (2010) 1 SCC 444

30.K. Devakimma & ors. Vs Tirumala Tirupati Devasthanam & anr. (2015) 111 ALR 241

31.Brig. Sahib Singh Kalha Vs Amritsar Improvement Trust (1982) 1 SCC 419

32.Administrator Gen. of W.B. Vs Collector, Varanasi (1988) 2 SCC 150

33.In Land Acquisition Officer Revenue Divisional Officer, Chottor Vs L. Kamalamma (Smt.) Dead by & ors. (1998) 2 SCC 385

34.Land Acquisition Officer Vs Nookala Rajamallu & anr. (2003) 12 SCC 334

35.V. Hanumantha Reddy (Dead) Vs Land Acquisition Officer (2003) 12 SCC 642

36.Viluben Jhalejar Contractor Vs St. of Guj. (2005) 4 SCC 789

37.Atma Singh Vs St. of Har.7 anr. (2008)2 SCC 568,

38.Andhra Pradesh Housing Board Vs K. Manohar Reddy 7 ors. (2010) 12 SCC 707,

39.Special Land Acquisition Officer 7 anr. Vs M.K. Rafiq Sahib (2011) 7 SCC 714

40.Nirmal Singh Vs St. of Har. (2015) 2 SCC 160

41.Major General Kapil Mehra & ors. Vs Union Of India & anr. (2015) 2 SCC 262

42.Power Grid Corporation Vs St. of U.P.& ors. (2019) 1 ADJ 753

43.Sabhia Mohammed Yusuf Abdul Hamid Mulla (d) by LRS & anr. Vs Special Land 42 Acquisition Officer & ors.(2012) 7 SCC 595

44.Viluben Jhalejar Contractor Vs St. of Guj. (2005) 4 SCC 789

45.Urban Water Supply & Drainage Board & ors. Vs K.S. Gangadharappa & anr. (2009) 11 SCC 164

46.St. of U.P. Vs Major Jitendra Kumar & anr. AIR 1982 SC 876

47.Administrator Gen. of W.B. Vs Collector, Varanasi AIR 1998 SC 943

48.Trishala Jain & anr. Vs St.of Uttranchal & Anr. (2011) 6 SCC 47

49.Union of India & Ors. Vs Mangatu Ram (1997) 6 SCC 59

50.Wazir & ors. Vs St. of Har. (2019) 3 SCJ 506 (SC)

51.Har. St. Industrial Development Corporation Vs Pran Sukh & ors. (2010) 11 SCC 175

52.Har. St. Industrial Development Corporation Vs Udal 7 anr. (2013) 14 SCC 506.

53.Ranjit Singh Vs Union Territory of Chandigarh (1992) 4 SCC 659;

54.Land Acquisition Officer & Revenue Divisional Officer Vs Ramanjulu (2005) 9 SCC 594.

55.Krishi Utpadan Mandi Samiti Vs Bipin Kumar (2004) 2 SCC 283.

(Delivered by Hon'ble Sudhir Agarwal, J.
Hon'ble Rajeev Misra, J.)

1. Sri B. Dayal, Advocate for appellant in both these appeals and Sri M.C. Singh, Advocate, for respondents in First Appeal No. 3 of 2016.

2. In First Appeal No. 264 of 2012, names of three counsel appear for respondents as shown in the cause list, one of whom namely Sri D.K. Mishra has sought adjournment on the ground of illness, but no reason has been assigned as to why other counsel are not present despite the case having been called in revised. In such circumstances, we find no justification to adjourn this matter and proceed to decide present appeals after hearing above mentioned learned counsel appearing for respective parties. .

3. Both these appeals arise from two similar but seperate Awards of Reference Courts under Section 18 of Land Acquisition Act, 1894 (hereinafter referred to as "Act 1894"), and have been filed under section 54 of the said Act. Since they involve common and similar questions of facts and law, therefore, have been heard together and are being decided by this common judgement.

4. Appeal No. 264 of 2012 (hereinafter referred to as 'Appeal-1') is a defendant's appeal arising from judgement and Award dated 10.5.2010 and decree dated 31.5.2010, passed by Sri Sushil Kumar, Additional District and Sessions Judge, Court No.9, Bulandshahr (hereinafter referred to as the 'Reference Court') adjudicating Land Acquisition Reference (hereinafter referred to as 'LAR') No. 184 of 2001 (Smt. Amir kuwar Vs. State of U.P.), determining market value of the acquired land for the purpose of payment of compensation at the rate of Rs. 8,50,000/- per Pakka Bigha (Rs. 281/- per sq-yard) and Rs. 3,54,783/- towards cost of the trees. Reference Court has also awarded other statutory dues like 12% additional compensation, 30% soletium and interest at the rate of 9% for

one year from the date of possession and for subsequent period at the rate of 15%.

5. Appeal No. 3 of 2016 (hereinafter referred to as "Appeal-2") is also a defendant's appeal arising from judgement and Award dated 24.9.2015 and decree dated 6.10.2015, passed by Sri Rajat Singh Jain, Additional District Judge, Court No.2, Bulandshahr in LAR No. 1 of 2006, determining market value for the payment of compensation at the rate of Rs. 8,50,000/- per Pakka Bigha (Rs. 281/- per sq-yards) besides other dues like 30% solatium, 12% additional compensation and interest as per various provisions of the Statute. This Award has been delivered following earlier Award dated 10.5.2010, passed in LAR No. 184 of 2001, which is subject of Appeal-1.

Appeal-1

6. Facts in brief giving rise to this appeal are, that, Bulandshahr Khurja Development Authority (hereinafter referred to as "BKDA") is a statutory body constituted under the provisions of U.P. Urban and Planning Development Act, 1973 (hereinafter referred to as "Act 1973") for undertaking development in the area notified under Act 1973 of District Bulandshahr at Khurja. For the purpose of construction of residential and commercial building, BKDA proposed acquisition of land in village Akbarpur. The proposed scheme was named as 'Yamunapuram Avasiya Yojna, first phase'. It proposed acquisition of 61.801 acres (299116.84 sq-yard or 98.88 Bigha) land.

7. A notification dated 20.12.1988 under Section 4 of Act 1894 was published in U.P. Gazette on 20.12.1988. Notification dated 18.1.1989 making declaration under section 6 of Act 1894 was published in U.P. Gazette dated 18.1.1989. Possession of land was taken on 19.5.1989 and Award was published by Special Land Acquisition Officer (hereinafter referred to as "SLAO") on 4.4.1991. The said Award, however, did not include Gatas No. 363 area 5-0-11; 385 area 10-0-11; 375 area 0-4-0 i.e. 3 plots of total area 18-5-2 for the reason that तमेचवदकमदज Smt. Amir Kunwar Devi in appeal-1 had filed Writ Petition No. 3317 of 1989, challenging acquisition Notifications and therein, an interim order was passed on 21.2.1989. The said writ petition was dismissed on 4.9.2000. Thereafter, aforesaid land of respondent Smt. Amir Kuwar Devi in Appeal-1 was taken in possession by State and transferred to BKDA on 22.9.2000. S.L.A.O published a supplementary Award dated 10.5.2001, offering compensation to respondents in First Appeals by determining market value for the purpose of compensation of acquired land, at the rate of Rs. 88,000/- per Bigha (i.e. Rs. 29.09 sq-yard).

8. In the award dated 4.4.1991, SLAO found that the part of land which was sold in small area plots to various sale-deeds, shows rates between Rs. 100/- per sq-yard to 420/- per sq-yard. There are some sale-deeds which show rates of Rs. 70/- to 100/- per sq-yard. SLAO ultimately, relied on sale-deeds No. 84 dated 25.11.1987, which relates to Plot No. 386, area 200 sq-yard (167.22 sq-meter) land was sold for consideration of Rs. 2000/- i.e. Rs. 100/- per sq-yard. Since the area of acquired land was much bigger, therefore he applied 25% deduction and determined market value of Rs. 75/- per sq-yard. Then it applied

belting system, divided the said rate into two i.e. Rs. 75/- per sq-yard land which is nearer to Highway/G.T. Road and land which was 50 meter and more deep, at Rs. 50/- per sq-yard. In respect of other land which he found was agricultural land applying circle rate, he determined market value of Rs. 88,000/- per Pakka Bigha i.e. Rs. 29.09 per sq-yard for Jungle Auwal Abi and Rs. 56981/- for Jungle Auwal Khaki. In the supplementary award dated 10.5.2001, SLAO has followed earlier award by applying rate of Rs. 88,000 per Pakka Bigha i.e. Rs. 29.09 per sq-yard, which was determined for Jungle Auwal Abi.

9. Respondent in Appeal-1, filed Writ Petition No. 13729 of 2001 (Smt. Amir Kunwar Devi Vs. B.K.D.A. and Others), which was disposed of vide judgement dated 13.4.2001, directing Authority concerned to decide her representation. The order reads as under:

"The present writ petition is disposed of with the direction that it is open to the petitioner to approach the authority concerned for deciding the representation which is said to be pending before him. It is hereby directed that if the representation has not yet been decided, it may be decided in accordance with law very expeditiously.

The writ petition is disposed of with the observations. "

10. The representation was rejected by Vice Chairman, BKDA vide order dated 6.7.2001. Aggrieved by supplementary Award dated 10.5.2001, Smt. Amir kunwar Devi, respondent in Appeal-1, made an application to Collector under Section 18 of Act 1894 requesting to make Reference to District Judge for determination of market value for the purpose of compensation, under section 23 of Act 1894. She claimed compensation at the rate of Rs. 10,000/- per sq-meter and Rs. 75,00,000/- as the cost of 400 mango trees and Rs. 50,000/- compensation in respect of tubewell installed at the acquired land.

11. The appellant contested Reference by filing written statement, raising an objection that there was already a settlement between parties, wherein claimant-respondent, Smt. Amir kunwar Devi, had accepted compensation at the rate of Rs. 49.35 sq-meter. In this regard, agreement was executed on 16.4.2003 and sale-deed was executed on 16.4.2003 for 3001.84 sq-yard land, hence Reference is not maintainable. Reference Court in Appeal-1 formulated five issues, as under :

''1– क्या भूमि अध्याप्ति अधिकारी द्वारा दिनांक 10–05–2001 को दिया गया एवार्ड नगण्य है तथा वाद पत्र की धारा–8 के अनुसार बाजारू कीमत व सर्किल रेट के कई गुना कम है ?

2– क्या याचना पत्र की धारा–7 के अनुसार अधिग्रहण व्यवसायिक उद्देश्य से किया गया था, यदि हॉ तो प्रभाव ?

3– क्या वाद पत्र की धारा–9 के अनुसार अर्जित भूमि में पौधों की कीमत तथा अन्य टयूववैल व क्षतिपूर्ति की प्रतिकर आदि एवार्ड में नही दिया गया है, यदि हॉ तो प्रभाव ?

4– क्या प्रतिवाद पत्र 28क की धारा–27 के अनुसार याचिनी का वादपत्र पोषणीय न होने के कारण खारिज होने योग्य है ?

5– उपशम ?''

"1. Whether the Award dated 10.05.2001 passed by the Land Acquisition Officer is null & void; and is many times lesser than the market price and circle rate as alleged in para 8 to the plaint?

2. Whether the acquisition was done for commercial purpose as alleged in para 7 to the plaint? If so, its effect?

3. Whether compensation for the cost of planting, erection of tube-well, etc. in the acquired land has not been awarded as alleged in para 9 to the plaint? If so, its effect?

4. Whether the plaint of the petitioner is liable to be dismissed as being not maintainable as alleged in para 27 to the written statement being 28 Ka?

5. Relief?"

(English Tanslation by Court)

12. Claimant-respondent in Appeal-1, in support of her claim, examined Sri Virendra Singh P.W.1 and herself as P.W.2. Defendant's oral evidence comprised of Sri Hari Singh as D.W.1.

13. Besides oral evidence, claimant-respondent in Appeal-1 filed copy of Award in LAR No. 563 of 1991, Ashok Kumar Vs. State of U.P; 266 of 1992, Kamal Mustafa Vs. State of U.P; 68 of 1992, Tahir Khatoon Vs. State of U.P and also submitted 61 sale-deeds executed between year 1991 to 2003 through List, Paper No. 29-C. Vide List Paper No. 151- C, she filed copies of 6 sale deeds; and vide List Paper No. 163-C, copies of 6 more sale deeds were filed. She also filed copy of Award dated 29.4.1995 in LARs No. 100 of 92, 169 of 92, 195 of 92 and 67 of 1992; copy of judgement dated 7.4.2010, passed by this Court in First Appeal No. 102 of 2000 (BKDA Vs. Ajay Kumar) and First Appeal No. 103 of 2000 (BKDA Vs. Arvind Kumar).

14. Defendant-appellants filed copies of 19 sale-deeds executed between 13.4.1987 to 15.7.1987, Award dated 4.4.1991 given by SLAO and agreement dated 16.4.2003.

15. Reference Court found that SLAO has determined market rate for the purpose of compensation at Rs. 88,000/- per Pakka Bigha (Rs. 29.09 per Sq-yard) for agricultural land, and Rs. 49.35 per sq-yard for abadi land. While answering issue-1, it has held that sale exemplars relied by SLAO are 1 to 2 years earlier to the date of notification under Section 4 of Act 1894 and land in those exemplars situated more than 100 meters away from the main road, while land in dispute was appurtenant to G.T Road, therefore, those exemplars were not valid in respect of land in dispute. Reference Court also rejected three sale-deeds relied by Claimant- respondents, filed along with List Paper No.160-C, on the ground that the same relate to the land which is far away from disputed land and hence not relevant in the matter. Similarly, documents filed as Paper No. 30-C to 60-C were also rejected. Thereafter, Reference Court referred to Awards given in LARs No. 168 of 1992, 169 of 1992, 195 of 1992 and 67 of 1992.

16. In LAR No. 195 of 1992, Plot No. 85, area 68 sq-yrd, was acquired for the same scheme with which the present matter relates. Reference Court determined market value at Rs.400/- per sq-yard, while in other References i.e. LARs No. 168 of 1992, 169 of 1992 and 67 of 1992, market rate was determined at Rs. 350/- per sq-yard. First Appeals No. 102 and 103 of 2010 filed by BKDA, challenging aforesaid determination of market value were dismissed on 7.4.2010.

17. Reference Court also examined difference in aforesaid References and the present one, inasmuch as area of land involved in aforesaid References was very small while in the present case, total area was more than 15 Pakka Bigha, which is a very bigger plot. Consequently, it

followed the principle of deduction towards largeness of area and found that in the Awards, wherein appeals were dismissed, land was about 5 Pakka bigha and more, and its value comes to Rs. 10,50,000/- per Bigha; since in the case in hand it is thrice bigger, it held appropriate to allow 10 % deduction per Bigha and therefore, deducting Rs. 2,00,000/- lump sum, it determined market value at Rs. 8,50,000/- per Bigha (i.e. Rs. 281/- per sq yard).

18. Reference Court has also stated that during course of argument, counsel for B.K.D.A. admitted that tenure holders have already been paid compensation at the rate of Rs. 300/- per sq-yard. Issue-1 was answered accordingly, determining market rate at the rate of Rs. 8,50,000/- per Pakka Bigha (i.e. Rs. 281 per sqr-yard).

19. Issue 2 was also answered in favour of Claimant-respondent. Issue-3, since in the Award dated 10.5.2001, no compensation was awarded in respect of trees and tubewell, hence it was answered in favour of Claimant-respondent holding that she was entitled for compensation in respect of standing trees and it determined compensation of Rs. 3,54,783/- on this count.

20. Answering issue-4, Reference Court found that alleged agreement was confined only in respect of 3001.83 sq-yard land and not the remaining one, therefore, for remaining land, said agreement was not relevant, particularly when it was clearly stated that Reference pending in Reference Court, only to the extent of area of land for which settlement was entered into, would not be pressed. Issue-5 was also answered in negative and thereafter Reference has been answered as stated above.

21. Appeal-2 also relates to the same acquisition proceedings arising from notifications dated 20.12.1988 issued under section 4 of Act 1894 and 18.1.1989 issued under section 6 of Act 1894.

22. Claimant-respondent, Sri Atul Chandra and Smt. Vibha Chand, are owners of Khata No. 132 Gata No. 358 area 3-9-0 and Gata No. 384 area 4-16-10. Possession of aforesaid land was also belated due to writ petition filed by Claimant-respondent before this Court and ultimately, possession was taken on 22.5.2000. Award was made by SLAO on 7.7.2005, offering compensation at the rate of Rs.88,000/- per Bigha i.e. Rs. 29.09 per sq-yard. Aggrieved thereby, Claimant-respondents made application under section 18 for Reference to District Judge for determining market value under section 25 of Act, 1894, claiming compensation at the rate of Rs. 5,000/- per sqr. mtr. Here also Reference Court formulated five issues, as under:

"1. Whether the compensation, awarded to the petitioners for their acquired land is insufficient?

2. Whether the acquired land is of residential and commercial potentiality?"

3. Whether the petition is barred by principles of estoppels and acquiescence?

4. Whether the reference is time barred?

5. Relief?

23. Issue -3 and 4 were answered in negative. Answering issue-1, Reference Court also followed the same reasonings as were followed by Reference Court in

its Award dated 10.5.2010, passed in LAR. No. 184 of 2001 and determined market value at the rate of Rs. 8,50,000/- per Pakka Bigha (i.e. Rs. 281/- per sqr yard) for the purpose of compensation.

Contentions in these Appeals

24. Learned counsel appearing for appellants has confined his challenge to the awards in question only to the extent of market value of acquired land determined at the rate of Rs. 8,50,000/- Bigha (i.e. Rs. 281/- per sq-yard). He submits that determination of market value by Reference Court is imaginary, highly excessive, unreal and beyond the rates prevailing in the area at the time of issue of notification under Section 4 of Act 1894. He also contended that relevant exemplars have been ignored, findings are based on exemplars, which pertained to very small land and should not have been treated to be a valid exemplars; percentage of deduction applied towards largeness of area is almost negligible, and deduction ought to have been applied to a larger extent, and thus the awards are liable to be set aside.

25. Per contra, learned counsel appearing for claimant-respondents submitted that acquired land is in highly developed area, appurtenant to Highway i.e. G.T. Road and had great potential of development; mere fact that it was used for agricultural purpose has no relevance for the reason that near-by area was already developed as Abadi, having all amenities and facilities; land was being sold in small plots at a much higher rates than what has been Awarded by Reference Court, therefore, no interference is called for. Lastly, he submitted that poor farmers have lost their source of livelihood i.e. agricultural land pursuant to acquisition in question as long back as in December, 1988 and after more than 31 years, are still engaged in litigation and that too only to get appropriate consideration of land, which has been snatched away forcibly by acquisition by State without paying compensation at market value and still they are reeling in hope of getting appropriate market value which for all practical purposes has already lost much substance for the reason that whatever amount now they will get, would not be sufficient to enable them to purchase another land, since cost of land has multiplied several hundred times, particularly, due to extraordinary development in the vicinity of BKDA area and sky rocketing prices of land. Now alternative land to respondents has become a dream, which cannot be achieved. Therefore, State on the one hand had taken away their land and on the other has failed to pay adequate compensation at par with the market value and lastly by engaging claimant-respondent in litigation for last three decades, it has virtually rendered respondents totally landless and also without any source of earning livelihood. It is also said that how and in what manner respondents had met their expenses and managed litigation expenses, is something which only respondents know and even if payment is now made to respondents as per rates determined by Reference Court, it would be virtually negligible part of actual market value of the land acquired by BKDA, which it can fetch now. He, therefore, submitted that it is not a fit case in which Court should interfere, particularly when substantial justice has been done and Reference Court has made

its Award on the basis of relevant material placed before it.

26. It is not in dispute that determination of market value is to be made with reference to date when notification under Section 4 of Act 1894 was issued and in the present case, the relevant date would be 20.12.1988.

27. From the rival submissions advanced on behalf of both the sides, in our opinion, following points for determination have arisen:

(i) Whether Reference Court has rightly determined market rate of Rs. 8,50,000.- i.e. Rs. 281/- per square meter of entire acquired land irrespective of area of individual plots of Land Owners, their location and other relevant factors?

(ii) Whether Reference Court ought to have considered the question of determination of market value, with reference to entire area of acquired land, its location/situation and other developmental advantages/ disadvantage vis-a-vis relevant exemplars or it should be vis-a-vis different plots of different Land Owners?

(iii) Where area of acquired land is very large and from main G.T. Road land goes in deep to the extent of more than 500 meters, whether 'Belting System' ought to have been applied and Court below has erred in law by not applying 'Belting System'.

(iv) Whether Court below has rightly followed exemplar sale-deed and awards in other LARs, relating to same acquisition proceedings has erred in law in rejecting exemplar sale-deeds, relied by appellants and placed in evidence?

(v) Whether Reference Court has considered/ rejected relevant exemplars or has followed exemplar(s), which was/were not valid and inapplicable in the case in hand and its findings is based on irrelevant material?

28. All the aforesaid issues are interrelated, therefore, we are considering the same together.

29. Before examining the aforesaid issues on merits, it would be appropriate to have a bird eye view of relevant legal principles settled in last several decades, which are to be applied when market value of a land acquired, forcibly, under the provisions of Act, 1894 has to be determined by Court in a Reference made under Section 18 of the said Act.

30. In the light of rival submissions, as noticed above, we have now to examine the only point for determination, "whether market value determined by Reference Court is just, adequate and actual or it is excessive and on a higher side which requires reduction".

31. Before examining the aforesaid issue on merits, it would be appropriate to have a bird's eye view of relevant legal principles settled in last several decades, which are to be applied when 'market value' of a land acquired forcibly under the provisions of Act, 1894 has to be determined by Court in a Reference made under Section 18 of the said Act.

32. In **Chimanlal Hargovinddas vs. Special Land Acquisition Officer (1988) 3 SCC 751**, Court has said that a reference is like a suit which is to be treated as an original proceeding. Claimant is in the position of a plaintiff who has to show that price offered for his land in the Award is inadequate.

However, for the said purpose, Court would not consider the material, relied upon by Land Acquisition Officer in Award, unless some material is produced and proved before Court.

33. Thus, Reference Court does not sit in appeal over the Award of Land Acquisition Officer. Material used by Land Acquisition Officer is not open to be used by Court suo motu unless such material is produced by the parties and proved independently before Reference Court. Determination of market value has to be made as per market rate, prevailing on the date of publication of notification under section 4 (1) of Act, 1894.

Circle Rate- Relevance:

34. As we have noticed that circle rates were also relied before Reference Court. In law circle rates are irrelevant and ought not to have been considered. In the matters where circle rates are relied and referred such an approach has been castigated, condemned and disapproved by Courts time and again.

35. In **Jawajee Nagnatham v. Revenue Divisional Officer, (1994) 4 SCC 595**, this question came up for consideration in the matter arisen from State of Andhra Pradesh. The landowners appealed against order of Reference Court before Andhra Pradesh High Court claiming higher compensation on the basis of "Basic Valuation Register" maintained by Revenue authorities under Stamp Act, 1899. The claim of Land-Owners failed in High Court, which held that such Register had no evidenciary value on statutory basis. In appeal, Supreme Court held that Basic Valuation Register was maintained for the purpose of collecting stamp duty under Section 47-A of Stamp Act, 1899 as amended in State of Andhra Pradesh. It did not confer, expressly, any power upon Government to determine market value of land prevailing in a particular area, i.e., village, block, district or region. It also did not provide a statutory obligation upon Revenue authorities to maintain Basic Valuation Register for levy of stamp duty in regard to instruments presented for registration. Therefore, there existed no statutory provision or rule providing for maintaining such valuation register. In the circumstances, such register prepared and maintained for the purpose of collecting stamp duty had no statutory force or basis and cannot form a valid criteria to determine market value of land acquired under Act, 1894. This decision was followed in **Land Acquisition Officer Vs. Jasti Rohini, 1995 (1) SCC 717.**

36. Another matter from State of U.P. came up for consideration involving same issue in **U.P. Jal Nigam Vs. M/s Kalra Properties (P) Ltd., (1996) 3 SCC 124.** Landowners' demanded compensation in regard to land acquired under Act, 1894 on the basis of market value assessed as per circle rate determined by Collector. It was accepted by High Court, but in appeal, judgment was reversed by Supreme Court following its earlier decision in **Jawajee Nagnatham (supra)**. Court held that market value under Section 23 of Act, 1894 cannot be determined on circle rates determined by Collector for the purpose of stamp duty under Stamp Act, 1899. This view was reiterated in **Krishi Utpadan Mandi Samiti Vs. Bipin Kumar, (2004) 2 SCC 283.**

37. The issue was again considered by a larger Bench in **Lal Chand Vs. Union of India and another (2009) 15**

SCC 769 wherein two Judgments of Apex Court taking a view that circle rates may be considered, as prima facie basis, for the purpose of ascertaining market value, were examined. These decisions are **Ramesh Chand Bansal v. District Magistrate/Collector, (1999) 5 SCC 62** and **R Sai Ram Bharathi v. J Jayalalitha, (2004) 2 SCC 9.** Court resolved controversy, holding, if in a particular case, guidelines for market values are determined by an Expert Committee constituted under State Stamp Law, following a detailed procedure laid down under the relevant rules and are published in State Gazette, same may be considered as a relevant material to determine 'market value'. Court said, when guidelines of market value, i.e., minimum rates for registration of properties, are so evaluated and determined by Expert Committees, as per statutory procedure, there is no reason why such rates should not be a relevant piece of evidence for determination of market value. Having said so, in para 44, Court further said:-

"44. One of the recognised methods for determination of market value is with reference to the opinion of experts. The estimation of market value by such statutorily constituted Expert Committees, as expert evidence can, therefore, form the basis for determining the market value in land acquisition cases, as a relevant piece of evidence. It will be however open to either party to place evidence to dislodge the presumption that may flow from such guideline market value. We, however, hasten to add that the ***guideline market value can be a relevant piece of evidence only if they are assessed by statutorily appointed Expert Committees, in accordance with the prescribed assessment procedure*** *(either streetwise, or roadwise, or areawise, or villagewise)* ***and finalized after inviting objections and published in the gazette****. Be that as it may."*
(emphasis added)

38. It is thus evident that for the purposes of determining market value circle rate fixed by Collector for the purposes of stamp duty would not be a relevant material unless such determination is under a statutory obligation and after following the prescribed procedure.

Other Principles relevant for determining market value:

39. For determining market value of acquired land, in the last several decades, Courts have considered the matter time and again and laid down certain principles which includes; (i) Court should proceed as hypothetical purchaser willing to purchase land from open market and prepared to pay a reasonable price on the scheduled date, i.e., the date of publication of notification under Section 4 of Act 1894, (ii) willingness of Vendor to sell the land on reasonable price shall be presumed, (iii) relevant material, which may help the Court to find out reasonable price would include sale deeds, if any, executed in the close proximity of the relevant date which is genuine and shows a voluntary and open transaction between the parties. Where land subject matter of exemplar sale deed is smaller or larger but the document otherwise is credible and genuine, suitable adjustment by applying plus and minus factors and also appropriate deduction can be made by the Court.

40. A burden, however, to establish as to what is the reasonable and adequate

market value and that the offer made by Collector is inadequate, is on the Land Owners at whose instance Reference has been made to District Judge under Section 18 of Act, 1894.

41. The size of land would constitute an important factor to determine market value. It cannot be doubted that small size plot may attract a large number of persons being within their reach which will not be possible in respect of large block of land wherein incumbent will have to incur extra liability in preparing a lay out and carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers etc. Courts have said that in such matters, factors can be discounted by making deduction by way of an allowance at an appropriate rate ranging between 20% to 75%, to account for land, required to be set apart for carving out road etc. and for plotting out small plots.

42. The concept of smaller and larger plots should be looked into not only from the angle as to what area has been acquired, but also the number of land holders and size of their plots. When we talk of concept of prudent seller and prudent buyer, we cannot ignore the fact that in the category of prudent seller, the individual land holder will come. It is the area of his holding which will be relevant for him and not that of actual, total and collective large area, which is sought to be acquired.

43. In **Kausalya Devi Bogra and others v. Land Acquisition Officer, Aurangabad and another, (1984) 2 SCC 324**, about 150 acres of land was acquired. Owners of acquired land were in two groups, i.e. Kaushalya Devi Bogra and Syed Yusufuddin Syed Ziauddin. First group, i.e. Kaushalya Devi Bogra owned 74 acres, while Yusuffuddin owned about 15 acres of land. In these facts of the case, where almost 60% of total acquired land was owned by two sets of owners and exemplar of smaller property was relied, Court said that "when large tracts are acquired, the transaction in respect of small properties do not offer a proper guideline. In certain other cases, for determining market value of a large property on the basis of a sale transaction for smaller property, a deduction should be given.

44. In **Bhagwathula Samnna and others v. Special Tehsildar and Land Acquisition Officer, Visakhapatnam Municipality (1991) 4 SCC 506**, High Court applied deduction of 33.3% observing, when large extent of land was acquired under housing scheme and exemplar is of small land, reasonable deduction can be made. Following the decision in **Tribeni Devi v. Collector, Ranchi, AIR 1972 SC 1417**, it was argued that High Court wrongly applied deduction; acquired land was fully developed and eminently suitable for being used as house sites and, therefore, there was no justification for making any deduction. The land was acquired for formation of road, High Court applied deduction on the ground that expenses have to be incurred for development, which was not justified. Aforesaid submission was considered by Supreme Court in the light of facts of that case. In para 7 and 11, Court said: -

"7. In awarding compensation in acquisition proceedings, the Court has necessarily to determine the market value of the land as on the date of the relevant notification. ***It is useful to consider the***

value paid for similar land at the material time under genuine transactions. *The market value envisages the price which a willing purchaser may pay under bona fide transfer to a willing seller. The land value can differ depending upon the extent and nature of the land sold.* ***A fully developed small plot in an important locality may fetch a higher value than a larger area in an undeveloped condition and situated in a remote locality.*** *By comparing the price shown in the transactions all variables have to be taken into consideration. T****he transaction in regard to smaller property cannot, therefore, be taken as a real basis for fixing the compensation for larger tracts of property.*** *In fixing the market value of a large property on the basis of a sale transaction for smaller property,* ***generally a deduction is given taking into consideration the expenses required for development of the larger tract to make smaller plots within that area in order to compare with the small plots dealt with under the sale transaction.***

11. The principle of deduction in the land value covered by the comparable sale is thus adopted in order to arrive at the market value of the acquired land. In applying the principle it is necessary to consider all relevant facts. It is not the extent of the area covered under the acquisition, the only relevant factor. Even in the vast area there may be land which is fully developed having all amenities and situated in an advantageous position. If smaller area within the large tract is already and suitable for building purposes and have in its vicinity roads, drainage, electricity, communications etc. then the principle of deduction simply for the reasons that it is part of the large tract acquired, may not be justified."

(emphasis added)

45. Court further held that proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and in given circumstances it would be permissible to take into account price fetched by small plots of land. If larger tract of land, because of advantageous position, is capable of being used for the purpose for which smaller plots are used and is also situated in a developed area with little or no requirement of further development, the principle of deduction of value for the purposes of comparison is not warranted. Having said so, Court in para 13 held as under: -

"13. With regard to the nature of the plots involved in these two cases, it has been satisfactorily shown on the evidence on record that the land has facilities of road and other amenities and is adjacent to a developed colony and in such circumstances it is possible to utilize the entire area in question as house sites. In respect of the land acquired for the road, the same advantages are available and it did not require any further development. We are, therefore, of the view that the High Court has erred in applying the principle of deduction and reducing the fair market value of land from Rs.10/- pr square yard to Rs.6.50 paise pr square yard. In our opinion, no such deduction is justified in the facts and circumstances of these cases." (emphasis added)

46. In **V.M. Salgoacar & brother Ltd. vs. Union of India (1995) 2 S.C.C 302**, land acquired by notification dated 06.07.1970 in village Chicalim near Goa Airport belonged to a single owner. Court

observed, when land is sold out in smaller plots, there may be a rising trend in the market, of fetching higher price in comparison to the plot which are much higher in size. Having said so Court further said:

" though the small plots ipso facto may not form the basis per se to determine the compensation, they would provide foundation for determining the market value. On its basis, giving proper deduction, the market value ought to be determined".
(emphasis added)

47. Again in **Shakuntalabai (Smt.) and others vs. State of Maharashtra, 1996 (2) S.C.C 152, 20** acres of land in Akola town was sought to be acquired by notification published on 11.08.1965 under section 4(1) of Act, 1894 which was also owned by a single person. It is in this context, Court said:

"the Reference Court committed manifest error in determining compensation on the basis of sq. ft. when land of an extent of 20 acres is offered for sale in an open market, no willing and prudent purchaser would come forward to purchase that vast extent of land on sq. ft. basis. Therefore, the Reference Court has to consider valuation sitting on the armchair of a willing prudent hypothetical vendee and to put a question to itself whether in given circumstances, he would agree to purchase the land on sq. ft. basis. No feat of imagination is necessary to reach the conclusion. The answer is obviously "no".
(emphasis added)

48. In order to determine market value when exemplars are adduced, normally it is found that exemplars of small land, and that too, in developed area after plotting and development are relied. Sometimes a single exemplar is available and sometimes more than that. It is not the number of exemplars which is important and would determine the question whether burden has been discharged by Claimants that offer of compensation made by Collector is inadequate and he is entitled to higher compensation but it is the genuity, authenticity and creditworthiness of the documents. If the document is found most suitable and appropriate for determining compensation in respect of acquired land, even a single instance/exemplar cited by Land Owner may be relied and it can be said that Claimant-Land Owner has succeeded in discharging his burden.

49. In **Gafar vs. Moradabad Development Authority, 2007 (7) SCC 614**, Court observed that burden is on Claimants to establish that amount awarded to them by Collector is inadequate. That burden has to be discharged by Claimants and only if initial burden in that behalf is discharged, the burden would shift to State to justify the compensation offered by SLAO.

50. Further, when there are more than one exemplar, one, which provides highest rate, has to be followed. In **Satish Vs. State of U.P., 2009 (14) SCC 758**, Court after relying on its earlier decision in **Viluben Jhalenjar Contractor (Dead) by Lrs. Vs. State of Gujarat, 2005 (4) SCC 789**, said :

"...when comparable exemplars are brought on record, the one carrying the highest market value amongst them may be followed."

(emphasis added)

Deductions:

51. Whenever the area of acquired land is larger than the area of land which is subject matter of the exemplar and smaller in size, Courts have held the same admissible subject to appropriate deduction.

52. In **Basavva (Smt.) and others Vs. Special Land Acquisition Officer and others, (1996) 9 SCC 640**, notification under Section 4(1) of Act, 1894 proposing to acquire 194 acres of land for industrial development near Dharwad was published on 30.10.1981. Collector made award dated 22.8.1985 offering compensation at the rate between Rs. 8,000/- to Rs.8,080/-, which was enhanced by Reference Court vide award dated 11.10.1988 to Rs.1.72/- per square foot (Rs.74,953/- per acre). On appeal High Court reduced compensation to Rs.56,000/- per acre. The appeal preferred by State Government against High Court's judgment was dismissed. In the appeals preferred by landowners, it was contended on behalf of landowners that deduction towards development upto 53% was reasonable but High Court in applying 65% deduction has erred in law. Court observed, while determining compensation, at first instance, it has to be seen whether sales relating to smaller pieces of land are genuine and reliable; and, whether they are in respect of comparable land. If it is found that sales are genuine and reliable and lands have comparable features, sufficient deduction should be made to arrive at a just and fair market value of large tracts of land. The time lag for real development and waiting period for development are also relevant for determination of just and comparable compensation. For deduction of development charges, nature of development, conditions and nature of land, the land required to be set apart under building rules for roads, sewerage, electricity, parks, water etc. and all other relevant circumstances involved are to be considered.

53. The above principles were also laid down in **D. Vasundara Devi Vs. Revenue Divisional Officer, (1995) 5 SCC 426** which was relied by Court in **Basavva (Smt.) & Others Vs. Special Land Acquisition Officer and others (supra)**. It then found that exemplar sale deed was dependable but in respect of a small plot of land situated at a distance of more than 1 k.m; land in area is not developed and there is no development towards that area and it would take years for development in those land though land was capable of user for non-agricultural purpose. It is in this background, Court applied 53% deduction for development. It further held that since long time would be taken for development and for that purpose additional 12% deduction was allowed making total deduction as 65%.

54. In **Land Acquisition Officer, Kammarapally Village Vs. Nookala Rajamallu and others, AIR 2004 SC 1031**, Court said as under :

"It has been held that the deduction can be made where the land is acquired for residential and commercial purpose with regard to roads and civic amenities, expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price, the profits on

*the venture etc. So far as t**his Court is concerned, it has discarded the deduction policy on various grounds. One of the grounds is that if the State or its authority acquires the land for the purpose of selling it to the ultimate purchasers upon making available facilities, they normally recover the price inclusive of common facilities, therefore, a Government or its authority cannot be doubly benefited either by deductions from the payment of compensation in one hand and by collections of price of such development from the ultimate purchasers on the other hand**. It also to be seen that **no law prescribes deduction in paying compensation**. It is to be remembered that **deduction is an exception not the rule**."*
(emphasis added)

55. In **Udho Dass Vs. State of Haryana and Ors. 2010 (12) SCC 51**, by notification dated 17.5.1990, 162.5 acres of land in village Patti Musalmanan was sought to be acquired for the purposes of housing project in Sonepat (Haryana). Collector determined compensation at the rate of Rs.Two Lacs per acre, but it was enhanced by Additional District Judge on reference under Section 18 of Act, 1894 to Rs.125/- per square yard for the land behind E.C.E. Factory, situated away, and on the left side of the Sonepat Bahalgarh road, and Rs.150/- per square yard on the right side abutting the road. Reference Court held that land on the left side did not abut the road and it had therefore less potential value vis-a-vis land on the right side, which touched the road. In appeal High Court enhanced compensation from Rs.125/- to Rs.135/- and from Rs.150/- to Rs.160/-. Land owner came in appeal before Supreme Court claiming compensation at Rs.200/- per square yard. Court, as a matter of fact, found that even compensation, which was determined by Collector or Reference Court was not paid to Land-Owners immediately, but payment spread over for two decades. Court said if compensation payment continued over a period of almost 20 years, potential of land acquired from Land-Owners must also be adjudged keeping in view development in the area, spread over the period of 20 years if evidence so permits and cannot be limited to near future alone. Court observed that this broad principle would be applicable where possession of land has been taken pursuant to proceedings under an acquiring Act and not to those cases where land is already in possession of Government and is subsequently acquired. Court also observed that in case where compensation is based exclusively on sale instances, it creates some time a disadvantageous position to Land-Owners, whose land is forcibly acquired. There is wide spread tendency to undervalue sale prices. Circle rates determined by Collector only marginally corrected the anomaly, as these rates are also abnormally low and do not reflect true value. These things cause serious disadvantage to Land-Owners, since they have no control over price on which some other Land-Owners sell their property, which is often the basis for compensation payable to Land-Owners, whose land are forcibly acquired. Court also held that there cannot be application of belting system in that case. Normally, land along side the road has more value vis-à-vis the land away from, but that would have been the case where agricultural land, which have no potential for urbanization or commercialization had been acquired and in such a case, belting system is permissible.

56. In **Udho Dass (supra**) Court held that land was acquired in 1990. It had great potential and had been completely urbanized as huge residential complexes, industrial area and estates, huge education city have come up in the last 10 or 15 years. It further held as under: -

"Moreover, insofar as land which is to be used for residential purposes is concerned, a plot away from the main road is often of more value as the noise and the air pollution alongside the arterial roads is almost unbearable. It also significant that the land of Jamalpur Kalan was touching the rear side of the ECE factory and the High Court had granted compensation of Rs.250/- per square yard for the acquisition of the year 1992. We have also seen the site plan to satisfy ourselves and find that the land acquired from Jamalpur Kalan and the present land share a common boundary behind the ECE factory. The belting system in the facts of the present case would thus not be permissible."
(emphasis added)

57. In **Anjani Molu Desai v. State of Goa and another, (2010) 13 SCC 710**, a very large tract comprising 3,65,375 square meter of land in Balli village, Quepem Taulak, Goa was acquired for the purposes of Konkan Railway for laying down broad gauge line. Acquisition notification was issued on 30.7.1991. Appellant Anjani Molu Desai owned 60,343 square meter of land in Survey No.45/1, 45/5, 45/6, 51/1 and 51/2. Collector awarded compensation at the rate of Rs.12/- per square meters for orchard lands and Rs.6/- per square meter for paddy lands. Reference Court and High Court affirmed said valuation by rejecting Reference and Appeal. Collector determined market value relying upon two exemplars and taking an average thereof. First exemplar sale deed dated 30.8.1989 relates to 2055 square meters of land situated at the distance of 200 meter away from acquired land and sold at the rate of Rs.43.80 per square meters. Collector deducted 45% from sale price towards "development cost" i.e. for providing approach road and open spaces, expenses relating to development work, conversion charge etc. This reduced price to Rs.24/- per square meter. Since sale deed was of August, 1989 and acquisition commenced in 1991, thus there being gap of 20 months, Collector provided an increase at the rate of 14.5% per annum and thus, arrived at Rs.32.24 per square meter. Exemplar sale deed dated 30.1.1990 relates to sale of 7600 square meters of land at a distance of one kilometer from acquired land sold at Rs.3/- per square meter. Here also, there was a gap was of 18 months, thus 14.5% increase was allowed, which made sale price to Rs.3.82 per square meter. Collector then averaged two rates derived from two sale deeds and determined Rs.18/- per square meter (Rs.32.24 + Rs.3.82÷2). This method adopted by Collector was not approved by Supreme Court. It was held, where there are more than one exemplar, which could be considered for determining market value, the one providing higher rate should be accepted and followed. It is only in exceptional cases where there are several sales of similar land, whose prices range in a narrow bandwidth, the average can be taken as representing market value. But where values disclosed in respect of two sales are markedly different, it can only lead to an inference that they are with reference to dissimilar land or that lower

value sale is on account of under valuation or other price depressing reasons. In respect of orchard land, therefore, Court followed exemplar sale deed dated 30.8.1989 providing sale price at Rs.43.80 per square meter and applying appreciation of 14.5% and odd per annum, Court determined market value at Rs.57.50 and to that extent claim of appellant Anjani Molu Dessai was upheld. Here also proposition laid down by Apex Court is not exceptional but on the facts of the case.

58. In **Nelson Fernandes and others v. Special Land Acquisition Officer, South Goa and others, AIR 2007 SC 1414**, land was acquired for new broad gauge line of Konkan Railway. Acquisition notification under Section 4 Act, 1894 was issued in August, 1994. SLAO made award of Rs.4/- per square meter. In Reference, District and Sessions Judge relying on two sale deeds dated 13.12.1993 enhanced compensation at the rate of Rs.192/- per square meter. Sale price in exemplar sale deed was Rs.449/- per square meter. Land-Owners as well as acquiring body both preferred appeals. Land owner's appeal was rejected while acquiring body's appeal was allowed to the extent that market value was reduced to Rs.38/- per square meter. Supreme Court found that compensation awarded by High Court by rejecting valuer report is not based on cogent material and not supported by cogent reasons. The injury, which land owner, was likely to sustain due to loss of his future earning from selling land as also damage already suffered due to diminution of profit of land between time of publication of notice and time taken by Collector in possession was not considered. Since land was acquired for the purposes of laying down railway line, no development was to be done. There existed civil amenities like, school, police station, water supply, bank, electricity, highway, transport, petrol pump, industries, telecommunication and other business. Hence it determined compensation at the rate of Rs.250/- per square meter, but then applied 20% deduction, which brings rate at Rs.200/- per square meter.

59. In **Special Land Acquisition Office v. Karigowdo and others, 2010 (5) SCC 708**, total acquired land was 146 acres and 7 guntas. It was owned by 419 Claimants-land owners, whose area varied from 2 to 48 guntas. Acquired land situated in village Sanaba, Chinakavali Hobli, Pandavapura. These land got submerged in 1993 under backwaters of Tonnur tank due to construction of Hemavathi Dam. Physical possession of land was taken between October, 1996 to December, 1999, while acquisition notification under Section 4 (1) of Act, 1894 was issued on 4.4.2002. Crops standing on land were damaged. SLAO determined market value at Rs.90,460/- per acre for wet land and Rs.37,200/- per acre for dry land. On Reference, compensation was enhanced to Rs.2,92,500/- per acre for wet land (garden land), Rs.1,46,250/- for dry land (lightly irrigated) and Rs.1,20,000/- for dry land (without mulberry crop). In appeal by Land-Owners, High Court enhanced compensation to Rs.5,00,000/- per acre for wet/garden land and Rs.2,53,750/- per acre for dry land. State, therefore, came in appeal before Supreme Court. Dispute arose before Court was for computation of compensation payable to Claimants and quantum thereof. Argument advanced by State was that method adopted by Reference Court as

well as High Court was impermissible in law. Court cannot take into consideration commercial activity, which may result from, and be indirectly incidental to agricultural activity, particularly, when both of them are carried on independent of each other. In that case there were no sale instances from village Sanaba prior to 2002. The exemplars of adjoining villages were produced before Court. After looking into statutory provisions of Act, 1894, Court said (1) provision of Section 23 are mandatory; and (2) it is for Claimants to ascertain as a matter of fact - location, potential and quality of land for establishing its fair market value. It is for Claimant to show that, what is contemplated under conditions attached thereto has been satisfied. It is also for Claimants to show that to award compensation payable under statutory provisions, they have brought on record evidence to satisfy criterion and conditions required to be fulfilled for such a claim. Court has to determine compensation strictly in accordance with the provisions of Sections 23 and 24 of Act, 1894. Potentiality of land should be on the date of acquisition i.e. existing potentiality. Further, potentiality has to be directly relatable to capacity of acquired land to produce agricultural products, or its market value relatable to method of compensation. If there exist crops, trees or fruit bearing trees, the same can be taken into consideration, but extent of benefit cannot go to the extent that fruits grown in agricultural land would be converted into processed food like jam or any other eatable products. This extension of loss of benefits amounts to remote factors, which is not permitted to take into consideration. Court thus held that compensation determined by Reference Court and High Court was not justified. State appeal was partly allowed and Court provided for compensation at Rs.2,30,000/- per acre for wet/garden land and Rs.1,53,400/- per acre for dry land.

60. In **Mohinder Singh and others v. State of Haryana, (2014) 8 SCC 897**, by notification dated 2.12.1982, 327.52 acres in village Patti Jhambra, Shahabad in District Kurushetra (State of Haryana) was acquired for development and utilization of land for residential, commercial, industrial purposes etc. Notification under Section 6 was issued on 4.7.1984 in relation to 178.62 acres, and ultimate possession of only 90.07 acres was taken. Collector made award at different rates per acre depending upon quality of soil/land. Reference Court awarded uniform compensation at Rs.2,66,400/- per acre. State preferred appeal whereupon High Court reduced compensation to Rs.1,83,080/- per acre. Land Owner preferred intra court appeal and Division Bench determined market value at Rs.2,19,696/- per acre. Land-Owners further went in appeal before Supreme Court, which set aside judgment of High Court and restored award passed by Reference Court determining Rs.2,66,400/- per acre as market value. While restoring award of Reference Court, Supreme Court observed that 40% deduction applied by High Court was not justified. Since land was within developed Municipal limit, therefore, deduction of 25% applied by Reference Court was justified.

61. In **Union of India v. Raj Kumar Baghal Singh (dead) through legal representatives and others, (2014) 10 SCC 422**, 72.9375 acres of land in village Bir Kheri Gujran, District Patiala in State of Punjab was acquired vide

notification dated 14.3.1989. Collector made award of Rs.Two Lacs per acre. Reference Court enhanced amount of compensation to Rs.9,05,000/- per acre. In appeal, a Single Judge of High Court reduced compensation to Rs.105.80 per square yard and it was confirmed by Division Bench also. Union of India preferred appeal, which was dismissed. Court held that there is no rule of thumb for deduction at a particular rate. It varies and depends on individual case. In para 11 Court said "the extent of cut depends on individual fact situation".

62. Deduction for development is different than deduction permissible in respect of largeness of area vis-a-vis exemplar of small piece of land. Many times, Land Owners rely on the rates on which development authorities offer allotment of developed plots carved out by them in residential or industrial area. Such rates apparently cannot form basis for compensation for acquisition of undeveloped lands for reasons more than one. The market value in respect of large tract of undeveloped agricultural land in a rural area has to be determined in the context of a land similarly situated whereas allotment rates of development authorities are with reference to small plots and in a developed lay out falling within urban or semi-urban area. Statutory authorities including development authorities used to offer rates with reference to economic capacity of buyers like economic Weaker Sections, Low Income Group, Middle Income Group, Higher Income Group etc. Therefore, rates determined by such authorities are not uniform. The market value of acquired land cannot depend upon economic status of land loser and conversely on the economic status of the body at whose instance, land is acquired. Further, normally, land acquired is a freehold land whereas allotment rates determined by development authorities etc. constitute initial premium payable on allotment of plots on leasehold basis. However, where an exemplar of small piece of land is relied, in absence of any other relevant material, Court may determine market value in the light of evidence relating to sale price of small developed plots. In such cases, deduction varying from 20% to 75% is liable to apply depending upon nature of development of lay out in which exemplar plot is situated.

63. In **Shaji Kuriakose and another Vs. Indian Oil Corporation Ltd. and others, (2001) 7 SCC 650**, a large tract of land in village Manakunnam, District Cochin was proposed to be acquired for setting up a bottling plant by Indian Oil Corporation and notification under Section 4 (1) was issued on 23.08.1990. Acquired land included 7.13 acres of land of Claimant/Land Owner-Shaji Kuriakose. Collector vide award dated 05.05.1992 offered compensation at Rs. 1,225/- per acre i.e. Rs. 500 per cent which was enhanced to Rs.7,000/- per Cent by Reference Court. High Court reduced compensation to Rs.4,000/- per Cent for wet land and Rs.6,500/- for dry land. Appeal preferred by Claimants before Supreme Court failed. Court found that land which was sold vide exemplar sale deed was not similarly placed with acquired land inasmuch as there was no access to acquired land, there existed only an internal mud road which belonged to one of the Claimants, whose land was acquired, the land covered by exemplar sale deed was a dry land, whereas

acquired land was mostly wet land. After acquisition, acquired land has to be reclaimed and a lot of amount would be spent for filling it. The exemplar sale deed related to a small piece of land while acquired land was quite large. Sale for smaller plot fetches more consideration than larger or bigger piece of land. Considering all these facts, Court found that determination made by High Court was justified and dismissed appeal.

64. In **Kasturi and others Vs. State of Haryana, (2003) 1 SCC 354**, 84.31 acres of land in State of Haryana was proposed to be acquired for development of residential and commercial area at Sector 13 and 23, Bhiwani, by publishing notification under Section 4 on 04.04.1986. Collector made award dated 10.11.1987 and 31.03.1988 determining compensation at Rs.57,500/- per acre and Rs.55,200/- per acre which comes to around Rs. 11.81 per square yard. Reference Court enhanced compensation to Rs.125/- per square yard. Land Owners as well as State, both preferred appeal in High Court. Landowners sought compensation at Rs.500/- per square yard while State appealed for restoration of Collector's award. High Court reduced compensation to Rs.79.98 per square yard applying 20% deduction towards development charges. It partly allowed appeal of State but dismissed appeals preferred by Claimants/Land-Owners. Division Bench confirmed judgment of Single Judge hence matter was taken to Supreme Court by Claimants/ Land-Owners. It was contended that High Court erred in applying deduction of 20% towards development charges and also by not enhancing compensation to Rs.500/- per square yard as claimed by landowners. Supreme Court found that land acquired comprised a large area and was not developed though has potential for residential and commercial purposes. For its development roads were to be laid, provision for drainage was to be made and certain area was to be earmarked for other civic amenities. The acquired land is not a small plot located in such a way that no other development was required at all and it could be utilized as it is, being a developed building site. In respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 33% amount was processed for deduction subject to variations depending upon nature of land, location, extent of expenditure involved for development and area required for roads and other civic amenities to develop land so as to make plots for residential or commercial purposes. Whether land is plain or uneven, soil of land is soft or hard having bearing on foundation for the purpose of making construction; whether land is situated in the midst of a developed area all around or may have a hillock or may be low lying or may be having deep ditches, are all relevant considerations since that would have consequences in the amount to be spent for development. Court relied on various decisions and thereafter upheld deduction of 20% towards development and dismissed appeal of Land Owners.

65. In **Lal Chand Vs. Union of India (supra)**, Court noticed that deduction for development constitutes two components- one is with reference to area required to be utilized for development work and second is the cost of development work. It further held that deduction for development in respect of residential plot may be higher while not

so where it is an industrial plot. Similarly, if acquired land is in a semi-developed urban area or in any undeveloped rural area, then deduction for development may be much less and vary from 25 to 40 percent since some basic infrastructure will already be available. The percentage is only indicative and may vary depending upon relevant factors. With reference to exemplars of transfer of land between private parties, Court would also look into intrinsic evidence, i.e., the exemplar sale deed where it recites financial difficulties of vendor and urgent need to find money as a reason for sale or other similar factors, like litigation or existence of some other dispute. These are all factors constituting intrinsic evidence of a distress sale.

66. In **Lal Chand Vs. Union of India (supra)**, Court also observed, if acquisition is in regard to a large area of agricultural land in a village and exemplar sale deed is also in respect of an agricultural land in the same village, i.e. it may be possible to rely upon the sale deed as prima facie evidence of prevailing market value even if such land is at the other end of village, i.e. at a distance of one or two kilometers. But, the same may not be appropriate where acquisition relates to plots in a town or city where every locality or road has a different value. A distance of about a kilometer may not make a difference for the purpose of market value in a rural area but even a distance of 50 meters may make a huge difference in market value in urban properties. Thus, distance between two properties, the nature and situation of property, proximity to the village or a road and several other factors may all be relevant in determining market value.

67. In **Valliyammal & others Vs. Special Land Acquisition, 2011 (8) JT 442**, Court has looked into various earlier judgments laying down guiding principles for determination of market value of acquired land. Court has observed that comparable sales method of valuation is preferred since it furnishes evidence for determination of market value of acquired land at which a willing purchaser would pay for acquired land if it had been sold in open market at the time of acquisition. However, this method is not always conclusive and there are certain factors, which are required to be fulfilled and on fulfillment of those factors, compensation can be determined. Such factors are (a) sale must be a genuine transaction; (b) sale deed must have been executed at the time, proximate to the date of issue of notification under Section 4; (c) land covered by the sale must be in the vicinity of acquired land; (d) land covered by the sales must be similar to acquired land; and (e) size of plot of the land covered by the sales be comparable to the land acquired. If there is dissimilarity in regard to locality, shape and size or nature of land, court can proportionately reduce compensation depending upon disadvantages attached with the acquired land. Further, for determining market value, potentiality of acquired land should also be taken into consideration. The "potentiality" means, capacity or possibility for changing or developing into state of actuality. It is well settled that market value of property has to be determined having due regard to its existing condition, with all its existing advantages and its potential possibility when let out in its most advantageous manner. Court also said, when undeveloped or underdeveloped land is acquired and the exemplar is in respect to developed land, detection towards deduction can be made. Normally, such

deduction is 1/3, but it is not a hard and fast rule.

68. In **Bhule Ram v. Union of India and another, JT 2014 (5) SC 110**, Court in para 7 has observed that valuation of immovable property is not an exact science, nor it can be determined like algebraic problem, as it bounds in uncertainties and no strait-jacket formula can be laid down for arriving at exact market value of the land. There is always a room for conjecture, and thus court must act reluctantly to venture too far in this direction. The factors such as the nature and position of land to be acquired, adaptability and advantages, the purpose for which the land can be used in the most lucrative way, injurious affect resulting in damages to other properties, its potential value, the locality, situation, size and shape of the land, the rise of depression in the value of land in the locality consequent to acquisition etc., are relevant factors to be considered. It further said that value, which has to be assessed, is the value to the owner, who parts with his property, and not the value to the new owner, who takes it over. Fair and reasonable compensation means the price of a willing buyer, which is to be paid to the willing seller. Though Act does not provide for "just terms" or "just compensation", but 'market value' is to be assessed taking into consideration the use to which it is being put on acquisition and whether the land has unusual or unique features or potentialities. Court then also considered as to what is the concept of "guess work" and observed that it is not unknown to various fields of law as it applies in the cases relating to insurance, taxation, compensation under the Motor Vehicle Act as well as under Labour Laws. Having said so, Court further said: -

"The court has a discretion applying the guess work to the facts of the given case but is is not unfettered and has to be reasonable having connection to the facts on record adduced by the parties by way of evidence. The court further held as under: -

"'Guess' as understood in its common parlance is an estimate without any specific information while "calculations" are always made with reference to specific data. "Guesstimate" is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time "guess" cannot be treated synonymous to "conjecture". "Guess" by itself may be a statement or result based on unknown factors while "conjecture" is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. "Guesstimate" is with higher certainty than more "guess" or a "conjecture" per se." (para 8) (emphasis added)

69. In **Bhupal Singh and others v. State of Haryana, (2015) 5 SCC 801**, while above principles laid down in various cases were reiterated, Court in para 18 of judgment, said: -

"Law on the question as to how the court is required to determine the fair market value of the acquired land is fairly well settled by several decisions of this Court and remains no more res integra. This Court has, inter alia, held that when the acquired land is a large chunk of undeveloped land having potential and was acquired for residential purpose then while determining the fair market value of the lands on the date of acquisition, the appropriate deductions are also required to be made."
(emphasis added)

70. It is also reaffirmed that when an exemplar relates to small piece of

developed land and is sought to be relied to determine market value of large tract of undeveloped acquired land, deduction can be applied ranging between 20% to 75%. Court in para 20 of judgment relied upon its decision in **Chandrashekhar Vs. L.A. Officer, (2012) 1 SCC 390** stating that deduction has two components, one is "development" and another with respect to the "size of the area". Percentage of deduction was restricted in **Subh Ram v. State of Haryana, (2010) 1 SCC 444** stating that deduction of both components should be around 1/3 each in its entirety, which would roughly come to 67% of component of sale consideration of exemplar sale transaction.

71. With respect to escalation of price where relied on exemplar is of much earlier in point of time, Court in **K. Devakimma and others v. Tirumala Tirupati Devasthanam and another, 2015 (111) ALR 241** said that recourse can be taken in appropriate cases to the mode of determining market value by providing appropriate escalation over the proved market value of nearby land in previous years where there is no evidence of any contemporaneous sale transaction or acquisition of comparable lands in neighbourhood. The percentage of escalation may vary from case to case so also the extent of years to determine the rates.

72. In **Chandrashekhar Versus Land Acquisition Officer (supra)**, for residential layout issued by Gulbarga Development Authority, acquisition proceedings were initiated by publishing Notification dated 13.5.1982 under Section 4 of Act, 1894, proposing to acquire 144 acres of land in villages Rajapur (71 acres) and Badepur (73 acres). The land of Claimants-appellants measured 8 acres, 4 guntas in village Badepur and in connected appeal it measured 7 acres, 7 guntas. Collector made award determining compensation at Rs.4100/- per acre for land in village Badepur and Rs.13,500/- for land in village Rajapur. Reference Court enhanced compensation to Rs.1,46,000/- per acre in place of Rs.4100/- per acre for land in village Badepur. On appeal, High Court remanded matter, whereafter Reference Court determined compensation at Rs.1,45,000/- per acre vide order dated 21.12.2002. High Court reduced compensation in appeal at Rs. 65,000/-. The view taken by High Court was upheld by Supreme Court by dismissing appeal of Land Owners. The issue raised before Court was the extent of deduction to be applied while determining market. It would be interesting to notice review of various cases by Supreme Court demonstrating that deduction applied has varied in all cases.

(a) In **Brig. Sahib Singh Kalha Vs. Amritsar Improvement Trust, (1982) 1 SCC 419**, Court said where a large area of undeveloped land is acquired, provision has to be made for providing minimum amenities of town-life. Accordingly, deduction of 20 percent of total acquired land should be made for land over which infrastructure has to be made (space for roads etc.). Besides, cause of raising infrastructure like roads, electricity, water, underground drainage, etc. is also to be considered and for this purposes deduction would range from 20% to 33%. Thus, in all Court upheld deductions between 40% and 53%.

(b) In **Administrator General of West Bengal Vs. Collector, Varanasi,**

(1988) 2 SCC 150, Court upheld deduction of 40%.

(c) In **Chimanlal Hargovinddas Vs. Special Land Acquisition Officer, Poona and another (supra)**, Court upheld deduction between 20% to 50%.

(d) In **Land Acquisition Officer Revenue Divisional Officer, Chottor vs. L. Kamalamma (Smt.) Dead by and others, (1998) 2 SCC 385**, Court upheld deduction of 40% as development cost.

(e) In **Kasturi and others vs. State of Haryana (supra)**, 1/3rd deduction was upheld on development, clarifying that deduction can be more or less of 1/3rd depending upon facts of the case.

(f) In **Land Acquisition Officer vs. Nookala Rajamallu and others, (2003) 12 SCC 334,** Court upheld 53% deduction.

(g) In **V. Hanumantha Reddy (Dead) Versus Land Acquisition Officer, (2003) 12 SCC 642,** Court upheld 37% deduction towards development.

(h) In **Viluben Jhalejar Contractor Versus State of Gujarat, (2005) 4 SCC 789**, Court observed that deduction of 20 to 50% towards development is permissible.

(i) In **Atma Singh Versus State of Haryana and another, (2008)2 SCC 568**, 20% deduction towards largeness of area was applied.

(j) In **Subh Ram and others Vs. State of Haryana and others, (supra**), Court observed that where valuation of a large area of agricultural or undeveloped land has to be determined on the basis of sale price of a small developed plot, standard deductions would be 1/3rd towards infrastructural space and 1/3 towards infrastructural developmental cost, i.e. 2/3rd % i.e. 67%.

(k) In **Andhra Pradesh Housing Board Versus K. Manohar Reddy and others, (2010) 12 SCC 707**, it was observed that deductions on account of development could vary between 20% to 75%.

(l) In **Special Land Acquisition Officer and another Versus M.K. Rafiq Sahib, (2011) 7 SCC 714**, Court was upheld 60% deduction.

73. In this background of authorities, Court in **Chandrashekhar Versus Land Acquisition Officer (supra)**, observed that quantum of deduction towards development is on account of two components. In this regard it said in para 19.1 and 19.2 as under :

*" 19.1. **Firstly,** space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. **This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.***

19.2 Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred

to as deductions for developmental expenditure /expense."
(emphasis added)

74. Having said so Court in para 23 said:-

"23. Having given our thoughtful consideration to the analysis of the legal position referred to in the foregoing two paragraphs, we are of the view that there is no discrepancy on the issue, in the recent judgments of this Court. ***In our view, for the "first component" under the head of "development", deduction of 33-1/3 percent can be made. Likewise, for the "second component" under the head of "development" a further deduction of 33-1/3 percent can additionally be made.*** *The facts and circumstances of each case would determine the actual component of deduction, for each of the two components. Yet under the head of "development", the applied deduction should not exceed 67 percent. That should be treated as the upper benchmark. This would mean, that even if deduction under one or the other of the two components exceeds 33-1/3 percent, the two components under the head of "development" put together, should not exceed the upper benchmark."*
(emphasis added)

75. The above principles have further been followed and reiterated in **Atma Singh Versus State of Haryana and another (supra), Nirmal Singh Vs. State of Haryana, (2015) 2 SCC 160 and Major General Kapil Mehra and others Vs. Union Of India and another (2015) 2 SCC 262.**

76. Decision of this Court in **Power Grid Corporation Vs. State of U.P. and Others, (2019) 1 ADJ 753** also reiterates the said principles.

77. In **Sabhia Mohammed Yusuf Abdul Hamid Mulla (d) by LRS and others vs. Special Land Acquisition Officer and others (2012) 7 SCC 595** Reference Court, while determining market value observed that though land was agricultural but had non-agricultural potential and determined market value. High Court made a deduction of 15% towards development charges.

78. Referring to an earlier decision in **Viluben Jhalejar Contractor vs. State of Gujrat, (2005) 4 SCC 789,** Court in **Sabhia Mohammed Yusuf Abdul Hamid Mulla (supra)** said that development charges may range between 20% to 50% of the total price. Court further observed:

"in fixing market value of the acquired land which is undeveloped and under-developed the courts have generally approved deduction of 1/3rd of the market value towards development cost except when no development is required to be made for implementation of the public purpose for which land is acquired." (emphasis added)

79. Above authorities and several others have been considered in Major General Kapil Mehra Vs. Union of India and another (supra), and Court has observed that while fixing market value of acquired land, Land Acquisition Collector is required to keep in mind the following factors:-

(i) Existing geographical situation of land.

(ii) Existing use of land.

(iii) Already available advantages, like proximity to National or State Highway or road and/ or developed area,

(iv) Market value of other land situated in the same locality/ village/ area or adjacent or very near the acquired land.

80. Court has further said that market value is determined with reference to the market sale of comparable land in the neighbourhood by a willing seller to a willing buyer on or before the date of preliminary notification i.e. under Section 4(1) of 1894 Act, as that would give a fair indication of market value.

81. With respect to factors of comparable sales, Court in **Major General Kapil Mehra Vs. Union of India and another (supra)** has referred to its earlier decision in **Urban Water Supply and Drainage Board and Others Versus K.S. Gangadharappa and another, (2009) 11 SCC 164**, and has observed that element of speculation is reduced to minimum if underlying principles of fixation of market value with reference to comparable sales are satisfied, i.e.,(i) when sale is within a reasonable time of the date of notification under Section 4(1); (ii) it should be a bona fide transaction; (iii)) it should be of the land acquired or of the land adjacent to the land acquired; and (iv) It should possess similar advantages.

82. Where there are several exemplars showing different rates, it has been said that averaging is not permissible, if land acquired are of different types and situated in different locations. But where there are several sales of similar land, more or less, at the same time, prices whereof have marginal variation, averaging thereof is permissible. It is further held that for the purpose of fixation of fair and reasonable market value of any type of land, abnormally highvalue or abnormally low value sales should be carefully discarded. If number of sale deeds of the same locality and of same period with short intervals are available, average price of available number of sale deeds shall be considered as a fair and reasonable market price. Ultimately, it is in the interest of justice that land losers are awarded fair compensation. All attempts should be made to award fair compensation to the extent possible on the basis of accessibility to different kinds of roads, locational advantages etc.

83. "Freehold land' and "leasehold land', both these terms are conceptually different. If a property, subject to lease and in possession of a lessee, is offered for sale by an owner to a prospective private purchaser, the purchaser being aware that on purchase he will get only title and not possession and that the sale in his favour will be subject to encumbrance namely, the lease, he will offer a price taking note of the encumbrances. Naturally, such a price would be less than the price of a property without any encumbrance. But when a land is acquired free from encumbrances, market value of the same will certainly be higher.

84. In ***Urban Water Supply and Drainage Board (supra)***, Court also considered deductions towards competitive bidding and development. In paragraph no. 39, Court said :

"We have referred to various decisions of this Court on deduction towards development to stress upon the point that deduction towards development depends upon the nature and location of the acquired land. The deduction includes

components of land required to be set apart under the building rules for roads, sewage, electricity, parks and other common facilities and also deduction towards development charges like laying of roads, construction of sewerage."

85. Thus, having gone through the aforesaid decisions, we find that no absolute principle or Rule of Thumb has been laid down in any of the authorities as to how much deduction should be made. The substance of all the decisions is that deduction should be applied where undeveloped and under-developed land is acquired and it can vary from 10% to 70%, depending upon various factors of each case. Similarly, if area of land exemplar is very small, appropriate deduction can be made.

86. Normally, Courts have held that exemplars should be such which are before the date of notification under Section 4(1) of Act, 1894 but an exemplar sale deed of a subsequent period of date of acquisition notification is not completely ruled out to be relevant document provided circumstances to justify the same are available.

87. In **State of U.P. Vs. Major Jitendra Kumar and others, AIR 1982 SC 876**, notification under Section 4 was published on 6.1.1948. Court determined rate of compensation relying on a sale deed dated 11.7.1951, i.e., a document executed after almost three and half years after the date of acquisition notification. Court upheld reliance on such document, observing, if there is no material to show that there was any fluctuation in market rate between the date of acquisition and the date of concerned sale deed, such document may be considered as a relevant material in absence of any other apt evidence. This view was followed in a subsequent decision, i.e., **Administrator General of West Bengal Vs. Collector, Varanasi, AIR 1998 SC 943**, where it is held:

*"**Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area.** Further under certain circumstances **where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also b**e relied upon to ascertain the market value."*

(emphasis added)

88. In certain cases, where nature, extent, size, surrounding and location of acquired land greatly varies, Courts have applied "belting system" for determination of market rate of acquired land. It is applied in appropriate cases when different parcels of land with different survey numbers belong to different owners and having different locations are acquired. Such chunk cannot be taken as a compact block. In **Bijender and others Vs. State of Haryana and others (2018) 11 SCC 180**, Court in para 34 of judgment said:

"The acquired land comprises of more than around 300 acres or so and is thus a very large in chunk. The acquired land belonged to several landowners and obviously so being so large in volume. One side of the acquired land is abutting the road. The land has surrounding with

some kind of activities in nearby areas and this shows that the acquired land has some potential."

89. In Belting System, acquired land is usually divided in two or three belts depending upon the facts of each case. Appreciating this aspect in para 35 of judgment in **Bijender and others Vs. State of Haryana and others (supra)**, Court said:

"The market value of the front belt abutting the main road is taken to fetch maximum value whereas the second belt fetches two third or so of the rate determined in relation to the first belt and the third belt, if considered proper to carve out, fetches half or so of the maximum. It is again depending upon facts of each case."

90. In para 49 of judgment, Court further said:

"49. It is also held that the value of the smaller plots, which is always on the higher side, is usually not taken into consideration for determining the large block of the land. One of the reasons being that the substantial area of the large block is used for development of sites like laying out the roads, drains sewers, water and electricity lines and several civic amenities and to provide these facilities, lot of time is consumed. The deduction is, therefore, made, which ranges from 20% to 50% or in appropriate cases even more."

91. In **Trishala Jain and another Vs. State of Uttranchal and another, (2011) 6 SCC 47**, for the purposes of construction of Government Polytechnic Institute at Dehradun, notification under Section 4 was published on 30th January, 1992, proposing to acquire 12.85 acres of land situated in village Sewala Kalan, Pargana Kendriya Doon, District Dehradun. The area of land belonging to Claimants-Land Owner, Trishala Jain and others, was 4.58 acres and 3.031 acres respectively. Collector offered compensation applying "belting system," for first belt at Rs.9,78,223.40 per acre, second belt at Rs. 6,52,482.27 per acre and third belt at Rs. 4,39,362.70 per acre. Reference Court held 'belting system' applied by Collector improper observing that entire land having been acquired for one purpose, there was no justification for application of 'belting system'. Relying on two exemplar sale deeds dated 26.11.1991 and 17.11.1991 it awarded compensation at Rs. 5,12,000/- per bigha after applying 20% deduction to gross market value of Rs.6,40,000/- per bigha. In appeal, High Court upheld view taken by Reference Court that there was no justification for applying "belting system" but raised deduction from 20% to 33.33% and hence determined market value at Rs. 4,26,667/- per bigha. The aforesaid deduction was applied on account of "development charges". Appeal was taken to Supreme Court by Claimants/Land-Owners. Four questions formulated by Supreme Court are as under:

"I. Whether or not the 'belting system' ought to have been applied for determination of fair market value of the acquired land?

II. What should be the just and fair market value of the acquired land on the date of issuance of notification under Section of the Act?

III. Whether in the facts and circumstances of the present case there ought to be any deduction after determining the fair market value of the land?

IV. What compensation and benefits are the claimants entitled to?"

92. Court upheld the view taken by courts below that application of "belting system" was unjustified since land as a whole was similarly placed and surrounded by developed areas and proposed to be used for one purpose, i.e., construction of Government Polytechnic Institute. Court then also held that deduction towards development is justified in certain circumstances but how much deduction is to be applied, will depend upon individual facts of the case. In para 39 of judgment, Court said:

"39. The law with regard to applying the principle of deduction to the determined market value of the acquired land is quite consistent, though, of course, the extent of deduction has varied very widely depending on the facts and circumstances of a given case. In other words, it is not possible to state precisely the exact deduction which could be made uniformly applicable to all the cases. Normally the rule stated by this Court consistently, in its different judgments, is that ***deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects. It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land."*** *(emphasis added)*

93. Further in paras 41 and 44 of judgment, Court said:

"41. The cases where the ***acquired land itself is fully developed and has all essential amenities, before acquisition,*** *for the purpose for which it is acquired requiring no additional expenditure for its development,* ***falls under the purview of cases of `no deduction'.*** *Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of `no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are exceptional and/or rare as normally the lands which are proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly developed lands at the time of issuance of notification under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question."*

"44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the ***sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction.*** *On such principles each case would have to be considered on its own merits." (emphasis added)*

94. In **Union of India and others Vs. Mangatu Ram (1997) 6 SCC 59**, a

Three-Judge Bench of Supreme Court considered the question, when 'belting system' should be applied and held that when a large extent of land under acquisition comprises of lands of several persons and some lands are abutting the main road and some lands are in the interior, the same would not have the uniform rate of market value. Reasonable demarcation/classification should be made before determination of the compensation. Upholding the 'belting system' to be applied in that case, Court said that lands situated around 500 yards from the main road should be classified as 'A' class land irrespective of the quality of the land and uniform rate of compensation should be applied to the same and remaining should be placed in category 'B' and applied another but lesser rate. Therein an argument was made that if different rates are applied, it will violate fundamental right of equality enshrined under Article 14. Rejecting it, Court said:

"It is equally settled law that Article 14 has no application vis-a-vis determination of the compensation for the obvious reason that it is hardly possible that all the lands are equal in all respects; they differ from one another and bear different features, e.g., nature, quality and character; therefore, all the lands do not command the same market value when they are sold to a willing purchaser by a willing vendor in the open market."

95. Court further held:

" ... the doctrine of equality in the matter of payment of compensation under Article 14 is inapplicable."

96. In **Wazir and others State of Haryana, (2019) 3 SCJ 506 (SC)**, a very large chunk of land i.e. about 1500 acres spreading in several villages, namely, Kasan, Bas Kusla, Naharpur Kasan, Manesar, Bas Haria and Dhana, Tehsil and District Gurgaon was acquired by publishing Notifications under Section 4(1) of Act, 1894 on 06.03.2002, 07.03.2002 and 26.02.2002. Declarations under Section 6 were published on 15.11.2002, 25.11.2002 and 18.11.2002. Sub-Divisional Officer (Compensation)-cum-Land Acquisition Collector (hereinafter referred to as "LAO") found market value of land different in different villages and made award offering compensation on various rates ranging from Rs. 3,60,000/- per acre to 10 lakhs per acre. The land in village Manesar was offered highest rate of compensation of Rs.10 lakhs per acre while in Villages Kasan and Naharpur Kasan, Rs.7,50,000/- and 7,20,000/- per acre respectively were offered while in Villages Bas Kusla, Bas Haria and Dhana, market value was determined at Rs.3,60,000/- per acre. Dissatisfied with said award of LAO, Land-Owners sought Reference under Section 18 of Act, 1894. When matter was pending, in another matter where Notification under Section 4(1) was published on 15.11.1994 acquiring land in Villages Manesar, Naharpur Kasan, Khoh and Kasan, Supreme Court in **Harayana State Industrial Development Corporation Vs. Pran Sukh and Ors., (2010) 11 SCC 175** determined market value at Rs.20 lakhs per acre. Relying thereon, Reference Court vide judgment and award dated 30.11.2010, determined market value at Rs.37,40,230/- per acre by allowing annual increase of 12 per cent per annum. High Court affirmed the aforesaid rate whereafter matter went in appeals to Supreme Court in **Harayana State Industrial Development**

Corporation Vs. Udal and Another, (2013) 14 SCC 506. Supreme Court allowed appeals and remanded matter to High Court observing that flat enhancement of 12 per cent per annum was not justified. High Court in its turn vide judgment dated 06.10.2015 remanded matter to Reference Court for fresh disposal. In appeal, this judgment of High Court was set aside and matter was again remanded to High Court. Again it was decided by High Court by applying cumulative enhancement at the rate of 12 to 15 per cent per annum over base rate of Rs.20 lakhs per acre but thereafter applying an over all rate deduction of 10 to 20 per cent. Market rate determined by High Court in fact came to Rs.41.40 lakhs for land acquired in Villages Naharpur Kasan, Kasan, Bas Haria, Bas Kusla and Dhana. However, in respect of land acquired in Village Manesar, it applied 50 per cent enhancement and determined market value at the rate of Rs.62.10 lakhs per acre. This judgment when came up for consideration before Supreme Court in **Wazir and others State of Haryana (supra)**, it was held that annual appreciation of rates depends on various factors. There is no hard and fast rule as to how much appreciation will apply and there cannot be any uniformity in this regard since it depends upon different factors. Court found that different appreciation was allowed from time to time in different cases as under:-

(i) 10 per cent per annum appreciation was allowed in **Ranjit Singh Vs. Union Territory of Chandigarh, (1992) 4 SCC 659; Land Acquisition Officer and Revenue Divisional Officer Vs. Ramanjulu, (2005) 9 SCC 594.**

(ii) 15 per cent per annum escalation was accepted in **Krishi Utpadan Mandi Samiti Vs. Bipin Kumar, (2004) 2 SCC 283.**

97. Considering above authorities, Supreme Court held that increase in land prices depends on four factors: (i) situation of land; (ii) nature of development in surrounding area; (iii) availability of land for development in area; and (iv) demand for land in area. In rural areas, unless there is any prospect of development in the vicinity, increase in prices would be slow, steady and gradual, without any sudden spurts or jumps. Contrary thereto, in urban and semi-urban areas, where development is faster, demand for land is high and construction activities are going on all around, escalation in market price would be at a much higher rate as comparing to rural areas. In some pockets in big cities, due to rapid development and high demand for land, escalations in prices had touched even 30 per cent to 50 per cent or more, per year, during nineties. Similarly, in remote rural areas, where there was no chance of any development and hardly any buyers, prices stagnated for years and rose marginally at a nominal rate of 1 or 2 per cent per annum. Thus there is a significant difference in increase of market value of land in urban/semi-urban areas vis-a-vis rural areas. Court said, if increase in market value in urban/semi-urban areas is about 10 to 15 per cent per annum, corresponding increases in rural areas would, at the best, be only around half of it, i.e. 5 to 7 per cent. If, there is any special reason for applying higher rate of increase that may be considered in the light of special facts and evidence brought before Court in this regard. Consequently, Supreme Court held that

7.5 per cent per annum appreciation would be sufficient and reasonable to determine market value of acquired land. Then, Court also considered that acquired land, though relates to common acquisition proceedings, but situate in different villages. It was also evident that valuation was different in different villages and it gives rise to another question "whether two sets of villages ought to be given different treatment or be clubbed and put at the same level for the purpose of payment of compensation for land acquired under Act, 1894". After considering sale exemplars and other evidence, Court held that market value of land acquired in Villages Bas Kusla, Bas Haria and Dhana, should be same i.e. Rs.28.77 lakhs per acre, for Villages Naharpur Kasan and Kasan, market value was determined at Rs.37.54 lakhs per acre and for Village Manesar, it was determined at Rs.56.31 lakhs per acre.

98. The market value determined by Reference Court in the case in hand, thus has to be examined in the light of aforesaid facts and exposition of law.

99. Now in the light of above exposition of law we proceed to examine question as to whether market value determined by Reference Court is just adequate and fair market value or excessive.

100. Apparently, area of land acquired vide notification dated 20.12.1988 issued under section 4 and 18.1.1989 issued under section 6 of Act 1894, is 61-801 acre of land (98-17-13 Bigha) i.e. 2,50,101.472 sq-metres. Entire area of land sought to be acquired, belong to more than 150 Tenure Holders/Land owners, having different plot numbers and areas and some of them are as under:

Serial No.	Plot Number	Area (in Sq-meter)	Name of Owner/Tenure Holder
1	352		Raghuraj Singh
2	352	4679.17	Smt. Raghuveer Kaur and Sri Shivraj Singh
3	372	11103.52	Smt. Tahira Khatoor
4	382	7113.60	Smt. Maya Devi
5	371	6177.74	Chandan Singh
6	376		Raghuraj Singh
7	367,368,369		Ajay Kumar
8	370	10913.85	Arvind Singh
9	383	8473.10	Anand Swarup
10	374	5690.89	Virendra Chandra, Gopal Chandra, Arvind Kumar, Ajay Kumar
11	384		Ram Kishan Gupta And Smt. Asha Gupta
12	382		Smt. Kamla Devi
13	358,384	5754.10 (358) and 8599.56 (384)	Salil Chandra, Praveen Chandra, Sarad Chandra
14	384	142287.97	Jaipal Chand
15	374		Gopal Chandra
16	210	12023.42	Mohd. Yusuf Ali
17	385	25362.38	Smt. Amir Kunwar
18	375	505.58	Smt. Amir Kunwar
19	363	13348.75	Smt. Amir Kunwar

101. Besides above, there is a Plot No. 386 in which there are 104 owners and area of land owned by them ranges from 550 to 2000 sq-yard. 15 owners owned 101 to 200 sq-yard; 15 from 201 to 300 sq-yard; 13 from 301 to 400 sq-yard and 11 from 401 to 500 sq-yard and so on. The fact is only one tenure holder has

2,000 sq-yard and rest have below 700 sq-yard.

102. From award dated 4.4.1991 at Paper No.144 (C-2), it is also evident that entire acquired land was not agricultural but some of it was declared 'Abadi' under section 143 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as "Act 1950") or some was within Municipal Limit of Nagar Palika.

103. Plot No. 372, area 4-7-16 owned by Smt. Tahira Khatoon to the extent of 50% was within Municipal Limit. Similarly Plot No. 383 area 3-7-0, owned by Anand Swaroop was within Municipal Limit of Bulandshahr. Plot No. 374, area 2-5-0, owned by Virendra Chand and others was declared as Abadi under Section 143 of Act 1951. Plot No. 384, area 4-2-0 was declared Abadi under section 143 by the Competent Authority by order dated 20.12.1988. Plot No. 374, area 3 Bigha owned by Gopal Chandra was also declared Abadi under section 143 of Act 1951.

104. It is also evident from the aforesaid award that substantial land is within the municipal limit of Bulandshahr. With regard to development in the area and location of the land owned by claimant-respondent, D.W.1 Hari Singh has admitted that part of land is appurtenant to Delhi-Kanpur National Highway; Police Chauki is established in front of the said land and on another land adjacent, there is already construction where a motel is running. There is road crossing about 500 meters from acquired land where substation/city shops are existing. On the other side of acquired land, there is PWD Guest House at a distance of about 500 meters and after said guest house, there is a market and Nursing Home.

105. Grievance of appellant is that he had placed reliance on 19 sale-deeds before Reference Court but the same have been rejected and much higher market rate has been determined. These sale-deeds are paper No.77-C (1)/(2) to 142 (C-2) and details of these exemplars are given in the form of chart as hereunder:

Sr. No.	Date of sale deed	Vendor	Vendee	Plot No.	Area(in Sq-meter)	Rate (in Sq-meter)	Paper No.
1.	16.4.2003	BKDA	Smt. Amir Kuwar Devi	385	2509.90	209.02/-	77 C 1/2
2.	13.4.1984	Chandrapal Dat Sharma	M/S Sudir Kumar Rana	---	---	-----	124 C2
3.	13.4.1987	Chandrapal Dat Sharma	Aruna Devi	386	167.22	137.54/-	125 C2
4.	13.4.1987	Chandrapal Dat Sharma	Dinesh Kumar Sharma	383	167.22	137.54/-	126 C2
5.	13.4.1987	Chandrapal Dat Sharma	Dinesh Kumar Sharma	383	178.3	84.12/-	127 C2
6.	13.4.1987	Chandrapal Dat Sharma	Dinesh Kumar Sharma	386	178.3	84.12/-	128 C2

7.	13.4.1987	Chandrapal Dat Sharma	Parvez Alam	386	334.45	83.71/-	129 C2
8.	13.4.1987	Chandrapal Dat Sharma	Smt. Laxmi Palival	386	178.3	131.27/-	130 C2
9.	11.5.1987	Dinesh Kumar Sharma	Smt. Raisa Khanam	386	171.40	81.68/-	132 C2
10.	11.5.1987	Dinesh Kumar Sharma	Smt. Lila Krishna	311	167.34	83.66/-	131 C2
11.	11.5.1987	Dinesh Kumar Sharma	Smt. Bina	386	356.19	84.22/-	133 C2
12.	11.5.1987	Dinesh Kumar Sharma	Harendra Pal Gupta	386	83.61	83.72/-	134 C2
13.	15.7.1987	Anil Kumar andAkhilesh Kumar	Shanti Devi	386	236.62	84.52/-	135 C2
14.	18.5.1987	Anil Kumar	Tulsiram	386	211.54	70.90/-	136 C2
15.	13.4.1987	Chandrapal Dall Sharma	Kamal Singh	386	125.41	83.72/-	137 C2
16.	13.4.1	Chandrap	Smt. Mamta	386	376.25	84.38/-	138 C2
	987	al Dall Sharma	Paliwali				
17.	15.6.1987	Dinesh Kumar Sharma	Om Prakash Jindal	386	254.18	82.61/-	139 C2
18.	11.5.1987	Dinesh Kumar Sharma	Maheshwari Devi	386	91.97	76.11/-	140 C2
19.	11.5.1987	Chandrapal Dat Sharma	Dr. Prabhat Kumar	386	173.07	129.42/-	141 C2
20.	13.4.1987	Dinesh Kumar Sharma	Salimuddin	386	267.56	83.71/-	142 C2

106. The aforesaid sale exemplars are all of the period from 13.4.1987 to 15.7.1987. After plotting of Plots No. 386, 383 and 311, land was sold by respective owner to various persons. From description of boundaries given, it is evident that entire land shown in Plots was surrounded by plots of other persons and distance of plot sold from the Government Road was more than 100 meters. Thus at the time of sale of above plots, they had no excess directly since all the plots were surrounded by plots of private parties and distance of plots was more than 100 meters from the Government Road. Most land has been sold to Power of Attorney Holders and found part of share of owner. All these sale-deeds were executed about more than 1 and ½ years from the date of acquisition notification under section 4 of Act 1894,

issued for acquisition of land which is subject matter of dispute in present appeals. In fact, as admitted by appellants even the proposal for acquisition was initiated on 10.6.1988, as is evident from Paper No. 143 (c) (2), which is part of paper book.

107. Moreover, sale deed exemplars relied by claimant respondent i.e. dated 6.9.1986, 29.12.1986 and 10.4.1988 have also been rejected by Reference Court, observing that they relate to land situate much far from acquired land and therefore, not relevant to determine market value in present case. In the sale-deed, [Paper Nos. 161 (c) and 163 (c), the land was situate at G.T. Road Bulandshahr and in third sale-deed i.e. Paper No. 162 (c)] land situated in Civil Lines, Bulandshahr, which is much far of old city. The claimant respondent also placed reliance on sale-deed Paper Nos. 32 (c) to 31 (c) which relate to the period subsequent to date of notification under section 4 (1) of Act 1894 and same has also been rejected by Reference Court. 108. Thereafter, Court below refers to market value already determined in respect of acquisition, subject matter of adjudication before Court earlier. Paper No. 30 (c)/1 is copy of judgement and award dated 26.11.1991, passed by Sri Vijay Singh, IV Additional District Judge, District, Bulandshahr deciding 38 LARs, collectively i.e. LAR Nos. 563 to 589 of 1991; 612 to 622 of 1991 which relate to land owners whose land fell in the category of first and second belting for which market rate was determined by SLAO vide award dated 4.4.1991, as Rs. 75 per sq-yard and Rs. 50 per sq-yard. The Reference Court therein determined market value at Rs. 400/- per sq-yard. Another award on record is Paper No. 31 (c)/1 dated 27.10.1995, passed by Sri V.K. Jain, District Judge, Bulandshahr in L.AR. Nos. 266 and 267 of 1992 but it was in respect of different acquisition proceedings, whereby land of Village Chandpur, Pargana Baran, District Bulandshahr was acquired for construction of Delhi Kanpur Road by U.P. Public Works Department. Notification therein under Section 4, was published on 11.3.1989 and declaration was made on 3.10.1989, possession was taken on 6.9.1990 and SLAO gave an award on 13.12.1991. Reference Court determined market value in that case at Rs. 390/- per sq-yard.

109. Reference Court instead of relying upon aforesaid awards, has placed reliance on the awards rendered in LARs No. 168 of 1992, 169 of 1992 and 195 of 1992 and 67 of 1992, wherein, Reference Court had determined two rates i.e. Rs. 400/- per sq-yard and 350/- per sq-yard. In LAR No. 195 of 1992, land owner whose land was acquired had purchased about 68 sq-yard of land for residential purposes and therefore, compensation for him was determined at Rs. 400/- per sq-yard while in respect of other land owners, it was determined at Rs. 350/- per sq-yard. Award in aforesaid LARs was challenged by BKDA in First Appeals No. 102 of 2000 and 103 of 2000, which were dismissed on 7.4.2010. Counsel for BKDA also admitted before Reference Court during the course of argument that land owners were already paid compensation at the rate of Rs. 300/- per sq-yard. This part of statement mentioned in award is reproduced as under:

" बहस के दौरान प्राधिकरण के विद्वान अधिवक्ता ने यह स्वीकार किया है कि अंकन तीन सौ रुपए प्रति वर्ग गज की दर से भुगतान भी काश्तवारों को किया गया है।"

"Learned counsel for the Authority, during the arguments, admitted that even payment has been made to the Kashkaars (cultivators) at the rate of three hundred rupees per square yard."

(English translation by Court)

110. Keeping the aforesaid awards as a guiding factor, Reference Court in the present case, found that market value determined was in respect of land which was less than 5 Bigha pukhta and per Bigha it comes to Rs. 50,000/- . Therefore, after deducting Rs. 1 lakh for every additional 5 Bigha, which comes to Rs. 2 Lakhs in the case in hand, market value was determined as Rs. 8,50,000 per Pakka Bigha (Rs. 281/- per sq-yard) and on that basis award has been given. Reference Court has followed earlier award and also statement of counsel for BKDA that compensation at the rate of Rs. 300/- per sq-yard has already been paid for the land, deeper from main road and belting system was also applied, inasmuch as for the land nearer to G.T. Road, rates of Rs. 75/- per sq-yard and for interior one Rs. 50- per sq-yard. For other land treating it as agricultural, different rates have been applied. Determination of market value and deduction as to the size of land has to be applied and has been applied as per the area of land of individual land owner and not entire chunk which was acquired and belong to large number of land owners.

111. We, therefore answer first question by holding that Reference Court has rightly determined market value by considering area of individual land owners, their location and other relevant factors and determination of market value at Rs. 8,50,000 per Bigha (Rs. 281/- sq-yard) is absolutely justified.

112. Question no.2 is answered by holding that determination of market value has to be considered taking into account area of concerned land owner and not the entire area of acquisition by State, otherwise, the consent of notional sale by individual vendor to prospective vendee will become illusory and meaningless.

113. In respect of question no.3 we find that belting system has already been applied by Reference Court in respect of distance of land from G.T.Road or National Highway, also keeping in view size and nature of land. Therefore, we do not find any infirmity in the manner rates have been determined. Therefore, principle of law about application of belting system wherever attracted cannot be disputed. Further in the present case, same has been applied and warrants no interference.

114. Question No.4 is answered by holding that Reference Court has rightly followed earlier awards in other LARs particularly when there was admission on the part of appellant's counsel that compensation was paid at the rate of Rs. 300/- per sq-yard to various land owners.

115. Question no.5 is answered by holding that Reference Court has rightly rejected various sale-deeds relied by appellants in the case in hand.

116. At this stage, we may also refer the alleged compromise Paper No. 76 (c) dated 16.4.2003 which is not a compromise for payment of compensation of acquired land. In fact it is a lease deed executed by BKDA in favour of Smt. Amir Kunwar Devi staing that her land in village Akbarpur i.e. Gata No. 363 area 5-0-11; 385 area 10-0-11 total 15.52 Bigha

was acquired. The acquisition notification under section 4 of Act 1894 was published on 20.4.1988 under section 6 of Act 1894 was published on 18.8.1989 and compensation at the rate of Rs. 49.35 per sq-yard pursuant to the award of SLAO was deposited in the office of SLAO. Due to interim order passed by Court on 4.10.2001, in Writ Petition No. 32851 of 2001, BKDA was not able to proceed with the development work on the acquired land and therefore, from Gata No. 385 it agreed to lease out 3001.84 sq-yard land i.e. 2509.90 sq-meter. Therefore, on payment of Rs. 1,48,140 as compensation deposited by BKDA in SLAO's office, acquisition cost of Rs. 14814/- and further payment of Rs. 115/- per sq-meter towards development charges and further payment of free hold charges, land was allotted on lease to Smt. Amir Kunwar. Thus, it is not an agreement for the purpose of payment of compensation but a compromise executed by BKDA with Amir Kunwar in different circumstances since it was not able to proceed with development activities of acquired land. The aforesaid document therefore, is wholly irrelevant for the purpose of determining market value of acquired land in the case in hand and that has rightly been rejected by Reference Court.

117. In view of above discussions, we do not find any manifest error in both the judgements as well as awards of Reference Court. Since the points for determinations have rightly been answered against appellants, we do not find any merit in these appeals.

118. Both are accordingly dismissed with cost.

(2019)10ILR A 852

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 276 of 2012

Rajesh Kumar Chaudhary
...Plaintiff-Appellant
Versus
Smt. Sarita ...Defendant-Respondent

Counsel for the Appellant:
Sri S.N. Pandey, Sri Ashok Nath Tripathi, Sri Havaldar Verma

Counsel for the Respondent:
Sri Namwar Singh, Sri Sanjiv Singh

A. Hindu Marriage Act, 1955 - Section 13 - Divorce on the ground of irretrievable breakdown of marriage - Irretrievable breakdown of marriage not a ground for divorce in the Act 1955 - But, where marriage is beyond repair - a marriage which is dead for all purposes - Courts have taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie.

B. Hindu Marriage Act, 1955 - Irretrievable breakdown of marriage - Divorce cannot be granted on the ground of irretrievable break down of marriage particularly when such a plea is raised by one party alone - No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault.

Held: - Husband prayed for the first time in appeal before High Court that since parties have been living separately since 02.07.2004 and therefore, the marriage has broken down irretrievably - High Court held Parties have not

been living separately on account of their own free will. It is the husband, who has refused to keep wife with him. Wife has continuously and consistently pleaded that she wants to live with husband. Further before family court decree of divorce was not prayed for on the ground of irretrievable break down of marriage - Husband Appeal dismissed. (Para 38)

C. Hindu Marriage Act, 1955 - Section 24 - Interim maintenance during the pendency of the appeal - So long as defendant continues to be the legally wedded wife of plaintiff the plaintiff has a legal as well as moral obligation to maintain her.

Held: - Husband directed by High Court to pay interim maintenance @ Rs. 5,000/- per month from April, 2012 till July 2019 - failing which Court below shall proceed to recover the same. (Para 39)

D. Hindu Marriage Act, 1955 - DNA test - Divorce petition-To substantiate allegations of wife's infidelity.

Held:-A matrimonial court has the power to order a person to undergo medical test and it would not be in violation of the right to personal liberty under Article 21 – However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court – once the order for D.N.A. Test has been passed and D.N.A test has been conducted, the result of D.N.A. Test cannot be brushed aside and same will have to be given effect to even if the circumstances justifying attraction of presumption as contemplated under section 112 of Indian Evidence Act exists. (Para 31, 33)

E. Practice and Procedure - Decree of reversal cannot be passed on a ground which was not the subject matter of adjudication before the Court below. (Para 35, 38)

First Appeal fails (E-5)

Cases relied upon: -

1.Naveen Kohli Vs Neelu Kohli (2006) 4 SCC 558

2. Shyam Sunder Kohli Vs Sushma Kohli (2004) 7 SCC 747

3. Samar Ghosh Vs Jaya Ghosh (2007) 4 SCC 511

4. Dipanwita Roy Vs Ronobroto Roy (2015) 1 SCC 365.

5. Smt. Sarita Devi Vs Sri Ashok Kumar Singh (2018) 3 AWC 2328

6. Goutam Kundu Vs St. of W.B. & anr. (1993) 3 SCC 418

7. Raghunath Vs Shardabai 1986 AIR Bombay 388

8. Sharda Vs Dharmpal (2003) 4 SCC 493

9. Bhabani Prasad Jena Vs Convenor Secretary, Ori. St. Commission for Women (2010) 8 SCC 633

10.Smt. Kavita Sharma Vs Neeraj Sharma) First Appeal No. 525 of 2006 decided on 7.2.2018

11. Ashwani Kumar Kohli Vs Smt. Anita First Appeal No. 792 of 2008 decided on 17.11.2016

(Delivered by Hon'ble Rajeev Misra, J.)

1. This plaintiff's Appeal under Section 19 of Family Courts Act 1984 (hereinafter referred to as the Act of 1984) filed by Rajesh Kumar Chaudhary (husband) challenging judgement dated 27.03.2012 and decree dated 10.04.2012 passed by the Principal Judge (Family Court), Varanasi in Petition No. 360 of 2004 (Rajesh Kumar Chaudhary Vs. Savita) whereby aforesaid petition for divorce filed by the plaintiff-appellant under Section 13 (1) of Hindu Marriage Act 1955 (hereinafter referred to as the Act of 1955) has been dismissed.

2. We have heard Mr. Ashok Nath Tripathi, learned counsel for plaintiff-appellant and Mr. Sanjiv Singh, learned

counsel representing defendant-respondent.

3. The plaint case set up by plaintiff-appellant is that marriage of plaintiff-appellant was solemnized with defendant-respondent on 03.06.1994 in accordance with Hindu Rites and Customs. Defendant-respondent came to the house of plaintiff once or twice and again back to her parental home. The defendant-respondent never established conjugal relationship with plaintiff-appellant at her marital home. According to plaintiff-appellant it was disclosed by defendant-respondent to him that her marriage has been solemnized with plaintiff-appellant, forceably, and contrary to her wishes, whereas she has already surrendered physically and mentally to another person. Whenever defendant-respondent came to her marital home, she never stayed for more than three or four days nor established conjugal relationship with plaintiff-appellant. In order to make married life happy plaintiff-appellant made many efforts to resolve deadlock but in vain. However, looking at the prestige of his family, plaintiff-appellant kept quiet. The defendant-respondent came to her marital home on 04.06.1994 and after staying about three days, went to her parental home on 07.04.1994 in the company of her brother and relatives. Thereafter, plaintiff-appellant and his family members made continuous efforts to bring her back. Ultimately, after expiry of a period of three years, defendant-respondent came to her marital home on 10.03.1997. After staying for about three or four days with the family of plaintiff-appellant, she again went to her parental home. All this time she did not discharge her obligations as wife of the plaintiff-appellant and while returning to her parental home, she took away all jewelry and stridhan. A letter was sent by father of defendant-respondent to father of plaintiff-appellant that a daughter has been born to defendant-respondent on 01.03.1998 who has been named as Vibhushita @ Prachi. On recipt of this information, plaintiff-appellant was astonished as no child could be born out of the wedlock of plaintiff-appellant with defendant-respondent as there was no conjugal relationship between the two. However, considering the prestige and grace of the family and himself, he did not raise voice and kept quiet. Plaintiff-appellant, inspite of the aforesaid, requested defendant-respondent to improve her conduct but she failed. The family of plaintiff-appellant did not want to leave defendant-respondent as defendant-respondent was blessed with a girl child who is loved by all. Plaintiff-appellant and his family members were unaware of the truth and inspite of the humiliation faced by them at the behest of defendant-respondent, they kept quiet. Ultimately, as per the wishes of his family members, plaintiff-appellant met defendant-respondent and her family members again on 02.07.2004 to bring her back to her marital home but she refused. She again stated that she has wrongly been married to the plaintiff-appellant. On account of aforesaid conduct of defendant-respondent, plaintiff has suffered physical and mental cruelty at the hands of the defendant-respondent and hence the suit for divorce.

4. The suit for divorce filed by plaintiff-appellant was contested by defendant-respondent. Accordingly, she filed a written statement (Paper No. 25 Ka.) whereby she not only denied plaint allegations but also raised additional

pleas. According to defendant-respondent, the divorce petition was filed only to harass defendant-respondent and her family members and further to solemnize second marriage. As such the divorce petition was liable to be dismissed. The defendant-respondent further stated that after marriage, she came to her marital home and stayed at her marital home in a cordial atmosphere with the plaintiff-appellant and other family members. After sometime, defendant-respondent came to her parental home. However, plaintiff-appellant as well as his family members refused to bring back defendant-respondent on the ground that they want to take defendant-respondent to Bombay. However, as the Flat in Bombay was too small they were making every effort to purchase a new Flat for which there was a deficiency of Rs.5 lacs. As such, it was stated by plaintiff-appellant and his family members that either the parents of defendant-respondent should give a sum of Rs.5 lacs immediately or wait for such time till new Flat is purchased in Bombay. After expiry of a period of two and a half years no information regarding the purchase of a Flat in Bombay was given nor any attempt was made to bring back defendant-respondent to her marital home. In the aforesaid circumstances, parents of defendant-respondent started exerting pressure upon Mahendra Pratap Singh (the mediator of the marriage), Samar Bahadur Singh and other relatives to pressurize plaintiff-appellant and his family members to take back defendant respondent to her marital home. On this plaintiff-appellant and his father brought defendant-respondent to their home in Village Barahi Kalan, District-Varanasi and started exerting pressure upon the defendant-respondent for the payment of Rs. 5 Lacs by her father. The defendant-respondent spent a period of one month with plaintiff-appellant in a cordial atmosphere. Consequently, conjugal relationship between the parties was established. Out of the cohabitation of defendant-respondent and plaintiff-appellant, she came in family way. Ultimately, defendant-respondent gave birth to a daughter namely Vibhushita @ Prachi on 01.03.1998.

5. The entire family of plaintiff-appellant resides in Bombay. At Village Barahi Kalan only family of the uncle of plaintiff-appellant resides and looks after the house and agriculture fields of the plaintiff-appellant. The family of plaintiff-appellant comes to Village-Barahi Kalan twice or thrice in a year and after staying about a week or ten days they used to go back to Bombay. Whenever plaintiff-appellant used to come to Village-Barahi Kalan, he used to go to the house of defendant-respondent to meet her and also to look at his daughter. With the permission of father of defendant-respondent, plaintiff-appellant used to take defendant-respondent alongwith her daughter to Varanasi for a joyride and used to stay at Varanasi in a Hotel. In spite of the aforesaid cordial relations, plaintiff-appellant never agreed to take defendant-respondent to Bombay and the only reason assigned was shortage of space at Bombay. It was also stated that till a Flat is purchased in Bombay, defendant-respondent cannot be taken to Bombay. As defendant-respondent or her parents could not pay a sum of Rs. 5 Lakhs to plaintiff-appellant as such out of vengeance, they started levelling false and frivolous allegations against defendant-respondent and her family members. As the marriage of younger sister of defendant-respondent was scheduled to be held on 11.02.2005, therefore in order to create obstruction in the marriage and to tarnish

image of the defendant-respondent and her family members, various uncalled for and baseless allegations were levelled. According to the defendant-respondent the plaintiff-appellant resides at Bombay where he has a laundary, Hotel and Beer Bar from which he has substantial income. Plaintiff-appellant wants to marry a fashionable girl and in pursuit of the aforesaid desire, he has filed divorce suit on unfounded and baseless allegations, which are wholly untruthfull. The defendant-respondent was always ready to reside with plaintiff-appellant and even on date she is ready to live with plaintiff-appellant. The defendant-respondent never refused to live with the plaintiff-appellant. Only because the demand of Rs. 5 Lakhs raised by plaintiff-appellant could not be satisfied by defendant-respondent or her parents, the plaintiff-appellant is not keeping defendant-respondent with him. The defendant-respondent was and is ready to reside with plaintiff-appellant alongwith her daughter and lead a happy married life. The defendant-respondent came to her parental home on five or six occasions and also went to her marital home, but ultimately came to her parental home in February 2005. Since then no effort has been made by the plaintiff-appellant to take her back and his daughter nor any proposal to that effect was made. Since no cause of action arises, the suit for divorce filed by the plaintiff-appellant is liable to be dismissed.

6. On the pleadings of the parties, Court below framed following issues for adjudication:

"i. Whether the defendant-respondent has not discharged her spousal obligations with the plaintiff-appellant, as averred in the plaint?

ii. Whether the defendant-respondent went to her father's place against the wishes of the plaintiff-appellant, as averred in the plaint?

iii. Whether the daughter born to the defendant-respondent is out of the wedlock of the parties and on account of cohabitation of the parties, as averred in the plaint?

iv. Whether the plaintiff-appellant demanded Rs. 5 Lakhs from the defendant-respondent to purchase a Flat and for that, subjected her to cruelty by harassing her, as stated in the written statement?

v. Whether the plaintiff-appellant subjected the defendant-respondent to cruelty by levelling false charges against her and by indulging in loose talks with her, with an intent to create hurdles in the marriage of her younger sister and to tarnish her social prestige?

vi. Whether the plaintiff-appellant is entitled to get any relief?"

7. After the issues were framed, parties led evidence in support of their respective case. Plaintiff-appellant in order to prove his case adduced himself as P.W.-1, one Hira Lal as P.W.-2 and Vindhyavasini as P.W.-3. While P.W.-2 Hira Lal is the father of plaintiff-appellant P.W.-3 Vindhyavasini is a resident of Village of plaintiff-appellant. The plaintiff-appellant also adduced documentary evidence as is evident from page 11 of the certified copy of impugned judgement.

8. Similarly defendant-respondent in order to prove her defence, adduced herself as D.W.-1, Bindu Kanaujiya as D.W.-2, Baljeet as D.W.-3, Samar Bahadur Singh as D.W.-4 and Om Prakash Lal Srivastava as D.W.-5. D.W-2 Bindu Kannaujia is the daughter of the Mausi of defendant-respondent (sister of

the mother of defendant respondent). D.W.4 Samar Bahadur Singh is the mediator of the marriage. Defendant-respondent also adduced documentary evidence to establish her defence. The same is learly recorded at page 11 of the certified copy of impugned judgement.

9. Court below on the basis of pleadings of the parties and evidence adduced, decided the issues so framed. Issue no.1 relates to the failure on the part of the defendant-respondent in establishing marital relationship with the plaintiff-appellant. Issue no.2 was framed to the effect as to whether defendant-respondent has gone with her father to her parental home contrary to the wishes of the plaintiff-appellant. Both the issues were decided together. The said issues were essentially framed to find out whether defendant-respondent has committed physical and mental cruelty upon plaintiff-appellant by her conduct. Court below concluded that as per testimony of D.W.-1 Sarita, it has been categorically established that after her marriage on 03.06.1994, she came to her marital home on 04.06.1994. While residing at her marital home, she duly discharged her obligations as wife and while she stayed at her marital home, there was not only cohabitation of the plaintiff-appellant and the defendant-respondent but there also established conjugal relationship between the two. Defendant-respondent came to her parental home only when she was sent (Vidai) by her in-laws. The defendant-respondent never came to her parental home out of her free will. Defendant-respondent in her testimony has deposed before Court below in a very natural manner and there is no such element in her testimony on the basis of which it could be discarded or the witness himself could be disbelived on account of being incredible. The manner in which this witness has detailed the chain of events which occurred from 04.06.1994 do not leave any room, to doubt her testimony. Apart from above, D.W.-2, Bindu Kannaujia, who is the daughter of the sister of mother of defendant-respondent has also supported the testimony of D.W.-1, Smt. Sarita. None of the family members of plaintiff-appellant has come forward to support the case of plaintiff-appellant or deposed before Court below in his favour. Apart from the aforesaid, Court below further found that in case the conduct of defendant-respondent was so unnatural as alleged by plaintiff-appellant, then, in that event, suit for divorce would not have been filed after about ten years from the date of marriage. This circumstance also reamined unexplained before Court below. On the aforesaid premise Court below concluded that plaintiff-appellant has failed to establish that defendant-respondent failed to establish marital relationship with plaintiff-appellant and defendant-respondent went to her parental home contrary to the wishes of the plaintiff-appellant. Consequently, the said issues were decided against plaintiff-appellant.

10. Issue no.3 relating to the birth of the girl child from the conjugal relationship of the plaintiff-appellant and defendant-respondent was decided against plaintiff-appellant. The necessity to frame this issue arose since plaintiff-appellant filed an application (Paper No. 42 Ga) for getting D.N.A test of minor girl. This application filed by the plaintiff-appellant was contested by defendant-respondent and accordingly, she filed her objections (Paper No. 5. Ga). On this application,

Court below passed an order dated 28.10.2006 whereby it directed that the application (Paper NO. 42-Ga) shall be decided after oral evidence of parties is over. Subsequently, plaintiff-appellant filed another application dated 20.3.2012 praying therein that the application (Paper No. 42 Ga) be decided in the light of the order 28.10.2006. At this stage plaintiff-appellant appears to have approached this Court and this Court directed that the applicaion (Paper No. 42 Ga) be decided within a period of one month. Consequently, the aforesaid application was decided alongwith the divorce petition.

11. The basis of the application (Paper No. 42 Ga) was the pathological reports filed by plaintiff-appellant before Court below namely (Paper No. 32 Ga) and (Paper No. 34 Ga) vide list of documents which is (Paper No. 31 Ga). The said pathological reports show that the blood group of the plaintiff-appellant is A positive, that of the defendant-respondent is also A positive but the blood group of minor child is B positive. Drawing legal support from Modi's Medical Jurisprudence, it was urged before Court below that the same is impossible. He has referred to Table-2 occurring under Chapter-VII (Examination of Biological Stains and Hair) of Modi's Medical Jurisprudence, 21st Edition at page 108, which is quoted hereunder:-

Phenotypes of parents	Phenotypes of Children	
	Possible	Impossible
AxA	A and O	B, and AB
AxB	A,B, O and AB	None
AxAB	A, B, and AB	O
AxO	A and O	B and AB
BxB	B and O	A and AB
BxAB	A, B and AB	O
BxO	B and O	A and AB
ABxAB	A, B, and AB	O
ABxO	A and B	A, B, and O
OxO	O	A, B, and AB

12. Thus on the aforesaid premise, it was contended before Court below that the girl child has not been born out of the cohabitation and conjugal relationship of the parties and therefore, the necessity of getting a D.N.A. Test of the daughter namely Vibhushita @ Prachi.

13. The application Paper No. 42 Ga was objected to by defendant respondent. According to defendant-respondent, as per the provisions of Section 4 and 112 of Indian Evidence Act, the application (Paper No. 42 Ga) filed by plaintiff-appellant is liable to be rejected. There is no explanation by the plaintiff-appellant as to how the said pathological reports have been received by him when it is admitted case of plaintiff-appellant that the daughter was born on 01.03.1998 and prior to her birth plaintiff-appellant has not met defendant-respondent nor the defendant-respondent came to her marital home. Court below thus concluded that there is no such material on the basis of which D.N.A. Test of minor girl could be directed. Court below on the aforesaid factual premise, and coupled with the fact that the evidence on the record show that there was cohabitation of the parties and also establishment of conjugal relationship, the presumption arising out 112 of Indian Evidence Act was drawn against plaintiff-appellant. On facts, Court below further found that there is no such

material on record to establish that after the marriage of parties, they were unable to meet each other and consequently, defendant-respondent could not have come in family way due to cohabitation of the plaintiff-appellant. Apart from the above, Court below further held that no D.N.A. Test can be directed to be held without the consent of the affected person who admittedly in this case was a minor and therefore, it was consent of the mother which was necessary. Court below further observed that plaintiff-appellant has not alleged any extra marital relationship of defendant-respondent, therefore, in the absence of any such allegation, application for getting D.N.A test of minor girl cannot be allowed. On the aforesaid premise, issue No.3 was decided against plaintiff-appellant.

14. Issue no.4 which was in respect of additional plea raised by defendant-respondent in her written statement alleging therein that the plaintiff-appellant demanded a sum of Rs. 5 lacs from defendant-respondent for purchase of Flat and the consequential cruel behavior on the part of plaintiff-appellant towards defendant-respondent. Issue no.5 related to the conduct of the plaintiff-appellant at the time of marriage of younger sister of defendant-respondent so as to malign her social status and thereby committing cruelty upon the defendant-respondent by making false and frivolous allegations against defendant-respondent. The said issues were decided in favour of plaintiff-appellant. Court below came to the conclusion that from the pleadings of parties, it is established that apart from the present litigation, a case under Sections 498A, 323, 504, 506 I.P.C. and Section ¾ Dowry Prohibition Act, P.S. Phoolpur, has come into existence pursuant to an F.I.R. Apart from the above, a case under Protection of Women from Domestic Violence Act has also been initiated which is pending. No application under order 41 Rule 27 C.P.C. has been filed bringing on record the subsequent developments in the aforesaid cases nor any statement of fact regarding the same has been made in the affidavit filed in support of the stay application. However, Court below on account of the deficiency in evidence of defendant-respondent concluded that even though criminal proceedings are pending but upto this stage it is not established that the plaintiff-appellant demanded a sum of Rs. 5 Lakhs for purchasing a Flat and in pursuit thereof committed cruelty upon the defendant-respondent. Apart from the above Court below relied upon the testimony of D.W.-1 that in the marriage of her younger sister no obstruction was made by the brothers of the plaintiff-appellant. As such both the issues came to be decided against defendant-respondent.

15. Issue no.6 was in respect of the relief which can be granted to the plaintiff-appellant. Court below upon appreciation of pleadings, oral and documentary evidence on record, concluded that plaintiff-appellant is not entitled to any relief and consequently suit of plaintiff-appellant for a decree of divorce was dismissed.

16. Feeling aggrieved by the judgement dated 27.03.2012 and decree dated 10.04.2012 passed by Principal Judge, Family Court, Varanasi, plaintiff-appellant has now approached this Court by means of present Family Court Appeal.

17. Mr. Ashok Nath Tripathi, learned counsel for plaintiff-appellant, in

support of appeal, has vehemently urged before us that cruelty on the part of defendant-respondent against plaintiff-appellant was duly established and therefore, Court below has erred in law and fact in dismissing suit for divorce filed by plaintiff-appellant. To buttress his submission he has relied upon the judgement in **Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511**. He further contends that the findings recorded by Court below on issue no.3 which related to the birth of a female child from the alleged conjugal relationship and cohabitation of plaintiff-appellant and the defendant-respondent was wrongly decided as inspite of an specific application filed by plaintiff-appellant for DNA test of female child, the same has not been allowed by Court below. The procedure so adopted by Court below has resulted in miscarriage of justice. He further contends that as per Modi's Medical Jurisprudence, female child could not have been born out of the cohabitation of the plaintiff-appellant and defendant-respondent as the blood group of plaintiff-appellant is A positive and that of the defendant-respondent is also A positive whereas blood group of female child is B positive. According to learned counsel for plaintiff-appellant, D.N.A test alone could have decided parentage of minor daughter. To lend support his submission, he has relied upon the judgement in **Dipanwita Roy Vs. Ronobroto Roy, 2015 (1) SCC 365**. He lastly submits that the parties have been living separately since 02.07.2004 and therefore, the marriage has broken down irretrievably. He thus concludes that in view of the above the impugned judgement and decree passed by the Court below is liable to be set aside and the suit of the plaintiff-appellant for the grant of decree of divorce is liable to be decreed.

18. Sri Sanjiv Singh, learned counsel for respondent refuted above submissions and sought to support judgement of Court below on the findings recorded therein.

19. On the basis of the submissions urged by the learned counsel for the plaintiff-appellant, the following points of determination arise in the present appeal:

(a) Whether plaintiff-appellant has been able to establish cruelty on the part of defendant-respondent and therefore entitled to decree of divorce as prayed for in terms of Section 13 (1) (i-a) of the Act of 1955.

(b) Whether finding recorded by Court below on issue no.3 relating to the birth of the female child from the wedlock and cohabitation of the plaintiff-appellant and defendant-respondent is illegal perverse and erroneous.

(c) Whether there has been irretrievable break down of marriage as according to plaintiff-appellant, parties are living separately since 02.07.2004.

20. The term 'cruelty' has not been defined in Hindu Marriage Act 1955 (hereinafter referred to as "Act 1955"). Consequently, this term has been the subject matter of debate for long. However, recently a Division Bench of this Court in the case of **Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328** has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 which reads as under:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting

suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence

should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the

conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

27. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

29. In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

21. The aforesaid Division Bench judgement clearly explains different shades of 'cruelty' which by itself are sufficient enough to dissolve the marriage on the ground of cruelty. The aforesaid judgement also prescribes the mode as to how 'cruelty' has to be proved and in what decree it has to be proved so as to grant of decree of divorce on the ground of 'cruelty'.

22. With the aid of the aforesaid material, Court has now to examine, whether plaintiff-appellant was able to successfully establish cruelty on the part of defendant- respondent and therefore, entitled to the decree of divorce on the aforesaid ground.

23. As already noted above, the aforesaid issue is decided by Court below against plaintiff-appellant on the findings which have been reproduced in paragraph - 8 of this judgement. So unless counsel for plaintiff-appellant is able to show that the findings recorded by Court below in respect of the aforesaid issue are illegal, perverse or erroneous, the findings so recorded by Court below on the aforesaid issue cannot be reversed. The only submission urged by learned counsel for the appellant before us is that defendant-respondent did not stay at her matrimonial home nor did she discharge her marital obligations towards the plaintiff-appellant, causing physical and mental cruelty to the plaintiff-appellant. The submissions so made appeared to be attractive at the first flush. However, on deeper scrutiny we find that the case of plaintiff-appellant stood totally demolished in view of the testimony of D.W.-1 and D.W.-2. Even testimony of P.W. 2 Hira Lal who is the father of plaintiff-appellant, does not prove plaint allegations. His testimony is vague and therefore, not worthy of being relied upon. As such Court below disbelieved the case of plaintiff-appellant by recording findings, which we have already noted herein above. Since nothing substantial was placed before us to dislodge the findings on the aforesaid issue, the challenge laid to the aforesaid findings is an half hearted attempt which must fail. Accordingly, we reject the same.

24. Coming to the second point of determination, we find that the Court

below rejected application (Paper NO. 42 Ga) filed by the plaintiff-appellant for getting D.N.A. Test of the girl child. Court below upon consideration of the entire material on record concluded that plaintiff-appellant has failed to establish as to how pathological reports relied upon by him were obtained by him when admittedly the daughter was born on 01.03.1998 and prior to her birth, plaintiff-appellant did not meet defendant-respondent nor defendant-respondent came to her marital home. On this factual premise, Court below concluded that there was no basis for allowing the application (Paper No. 42 Ga). Court below thus concluded that there is no such material on the basis of which D.N.A. Test of the minor girl could be directed. Court below on the aforesaid factual premise, and coupled with the fact that evidence on record show that there was cohabitation of the parties and also establishment of conjugal relationship, the presumption arising out 112 of Indian Evidence Act was drawn against plaintiff-appellant. On facts, Court below further found that there is no such material on record to establish that after the marriage of parties, they were unable to meet each other and consequently, defendant-respondent could not come in family way in cohabitation of the plaintiff-appellant. Apart from the above, Court below further held that no D.N.A. Test can be directed to be held without the consent of affected person who admittedly in this case was a minor and therefore, it was consent of mother which was necessary. Court below further observed that plaintiff-appellant has not alleged any extra marital relationship of defendant-respondent, therefore, in the absence of any such allegation, application for getting D.N.A test of minor girl cannot be allowed. On the aforesaid premise, issue No.3 was decided against the plaintiff-appellant. The Court below further concluded that D.N.A. Test cannot be got conducted as a matter of Court and without the consent of the affected party.

25. Mr. Ashok Nath Tripathi, learned counsel for the plaintiff-appellant, has referred to the judgment in **Dipanwita Roy Vs. Romobroto Roy (Supra)** and on the basis thereof, he submits that since wife objected to the application filed by plaintiff appellant for getting the D.NA. test of minor daughter conducted, an adverse presumption should be drawn against the defendant-respondent and on that basis suit of plaintiff-appellant for divorse is liable to be decreed.

26. Before proceeding to evaluate the submission urged by the learned counsel for the plaintiff-appellant, it shall be useful to refer to the provisions of section 4 and section 112 of Indian Evidence Act:

"Section-4

*"**May Presume**".- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.*

*"**Shall presume**".- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.*

*"**Conclusive proof**".- When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.*

Section-112

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

27. **In Goutam Kundu Vs. State of West Bengal and another, 1993 (3) SCC 418**, a two Judges Bench of Supreme Court considered the question regarding propriety of holding of blood group test to determine parentage of the child, and the following was observed in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25:

"15. In India there is no special statute governing this. Neither the Criminal Procedure Code nor the Evidence Act empowers the court to direct such a test to be made. In 1951 (1) Madras Law Journal p.58O Polavarapu Venkteswarlu, minor by guardian and mother Hanwnamma v. Polavarapu Subbayya in that case the application was preferred under section 151 of the Code of Civil Procedure invoking the inherent powers of the Court to direct a blood test. The learned judge was of the following view:-

Section 15 1, Civil Procedure Code, has been introduced in to the Statute book to give effect to the inherent powers. of Courts as expounded by Woodroffe, J., in Hukum Chand Boid v. Kamalan and Singh. Such powers can only be exercised ex debito justice and not on the mere invocation of parties or on the mere volition of courts. There is no procedure either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case. It is said by Mr. Ramakrishna for the respondent before m e that in England this sort of test is resorted to by Courts where the question of non-access in connection with an issue of legitimacy arises for consideration. My attention has been drawn by learned counsel to page 69 of Taylor's Principles and Practice of Medical Jurisprudence, Volume 2, where it is stated thus :

"In Wilson v. Wilson, Lancet [1942] 1. 570, evidence was given that the husband's group was OM, that the wife's was BM and that the child's was ABN. The Court held that the husband was not the father of child, and granted a decree for nullity."

"It is also pointed out by learned counsel that in the text books on Medical Jurisprudence and Toxicology by Rai Bahadur Jaising P. Moi, (8th Edition), at page 94, reference is made to a case decided by a Criminal Court at Mercare in June, 194 1, in which the paternity and maternity of the child being under dispute, the Court resorted to the results of the blood grouping test."

That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind this Court can force them to do so."

16. The same view was taken by the Kerala High Court in Vasu v. Santha 1975 Kerala Law Times p. 533 as

"A special protection is given by the law to the status of legitimacy in India. The law is very strict regarding the type of the evidence which can be let in to rebut the presumption of legitimacy of a child. Even proof that the mother

committed adultery with any number of men will not of itself suffice for proving the illegitimacy of the child. If she had access to her husband during the time the child could have been begotten the law will not countenance any attempt on the part of the husband to prove that the child is not actually his. The presumption of law of legitimacy of a child will not be lightly repelled. It will not be allowed to be broken or shaken by a mere balance of probability. The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive see Morris v. Davies, (1837) 5 Cl. & Fin. 163. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be triffled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England t o protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not their father. But, the legislature alone can change the rigour of the law and not the court. The court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted.

There is an aspect of the matter also. Before a blood test of a person is ordered his consert is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can compel a blood test is doubtful. Here no consent is given by any of the respondents. It is also doubtful whether a guardian ad litem can give this consent. Therefore, in these circumstances, the learned Munsiff was right in refusing the prayer for a blood test of the appellant and respondents 2 and 3. The learned Judge is also correct in holding that there was no illegality in refusing a blood test. The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference (see in this connection Subayya Gounder v. Bhoopala, AIR 1959 Madras 396, and the earlier decision of the same court in Venkateswarlu v. Subbayya AIR 1951 Madras 910. Such an adverse inference which has only a very little relevance here will not advance the appellants case to any extent. He has to prove that he had no opportunity to have any sexual intercourse with the 1st respondent at a time when these children could have been begotten. That is the only proof that is permitted under S. II 2 to dislodge the conclusive presumption enjoined by the Section."

17. In Hargavind Soni v. Ramdulari AIR 1986 MP at 57 held as:-

"The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by Courts as a circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal."

18. Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a circumstantial evidence which ultimately excludes a certain invididual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal.

19. In Raghunath v. Shardabai 1986 AIR Bombay 388, it was observed blood grouping test have their limitation, they cannot possibly establish paternity, they can only indicate its possibilities.

20. In Bhartiraj v. Sumesh Sachdeo & Ors., 1986 AIR Allahabad 2591 held as:-

"Discussing the evidentiary value of blood tests for determining paternity, Rayden on Divorce, (1983) Vol. 1) p. 1054 has this to say

"Medical Science is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect the proves most valuable in determining paternity, that is, the exclusion aspect for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show. positively he is not the father, and in some cases the chance is even higher: between two giver men who have had sexual intercourse with. the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.'

The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."

21. "The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to section 112 of the Evidence Act. This section is based on the well known maxim pater est quem nuptioe demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, any that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immoratility."

22. It is a rebuttable presumption of law that a child born. during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderannce of evidence, and not by a mere balance of probabilities.

23. In Smt. Dukhtar Jahan v. Mohammed Faroog AIR 1987 SC 1049 this court held.

"Section II 2 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundren and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at anytime when he could have been begotten. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basts of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non- existence of opportunities for sexual intercourse; it does not mean actual cohabitation.

25. The effect of this section is this: there is a presumption and a very strong one though a reubttable one. Conclusive proof means as laid down under section 4 of the Evidence Act."

28. Subsequently, a three Judges Bench in **Sharda Vs. Dharmpal 2003 (4) SCC 493** considered the question regarding holding of Blood Group test to ascertain paternity of the child. The following was observed by Court in paragraphs 38, 39, 54, 55, 56, 58, 59, 60, 76, 79 and 80:

"38. In Goutam Kundu v. State of West Bengal and Anr. this Court while dealing with a question about the paternity of a child noticed the provision of Section 112 of the Evidence Act and held that the presumption arising thereunder can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It was held (SCC p. 428, para 26):

"26. From the above discussion it emerges-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to having roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis".

39. Goutam Kundu (supra) is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other

jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.

54. The right to privacy has been developed by the Supreme Court over a period of time. A Bench of eight judges in M.P. Sharma v. Satish Chandra AIR at pp.306-07, para 8 in the context of search and seizure observed that:

"When the Constitution makers have though fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction"

55. Similarly in Kharak Singh v. State of UP., AIR 1963 SC 1295, the majority judgment observed thus: (AIR p. 1303, parsa 20)

"The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. [See R. Rajagopal v. State of Tamil Nadu and Ors.

95, People's Union of Civil Liberties v. Union of India 97]. In some cases the right has been held to amalgam of various rights.

58. In Govind v. State of Madhya Pradesh and Anr., it was held:

"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

59. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. [See Mr. 'X' v. Hospital 'Z' (1998) 8 SCC 296 and Mr. 'X' v. Hospital 'Z' 02]. In R. Rajagopal v. State of Tamil Nadu and Ors. this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all comprehending and indeed no such enunciation is possible or advisable.

60. In Govind v. State of Madhya Pradesh and Anr. (supra) it was held:

"28. The right to privacy in any event will necessarily have to go through a process of case- by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

76. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia...etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouses seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the

Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In mattes of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has to reconcile these competing interests by balancing the interests involved.

79. If despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out Section 114 of the Indian Evidence Act also enables a Court to draw an adverse inference if the party does not produce the relevant evidences in his power an possession.

80. So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot beheld to be violative of one's right of privacy."

29. Thereafter, in **Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women, 2010 (8) SCC 633**, Court considered the questions of right to privacy and when can a direction be given to hold a D.N.A. Test. The two judges Bench specifically dealt with the question regarding propriety of holding a D.N.A. Test in the light of the provisions contained in Section 112 of Indian Evidence Act. The following has been observed by the Court in paragraph 15, 16, 17, 18, 19, 20, 21, 22, 23:

"15. In Goutam Kundu v. State of West Bengal and Anr.1, this Court was concerned with a matter arising out of maintenance for child claimed by the wife. The husband disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. This Court referred to Section 4 and Section 112 of the Evidence Act and also the decisions of English and American Courts and some authoritative texts including the following statement made in Rayden's Law and Practice in Divorce and Family Matters (1983), Vol. I, p. 1054 which reads thus:

"Medical Science is able to analyse the blood of individuals into definite groups; and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves most valuable in determining paternity, that is, the exclusion aspect, for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show positively he is not the father, and in some cases the chance is even higher; between two given men who have had sexual intercourse with the mother at the time of conception, both of whom

undergo blood tests, it has likewise been said that there is a 90 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father."

16. This Court then finally concluded, thus :

"(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non- access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis."

17. In Sharda v. Dharmpal, 2003 (4) SCC 493, a three-Judge Bench was concerned with the question whether a party to the divorce proceedings can be compelled to a medical examination. That case arose out of an application for divorce filed by the husband against the wife under Section 13(1)(iii) of the Hindu Marriage Act, 1955. In other words, the husband claimed divorce on the ground that wife has been incurably of unsound mind or has been suffering from mental disorder. The Court observed,

"Goutam Kundu is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child."

18. While dealing with the aspect as to whether subjecting a person to a medical test is violative of Article 21 of the Constitution of India, it was stated that the right to privacy in terms of Article 21 of the Constitution is not an absolute right. This Court summed up conclusions thus : (2003) 4 SCC 493 "

1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

19. In Banarsi Dass v. Teeku Dutta & Anr.3, this Court was concerned with a case arising out of succession certificate. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was made to subject Teeku Dutta to DNA test. The High Court held that trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test. When the matter reached this Court, few decisions of this Court, particularly, Goutam Kundu1 was noticed and it was held that even the result of a genuine DNA test may not be enough to (2005) 4 SCC 449 escape from the conclusiveness

of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception. This is what this Court said :

"13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

It was emphasized that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given.

20. Recently, in the case of Ramkanya Bai v. Bharatram4 decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA of the child at the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA of the child on the ground that there will be possibility of reunion of the parties if such DNA was conducted and if it was found from the outcome of the DNA that the son was born out of the wedlock of the parties.

21. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of `eminent need' whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu1 and Sharda2 . In Goutam Kundu1 , it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course."

30. In **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another, 2014 (2) SCC 576**, Court considered the question of presumption in the light in section 4, section 101 to 117 of Indian Evidence Act and also the propriety of holding D.N.A. Test to judge the legitimacy of a child. The following was observed by Court in paragraphs 14, 15, 16, 17, 18 :

"14. Now we have to consider as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no. 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows:

"112. Birth during marriage, conclusive proof of legitimacy.-

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

From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten.

15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife

at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption."

31. From the aforesaid judgement of the Apex Court, it is clear that once the order for D.N.A. Test has been passed and D.N.A test has been conducted, the result of D.N.A. Test cannot be brushed aside. The same will have to be given effect to even if the circumstances justifying attraction of presumption as contemplated under section 112 of Indian Evidence Act exists. This judgement therefore, does not directly deal with the issue in hand.

32. Coming to the judgement relied upon by learned counsel for the plaintiff-appellant i.e. Dipanwita Roy Vs. Ronobroto Roy (Supra), Court considered the question of the presumption arising out under section 112 and the necessity of holding D.N.A. test. The Court Bench referred to the provisions of Section 112 and thereafter observed as follows in paragraphs 9, 10, 11, 13, 14, 15, 17, 18:

"9. Learned counsel for the appellant-wife, in the first instance, invited our attention to Section 112 of the Indian Evidence Act. The same is being extracted hereunder:

"112. Birth during marriage, conclusive proof of legitimacy- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two

hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Based on the aforesaid provision, learned counsel for the appellant-wife drew our attention to decision rendered by the Privy Council in Karapaya Servai v. Mayandi, AIR 1934 PC 49, wherein it was held, that the word 'access' used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. It was the submission of the learned counsel for the appellant-wife, that the determination of the Privy Council in Karapaya Servai's case(supra) was approved by this Court in Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana, 1954 SCR 424.

10. Learned counsel for the appellant-wife also invited our attention to a decision rendered by this Court in Goutam Kundu vs. State of West Bengal and another, (1993) 3 SCC 418, wherein this Court, inter alia, held as under:

"(1) That Courts in India cannot order blood test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give samle of blood for analysis." Reliance was also placed on the decision rendered by this Court in Kamti Devi and another v. Poshi Ram, AIR 2001 SC 2226, wherefrom, the following observations made by this Court, were sought to be highlighted:

"9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of

the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from thepoint of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

11.....Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband. " (emphasis is ours)

11. Lastly, learned counsel for the appellant-wife, placed reliance on the decision rendered by this Court in Sham Lal @ Kuldeep vs. Sanjeev Kumar and others, (2009) 12 SCC 454, wherein it was inter alia, held as under:

"Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. In the instant case, admittedly the plaintiff and Defendant 4 were born to D during the continuance of her valid marriage with B. Their marriage was in fact never dissolved. There is no evidence on record that B at any point of time did not have access to D." (emphasis is ours).

13. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play.

14. A similar issue came to be adjudicated upon by this Court in

Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633, wherein this Court held as under:

"21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this ourt, namely, Goutam Kundu vs. State of West Bengal (1993) 3 SCC 418 and Sharda vs. Dharmpal (2003) 4 SCC 493. In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is

not possible to sustain the order passed by the High Court. " (emphasis is ours)

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties.

15. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, wherein this Court held as under:

"15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to

be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice." (emphasis is ours) This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.

17. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband,

against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

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

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

*This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would als*o be incidentally involved.

33. Thus from the law as discussed above, Court in **Dipanwita Roy Vs. Ronobroto Roy, (Supra)** relied upon by the learned counsel for the appellant is of no help as the aforesaid judgement is in respect of a case where infidelity of the spouse is sought to be established. From the perusal of plaint of divorse petition, we find that no such plea regarding infedility of spouse was pleaded and therefore, no benefit can be derived from the aforesaid judgement. The law laid down by the three judges Bench in the case of Sharda Vs. Dharampal (Supra) holds the field. The following conclusions were drawn by Court in the aforesaid judgement:

"1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

34. Thus the point of determination No. 3 involved in the present appeal has to be decided in the light of the third conclusion drawn in **Sharda Vs. Dharmpal (Supra).** As already noted above, except for the two pathological reports, there is no other material relied upon by plaintiff-appellant, in support of his application (paper No. 42 Ga) for getting the D.N.A. test of the minor girl. Court below has disbelieved pathological report as plaintiff-appellant could not establish as to how the said reports were obtained by him. Apart from the aforesaid, we further find that there is no allegations of adultery against the defendant-respondent, on the basis of which, infidelity of spouse could be established. There is no pleading to the

effect that during subsistence of marriage, plaintiff-appellant had never any access to the defendant-respondent, whereas, the testimony of D.W.1 the defendant-respondent and D.W. proves to the contrary. As such, the second point of determination, is answered against appellant.

35. So far as the third point of determination is concerned we find from the perusal of plaint that no such ground was pleaded in the plaint. Therefore, question that crops up for consideration is "whether a decree of reversal can be passed on a ground which was not the subject matter of adjudication before the Court below."

36. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in **First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma**) decided on 7.2.2018, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

37. Similarly this Court in **First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita)** decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs.

Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal, J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature

and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

38. In the case in hand, we find that the parties have not been living separately on account of their own free will. The record shows, it is the plaintiff-appellant, who has refused to keep defendant-respondent with him. The defendant-respondent has continuously and consistently pleaded that she wants to live with plaintiff-appellant. In this view of the matter, the argument raised by the learned counsel for the appellant that there has been an irretrievable break down of marriage has no factual foundation. That apart this Court in **Ashwani Kumar Kohli (supra)** has clearly held that the divorce cannot be granted on the aforesaid ground particularly when such a plea is raised by one party alone. In addition to the aforesaid, decree of divorce was not prayed for on the ground of irretrievable break down of marriage as the parties are alleged to have been living separately since 02.07.2004. The plaint was presented in the year 2004 whereas divorce petition was finally decided vide judgement dated 27.03.2012 and decree dated 10.04.2012 passed by the Principal Judge (Family Court), Varanasi in Petition No. 360 of 2004 (Rajesh Kumar Chaudhary Vs. Savita). For a period of eight long years, plaintiff-appellant kept quiet and now for the first time, this issue is being raised. We are of the considered opinion that in view of the discussion made herein above, plaintiff-appellant is estopped from raising this plea.

39. The defendant-respondent has filed an application in the year 2013 for payment of interim maintenance in terms of Section 24 of Act, 1955 during the pendency of the appeal. From the record, it appears that plaintiff-appellant was directed to pay a sum of Rs. 3,000/- to the defendant-respondent towards interim maintenance. However, payment of interim maintenance to the defendant-respondent came to an end with the passing of the final judgement and decree. So long as defendant-respondent continues to be the legally wedded wife of plaintiff-appellant the plaintiff-appellant, he has a legal as well as moral obligation to maintain her. There is nothing on record to show that the plaintiff-appellant has maintained his wife even subsequent to the judgement and decree passed by Court below. We accordingly allow the application for interim maintenance filed by defendant-respondent, i.e. Civil Misc. Application No. 28761 of 2013 and accordingly direct plaintiff-appellant to pay interim maintenance @ Rs. 5,000/- per month from April, 2012 till July 2019. The entire amount shall be deposited by plaintiff-appellant before Court below within a period of one month from the date of the judgement, failing which Court below shall proceed to recover the same.

40. No other point was pressed before us. Consequently, appeal fails and is therefore liable to be dismissed. It is accordingly dismissed with costs.

(2019)10ILR A 885

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 167 of 2012

Anil Kumar Jain **Appellant**
Versus
Smt. Kalpana Jain **...Respondent**

Counsel for the Appellant:
Sri Swapnil Kumar

Counsel for the Respondent:
Sri S.K. Purwar

A. Hindu Marriage Act, 1955 - Section 13 (i-a)- Cruelty - If no specific instance of physical or mental cruelty is pleaded, divorce on ground of cruelty cannot be granted.

Held: - Husband not gave any specific instance of such act on the part of the wife, which may constitute physical or mental cruelty – Only stated that wife refused to do house hold work – This by itself does not amount to commission of cruelty. (Para 24)

B. Hindu Marriage Act, 1955 - Decree of restitution of conjugal rights– Husband not honouring decree of restitution of conjugal rights - Adverse Inference drawn against him.

Held:-Decree of restitution of conjugal rights was granted in favour of the wife, yet inspite of the same the husband not honoured the same – That proved that the wife had not deserted the plaintiff' (husband) but that wife was ousted from her matrimonial home without any reason. (Para 23)

Appeal failed (E-5)

List of cases cited: -

1. Smt. Sarita Devi Vs Sri Ashok Kumar Singh (2018) 3 AWC 2328

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

3. A. Jaya Chandra Vs Aneel Kaur 2005 (2) SCC 22

(Delivered by Hon'ble Sudhir Agarwal, J.
Hon'ble Rajeev Misra, J.)

1. This appeal under Section 19 of the Family Courts Act, 1984 (hereinafter referred to as Act of 1984) has been filed by the plaintiff (husband) assailing the judgment and decree dated 29.02.2012 passed by Principal Judge, Family Court, Agra in Divorce Petition No. 457 of 2004 whereby the suit of the plaintiff-appellant for divorce filed under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as Act of 1955) has been dismissed.

2. We have heard Sri Swapnil Kumar, Advocate for plaintiff-appellant and Sri S. K. Purwar, learned counsel for the defendant-respondent.

3. From record it transpires that initially marriage of the appellant Anil Kumar Jain was solemnized with Smt. Nishi Jain on 12.04.1991. From aforesaid wedlock, two daughters namely Gazal Jain and Geetika Jain were born. Unfortunately, Smt. Nishi Jain, wife of the appellant, died on 12.04.1991. Accordingly, plaintiff-appellant performed his second marriage with the defendant Smt. Kalpana Jain on 14.11.1994. The aforesaid marriage was solemnized in accordance with Hindu Rites and Customs. It is the case of the

appellant that after almost more than nine years of marriage, the defendant-wife deserted the appellant on 25.05.2004 and went to her paternal home, without disclosing the grounds for leaving the matrimonial home. The appellant thereafter filed Marriage Petition No.457 of 2004 (Sri Anil Kumar Jain Vs. Smt. Kalpana Jain) before the Family Court, Agra, for a decree of divorce on the ground of cruelty.

4. At this stage, the defendant-wife filed Misc. Case No. 155 of 2005 under Section 9 of the Hindu Marriage Act i.e regarding Restitution of Conjugal Rights. At this very juncture, the defendant-wife also initiated proceedings before the Rajasthan State Commission for Women in which the plaintiff-husband appeared. On 28.12.2005 the plaintiff-husband specifically stated before the Rajasthan State Commission for Women that he shall not keep the defendant-wife with him.

5. While the aforesaid Marriage Petition was pending, the defendant-wife filed Case No. 146 of 2007 (Smt. Kalpana Jain Vs. Anil Kumar Jain) under Sections 12, 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005. However, the aforesaid case came to be dismissed vide order dated 08.03.2010.

6. Ultimately, Misc. Case No. 155 of 2005 (Kalyani Jain Vs. Anil Kumar Jain) for Restitution of Conjugal Rights was decreed by the Family Court, Kota Rajasthan vide judgement and decree dated 16.03.2011. Against the aforesaid judgement and decree, the plaintiff-husband has preferred Civil Misc. Appeal No. 2088 of 2006 (Anil Kumar Jain Vs. Kalpana Jain) before the Rajasthan High Court and the same is said to be pending.

7. The Court Below by means of the judgement and decree dated 29.02.2014 has dismissed the divorce Suit filed by the plaintiff-husband. Thus, feeling aggrieved by the aforesaid judgement and decree the plaintiff-husband has now approached this Court by means of the present Family Court Appeal.

8. The plaintiff-appellant filed Marriage Petition No. 457 of 2004 (Anil Kumar Jain Vs. Smt. Kalpana Jain) on the ground of cruelty. As per the allegations made in the divorce petition, it was alleged by the plaintiff-husband that though the plaintiff had performed all the marriage obligations towards his wife but the wife has failed to reciprocate the same. It was further alleged that after marriage the defendant-wife resided substantially at her parental home and spend very short time with the plaintiff at his home in Agra. The defendant-wife used to frequently leave her matrimonial home and went to her parental home at Kota, Rajasthan. It was also alleged that while the defendant resided with the plaintiff at Agra, her conduct towards the plaintiff was always full of harassment and cruelty, which amounted to commission of physical and mental cruelty upon the plaintiff-husband by the defendant-wife. It was also alleged that the defendant has refused to perform the daily house hold job on account of which the plaintiff and his two daughters have been deprived of the benefit of home cooked food and therefore of necessity they have to eat outside which in turn has a bad effect upon the health of the plaintiff and his two daughters. The defendant-wife does not behave cordially

with the two daughters of the plaintiff born from the wedlock with the first wife. The defendant indulges into scuffle and exchange of hot words with the two daughters resulting in immense mental pain to the plaintiff. It was also alleged that repeatedly the plaintiff requested the defendant to modify her behavior but no heed was paid by the defendant to the same. To the contrary out of sheer revenge the conduct of the defendant became more outrageous and non-cooperative. She not only exchanged hot words with the plaintiff but also indulged in fight with the plaintiff, which shows her wrath towards the plaintiff and also her outrageous character. It was also alleged that the defendant-wife has deprived the plaintiff of conjugal relationship and inspite of repeated request the defendant-wife has failed to discharge her marriage obligations. Lastly, it was alleged that the defendant-wife has left the house of the plaintiff on 26.05.2004 without disclosing any reason to the plaintiff-husband and since then she is residing with her parents at Kota, Rajasthan.

9. The divorce petition filed by the plaintiff-appellant was contested by the defendant-wife. Accordingly, the defendant-wife filed a written statement denying the allegations made in the divorce petition. The defendant-wife clearly admitted that at the time of marriage the plaintiff-husband had categorically disclosed that his first wife has expired. He also disclosed that from the first wife, there are two daughters, who live with their Mama or Bua. It is proper for up bringing of the two minor daughters that the plaintiff is remarrying. The defendant-wife further stated that right from 14.11.1994 upto 24.04.2004 when the plaintiff-appellant kept the defendant-wife, she duly discharged her obligations as wife and mother of the two minor daughters. She took every step for the proper up bringing of the two daughters and performed daily routine work with sincerity. The defendant-wife in discharge of her obligations as the mother of the two minor daughters even gave up her parental home and used to visit her parental home only during the summer vacations but alongwith the two minor daughters. She also travelled to Agra and Bombay alongwith the two daughters. For ten years, it is the defendant- wife, who looked after the two minor daughters and when they have become major, the plaintiff has turned dishonest and he as well as his two daughters have started committing cruelty upon the defendant-wife. It was also alleged that whenever the plaintiff-appellant went out of Agra in connection with his business, it was the defendant-wife who looked after them and discharged the obligations of not only the mother but also of the father. The defendant-wife had never misbehaved with the plaintiff-appellant or his two daughters nor even committed any cruelty upon them. Had it been so then the plaintiff would have certainly not kept the defendant with him for ten long years. The plaintiff would not have placed the responsibility of the two minor daughters upon the defendant in case her conduct was as alleged by the plaintiff. To the contrary, it is the plaintiff who has committed cruelty upon the defendant as she has been used as long as the two daughters were minors and thereafter, she has been sought to be abandoned by ousting her from her matrimonial home. It was further stated that as long as the defendant resided with the plaintiff at

Mumbai or Agra, she satisfied every demand of the plaintiff and her conduct towards the plaintiff and his two daughters was both amicable and cordial. The defendant further stated that the plaintiff had concealed the factum of his getting the family planning operation done and therefore, the charge alleged against the defendant that the defendant has filed to discharge marriage obligations is wholly incorrect. Lastly, it was stated that the defendant wants to reside with the plaintiff and for that purpose, she had instituted proceedings under Section 9 of Hindu Marriage Act, which had been decreed vide judement and decree dated 16.03.2011. The defendant is still ready to reside with the plaintiff.

10. The Court below on the basis of the pleadings of the parties framed the following three issues for adjudication:

(I) Whether the conduct of the defendant-wife towards the plaintiff-husband is cruel or the conduct of the plaintiff-husband towards the defendant-wife is cruel? If yes, its effect.

(II) Whether the plaintiff is entitled to the decree of divorce?

(III) Whether the plaintiff is entitled to any other relief? If yes, then what.

11. After the aforesaid issues were framed, the parties went to trial. The plaintiff in order to prove his case adduced himself as P.W.-1, his daughter Gazal as P.W.-2 and one Raju Prakash Jain as P.W.-3. The plaintiff further filed some documentary evidence in support of his case, the detail of which are mentioned in paragraph 7 of the impugned judgement.

12. The defendant-wife in order to establish her defence adduced herself as D.W.-1 and one Anil Kumar Jain as D.W.-2. The defendant-wife also filed documentary evidence to establish the document set up by her, the same is detailed in paragraph 8 of the impugned judgement.

13. The Court below considered issue no.1 in the light of the pleadings raised by the parties and the oral and documentary evidence adduced by them. While considering the aforesaid issue, the Court below framed an ancillary question as to whether the defendant-wife has been ousted from her matrimonial home for sufficient reason or the defendant-wife has herself left the matrimonial home. Upon evaluation of the same the Court below concluded that the plaintiff-husband has failed to establish cruelty on the part of the defendant-wife against the plaintiff and secondly, the defendant-wife has been ousted from her matrimonial home without any sufficient reason. As such the suit for divorce filed by the plaintiff-appellant was dismissed.

14. Mr. Swapnil Kumar, the learned counsel for the plaintiff-appellant has assailed the impugned judgement on the ground that the Court below has committed a manifest error of law in deciding the issue no.1 against the plaintiff. It is the submission of the learned counsel for the plaintiff-appellant that the allegations made in the divorce petition stood proved by the testimony of D.W.-2, Gazal. As such, the plaintiff-appellant is clearly entitled to the decree of divorce on the ground of cruelty as prayed for. He thus submits that the judgement and decree passed by the Court below are liable to be set aside on the suit of the plaintiff-appellant for divorce be decreed throughout.

15. Mr. S. K. Purwar, the learned counsel for the defendant-wife has supported the impugned judgement. He has referred to the facts relating to the proceedings initiated before the Rajasthan State Commission for Women and the decree passed under Section 9 of the Hindu Marriage Act in favour of the defendant-wife. It has further been argued that the marriage of the plaintiff-appellant was solemnized with the defendant-wife on 14.11.1994 whereas the suit for divorce has been filed on 22.07.2004 i.e. after more than 9 years of marriage. It was then urged that at the time of marriage the two daughters of the plaintiff-appellant namely Gazal Jain and Geetika Jain, who were born out of the wedlock from the first wife Smt. Nishi Jain, were minors and looked after by the defendant-wife. This is established from the fact that there is no pleading in the divorce petition as to who looked after the minor daughters in case the defendant-wife was absent from her matrimonial home at Agra and the plaintiff-appellant frequently left Agra in connection with his business.

16. Thus, the only question which has cropped up for consideration before us is whether the plaintiff-appellant was able to prove the case of cruelty and Court below has committed any error in disbelieving the case of appellant or not.

17. Before proceeding to consider the aforesaid question, it shall be appropriate to reproduce Section 13 of the Act of 1955, which provides for the grounds of divorce.

" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, [***] been suffering from a virulent and incurable form of leprosy; or

(v) has, [***] been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; [***]

[Explanation. —In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

(viii) [***]

(ix) [***]

[(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

[(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

"(1-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

" (viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"."

18. Section 13 (i-a) of the Act of 1955 clearly provides that a decree of divorce can be granted in case after the solemnization of marriage, the petitioner has been treated with cruelty.

19. The term cruelty has been the subject matter of debate for long. A Division Bench of this Court in the case of ***Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328*** has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In *Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250* Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In *Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105*, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In *V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337* considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot

reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In *Chetan Dass v. Kamla Devi, (2001) 4 SCC 250,* Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In *Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73,* Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

27. In *Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778* Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

29. In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish,

disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

20. With regard to mental cruelty reference be made to the judgement of the Apex Court in the case of A. Jaya Chandra Vs. Aneel Kaur, 2005 (2) SCC 22. The aforesaid judgement has also been considered by the Division Bench (supra) and the following has been observed in paragraph-26 of the judgement. The same is accordingly reproduced herein under.

"26. In *A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22*, Court observed that conduct of spouse, if established, an inference can legitimately be drawn that treatment of spouse is such that it causes an apprehension in the mind of other spouse, about his or her mental welfare then this conduct amounts to cruelty.

Court observed that when a petition for divorce on the ground of cruelty is considered, Court must bear in mind that the problems before it are those of human beings and psychological changes in a spouse's conduct have to be borne in mind before disposing of petition for divorce. Before a conduct can be called cruelty, it must touch a certain pitch of severity. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty."

21. In K. Srinivas Rao Vs. D.A. Deepa (2013) 5 SCC 226, while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh (supra) certain other illustrations could be added. We think it seemly to reproduce the observations:

"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

22. With the aid of the meaning of the term "physical cruelty" and "mental cruelty" this Court has now to examine as to whether the plaintiff-appellant was able to establish the same before the Court below and the findings recorded by the Court below are illegal, perverse and erroneous or not.

23. From the perusal of the impugned judgement, we find that the Court below has disbelieved the case set up by the plaintiff-appellant by assigning cogent reasons. The Court below concluded that the conduct of the plaintiff-appellant towards the defendant-respondent is inhuman and the defendant-respondent has been ousted from her matrimonial home deliberately by the plaintiff-appellant. Therefore, the case set up in the divorce petition that the defendant-respondent has herself left her matrimonial home was disbelieved by the Court below as the same was found to be false. In arriving at the aforesaid finding the Court below relied upon the statement of the plaintiff-appellant himself given before the Rajasthan State Commission for Women on 28.12.2005 that the plaintiff-appellant shall not keep the defendant-wife with him. Apart from the above, the Court below drew an adverse inference against the plaintiff-appellant that inspite of the fact that a decree of restitution of conjugal rights has been granted in favour of the defendant-respondent on 16.03.2011, yet inspite of the same the plaintiff-appellant has not honoured the same. This again goes to prove that the defendan-wife had not deserted the plaintiff' (husband) but that defendant-wife was ousted from her matrimonial home without any reason.

24. On the issue regarding the commission of physical and mental cruelty, the Court below concluded that the plaintiff-appellant has not given any specific instance of such act on the part of the defendant-respondent, which may constitute physical or mental cruelty. The plaintiff-appellant has only stated that physical and mental cruelty was exerted upon the plaintiff-appellant by the defendant-respondent by stating that the defendant-respondent refused to do house

hold work and misbehaved with the two daughters of the plaintiff-appellant born from the first wife. The Court below concluded that this by itself does not amount to commission of cruelty by the defendant-respondent. As such the plaintiff-husband failed to established cruelty on the part of the defendant-wife.

25. With regard to the issue relating to the failure on the part of the defendant-respondent in not performing her marriage obligations, the Court below concluded that the plaintiff-appellant has not approached the Court with clean hands. The various evidences filed by the plaintiff-appellant himself clearly belies his case on the aforesaid issue and therefore, the said issue was decided against the plaintiff-appellant.

26. The Trial Court also considered the issue relating to the conduct of the defendant-respondent towards the two daughters of the plaintiff-appellant who were born from the first wife. After considering the entire pleadings and the evidence on record, the Court below concluded that the conduct of the defendant-respondent cannot be interpreted in such a manner that it has lead to the commission of physical and mental cruelty upon the plaintiff-appellant and his two daughters. To the contrary the conduct of deponent-respondent right from the date of her marriage up to the date of her ouster i.e. 25.05.2004 has been that of a pious and benevolent mother and for the welfare of the two daughters she has taken every step, which a woman of even ordinary prudence could take.

27. Mr. Swapnil Kumar, the learned counsel for the plaintiff-appellant has confined his submission that the issue of commission of cruelty by the defendant-respondent was fully established and therefore the judgement and decree passed by the Court below is liable to be set aside. According to the learned counsel for the plaintiff-appellant, the oral testimony of P.W.-2 Gazal Jain clearly proves the plaintiff's case.

28. We have accordingly gone through the testimony of P.W.-2, Gazal Jain and find that the same is not worthy of reliance. P.W.-2 is neither a credible nor a reliable witness. Firstly, her statement is tutored as is reflected from the statement in chief itself. She herself states that the oral testimony is being given by her as per the advice of the advocate. Secondly, the deliberate omissions in her statement regarding the date of various occurrences referred to in her statement and also the absence of material facts which could substantiate her statement make her statement wholly doubtful. For the aforesaid reasons, the Court below disbelieved the testimony of P.W.-2 Gazal Jain. We do not find any illegality in the view taken by the Trial Court to discard the testimony of P.W.-2.

29. Mr. Swapnil Kumar, the learned counsel for the plaintiff-appellant could not place before us any such other material on the basis of which the view taken by the Court below in not accepting the oral testimony of P.W.-2 could be faulted with.

30. Accordingly, we hold that the Court below did not commit any illegality in disbelieving the testimony of P.W.-2 and rightly dismiss the suit of the plaintiff-appellant for divorce. No other point was pressed before us.

31. In view of the discussion made herein above, the appeal fails and is

therefore liable to be dismissed. It is accordingly dismissed with costs.

(2019)10ILR A 897

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

First Appeal No. 51 of 2012
connected with
First Appeal No. 178 of 2012

Bhavna Sharma ...Appellant
Versus
Sri Sanjeev Sharma ...Respondent

Counsel for the Appellant:
Sri Ajay Kumar Singh, Sri A.K.S. Bais, Sri Ashish Kumar Singh, Sri Ashok Kumar Singh, Sri Dhiraj Kumar Pandey, Sri Narendra Kumar, Sri Pratik J. Nagar

Counsel for the Respondent:
Sri Anurag Pathak

A. Hindu Marriage Act, 1955 - Section 12 -Divorce - Irretrievable breakdown of marriage.

Held:-Parties living separately for last 12 years - Court found that the marriage has virtually become a dead marriage - clear case of irretrievable breakdown - Also intention of the parties to go in for divorce - Wife had filed cases against the husband under Section 498-A IPC and Domestic Violence Act and under Section 125 Cr.P.C. and the husband had also undergone about two years of incarceration – Marriage between the parties was beyond repair - No fruitful purpose would be served by relegating the parties to the court below to file fresh petition for divorce under Section 13 of the Act, as more than 12 years has already passed – Alternative relief of divorce under Section 13 of the Act claimed before the Court granted. (Para 26 & 27)

Decree of divorce between the parties passed.

Appeal dismissed (E-5)

List of cases cited: -

1. Vinita Saxena Vs Pankaj Pandit (2006) 3 SCC 778

2. Sukhendu Das vs Rita Mukherjee (2017) 9 SCC 632

3. K. Srinivas Rao vs D.A. Deepa (2013) 5 SCC 226

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Pratik Nagar, learned counsel appearing for the appellant in First Appeal No. 51 of 2012 (Smt. Bhavna Sharma vs. Sri Sanjeev Sharma) arising out of Original Suit No. 1168 of 2008 filed under Section 12 of the Hindu Marriage Act, 1955 (hereinafter referred as the Act), for declaring the marriage as void on the ground of impotency of the defendant-respondent, who also appears for the defendant-respondent in the connected appeal and Sri Anurag Pathak, learned counsel for the appellant-plaintiff in the connected First Appeal No. 178 of 2012 (Sri Sanjeev Sharma Vs Smt. Bhavna Sharma) arising out of the Original Suit No. 88 of 2009 filed under Section 9 of the Act for restitution of conjugal rights, who also appears for the defendant-respondent in the leading appeal.

2. Both the original suits were consolidated and were dismissed by the lower court by a common judgment.

3. With the consent of parties First Appeal No. 51 of 2012 is taken as the leading appeal.

4. The marriage between the parties had taken place on 30.11.2007. An Original Suit No. 1168 of 2008 under Section 12 of the Act was filed by the wife on 22.11.2008, i.e. within one year of the marriage. The other suit being Original Suit No. 88 of 2009 under Section 9 of the Act was filed by the husband on 9.1.2009.

5. The trial Court framed six issues in O.S. No. 1168 of 2008 (Smt. Bhavna Sharma vs. Sri Sanjeev Sharma). The first issue was regarding impotency of the husband and its impact; second issue related to consummation of marriage between the parties; third issue was as to whether the marriage is liable to be declared as null and void, fourth issue was regarding relief to which the wife is entitled; fifth issue was as to whether the behaviour of opposite party (husband) was cruel towards the plaintiff (wife) and sixth issue was as to whether the opposite party has fraudulently represented himself as manager of a firm to marry the plaintiff (wife).

6. In evidence copy of affidavits and oral statements of Smt. Bhavna Sharma as P.W.-1, Sri Rajeev Kumar as P.W.-2, Sri Sanjeev Sharma as D.W.-1 and Smt. Sarita Sharma as D.W.-2 have been filed.

7. In O.S. No. 88 of 2009 (Sri Sanjeev Sharma vs. Smt. Bhavna Sharma) filed under Section 9 of the Hindu Marriage Act, 1955, five issues were framed. First, whether the defendant is legally wedded wife of plaintiff; second, whether they are living separately without any reasonable cause, third, whether the proceedings of the case are liable to be stayed under Section 10 of C.P.C.; fourth, whether the sole plaintiff is entitled for restitution of conjugal rights; and fifth was regarding any other relief.

8. In evidence statements of witness produced on behalf of the plaintiff as P.W.-1 and statements of witness produced on behalf of defendant as D.W.-1 have been filed.

9. The issue nos. 1 and 2 of both the original suits were decided together.

10. The Trial Court recorded a categorical finding that the plaintiff-wife had failed to prove the impotency of the defendant-husband and in this regard only oral statement was made by her. Similarly, it was also recorded that she has also failed to prove the ground of cruelty. In O.S. No. 88 of 2009 it was found that the husband has also failed to prove his case and there is no cogent evidence on record to substantiate his case claiming restitution of conjugal rights as he has failed to prove his case.

11. At the very outset, Sri Pratik Nagar submits that he does not want to press the ground of impotency. However, he is pressing his alternative prayer for divorce under Section 13 (1) (i-a) of the Act and submits that the same is liable to be allowed. In other words, learned counsel for the appellant did not press his relief for declaring marriage null and void on the ground of impotency under Section 12 of the Act.

12. At this stage, Sri Harshit Pathak, learned counsel holding brief of Sri Anurag Pathak, learned counsel for the respondent-defendant in the leading case submitted that since the issue of impotency is no longer in dispute and therefore, the suit under Section 9 of the

Act is liable to be allowed. He, further opposed the prayer for divorce on the ground that the wife has failed to prove her case of cruelty.

13. I have considered the rival submissions and perused the record.

14. In view of the statement made by Sri Pratik Nagar, the issue regarding impotency need not be gone into by this Court and thus, challenge to the impugned judgment to the extent of Section 12 of the Act stands rejected. Now, only alternative prayer for grant of divorce under Section 13 (1) (i-a) of the Act falls for consideration before this Court and the question before this Court is as to whether the same can be granted or not.

15. Admittedly, an agreement dated 19.8.2008 between the parties, paper no. 42C1, Annexure-1 to the affidavit, whereby the parties have agreed to take divorce and some amount was to be paid, was filed before the court below. I have perused the agreement as available on record of the lower court and I find that the same has been duly signed by both the parties as well as by five other witnesses. The affidavit and the agreement (paper no. 42C1) is quoted as under:-

पेपर नं0 42 सी 1

नकल शपथ पत्र मिनजानिब संजीव शर्मा मय एनेक्चर–1 सुलहनामा बमुकदमा वाद सं0 62/2009 (भावना शर्मा– बनाम– संजीव शर्मा)
दिनांक :– 05.04.2010
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न्यायालय श्रीमान ए0डी0जे0 कक्ष संख्या–10 सहारनपुर।
वाद संख्या 62 सन् 09
भावना शर्मा बनाम संजीव शर्मा

शपथपत्र ओर से :– संजीव शर्मा पुत्र श्री विनोद कुमार शर्मा निवासी मो0 मिस्सर मुरार, संकीर्तन भवन, सहारनपुर।

1– मैं शपथपूर्वक कथन करता हूँ कि मेरा नाम व पता उपरोक्त सब सच व सही है तथा मैं निम्न तथ्यों से वाकिफ हूँ।

2– मैं शपथपूर्वक कथन करता हूँ कि चन्द भले मौजिज व्यक्तियों ने पक्षकारगणों के मध्य राजीनामा करा दिया था जिसका लिखा पढ़ी हुई थी जिसके सम्बन्ध में राजीनामे की छाया प्रति बतौर एनेक्चर नम्बर–1 इस शपथपत्र के साथ दाखिल की जा रही है।

3– मैं शपथपूर्वक कथन करता हूँ कि मुझ शपथकर्ता के खिलाफ फिर भी मुकदमा कर दिया था तब 74,000/– रूपये केवल हमें वापस दिये गये थे।

4– मैं शपथपूर्व कथन करता हूँ कि मुझ शपथकर्ता को आज तक एक लाख रूपये वापस नहीं किया गया है। मैं शपथपूर्वक कथन करता हूँ कि शपथपत्र के पैरा 1 से 4 मेरे जाति इल्म में सब सच व सही है कोई तथ्य झूठ नहीं है सब बोलने में ईश्वर मेरी मदद करें।

दिनांक– शपथकर्ता– संजीव शर्मा
शपथकर्ता– संजीव शर्मा
ह0 अस्पष्ट
ऋषि पाल एडवोकेट
सिविल कोर्ट
सहारनपुर।
----------लगातार

आज दिनांक 19.8.08 को संजीव कुमार पुत्र विनोद कुमार संकीर्तन भवन रानी बाजार व द्वितीय पक्ष भावना शर्मा पुत्र दिनेश चन्द शर्मा निवासी प्रताप नगर सहारनपुर है।

लड़की की तरफ से 1 लाख 74 हजार व समान वापिसी का फैसला हो गया है। 1 लाख 74 हजार रूपये व समान रजनीश गुप्ता व अमित मित्तल की सुपुर्दगी में दे दिया गया है। कचहरी में तलाक होने के बाद भावना शर्मा पुत्र दिनेश शर्मा को समान व पैसे दे दिये जायेगे।

लड़के का मामा

(1) – अजय कुमार (लड़का) संजीव शर्मा
(2)– रजनीश गुप्ता (लड़की) भावना शर्मा

(3)– अमित कुमार मित्तल
(4) --------.....
(5) लड़के का चाचा

अरूण
सत्य प्रतिलिपि
ह0 अस्पष्ट
मुख्य प्रतिलिपिक
जजी सहारनपुर।

16. Insofar as the relief regarding restitution of conjugal rights is concerned, on perusal of the document at page 146 of the appellants' paper book and annexure 1 thereof, which is an agreement entered into between the parties, and of the finding that has been returned at page 135 of the paper book by the trial Court that in their statement both the parties have admitted execution of the said agreement and they have agreed to divorce, I do not find any good ground to allow the OS No. 88 of 2004 and consider the prayer for restitution of conjugal rights. The agreement entered into between the parties outside the court clearly indicates that the defendant-respondent in the leading appeal has, in fact, agreed for divorce between the parties. Even otherwise, the court below on the said issue has also recorded a finding against the husband. On perusal of the evidence, I do not find any cogent reason to disagree with the findings recorded by the trial court.

17. Now the sole question remains before this Court is regarding the claim of divorce under Section 13 (1) (i-a) of the Act on the ground of cruelty. The same has been rejected on the ground that since the petition was filed by the wife within a period of one year from the date of marriage, therefore, the petition under Section 13 was not maintainable. Hence, no relief was granted to the wife.

18. It is not in dispute that both husband and wife are living separately for about 12 years. On the last date, on 17.7.2019 both the learned counsel agreed that the appeals be decided on merits. In this view of the matter, I am not inclined to relegate the parties to the court below for filing fresh petition under Section 13 of the Act. Moreso, in view of the settled law I find that it is a case where ground of irretrievable breakdown between the parties is liable to be considered and thus, prayer for the relief of divorce can be considered by this Court.

19. Learned counsel for the petitioner has placed reliance on judgments of the Hon'ble Apex Court in the case of Vinita Saxena Vs. Pankaj Pandit, (2006) 3 SCC 778; Sukhendu Das vs. Rita Mukherjee, (2017) 9 SCC 632; and K. Srinivas Rao vs. D.A. Deepa, (2013) 5 SCC 226 to contend that it is a case of mental cruelty and the appellant cannot be forced to stay in a dead marriage. He, thus, submits that no purpose would be served by compelling the parties to live together in the matrimony.

20. Paragraphs 41 and 49 of Vinita Saxena (supra) are quoted as under:

"41. The Division Bench in Rita Nijhawan v. Balkishan Nijhawan AIR 1973 Del 200 in AIR at p. 209, para 22 observed as follows:

"Marriage without sex in an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a

woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

"49. The observation made by this Court in Shobha Rani vs. Madhukar Reddi (1988) 1 SCC 105: 1988 SCC (Cri) 60: AIR 1988 SC 121 can be reproduced to appreciate the facts and circumstances of the case on hand. It reads as follows:

"There has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, there is a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The judges and lawyers, therefore, should not import their own notions of life. Judges may not go in parallel with them. There may be a generation gap between the judges and the parties. It would better be if the judges keep aside their customs and manners. It would also be better if judges less depend upon precedents."

(Emphasis supplied)

21. Paragraphs 7 and 8 of Sukhendu Das (supra) are quoted as under:

"7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty (Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511). The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage.

8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted (Manish Goel v. Rohini Goel (2010) 4 SCC 393). Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in 1 (2007) 4 SCC 511 [para101 (xiv)] 2 (2010) 4 SCC 393 [para 11] matrimony (Rishikesh Sharma v. Saruoj Sharma (2007) 2 SCC 263). The daughter of the Appellant and the

Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950."

(Emphasis supplied)

22. Paragraphs 30, 31 and 32 of K. Srinivas Rao (supra) are also quoted as under:

"30. It is also to be noted that the appellant husband and the respondent wife are staying apart from 27-4-1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, if we refuse to sever the tie, it may lead to mental cruelty."

"31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst other necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

"32. In V. Bhagat v. D. Bhagat, (1994) 1 SCC 337, this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that:

"21. ... Irretrievable breakdown of the marriage is not a ground by itself. But, while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind."

(Emphasis supplied)

23. To consider the prayer for grant of divorce I also would like to make a reference to the judgements rendered in the case of Naveen Kohli vs. Neelu Kohli, (2006) SCC 558 and Smt. Mamta Dubey vs. Rajesh Dubey, AIR 2009 Allahabad 141.

24. Paragraphs 57, 58, 59, 60, 66, 67, 72, 74, 75, 83, 84, 85, 86, 87, 88, 89 and 91 of Naveen Kohli (supra) are quoted as under:

"57. In Sandhya Rani v. Kalyanram Narayanan 1994 Supp (2) SCC 588 this Court reiterated and took the view that since the parties are living separately for the last more than three years, we have no doubt in our minds that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, the Court granted the decree of divorce.

58. In the case of Chandrakala Menon v. Vipin Menon, reported in

(1993) 2 SCC 6, the parties had been living separately for so many years. This Court came to the conclusion that there is no scope of settlement between them because, according to the observation of this Court, the marriage has irretrievably broken down and there is no chance of their coming together. This Court granted decree of divorce.

59. In the case of Kanchan Devi v. Promod Kumar Mittal, reported in (1996) 8 SCC 90, the parties were living separately for more than 10 years and the Court came to the conclusion that the marriage between the parties had to be irretrievably broken down and there was no possibility of reconciliation and therefore the Court directed that the marriage between the parties stands dissolved by a decree of divorce.

60. In Swati Verma v. Rajan Verma (2004), reported in (2004) 1 SCC 123, a large number of criminal cases had been filed by the petitioner against the respondent. This Court observed that the marriage between the parties had broken down irretrievably with a view to restore good relationship and to put a quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, and on the request of the parties, in exercise of the power vested in this Court under Article 142 of the Constitution of India, the Court allowed the application for divorce by mutual consent filed before it under Section 13-B of the Hindu Marriage Act and declared the marriage dissolved and granted decree of divorce by mutual consent.

66. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955.

67.The 71st Report of the Law Commission of India briefly dealt with the concept of Irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. We deem it appropriate to recapitulate the recommendation extensively. In this Report, it is mentioned that during last 20 years or so, and now it would around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

72. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

83. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

84. The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

85. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

87.The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

88. The High Court ought to have considered that a human problem can be properly resolved by adopting a human

approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

89. In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the Trial Court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties.

91. Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps."

(Emphasis supplied)

25. Paragraphs 36 and 39 of Smt. Mamta Dubey (supra) are quoted as under:

"36. Upon an overall assessment of the facts and circumstances of the case and the perusal of record, we are of the opinion that the marriage between the plaintiff and the defendant has broken down irretrievably. The defendant-appellant is not willing to withdraw the criminal prosecution which is pending against the plaintiff and his family members. On account of the filing of the case under Section 498-A IPC by the defendant against the plaintiff and his family members, the plaintiff and his father were sent to jail and they had to remain there for a considerably long period of time before they were enlarged on bail. There has been no interaction between the parties after 1999. The parties admittedly have not cohabited for the last 13 years. The defendant has accused the plaintiff of having adulterous relationship with his female colleagues and Ms. Deepti Rawal and also made these allegations public thereby seriously damaging the plaintiff's reputation and undermining his character. A husband cannot be expected to live with his wife under the same roof who distrusts him, holds him responsible for the death of her daughters and who is prosecuting a criminal case against him and his entire family. Admittedly, there has been a long period of continuous separation in the present case and it may fairly be concluded that the matrimonial bond is beyond repair. Thus we are of the view that the marriage between the plaintiff and the defendant is dead in all respects and has broken down irretrievably.

39. The judgment and decree passed by the trial court does not call for any interference."

(Emphasis supplied)

26. Learned counsel for the respondent though sought to support the case of the husband, however, could not dispute the fact that admittedly, both the parties are living separately for last about 12 years. On the last date husband, namely, Sri Sanjeev Sharma was present in the Court and on pointed query, this Court also found that the marriage has virtually become a dead marriage and there is a clear case of irretrievable

breakdown. Apart from that, the agreement entered into between the parties, which is on record bearing the signature of the parties and is also not in dispute, clearly reflects the intention of the parties to go in for divorce. Apart from that admittedly, the plaintiff wife had filed cases against the defendant under Section 498-A IPC and Domestic Violence Act and under Section 125 Cr.P.C. and undisputedly, the defendant had also undergone about two years of incarceration.

27. Under such circumstances, I do not find any good ground to set aside the judgments passed by the court below impugned in the leading appeal filed under Section 12 of the Act, as well as in the connected appeal passed filed under Section 19 of the Act. However, in view of the law as discussed above, I find that it is a case of irretrievable breakdown of marriage, where marriage between the parties is beyond repair and is dead, and no fruitful purpose would be served by relegating the parties to the court below to file fresh petition for divorce under Section 13 of the Act, as more than 12 years has already passed and the alternative relief of divorce under Section 13 of the Act claimed before the Court is liable to be granted.

28. Accordingly, the relief claimed by the wife in alternative in O.S. No. 1168 of 2008 is granted and a decree of divorce between the parties is passed.

29. However, before parting with the appeal I would like to put this on record that on the last date, on 17.7.2019, in order to settle the dispute between the parties, when learned counsel for the appellant (wife) in leading appeal was pressing hard for grant of divorce, he was pointedly asked to seek instructions from his client (wife) if she is agreeable to forgo any kind of permanent alimony/compensation, as the defendant-respondent (husband) present in the court has narrated the pain of undergoing imprisonment for about 2 years in a case under Section 498-A IPC and stated that the plaintiff (wife) is well of, today learned counsel for the appellant Sri Pratik Nagar on instructions from his client (wife) stated that she is willing to forgo the same. I also find that, in fact, there is no such prayer also. There is yet another reason for the same i.e., a compromise had already taken place between the parties outside the court as mentioned above.

30. No other point was pressed.

31. For the discussions made hereinabove, the leading appeal being First Appeal No. 51 of 2012 (Smt. Bhavna Sharma vs. Sanjeev Sharma) stands partly allowed and a decree of divorce is granted under Section 13 of the Hindu Marriage Act, 1955 and the connected appeal being First Appeal No. 178 of 2012 stands dismissed.

32. Ordered accordingly.

(2019)10ILR A 906

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2019

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE UMESH KUMAR, J.

Criminal Misc. Writ Petition No. 12281 of 2019

Raghvendra Singh & Ors. ...Petitioners
Versus

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

Counsel for the Petitioners:
Sri V.P. Srivastava, Sri Sangam Lal Kesharwani, Sri Manish Kesharwani

Counsel for the Respondents:
Sri A.N. Mulla, A.G.A.

A. Indian Penal Code, 1860 - Sections 195/211/220/323/330/197 & The Narcotic Drug and Psychotropic Substance (N.D.P.S.) Act, 1985 - Section 8/20 & Code of Criminal Procedure - Section 195 - challenge to- recovery of ganja from accused - The accused was subjected to physical torture and the alleged recovery is fake and planted- The medical report of the accused prepared by Doctor of C.H.C. did not indicate any pain or injury - The Special Court directed for fresh medical examination- The Board examined the accused and reported as many as 17 injuries- prima facie the contention of the accused that he was subjected to physical torture in police custody, is made out and The court below refused to grant further remand of the accused, directed for his immediate release on personal bond, imposed a penalty of Rs.1000/- each on the petitioners, which was directed to be paid to the accused after deduction from their salary-The order stand quashed with the direction to the C.J.M. who shall treat the same as a complaint on its own merit and disciplinary / departmental proceedings against the petitioners, if any, shall continue.

B. If the court upon an application or otherwise finds it in the interest of justice that an inquiry in respect of offences mentioned in Section 195 of the Code is necessary, the court would make a preliminary inquiry and after such inquiry, record a finding to that effect and make a complaint in writing to the magistrate of 1st class having jurisdiction. where an act amounts to the offence of contempt of the lawful authority of public servants or to an offence against public justice, private prosecutions are barred and only the court in relation to which the offence was committed may initiate proceedings by way of complaint. (Para 6, 9 to 12)

Crl. Misc. Writ Petition disposed of (E-6)

(Delivered by Hon'ble Pankaj Naqvi, J.
Hon'ble Umesh Kumar, J.)

Heard Sri V.P. Srivastava, the learned Senior Counsel assisted by Sri Sangam Lal Kesharwani for the petitioners and Sri A.N. Mulla, the learned A.G.A.

This writ petition challenges the order dated 25.4.2019, passed by the Addl. Sessions Judge / F.T.C.-I, Kushinagar at Padrauna, directing for registration of cases against the petitioners and the consequential FIR dated 28.4.2019 as Case Crime No.235/2019, under Sections 195/211/220/323/330/197 IPC, P.S. Taraya Sujan, Kushinagar.

1. Brief facts are as under:-

Petitioner no. 1, the Sub-Inspector, no. 2, the Investigating Officer and no. 3, the Constable of the P.S. concerned on 24.4.2019 allegedly recovered 1.9 kg. of ganja from accused Sarwan Yadav in Case Crime No.230/2019, under Section 8/20 of the N.D.P.S. Act, P.S. Taraya Sujan, Kushinagar. The accused was produced for remand before the Addl. Sessions Judge / F.T.C.-I, Kushinagar (Special Court) on 25.4.2019. The accused informed the court that he had been illegally detained for the last 4 days at the police station where he was subjected to physical torture and the alleged recovery is fake and planted. The

medical report of the accused prepared by Dr. Sanjay Kumar, C.H.C., Tamkuhiganj did not indicate any pain or injury. The Special Court physically examined the injuries of the accused and found several injuries on his body and directed the C.M.O., Kushinagar to get the accused examined by a board of 2 doctors for fresh medical examination. The Board examined the accused and reported as many as 17 injuries. The Board opined that out of 17 injuries, injuries nos. 2, 7, 11, 12, 15, 16 & 17 are old, injuries nos. 1, 3, 4, 5, 8, 9 & 14 are 3-5 days old, injury no. 6 is a week old, injury no. 13 is an inflammatory lesion and injuries nos. 5 & 10 are hard blunt trauma. The court below on above materials, was of the view that prima facie the contention of the accused that he was subjected to physical torture in police custody, is made out and while refusing to grant further remand of the accused, directed for his immediate release on personal bond, imposed a penalty of Rs.1000/- each on the petitioners, which was directed to be paid to the accused after deduction from their salary with a simultaneous direction for prosecution against the petitioners under Section 195/211/220/323/330 IPC and under Section 197 IPC against the doctor concerned along with a direction to send a copy of the order to the authorities concerned. Pursuant thereto, respondent no.4 lodged the above FIR against the petitioners, i.e., the Sub-Inspector, the Investigating Officer, the Constable of the police station concerned and the doctor, (non-petitioner).

2. Sri Srivastava, the learned Senior Counsel for the petitioners challenged the correctness of the order dated 25.4.2019 and the FIR dated 24.5.2019 on the ground that Section 195(1) of the Code specifically prohibits that no court shall take cognizance except on a complaint in writing of that court or by any designated officer of the court in respect of the offences specified therein, thus both the order and the FIR are in teeth of the statutory prohibition, same are liable to be quashed.

3. Sri Mulla, the learned A.G.A. submits that it would be in the fitness of things if a direction is given to the complaint magistrate to treat the FIR as a complaint. He had already on the previous date, i.e., 13.5.2019 submitted that considering the nature of issue involved, he does not propose to file any counter affidavit, writ petition be disposed off on available materials.

4. Section 195 of the Code in so far is relevant is extracted hereunder:

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(1) No Court shall take cognizance-

(a)

(i) .....

(ii) .....

(iii) .....

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) .....

(iii) .....

except on the complaint in writing of that Court, or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other court to which that court is subordinate.

5. The object of Section 195 is to safeguard against irresponsible and reckless prosecution by private individuals in respect of offences which relate to the administration of justice and contempt of lawful authority, i.e., where an act amounts to the offence of contempt of the lawful authority of public servants or to an offence against public justice, private prosecutions are barred and only the court in relation to which the offence was committed may initiate proceedings by way of complaint. Section 195(1)(b)(i) prohibits taking cognizance of the offences under Sections 193 to 196 IPC (both inclusive), 199, 200, 205 to 211 IPC (both inclusive) and 228 IPC when such offence is alleged to have been committed in, or in relation to any proceeding in any court, except on the complaint in writing of that court or by such other designated officer of the court.

6. To attract the prohibition under Section 195(1)(b)(i) of the Code, it will have to be demonstrated that the alleged specified offences were either committed in the court or **in relation to any proceeding in any court** (emphasis ours). Admittedly, in the present case, no offence is alleged to have been committed in the court. But the issue is whether it can be said that the offences were committed in relation to any proceeding in any court. The term "any proceeding in any court" under Section 195(1)(b)(i) of the Code came to be examined by the Apex Court in M.L. Sethi vs. R.P. Kapoor and others, AIR 1967 SC 528, wherein it held in paragraphs 13 to 15 as under:

13. .....

When examining the question whether there is any proceeding in any Court, there are three situations that can be envisaged. One is that there may be no proceeding in any Court at all. The second is that a proceeding in a Court may actually be pending at the point of time when cognizance is sought to be taken of the offence under s. 211, I.P.C. The third is that, though there may be no proceeding pending in any Court in which, or in relation to which, the offence under s. 211, I.P.C., could have been committed, there may have been a proceeding which had already concluded and the offence under s. 211 may be alleged to have been committed in, or in relation to, that proceeding. It seems to us that in both the latter two circumstances envisaged above, the bar to taking cognizance under s. 195(1)(b) would come into operation. If there be a proceeding actually pending in any Court and the offence under s. 211, I.P.C., is alleged to have been committed in, or in relation to, that proceeding, s. 195(1)(b) would clearly apply. Even if there be a case where there was, at one stage, a proceeding in any Court which may have concluded by the time the question of applying the provisions of s. 195(1)(b) arises, the bar under that provision would apply if it is alleged that the offence under s. 211 I.P.C., was committed in, or in relation to, that proceeding. The fact that the proceeding had concluded would be immaterial, because s. 195(1)(b) does not require that the proceeding in any Court must actually be pending at the

time when the question of applying this bar arises.

14. In the first circumstance envisaged above, when there is no proceeding pending in any Court at all at the time when the applicability of s. 195(1)(b) has to be determined, nor has there been any earlier proceeding which may have been concluded, the provisions of this sub-section would not be attracted, because the language used in it requires that there must be a proceeding in some Court in, or in relation to, which the offence under s. 211, I.P.C. is alleged to have been committed. In such a case, a Magistrate would be competent to take cognizance of the offence under s. 211 I.P.C., if his jurisdiction is invoked in the manner laid down in s. 190 of the Code of Criminal Procedure.

15. Mr. Frank Anthony on behalf of the appellant urged before us that even in those cases where there may be no pending proceeding in any Court, nor any proceeding which has already concluded in any Court, the bar of s. 195(1)(b) should be held to be applicable if it is found that subsequent proceeding in any Court is under contemplation. We do not think that the language of clause(b) of sub-s. (1) of s. 195 can justify any such interpretation. A proceeding in contemplation cannot be said to be a proceeding in a Court. When there is mere contemplation of starting a proceeding in future, there is no certainty that the proceeding will come into existence. It will always be dependent on the decision to be taken by the person who is contemplating that the proceeding be started; and any interpretation of the law, which will make the applicability dependent on a future decision to be taken by another person, would, in our opinion, be totally incorrect. The applicability of this provision at the sweet will of the person contemplating the proceeding will introduce an element of uncertainty in the applicability of the law; and such an interpretation must be avoided. In this case, apart from this circumstance, the language used clearly lends itself to the interpretation that the bar has been placed by the Legislature only in those cases where the offence is alleged to have been committed in, or in relation to, any proceeding actually pending in any Court, or any proceeding which has already been taken in any Court. There is nothing in the language to indicate that the Legislature also intended to lay down this bar if a proceeding in a Court was still under contemplation and if and when that proceeding is taken, it may be found that the offence alleged to have been committed was, in fact, committed in, or in relation to, that proceeding. In this connection, the question of time when the applicability of this provision has to be determined, assumes importance. It appears to us that at the time when in the present case the Judicial Magistrate at Chandigarh had to determine the applicability of this bar, he could not be expected to come to a decision whether any proceeding in any Court was under contemplation in, or in relation to, which the offence under s. 211, I.P.C., of which he was asked to take cognizance, was alleged to have been committed. In fact, it would be laying on the Magistrate a burden which he could not be expected to discharge properly and judicially as no Magistrate could determine in advance

of a proceeding in a Court whether the offence under s. 211, I.P.C., of which he is required to take cognizance, will be an offence which will be found subsequently to have been committed in relation to the contemplated proceeding to be taken thereafter. This interpretation, sought to be placed on this provision on behalf of the appellant, cannot, therefore, be accepted

7. The upshot of the above legal position is that there could be three contingencies which may arise under Section 195(1)(b)(i):-

(i).. where there is no proceeding pending at all,

(ii) where proceedings are pending,

(iii) where proceedings have been concluded.

8. The 1st contengency will not attract the prohibition but the 2nd and 3rd i.e., prosecution relating to specified offences therein would be maintainable only by way of a complaint. The Apex Court in paragraph -15 of the above judgment ruled out the applicability of prohibition in respect of a contemplated proceeding. But once contemplated proceeding is converted "into a proceeding", in a court, the statutory prohibition of Section 195 shall automatically come into operation. What is crucial for applicability of the prohibition under Section 195 of the Code is not the date when the alleged offence under specified offence is committed, rather it is the date on which a complaint / FIR is lodged.

9. Thus, it is immaterial as to when was the recovery effected in the present case. But once a proceeding has been initiated with request for remand in respect of an offence under the N.D.P.S. Act, the bar under Section 195 of the Code shall come into play as the offences under Sections 195/211/197 IPC are alleged to have been committed in relation to a proceeding under the N.D.P.S. Act, pending before the court.

10. The order dated 25.4.2019 does not specifically direct for lodging of an FIR, rather it directs for registering a case which could be interpreted both ways, i.e., FIR / complaint but the illegality crept in when the learned Judge after conducting a preliminary inquiry, instead of remitting the matter to the complaint magistrate as a complaint as envisaged under Section 340 Cr.P.C not only adjudicated the issue but also awarded penalty against the petitioners for an offence which was yet to be established in a court of competent jurisdiction, i.e., before the complaint magistrate, we precisely for these reasons, are not directing the FIR to be treated as complaint before the complaint magistrate.

11. How a prosecution in respect of specified offences under Section 195 of Cr.P.C would proceed, is provided under Section 340 Cr.P.C.

Section 340 of the Cr.P.C. Is extracted hereunder:-

340. Procedure in cases mentioned in section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to

have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195.

12. From the aforesaid, it is evident that if the court upon an application or otherwise finds it in the interest of justice that an inquiry in respect of offences mentioned in Section 195 of the Code is necessary, the court would make a preliminary inquiry and after such inquiry, record a finding to that effect and make a complaint in writing to the magistrate of 1st class having jurisdiction.

13. In view of above, this petition is disposed off with the following directions:

(i) The order dated 25.4.2019 and the consequential FIR dated 28.4.2019 as Case Crime No.235/2019, under Sections 195/211/220/323/330/197 IPC, P.S. Taraya Sujan, Kushinagar stand quashed.

(ii) The learned Special Court shall reduce the substance of accusation along with the relevant evidence and forward the same to the C.J.M. who shall treat the same as a complaint and endeavour to conclude the same as expeditiously as possible, preferably within 6 months, from the date of receipt of certified copy of the order, in accordance with law.

(iii) The complaint magistrate shall decide the complaint on its own merit, without being influenced by any observation on merits by us, as the same have been made only for a limited purpose.

(iv) Quashing of the order dated 25.4.2019 and its consequential FIR dated 28.4.2019 shall not adversely affect accused Sarwan Yadav in any manner but the disciplinary / departmental proceedings against the petitioners, if any, shall continue.

14. The O.S.D. (Criminal) is directed to immediately send a copy of this order to the court concerned and the Superintendent of Police concerned.

Compliance report be submitted by the complaint magistrate in the Chambers on 25.2.2020 at 4.00 PM.

(2019)10ILR A 913

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Misc. Writ Petition No. 15822 of 2019

Shri Raghav Bahl ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Pandey, Sri Amit Kumar Singh, Sri Prashant Kumar

Counsel for the Respondents:
C.S.C., Sri Ashish Agrawal

A. Black Money Act, 2015 - Sections 50, 51- Undisclosed Foreign Income and Assets- challenge to-issuance of show cause notice, sanction order and complaints without giving opportunity of hearing to the petitioner before granting sanction and filing the impugned complaint- prima facie case is made out against the petitioner or that the petitioner deserves no relief claimed by him-The criminal proceedings can be quashed only in accordance with parameters laid down by Hon'ble Apex Court in catena of decisions-The present petition does not fall in any of such category, wherein, this Court can exercise jurisdiction under Article 226 of the Constitution of India to quash the impugned notice and complaints.

B. As per prosecution manual it is not incumbent upon the office of Principal Director to grant opportunity hearing to petitioner. Further, grant of sanction is purely an administrative act and the department is not under the obligation to serve copy of the sanction on the petitioner and thus, no principle of judicial procedure has been violated. In view of the material on record it cannot be held that the impugned notice or criminal proceeding are manifestly attended with mala fide and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. (Para 6 to 12)

Crl. Misc. Writ Petition dismissed (E-6)

Precedent followed: -

1. Srinidhi Karti Chidambaram Vs Principal Chief Commissioner decided on 2 November, 2018

2. Medchl Chemicals & Pharma (P) Ltd. Vs Biological E Ltd. & ors. 2000 SCC (Cri) 615

3. Union of India Vs W.N. Chadha AIR 1993 SC 1082

4. St. of HA. Vs Bhajan Lal & ors. (supra)

5. Rupan Deol Bajaj Vs K.P.S. Gill (1995) SCC (Cri) 1059

6. Rajesh Bajaj Vs St. of NCT of Delhi (1999) 3 SCC 259

7. St. of M.P. Vs Dr. Krishna Chandra Saksena (1996) 11 SCC 439

8. Zenit Mataplast Prv. Ltd. Vs St. of Mah. (2009) 10 SCC 388

9. S.P. (C.B.I.) Vs Deepak Chaudhary AIR 1996 SC 186

10. St. of Ori. Vs Saroj Kumar Sahoo (2005) 13 SCC 540

(Delivered by Hon'ble Ramesh Sinha, J.
&

Hon'ble Raj Beer Singh, J.)

1. Heard Sri Rakesh Pandey, learned Senior Advocate, assisted by Sri Amit Kumar Singh and Sri Prashant Kumar, learned counsel for the petitioner and Sri Ashish Agrawal, learned counsel for respondents and perused record.

2. This petition under Article 226 of Constitution of India has been preferred seeking following relief:

(I) Issue an appropriate writ, order or direction to call for records leading to the issuance of Show cause notices dated 01.05.19 u/s 50 and 51 of the Black Money Act 2015, the Assessment order (if any exists on record), the Sanction order (if any exists on record) and the complaints u/s 50 and 51 of Black Money Act 2015 and quash and set aside the same as illegal, arbitrary aand violative of fundamental rights of petitioner.

(ii) Issue a writ, order or direction in the nature of certiorari quashing any sanction orders passed by the respondents whereby respondent's department filed the compliants dated 03.05.2019 u/s 50 and 51 of the Black Money Act 2015 for assessment year 2018-19 before the Special Judicial Magistrate, Meerut against petitioner without affording an opportunity of hearing to the petitioner and alternatively, if no such sanction orders are there quash the complaints dated 03.05.19 u/s 50 and 51 of Black Money Act 2015.

(iii) Issue a writ, order or direction in the nature of certiorari quashing the criminal complaints Nos. 2982/2019 and 2983/2019 dated o3.05.19 filed by respondent's department u/s 50 and 51 of the Black Money Act 2015 for assessment year 2018-19 before the Special Judicial Magistrate, Meerut against petitioner as illegal and arbitrary and violative of fundamental rights of the petitioner;

(iv) Issue a writ, order or direction in the nature of Prohibition to prohibit the respondent from unnecessary harassing the petitioner by issuing Show-cause notices without any substance or cause of action on the basis of documents recovered through search on 11.10.18 at the home and office premises of the petitioner;

(v) Issue a writ, order or direction in the nature of mandamus commanding the respondent to conduct hearing and inquiry with regard to show cause notices dated 01.05.19 as per established procedure and in conformity with the principles of natural justice after quashing and setting aside the same.

(vi) Issue a writ, order or direction to quash and set aside any subsequent and resultant proceedings, complaints dated 03.05.19 u/s 50 and 51 of the Black Money Act 2015 or action based on the show-cause notice dated 01.05.19 u/s 50 and 51 of Black Money Act 2015;

(vii) Any other writ, order or directions which this Hon'ble court may deem just, fit and proper in the light of aforementioned facts and circumstances of the case and may kindly be passed and;

(viii) Allow the writ petition with costs.

3. It has been argued by the learned counsel for the petitioner that the petitioner, who is a journalist and editor, has entered into Sale and Purchase Agreement dated 30.11.2015 with ST George Blackfriars Limited to purchase a property in London (foreign asset) against consideration of GBP 2,725,000/ and details of said property were duly disclosed in the Income Tax Return of

petitioner and that source of payments, which were made to purchase the alleged property, were also disclosed. The petitioner has made first payment of GBP 10,000 & 262500 from his foreign account and second payment of GBP 272,500 was made from foreign account of his daughter Ms Tara Bahl and thereafter through assignment deed dated 01.11.2017 petitioner has assigned his interest in said property to RBRK Investment Limited. It was submitted that a search under Section 132(1) of Income Tax Act was conducted by Income Tax Authorities at the residence and office premises of the petitioner and certain documents were seized and thereafter Income Tax Officer issued a show-cause notice dated 02.11.2018 against Ms. Tara Bahl, daughter of the petitioner, under Section 276C of the Income Tax Act 1961 for Assessment Year 2017-18 and 2018-19 and under Section 50 and 51 of the Black Money (Undisclosed Foreign Income and Asset) and Imposition of Tax Act, 2015) and another notice dated 02.11.2018 was issued against petitioner under Section 276C of the Income Tax Act 1961 for Assessment Year 2018-19 and under Section 50 and 51 of the Black Money Act, 2015, which were duly replied by their authorized representative/ Chartered Accountant. Again show cause notice dated 22.11.18 issued by the Income Tax Officer, which was replied vide reply letter dated 28.11.2018. Similarly, the show cause notice dated 07.12.18 under Section 50 of the Black Money Act, 2015 issued to the petitioner for the Assessment Year 2017-18 was also replied by reply dated 12.12.2018.

It was stated that the Income Tax Officer vide Emails dated 01.05.2019 issued show-cause notice dated 01.05.2019 under Section 50 and 51 of the Black Money Act, 2015 against the petitioner for the Assessment year 2018-19, wherein it was alleged that the petitioner has under-reported total investment in his foreign Assets by GBP 2.73 lakhs and thereby, has wilfully attempted to evade tax and its reply was sought by 02.05.2019. The authorised representative/ CA of petitioner submitted that the information provided in show-cause notice dated 01.05.2019 is factually incorrect and that payments made by petitioner for London property have been duly and properly mentioned in Income Tax Return for Assessment Year 2018-19. The petitioner's representative has requested Income Tax Authority to adjourn the matter for a fortnight for submitting detailed response but that request was rejected by the Income Tax officer vide Emails dated 02.05.2019 and petitioner was directed to file factual reply/ submission of show-cause notice by 02.05.2019. Petitioner's authorized representative again requested for the grant of adjournment vide Email dated 11.05.2019 and thereafter authorized representative/CA Firm, has filed reply dated 13.05.2019 containing detailed submissions against the show-cause notice dated 01.05.2019 but the Respondent's Department has filed impugned criminal complaints on 03.05.2019 under Section 50 and 51 of Black Money Act, 2015 in the Court the Special Chief Judicial Magistrate, Meerut, against petitioner.

It was further submitted that no copy of any sanction has been provided to the petitioner and that respondents have denied opportunity of hearing to the petitioner before granting sanction and filing the impugned complaint as much as

the third show-cause notice was issued on 01.05.2019 and complaint was filed on 03.05.2019 declining the request of petitioner to grant reasonable time to submit his submissions. If any Sanction order has been granted, it was passed without giving opportunity of personal hearing to the petitioner, who has specifically asked for it in its reply Emails dated 02.05.2019. The respondents have instituted the impugned complaints against the petitioner with intention to tarnish and harm his integrity and standing in public eyes and that the impugned complaints and sanction order do not fulfill the necessary ingredients of the alleged offence ie undisclosed foreign income and assets. It was stated that all the payments made in foreign bank account in connection with alleged property (foreign asset) were transferred from Indian legitimate bank accounts of petitioner and money transferred in foreign bank accounts was duly disclosed and that the petitioner has legitimate source of such income.

Learned counsel further argued that the necessary ingredients of Section 50 and 51 of Black Money Act, 2015 are not satisfied and that no prima facie case is made out against the petitioner. It has been submitted that all investment in London property were duly disclosed in Income Tax Return and there was no undisclosed foreign income or assets of the petitioner.

4. Sri Ashish Agrawal, learned counsel for respondents argued that as per the petitioner, he has made payment of GBP 145047 and GBP 28998.6 for London property on 11.06.2018 and 27.07.2018 and Ms. Ritu Kapur has made payments of GBP 72523.4 and GBP 43514.1 for the London property on 07.08.2018 and 29.10.2018 while the alleged assignment was made on 01.11.2017 and thus, payments for the alleged property were made by petitioner and Ms. Ritu Kapur after alleged assignment, which is contradictory to his later submissions and that petitioner has shown the London property as directly held asset in his ITR for Assessment Year 2018-19, that is after the purported assignment of the property to M/s RBRK Investments Ltd. It was pointed out that as per AY 2017-18 and 2018-19, total share holding of petitioner in M/s RBRK Investment Ltd is merely of Rs 200/ while of Ritu Kapur is Rs 2,51,16,284/. It was submitted that no details of RB Trust and Vidur Bahl having been allotted any shares has been submitted. It was stated that prosecution has been launched u/s 50 of Black Money Act for non disclosure of foreign bank accounts in the name of his minor son Vidur Bahl as there is no such disclosure in the ITRs of petitioner that any shares have been allotted to Vidur Bahl and that Prima facie, petitioner is owner of the said property and he has under-reported total investment till 31.03.2018 in London property.

So far as question of grant of sanction is concerned, it was submitted that Sanction order dated 02.05.19 has been passed considering the response submitted by the petitioner in response to show-cause notice dated 01.05.19. There is no obligation of serving the sanction order to the petitioner and that sanction orders were duly passed before instituting the prosecution in the Court. It was further submitted that the above stated assignment deed dated 01.11.2017 is not a registered document and thus, it has no evidentiary value. Further it does not even

specify the consideration against which the assignment has been made and that the alleged assignment deed is an afterthought arrangement. It was further pointed out that the petitioner was not allotted any shares even by the month of January 2019 i.e. much after the search on the petitioner, for assigning his interest in the London property to M/s RBRK Investments Ltd. The petitioner was given sufficient opportunity to make his submission/ representation. The show-cause notice dated 01.05.2019 was issued before granting sanction for launching prosecution. However, as per prosecution manual it is not incumbent upon the office of Principal Director to grant opportunity hearing to petitioner. Further, grant of sanction is purely an administrative act and the department is not under the obligation to serve copy of the sanction on the petitioner and thus, no principle of judicial procedure has been violated.

5. Much thrust has been given to the argument that petitioner was denied opportunity of hearing before according sanction for launching prosecution of petitioner as much as the show-cause notice was issued on 01.05.2019 and complaint was filed on 03.05.2019 by declining the request of petitioner to grant reasonable time to submit his submissions and that the sanction order was also passed without giving opportunity of personal hearing to the petitioner, who has specifically asked for it in the reply E-mails dated 02.05.2019. In this regard it would be pertinent to mention that petitioner could not show any such legal or mandatory requirement that before according sanction or instituting such prosecution, an opportunity of hearing has to be given to the accused. Further, show cause notices dated 02.11.2018, 27.11.18 and 07.12.18 were issued to the petitioner to put his submissions.

In the case of Superintendent of Police (C.B.I.) Vs. Deepak Chaudhary, AIR 1996 SC 186, referred by the learned counsel for the respondents, accused respondent filed writ petition in the High Court seeking quashing of the order of sanction. One of the ground for challenge was that he not given an opportunity of hearing before granting sanction. The High Court accepted the contention and quashed the sanction order. Before the Hon'ble Apex Court, it was contended on behalf of the appellant that question of giving an opportunity to the charged officer before granting sanction does not arise since it is not a quasi judicial function but purely an administrative function. This argument was accepted by the Hon'ble Apex Court and it was held as under :

"We find force in the contention. The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a Court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima-facie, the authority is enquired to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction. The grant of sanction, therefore, being administrative act the need to provide an opportunity of hearing the accused before according sanction does not arise. The High Court, therefore, was clearly in error in holding that the order of sanction is vitiated by violation of the principles of natural justice."

In case of Union of India Vs W.N. Chadha, AIR 1993 SC 1082 after registration of the case against the accused, the Director, CBI requested the authority in Switzerland for freezing/blocking certain bank accounts of the accused which had relevency in the investigation of the case whereupon Federal Department of Justice and Police in Switzerland made an application before the concerned court which vide order dated 29.1.1990 froze the said bank account and further directed that the account shall remain frozen till 28 February, 1990 and further necessary assistance would be rendered only on receipt of the letter rogatory from a competent judicial authority in India. In response thereto, the C.B.I. approached the Special Judge, Delhi to issue a letter rogatory/request to Switzerland for getting the necessary investigation, which was allowed vide order dated 05.02.1990. In the meantime, certain public interest litigation was filed and the matter travelled up to the Hon'ble Apex Court. Detail facts and orders passed in those cases have no relevance to the controversy herein. What is relevant to mention here is that one of the accused W.N. Chadha filed a criminal writ petition before the High Court of Delhi challenging the legality and validity of the first information report and also the letter rogatory issued by the Special Court. The High Court allowed the writ petition and quashed the first information report as well as letter rogatory issued on two occasions and other proceedings. The issue was taken to the Hon'ble Apex Court by way of Special Leave Petition. One of the issue raised before Hon'ble Apex Court was whether the letter rogatory issued without hearing the accused is violative of principle of natural justice and thereby has become liable to be quashed. While considering the said issue, it was observed in paragraph 80 & 81 as under :

"80. The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. In A.S. de Smith's Judicial Review of Administrative Action, 4th Ed. at page 184, it is stated that in administrative law, a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication in the presence of some factors, singly or in combination with another. Those special factors are mentioned under items (1) to (10) under the heading "Exclusion of the audi alteram partem rule". 81. Thus, there is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law 'lifeless; absurd, stultifying and self-defeating or plainly contrary to the common sense of the situation' and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands."

The Apex Court in the case of **State of M.P. Vs. Dr. Krishna Chandra Saksena, reported in (1996) 11 SCC 439**, relied by learned counsel for the respondents, held that at the stage of granting of sanction, accused need not be heard. Para 8 of the said judgment is as follows :

"8. On a careful consideration of the rival contentions it is found that the learned Single Judge had ex fade erred in interfering with the criminal proceedings

at the stage of filing a challan after investigation which was backed up by relevant sanction. It is now well settled that interference under Section 482 Cr.PC for quashing a criminal proceeding should be done very sparingly and in exceptional cases. In the case of State of Haryana v. Bhajan Lal it has been laid down by a two member Bench of this Court speaking through S. Ratnavel Pandian, J., that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The extraordinary or inherent powers do not confer an arbitrary jurisdiction on the High Courts to act according to its whim or caprice. The court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint. It has also been laid down by way of illustration as to under what circumstances the High Court can be justified in interfering with the criminal proceedings under Article 226 of the Constitution of India or Section 482 Cr.PC."

The case of **Zenit Mataplast Private Ltd Vs State of Maharashtra (2009)10 SCC 388**, relied by the learned counsel for the petitioner, does not address the issue involved in the present case. That case does not assist the appellant, since the facts and issue involved therein differ materially from those in present case. In the instant case, it is correct that prior of granting sanction, the show-cause notice was issued on 01.05.2019 and complaint was filed on 03.05.2019 by declining the request of petitioner for grant of more time to submit his submissions but from the above stated position of law it is quite apparent that grant of sanction is an administrative act and there is no requirement to provide an opportunity of hearing to the accused before according sanction. Once there was no requirement of affording an opportunity of hearing to the petitioner before grant of sanction, it would not make any difference that the request of petitioner for granting more time to submit reply in pursuance of notice dated 01.05.19 was declined.

In view of aforesaid legal position, no fault can be found with the alleged notice dated 01.05.19 or with grant of sanction. The complaint or proceeding thereof are not vitiated on ground that no opportunity of hearing was granted to the petitioner before according sanction or before instituting the complaint. The contention raised in this regard by the learned counsel for the petitioner has no substance.

6. So far the argument that alleged property in London can not be termed as "undisclosed foreign income and assets" and that necessary ingredients of Section 50 and 51 of Black Money Act, 2015 are not satisfied and that no prima facie case is made out against the petitioner, is concerned, in view of allegations made against petitioner and material on record, it can not be said that prima facie no case is made out against the petitioner. There are allegations against the petitioner that alleged payment of GBP 145047 and GBP 28998.6 for property in question were made on 11.06.2018 and 27.07.2018 and Ms. Ritu Kapur has made payments of GBP 72523.4 and GBP 43514.1 on 07.08.2018 and 29.10.2018 while the alleged assignment was made on 01.11.2017 and thus, payments for the alleged property were made by petitioner

and Ms. Ritu Kapur after alleged assignment, which is contradictory with the version of petitioner. No terms, conditions and consideration have been mentioned in the alleged assignment nor petitioner has provided share transfer deed of RBRK Investment. Further, petitioner has shown the London property as directly held asset in his ITR for Assessment Year 2018-19, that is after the purported assignment of the property to M/s RBRK Investments Ltd. Alleged Assignment deed was not registered and even as per petitioner, he was assigned shares of M/s RBRK Investments Ltd only in month of February 2019 and thus, as per the respondents, alleged assignment deed was afterthought. As per AY 2017-18 and 2018-19, total share holding of petitioner in M/s RBRK Investment Ltd is merely of Rs 200/ while of Ritu Kapur is Rs 2,51,16,284/. The account in name of his minor son, was not disclosed by the petitioner in return of income for 2017-18. No details of RB Trust and Vidur Bahl having been allotted any shares, were provided. Further, as per respondents, the prosecution has been launched u/s 50 of Black Money Act for non disclosure of foreign bank accounts in the name of his minor son Vidur Bahl as there is no such disclosure in the ITRs of petitioner and that there is nothing to show that any shares have been allotted to Vidur Bahl. As per respondent, Prima facie, petitioner is owner of the said property and he has under-reported total investment till 31.03.2018 in London property, which falls within the ambit of section 51 of Black Money Act 2015.

7. Recently in case of Srinidhi Karti Chidambaram vs The Principal Chief Commissioner decided on 2 November, 2018, (W.A.Nos.1125 to 1128, 1130 & 1131 of 2018, W.P.Nos.13005 to 13007, 13008 to 13010, 13070 to 13072, 13041 to 13043, 11714, 11715 & 22329 to 22331 & 22333 of 2018 and Rev.Appl.Nos.79 to 82 of 2018 and Connected WMPs, CMPs and MPs), Hon'ble Madras High Court had an occasion to consider the provisions of Black Money Act 2015 and it was held as under:

"The object of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA 2015 for short) is not only assessment of total disclosed foreign asset and income of an assessee but also mandates true and full disclosure of such foreign asset or income to be disclosed voluntarily by a resident assessee in the return of income filed by him under the Income Tax Act, 1961. Failure of such assessee to furnish return of income under s.139(1) attracts prosecution under s.49 of BMA, 2015; Failure to disclose fully and truly by such assessee details of foreign assets and income in a return of income filed under s.139(1) attracts prosecution under s.50 of BMA 2015 and attempts in any manner to evade tax, penalty that proceedings should be initiated and completed U/s 10 of the BMA before invoking the provisions of Chapter of V particularly Section 50 read with Section 55 is not tenable. Section 10 deals with assessment of undisclosed foreign income and asset. As per section 2(11), undisclosed asset located outside India means an asset held by the assessee in his name or in respect of which he is a beneficial owner, and he has no explanation about the source of Investment in such asset or the explanation given by him is in the opinion of the Assessing Officer unsatisfactory. The provisions of Section 50 (falling

under chapter V) are attracted for failure to furnish in a return of income filed any information about an asset (including financial interest in any entity) located outside India. Thus it can be seen the proceedings under s 10 and proceedings under 5.50 are separate and distinct. It is pertinent to point out here that even assuming that the assessee has provided explanation to the satisfaction of the A.0, regarding the source of investment of asset located outside India, still prosecution under s.50 is attracted for failure to furnish any information of asset located outside India in return of Income filed in the prescribed form setting forth such details in the prescribed manner. It therefore follows that the process of sanctioning prosecution can commence even before completion of assessment U/s 10(3) of the BMA, 2015. The scheme of the Act makes It clear that assessment and prosecution are not only distinct and separate but the two proceedings are independent and irrespective of the outcome of the assessment under s.10(3) of the BMA, 2015. Besides, it has been held by the Hon'ble Supreme Court in P.Jeyappan Vs S.K. PERUMAL, 1984 AIR 1693 that the pendency of assessment proceedings cannot act as a bar to institution of criminal prosecution for offences punishable under the provisions of law".

8. In the instant case on a careful consideration of the aforesaid facts and circumstances of the case and the provisions of law, we are satisfied that there exists a prima facie case to initiate prosecution against the petitioner for the offence in terms of section 50, 51 of the Black Money Act, 2015 and it could not be said that a prima facie case is not made out against the petitioner. The legal position on the issue of quashing of criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases and Courts should not ordinarily interfere with the investigations of cognizable offences. However, where the allegations made in the FIR or the complaint even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, the FIR or the charge-sheet may be quashed in exercise of powers under Article 226 or inherent powers under Section 482 of the Cr.P.C. In the well celebrated judgment reported in AIR 1992 SC 605 State of Haryana and others Vs. Ch. Bhajan Lal, also referred by learned counsel for the petitioner, Hon'ble Supreme Court has carved out certain guidelines, wherein proceedings can be quashed but cautioned that those guidelines should be exercised sparingly and that too in the rarest of rare cases. Guidelines are as follows:

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety to do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 156(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission

of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can every reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. The issue has been reconsidered by the Supreme Court on several occasions. In (2003) 6 SCC 195 (Union of India vs. Prakash P. Hinduja and Another) the Supreme Court narrowed down the scope of Ch. Bhajan Lal (supra) and held as follows:

"The grounds on which power under Section 482 Cr.P.C. can be exercised to quash the criminal proceedings are: (1) where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, (2) where the uncontroverted allegations made in the FIR or the complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, (3) where there is an express legal bar engrafted in any of the provisions of the Code of Criminal Procedure or the Act concerned to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great circumspection."

In case of State of Haryana v. Bhajan Lal & Ors. (supra) also, in guideline number 3 it was laid down that where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and do not make out a case against the accused, the Court may quash the FIR as well as the investigations, however a note of caution was added by observing that the power of quashing a criminal proceeding should be exercised sparingly and with circumspection and that too in the rarest of rare cases. It was held that the Court would not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint.

In the judgments of Rupan Deol Bajaj v. K.P.S. Gill; reported in (1995) SCC (Cri) 1059, Rajesh Bajaj v. State of NCT of Delhi; reported in (1999) 3 SCC 259 and Medchl Chemicals & Pharma (P)

Ltd. v. Biological E Ltd. & Ors; reported in 2000 SCC (Cri) 615, the Apex Court clearly held that if a prima facie case is made out disclosing the ingredients of the offence, Court should not quash the complaint. However, it was held that if the allegations do not constitute any offence as alleged and appear to be patently absurd and improbable, Court should not hesitate to quash the complaint. The note of caution was reiterated that while considering such petitions the Courts should be very circumspect, conscious and careful. Thus, there is no controversy about the legal proposition that in case a prima facie case is made out, the FIR or the proceedings in consequence thereof cannot be quashed.

10. It was further submitted by the learned counsel for the petitioner that the entire proceedings against the petitioner are malicious and that respondents are trying to put 'cart before the horse', it may be observed that no specific material was indicated in support of alleged plea and even otherwise, such questions can not be examined by this Court in proceedings under Article 226 of the Constitution of India. The appreciation of evidence or the reliability of the allegations can not be examined at this stage. In State of Orissa v. Saroj Kumar Sahoo (2005) 13 SCC 540 it has been held that probabilities of the prosecution version can not be analysed at this stage. Likewise, the allegations of mala fides of the complainant/ respondents are of secondary importance. The relevant passage reads thus: (SCCp. 550, para 11)

"11.....It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with."

11. From the above stated case law it is apparent that the adjudication of questions of facts and appreciation of evidence or examining the reliability and credibility of the version, does not fall within the arena of jurisdiction under Article 226 of the Constitution of India. In view of the material on record it can not be held that the impugned notice or criminal proceeding are manifestly attended with mala fide and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. The criminal proceedings can be quashed only in accordance with parameters laid down by Hon'ble Apex Court in catena of decisions. The present petition does not fall in any of such category, wherein, this Court can exercise jurisdiction under Article 226 of the Constitution of India to quash the impugned notice and complaints.

12. In view of aforementioned facts and legal position and considering submissions of the parties, allegations made against petitioner and perusing the material on record including sanction order, it could not be said that no prima facie case is made out against the petitioner or that the petitioner deserves any relief claimed by him. The petition lacks merit and thus, liable to be dismissed.

13. Hence the petition is accordingly, dismissed.

(2019)10ILR A 924

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 188 of 2017

Smt. Prabha ...Appellant
Versus
Kapil Kumar Singh ...Respondent

Counsel for the Appellant:
Sri Shiv Shankar Pd Gupta, Sri S.S.P. Gupta

Counsel for the Respondent:
Sri Arun Kumar Srivastava, Sri Abhishek Kumar Yadav, Sri Amit Kumar Srivastava, Sri Arun Kumar Vishvakarma, Sri Arun Kumar Srivastava, Sri Bhola Nath Yadav.

A. Hindu Marriage Act, 1955 - Section 24 - Interim maintenance - Object - To provide interim maintenance so that the parties in whose favour maintenance is awarded is able to support herself - Relevant factor - Petitioner's own income and the income of the respondent. (Para 12)

Husband Petition for dissolution of marriage – Wife moved application for interim maintenance – Court below, awarded a lump sum amount of Rs. 5000/- towards litigation expenses & a sum of Rs. 3,000/- towards interim maintenance for the wife and her minor son – Sum of Rs. 3,200/- was already awarded to the wife & to his minor son, towards interim maintenance in proceedings under section 125 Cr.P.C – Amount paid under section 125 Cr.P.C. was to be adjusted – For all practical purposes, no amount of interim maintenance was awarded under section 24 of Act 1955 – Wife First Appeal before High Court

Held: - High Court modified the judgement by directing that wife shall be entitled to a sum of Rs. 6,000/- per month towards interim maintenance i.e. Rs. 4000/- for herself and Rs. 2,000/- for minor son. However, the amount of maintenance paid and awarded under section 125 Cr.P.C. shall be adjusted. (Para 20)

First Appeal allowed (E-5)

List of cases cited: -

1. Neeta Rakesh Jain Vs Jeetmal Jain (2010) 12 SCC 242

2.Manish Jain Vs Akansha Jain (2017) 15 SCC 801

3.Lalta Prasad Kushwaha Vs Jayanti Kushwaha (2019) 2 ADJ 12

(Delivered by Hon'ble Rajeev Misra, J.)

1. This is defendant's appeal under section 19 of Family Court Act, 1984 (hereinafter referred to as 'Act 1984') arising out of judgement and order dated 24.4.2015, passed by Principal Judge, Family Court, Mathura in Misc. Case No. 294 of 2010 (Smt. Prabha Vs. Kapir Kumar Singh) under section 24 of Act 1984, in Marriage Petition No. 294 of 2010 (Kapil Kumar Singh Vs. Smt. Prabha), whereby application (paper no. 4 Ga) filed by defendant-appellant for interim maintenance has been decided to the dissatisfaction of plaintiff-appellant.

2. We have heard Mr. S.S.P. Gupta, learned counsel for defendant-appellant. Inspite of revision of cause list, no one has appeared on behalf of defendant-respondent even though names of five advocates namely, Mr. Amit Kumar Srivastava, Mr. Arun Kumar Srivastava, Mr. Abhishek Kumar Yadav, Mr. Arun Kumar Vishvakarma and Mr. Arun Kumar Srivastava are printed in cause list.

3. Plaintiff-respondent, Kapil Kumar Singh filed Marriage Petition No. 294 of

2010 (Kapil Kumar Singh Vs. Smt. Prabha) for a decree of dissolution of marriage of parties. As per plaint allegations, marriage of parties was solemnized at Central Goat Research Centre, Makhdoom Farrah, Tehsil and District Mathura on 28.2.2008. According to plaintiff-respondent, conduct of defendant-appellant was unbecoming of a wife. To the contrary her conduct towards plaintiff-respondent and his family members was full of cruelty. Consequently, the basis of suit for dissolution of marriage was cruelty which is a ground recognized in law for grant of dissolution of marriage, as per section 13 (i) (a) of Hindu Marriage Act, 1955 (hereinafter referred to as 'Act 1955').

4. Notices were issued to defendant-appellant. She accordingly appeared in Marriage Petition No. 294 of 2010 (Kapil Kumar Singh Vs. Smt. Prabha) and filed an application dated 16.8.2011 (paper no. 4 Ga) for interim maintenance for herself and her minor child and also litigation expenses as contemplated under section 24 of Act 1955. By means of aforesaid application, defend-appellant alleged that plaintiff-respondent is employed in R.S. Infra Project Pvt. Ltd. Greater Noida and is drawing salary to the tune of Rs. 18,000/- per month. It was further stated that plaintiff-respondent has an income of Rs. 35,000/- from Agricultural Land. Father-in-law of defend-appellant has superannuated from his services in the Irrigation Department of Government of U.P. He has received Rs. 50,000/- towards fund and gratuity. He is also getting Rs. 20,000/- per month towards pension. According to defendant-appellant, she is unemployed. The son born out of wedlock of parties is too young. No arrangement has been made by plaintiff-respondent for maintenance of his wife and minor son. As such it was prayed that defendant-appellant be awarded interim maintenance to the tune of Rs. 15,000/- and a sum of Rs. 12,000/- towards litigation expenses.

5. Plaintiff-respondent contested the application for interim maintenance (paper no. 4-Ga) filed by defendant-appellant. He accordingly, filed his objections dated 16.5.2012. According to plaintiff-respondent, all the expenses which were incurred in delivery of child were borne by plaintiff-respondent. The salary of plaintiff-respondent is Rs. 9008 and not Rs. 18,000/- as alleged by defendant-appellant. The plaintiff-respondent has no agricultural income. As plaintiff-respondent is residing separately from his father, he has no concern with finance available with father-in-law of defendant-appellant. It was also alleged that defendant-appellant is working as a teacher in Ideal Public Junior High School, Farrah Tehsil, District Mathura, from where she is getting salary at the rate of Rs. 10,000/- per month. Apart from above, defendant-appellant also earns Rs. 10,000/- from private tution. Father-in-law of plaintiff-respondent is working as Technical Officer at Central Goat Research Institute, Makhdoom Farrah, from where he is getting a salary of Rs. 50,000/- per month. Father-in-law of plaintiff-respondent also has some tenure recorded in his favour from which he earns about Rs. 2,00,000/- per annum.

6. After exchange of pleadings, Court below proceeded to decide application for interim maintenance filed by defendant-appellant. Upon evaluation of material on record, Court below concluded that as per salary bill dated 1.5.2014, salary of plaintiff-respondent is

Rs. 10,603/-. From the perusal of Khatauni 1413 to 1418 Fasli, it is established that plaintiff-respondent is recorded co-tenure holder along with Balbir Singh of Khatauni Khata No. 1447 area 0.729 hectares. As such, Court below concluded that plaintiff-respondent has some tenure recorded in his favour.

7. The defence raised by plaintiff-respondent that defendant-appellant is working in an institution and drawing a salary of Rs. 10,000/- could not be established by plaintiff-respondent. Similarly, plea raised by plaintiff-respondent that defendant-appellant earns Rs.10,000/- from tuition also could not be established by him. Court below concluded that defendant-appellant has no source of income and therefore, she is unable to maintain herself and her minor child. Accordingly, Court below opined that interest of justice shall be served in case some amount towards interim maintenance is granted to defendant-appellant after deducting the amount already paid pursuant to direction issued under section 125 Cr.P.C.

8. It is pertinent to mention here that vide order dated 1.6.2012 defendant-appellant has been awarded a sum of Rs. 2000/- towards maintenance for herself and a sum of Rs. 1,200/- has been awarded to minor child of defendant-appellant. As such, a total sum of Rs. 3,200/- has been awarded. Court below, however, very curiously awarded a sum of Rs. 3,000/- towards interim maintenance for defendant-appellant and her minor son. The amount paid under section 125 Cr.P.C. was to be adjusted. Apart from the above, a lump sum amount of Rs. 5000/- was given towards litigation expenses. With the aforesaid directions, Court below decided application for interim maintenance filed by defendant-appellant vide order dated 25.4.2015. Dissatisfied with the order dated 25.4.2015, defendant-appellant has come up in appeal before this Court.

9. Learned counsel for defendant-appellant in support of appeal has submitted that it is an undisputed fact that compensation to the tune of Rs. 3,200/- was already awarded to defendant-appellant and her minor son. However, Court below in proceedings under Section 24 of Act 1984, has awarded a sum of Rs. 3,000/- towards interim maintenance and litigation expenses, which have been quantified at Rs. 5000/-. Further, while granting benefit to defendant-appellant under section 24 of Act 1955, Court below has also directed that amount payable under section 125 Cr.P.C. shall be adjusted. Thus, for all practical purposes, no amount of interim maintenance has been awarded by Court below to defendant-appellant and her minor son under section 24 of Act 1955. He thus submits that the impugned order passed by Court below is liable to be set aside/modified by this Court.

10. It is next submitted that it is an admitted position that salary of plaintiff-respondent is Rs. 10,603/- per month. It is also proved on record that certain tenure is recorded in favour of plaintiff-respondent. Taking these two undisputed facts into account, Court below ought to have sympathetically considered application filed by defendant-appellant for interim maintenance. However, Court below while passing impugned order has completely ignored the undisputed position as noted herein above, rendering the impugned order arbitrary.

11. Before proceeding to consider the submissions urged by learned counsel for defendant- appellant, it shall be useful to refer to provisions of Section 24 of Act 1955 which provides for payment of interim maintenance and litigation expenses. The same is reproduced herein below:

*"**24. Maintenance pendente lite and expenses of proceedings.** - Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:*

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be."

12. The object of Section 24 of Act 1955 is to provide interim maintenance so that the parties in whose favour maintenance is awarded is able to support itself. As such, the meaning of term "maintenance" and 'support' needs to be referred to, as is defined in Black's Law Dictionary (6th Edn., pp.953-54) thus:

" ... The furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc. particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife."

13. Likewise, the word "support" as defined in the said dictionary (p. 1439) reads as under:

"That which furnishes a livelihood; a source or means of living; subsistence, sustenance, maintenance, or living. In a broad sense the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his station of life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes; also, proper care, nursing, and medical attendance in sickness, and suitable burial at death."

14. From perusal of Section 24 of Act 1955, it is apparent that there is only one indicator in the section, which shall be taken into account by a Court for the purpose of awarding interim maintenance. Similarly in the entire act of 1955, there is no provision, which provides relevant factors to be looked into by a Court while awarding interim maintenance or factors which are required to be ignored by a Court while awarding interim maintenance. In *Neeta Rakesh Jain Vs. Jeetmal Jain, 2010 (12) SCC 242* Court has considered relevant factors, which are required to be taken into consideration by a Court while deciding an application under Section 24 of Act 1955. Paragraphs 9 and 10 of aforesaid judgement are relevant for the controversy in hand. Accordingly, the same are reproduced herein under:

"9. Section 24 thus provides that in any proceeding under the Act, the spouse

who has no independent income sufficient for her or his support may apply to the court to direct the respondent to pay the monthly maintenance as the court may think reasonable, regard being had to the petitioner's own income and the income of the respondent. The very language in which the section is couched indicates that wide discretion has been conferred on the court in the matter of an order for interim maintenance. Although the discretion conferred on the court is wide, the section provides the guideline inasmuch as while fixing the interim maintenance the court has to give due regard to the income of the respondent and the petitioner's own income.

10. In other words, in the matter of making an order for interim maintenance, the discretion of the court must be guided by the criterion provided in the section, namely, the means of the parties and also after taking into account incidental and other relevant factors like social status; the background from which both the parties come from and the economical dependence of the petitioner. Since an order for interim maintenance by its very nature is temporary, a detailed and elaborate exercise by the court may not be necessary, but, at the same time, the court has got to take all the relevant factors into account and arrive at a proper amount having regard to the factors which are mentioned in the statute."

15. Subsequently, Apex Court in **Manish Jain Vs. Akansha Jain, 2017 (15) SCC 801** has observed as follows in paragraph 12:

"12. The Court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and neither arbitrary nor capricious. It is to be guided on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the Act and having regard to the object of the Act. The Court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. Section 24 of the HM Act lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the Court must have regard to the appellant's own income and the income of the respondent."

16. A Division Bench of our Court in **Lalta Prasad Kushwaha Vs. Jayanti Kushwaha, 2019 (2) ADJ 12**, after considering aforesaid judgements of Apex Court observed as follows in paragraphs 15 and 16:

"15. Section 24 of the HM Act empowers the court in any proceeding under the Act, if it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the applicant and the respondent. Heading of Section 24 of the Act is "Maintenance pendente lite and expenses of proceedings". The Section, however, does not use the word "maintenance"; but the word "support" can be interpreted to mean as Section 24 is intended to provide for maintenance pendente lite.

16. An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is no answer to a claim of maintenance that the wife is educated and could support herself. Likewise, the financial position of the wife's parents is also immaterial. The court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance and whether the applicant has any independent income sufficient for her or his support. Maintenance is always dependent upon factual situation; the court should, therefore, mould the claim for maintenance determining the quantum based on various factors brought before the court."

17. Upon perusal of impugned judgement in the backdrop of judgements referred to above, we find that Court below has not adverted itself to the undisputed facts that salary of plaintiff-respondent is Rs. 10,603/- and he also has recorded tenure in his favour. The plaintiff-respondent deliberately concealed his Agricultural income from Court below. Court below ought to have taken into consideration the aforesaid factors and in that situation, amount of interim maintenance awarded to defendant-appellant would certainly have been more than Rs. 3000/-.

18. There is another aspect of matter. A sum of Rs. 3,200/- has been awarded towards interim maintenance to defendant appellant and her minor son in proceedings under section 125 Cr.P.C. It is impossible even to imagine as to how a mother and a minor son can meet their daily expenses with a meagre amount of Rs. 3,200/-.

19. Considering the law laid down in **Neeta Rakesh Jain (Supra)**, and undisputed facts of the present case as detailed above, we are of the view that Court below has erred in law in awarding a sum of Rs. 3000/- towards interim maintenance to defendant-appellant and her minor child under section 24 of Act 1955. Court below has further directed that amount payable pursuant to order passed under section 125 Cr.P.C. shall be adjusted. The result of same is that no amount of interim maintenance has been awarded to defendant-appellant and her minor son.

20. In view of the discussions, made herein above, we are of the view that impugned judgement and order passed by Court below needs to be modified to do complete justice between the parties. Accordingly, we allow this appeal, modify the impugned judgement and decree passed by Court below by directing that defendant-appellant shall be entitled to a sum of Rs. 6,000/- per month towards interim maintenance i.e. Rs. 4000/- for herself and Rs. 2,000/- for minor son. However, the amount of maintenance paid and awarded under section 125 Cr.P.C. shall be adjusted.

21. Appeal is, accordingly, allowed.

(2019)10ILR A 929

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 31 of 2007

Smt. Dr. Sarita ...Appellant

Versus

Sri Dr. Vikas Kanaujia ...Respondent

Counsel for the Appellant:
Sri Sujeet Kumar

Counsel for the Respondent:
Sri Ravi Kiran Jain, Sri A.K. Srivastava, Sri A.P. Paul, Sri B.B. Paul, Deba Siddiqui, Sri Gautam, Sri Mohd. Shamim, Sri Sumit Srivastava

A. Practice & Procedure - Pleading - Rule - No amount of evidence can be looked into unless a fact is pleaded.

Factum with regard to commission of cruelty by wife upon husband on account of initiation of false criminal case was not pleaded initially nor plaint was got amended subsequently – Documents filed by husband in respect of criminal cases initiated by wife could not be looked into by Court below – *Held* – Decree passed by Court below is nonest as it is based upon facts not pleaded in plaint nor argued by counsel for husband before Court below – Further, documents relating to criminal cases initiated by wife were never admitted in evidence. Consequently, the same could not be relied upon by Court. (Para 30 & 31)

B. Hindu Marriage Act, 1955 - Section 12 -Divorce - Irretrievable breakdown of marriage.

Parties have not been living separately on account of their own free will – It is plaintiff-husband, who has refused to keep defendant-wife with him. Wife has herself not deserted husband –Decree of divorce was not prayed for on ground of irretrievable break down of marriage – Argument raised by learned counsel for husband that there has been an irretrievable break down of marriage has no factual foundation – For a period of fourteen long years, plaintiff-husband kept quiet and now for the first time, this issue is being raised – Plaintiff-husband is estopped from raising this plea. (Para 41)

First Appeal Allowed (E-5)

List of cases cited: -

1.Smt. Archana Vs Dr. P.K. Tomar (2003) 2 AWC 1119

2.Deepika Alias Baby Vs Naresh Chandra Singhnia (2000) 0 AIR (All) 148

3.A. Jayachandra Vs Aneel Kaur (2005) 2 SCC 22

4.Kiran Singh Vs Shiv Kumar (2013) 10 ADJ 560

5. G V N Kameswara Rao Vs G Jabilli (2002) 2 SCC 296

6.Parveen Mehta Vs Inderjit Mehta (2002) 5 SCC 706

7. Naveen Kohli Vs Neetu Kohli (2006) 4 SCC 558

8. Samar Ghosh Vs Jaya Ghosh (2007) 4 SCC 511

9.K Srinivas Rao Vs D A Deepa 2(013) 5 SCC 226

10.K Srinivas Vs K Sunita (2014) 16 SCC 34

11. Smt. Kavita Sharma Vs Neeraj Sharma, First Appeal No. 525 of 2006 decided on 7.2.2018

12.First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs Smt. Anita) decided on 17.11.2016

(Delivered by Hon'ble Rajeev Misra, J.)

1. This is defendant's appeal under Section 19 of Family Courts Act, 1984 (hereinafter refereed to as 'Act 1984'), challenging judgement and decree dated 20.12.2006, passed by Principal Judge, Family Court, Meerut in Matrimonial Case No. 123 of 2003 (Dr. Vikas Kannaujia Vs. Smt. (Dr.) Sarita), under section 13 (I) of Hindu Marriage Act 1955 (hereinafter referred to as 'Act 1955'), whereby Court below has decreed suit of plaintiff respondent and

consequently, annulled marriage of parties from the date of judgement i.e. 20.12.2006.

2. We have heard Mr. Sujeet Kumar, learned counsel for defendant-appellant, Mr. Ravi Kiran Jain, learned Senior Counsel assisted by Mr. A.P. Paul, learned counsel appearing for plaintiff-respondent.

3. According to plaint allegations, marriage of plaintiff respondent, was solemnized with defendant-appellant on 20.2.2002 at Delhi in accordance with Hindu Rites and Customs. After marriage defendant-appellant came to her marital home i.e. house of plaintiff-respondent situate at Tope Khana Bazar, Meerut Cant, District Meerut. It is the case of plaintiff-respondent that consummation of marriage took place on the first night of defendant-appellant at her marital home. It is alleged by plaintiff-respondent that subsequently, relationship between the parties became strained as according to plaintiff-respondent, defendant-appellant refused to perform her marital obligations to the satisfaction of plaintiff-respondent. It was also alleged that defendant-appellant, misbehaved with mother of plaintiff-respondent, when she was requested to touch feet of elder relatives and obtain their blessings. On 22nd February, 2002, younger brother of defendant-appellant and her maternal aunt (mami) are alleged to have visited house of plaintiff-respondent for taking defendant-appellant to her parental home. According to plaintiff-respondent, behaviour of younger brother of defendant-appellant as well as her maternal aunt was neither friendly nor cordial and they started to allege complaint on behalf of defendant-appellant. Ultimately, they all left marital home of defendant-appellant and went to parental home of defendant-appellant at Delhi along with defendant-appellant. Plaintiff-respondent, brought defendant-respondent back to her marital home on 4.3.2002. In the evening of 4.3.2002, they both went to Udhampur (Jammu and Kashmir) where plaintiff was working as an eye surgeon at Kishan Lal Sharma Memorial, Rotary Eye Hospital Udhampur, However, according to plaintiff-respondent, behaviour of defendant-appellant with plaintiff respondent at Udampur was neither cheerful nor congenial. So much so, that according to plaintiff-respondent, though they were in cohabitation, yet there was no establishment of conjugal relations between the parties in their seven days of stay on account of cold and indifferent attitude of defendant-respondent. Accordingly, parties returned in the morning of 11.3.2002. The thirteenth day function (Terahi Ceremony) of elder brother of father of plaintiff-respondent was scheduled on 17.3.2002 as he expired on 10.3.2002.However, according to plaintiff-respondent, defendant appellant left her marital home in the evening of 17.3.2002, which conduct is unbecoming of a good daughter-in-law. Since then defendant-respondent is residing at her parental home. Repeated attempts are alleged to have been made by plaintiff-respondent to bring back defendant-appellant to her marital home but all went in vain. Plaintiff-respondent also filed a suit under section 9 of Act 1955, which was registered as Suit No. 598 of 2002 (Dr. Vikas Kannaujia Vs. Smt. Dr. Sarita) for restitution of conjugal rights. The defendant-appellant appeared in aforesaid suit and filed an application under section 24 of Act 1955 claiming interim

maintenance and litigation expenses. According to plaintiff-respondent, inspite of initiation of above mentioned proceedings, defendant-appellant refused to reside along with plaintiff-respondent at her marital home, which is situate at Meerut. On the aforesaid factual premise, plaintiff-respondent alleged commission of 'cruelty' by defendant-appellant upon him and consequently prayed for grant of a decree of divorce on the ground of cruelty as contemplated under section 13 (1) (i-a) of Act 1955.

4. Suit filed by plaintiff-respondent was contested by defendant-appellant. She filed a written statement whereby, not only the plaint allegations were denied but also additional pleas were raised. According to defendant-appellant, she is a well educated lady and never even attempted to break matrimonial life. It is the parents and other relatives of plaintiff-respondent who want to break matrimonial life of defendant-appellant so that plaintiff-respondent could be remarried and their lust for dowry could be satisfied. The filing of petition under section 9 of Act 1955 was admitted to defendant-appellant. However, she pleaded that in the petition under section 9 of Act 1955 date was fixed for conciliation. However, plaintiff-respondent did not appear before Court on date fixed for conciliation. Ultimately, suit under section 9 of Act 1955 was withdrawn by plaintiff-respondent and thereafter suit for divorce has been filed. According to defendant-appellant, the above conduct clearly establishes malicious motive of plaintiff-respondent to bring married life of parties to an end without any valid cause. Defendant-appellant clearly denied commission of any physical or mental cruelty upon plaintiff-respondent or her family members. It was thus prayed that the suit is liable to be dismissed.

5. The parties went to trial. Plaintiff-respondent, in support of his case , adduced himself as P.W.1. and one Mahendra Singh Kannaujia as P.W.2. Plaintiff filed 39 documents vide list of documents (paper no. 31 Ga to 32 Ga), bringing on record the proceedings of different cases pending in Courts at Delhi. Defendant-appellant in proof of her defence adduced herself as D.W. 1 and her brother Sandeep as D.W.2. However, no documentary evidence was filed by her.

6. Court below on basis of pleadings raised by parties, framed following issues for determination:

a) Whether plaintiff-respondent is entitled to decree of annulment of marriage solemnized on 22.2.2002 on the ground of 'cruelty' against defendant-appellant?

b) Whether Court has j1.50 "urisdiction to try the suit?

c) Whether plaintiff-respondent is entitled to any relief?

7. In respect of Issue no.1, Court below concluded that there is no evidence with regard to giving of dowry or harassment of defendant-appellant on account of additional demand of dowry. The proceedings for cruelty against wife punishable under section 498 A IPC and for criminal breach of trust punishable under section 406 IPC have been initiated by defendant appellant one year after the institution of divorce suit. Court below further recorded a finding that even though defendant appellant is working as

a junior Doctor in Lady Harding Hospital, New Delhi, yet she has filed a complaint under section 125 Cr.P.C. in the Court of A.C.M.M, New Delhi. As such, intention of defendant appellant is not to have maintenance in case of despair and destitution but to harass plaintiff-respondent. The case of defendant-appellant that plaintiff-respondent and his family members caused physical and mental cruelty upon defendant-appellant was disbelieved by Court below. Defendant-appellant herself admitted in her cross-examination that she had no quarrel with mother-in-law. Her mother-in-law only scolded her but except for the aforesaid, there was no dispute with any member in the family of her in-laws. There were no differences between defendant-appellant and plaintiff-respondent upto 17.3.2000. It may be noted here that except for the solitary incident which took place on 17.3.2002, when defendant-appellant is alleged to left her matrimonial home in the evening even though the thirteenth day function (terahi) of elder brother of father-in-law was going on, no other instance of cruelty was pleaded in plaint. However, this particular conduct on the part of defendant-appellant was not considered by Court below to be sufficient enough to constitute 'cruelty' as a single instance does not constitute 'cruelty'.

8. Plea raised by plaintiff respondent that there was complete indifference and cold attitude on behalf of defendant-appellant towards plaintiff-respondent resulting in deprivation of physical pleasure was not accepted by Court below.

9. However, Court below concluded that commission of cruelty by defendant-appellant upon plaintiff-respondent is established from the fact that defendant-appellant has initiated false criminal cases against plaintiff-respondent and her family members. Placing reliance upon judgement of this Court in **Smt. Archana Vs. Dr. P.K. Tomar, 2003 (2) AWC 1119**, Court below concluded that such act falls within the category of commission of cruelty. As such suit for divorce filed by plaitiff-respondent was decreed on the ground of cruelty vide judgement and decree dated 20.12.2006.

10. Thus, feeling aggrieved by aforesaid judgement and decree, defendant-appellant has come to this Court by means of present first appeal.

11. Mr. Sujeet Kumar, learned counsel for defendant-appellant in challenge to impugned judgement and decree passed by Court below has submitted with vehemence that impugned judgement and decree passed by Court below are liable to be set aside, as the same are manifestly illegal and in excess of jurisdiction. According to learned counsel for defendant-appellant criminal proceedings were initiated by defendant-appellant after expiry of a period of one year from date of institution of divorce suit. The plaint of divorce suit was not got amended to plead that divorce is also being prayed on account of initiation of false criminal cases. He, further, submits that once the aforesaid factum was not pleaded in plaint, then evidence in that regard could not be looked into as no amount of evidence can be looked into unless a fact has been pleaded. As there was no pleading regarding commission of cruelty by defendant-appellant on account of initiation of false criminal cases by defendant-appellant, pleadings of criminal

cases, or documents relating thereto as well as judgement rendered therein could not be looked into. As such, Court below has erred in law in concluding that cruelty was committed by defendant-appellant upon plaintiff-respondent by initiating false criminal cases. As such, conclusion drawn by Court below to grant decree of divorce in favour of plaintiff-respondent on aforesaid basis is unsustainable.

12. He next contends that in the plaint, except for solitary incident which took place in the evening of 17.3.2002, when defendant-appellant left her matrimonial home when the thirteenth day function (terahi) of elder brother of father-in-law of defendant-appellant was being performed, no other instance of cruelty has been detailed. Thus decree of divorce could not have been granted even on the ground of cruelty as a single incident, does not by itself constitute cruelty.

13. He lastly, submits that allegation made by plaintiff-respondent with regard to failure of defendant-appellant to perform her obligations as wife and denial of physical pleasure to plaintiff-respondent to his satisfaction on account of her indifferent attitude could neither be established nor proved in evidence and therefore not taken as a ground by Court below to award decree of divorce. On cumulative strength of aforesaid submissions, it is urged by appellant's counsel that decree of divorce granted by Court below is liable to be set aside by this Court. To lend legal support to his submissions, he has referred to judgement in Deepika Alias Baby Vs. Naresh Chandra Singhnia, 2000 (0) AIR (All) 148; A. Jayachandra Vs. Aneel Kaur, 2005 (2) SCC 22; Kiran Singh Vs. Shiv Kumar, 2013 (10) ADJ 560.

14. Mr. Ravi Kiran Jain, learned Senior Counsel assisted by Mr. A.P. Paul, learned counsel for plaintiff-respondent has supported impugned judgement. According to learned Senior Counsel, it is established from record that defendant-appellant has deprived plaintiff-respondent of sexual pleasure. He has relied upon paragraphs 4, 5, and 10 of plaint. According to learned Senior Counsel, there is no denial of aforesaid by plaintiff-respondent in her written statement. The findings recorded by Court below at page 73 of respondent's paper book has been referred to in support of aforesaid submission. He then submits that admittedly, defendant-appellant is daughter-in-law of family. Therefore, it was obligatory on her part to behave in such a manner which is not unbecoming of an obedient daughter-in-law. However, contrary to same, defendant-appellant misbehaved with her mother-in-law. The finding to that effect has been recorded by Court below, which is at page 77 of respondent's paper book. He further submits that commission of physical and mental cruelty by defendant-appellant upon plaintiff-respondent is well established. To buttress his submission he has referred to findings recorded by Court below which is at page 74 of respondent's paper book. Lastly it is urged that parties have been living separately since 17.3.2002 and therefore, there has been an irretrievable break down of marriage. As such, in view of aforesaid, the decree of divorce granted by Court below is not liable to be set-aside. Mr. Ravi Kiran Jain in support of aforesaid submissions has relied upon judgements of Supreme Court : G V N Kameswara Rao V/s G Jabilli, 2002 (2) SCC 296; Parveen Mehta V/s Inderjit Mehta, 2002 5 SCC 706; Naveen Kohli V/s Neetu Kohli, 2006 (4) SCC

558; Samar Ghosh V/s Jaya Ghosh, 2007 (4) SCC 511; K Srinivas Rao V/s D A Deepa, 2013 (5) SCC 226; K Srinivas V/s K Sunita, 2014 (16) SCC 34

15. We shall refer to the aforesaid judgements at appropriate place in the subsequent part of this judgement.

16. After hearing counsel for parties, and upon perusal of record, following points of determination arise in this appeal:

A) Whether on the basis of allegations made in the plaint, it can be said with certainty that plaintiff-respondent has duly pleaded and proved commission of physical/mental cruelty by defendant-appellant upon him and therefore, entitled to grant of a decree of divorce under section 13 (i)(a) of Act 1955.

B) Whether proceedings of criminal case could be looked into or referred to by Court below even when criminal proceedings were initiated one year after the institution of divorce suit and plaint was not amended to enlarge the ground of cruelty by pleading initiation of false criminal proceedings.

C) Whether in the absence of any application filed under Order 41 Rule 27 C.P.C. any document filed by the parties in appeal has to be ignored mandatorily as it is not part of evidence.

D) Whether impugned judgement and decree passed by Court below has to be judged on the reasons recorded in judgement or independently of the same.

E) Whether judgement and decree passed by Court below can be sustained on the ground of irretrievable marriage.

17. Before proceeding to consider the points of determination involved in this appeal, it shall be useful to consider meaning of the term "cruelty" in the context of Act 1955

18. The term 'cruelty' has not been defined in Act 1955. Consequently, this term has been the subject matter of debate for long. However, recently a Division Bench of this Court in **Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328** has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 which read as under:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or

conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or

injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

27. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

29. In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the

sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

19. The aforesaid Division Bench judgement clearly explains different shades of 'cruelty' which by itself are sufficient enough to dissolve marriage on ground of cruelty. The aforesaid judgement also prescribes the mode as to how 'cruelty' has to be proved and also the manner in which it has to be proved so as to grant decree of divorce on ground of 'cruelty'.

20. With the aid of aforesaid material, Court has now to examine, whether plaintiff-respondent was able to successfully establish cruelty on part of defendant- appellant and therefore, entitled to decree of divorce on the aforesaid ground.

21. Plaintiff-respondent filed suit for divorce on ground of cruelty as contemplated under section 13 (1)(i-a) of Act 1955. Burden to prove same was upon plaintiff-respondent himself. From perusal of plaint, it is apparent that reference is made to a solitary instance of cruelty and otherwise only allegations of cruelty have been made. According to plaintiff-appellant, thirteenth day function (terahi ceremony) of elder brother of father of plaintiff-respondent was schedule on 17.3.2002 as he expired on 10.3.2002. According to plaintiff-respondent, defendant appellant left for her marital home in the evening of 17.3.2002, which conduct does not commensurate with her status as daughter-in-law. Except for aforesaid solitary instance, no other instance of cruelty has been alleged in the plaint. Court below has returned a finding that departure of defendant-respondent from her marital home on 17.3.2002 is proved. However, Court below did not grant decree of divorce in favour of plaintiff-respondent. It is well settled by now that a solitary instance does not constitute cruelty by itself as has been held in **G.V.N. Kameswara Rao Vs. G. Jabilli, 2002 (2) SCC 296.** Paragraph 12 of judgement is relevant for the controversy in hand, which reads as under:

"12. The court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the court should consider whether the conduct of the counter-petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

(Emphasis added)

22. Thus suit of plaintiff-appellant could be decreed on the ground of cruelty only as pleaded in plaint and also proved by plaintiff-appellant.

23. However, in the present case Court below has decreed suit on the ground of cruelty holding that defendant-respondent has initiated false criminal proceedings against plaintiff-respondent. It may be noted here that criminal

proceedings were initiated by defendant-appellant one year after institution of divorce suit. The suit for divorce was filed in the year 2003 but decided vide judgement dated 20.12.2006. During this entire period, no amendment application was filed seeking amendment in plaint, whereby, facts regarding initiation of false criminal proceedings which have been held to cause commission of cruelty could be brought on record and therefore, could also be taken as a ground of divorce.

24. The question is whether in absence of any pleading in plaint, divorce can be granted on the ground of commission of cruelty because of initiation of false criminal proceedings by wife against husband. Law stands crystallized on the aforesaid issue. Reference in this regard be made to **K. Srinivas Rao Vs. D.A. Deepa, 2013 (5) SCC 226**, wherein it has been held that initiation of false criminal cases by wife against husband also amounts to commission of cruelty.

25. However, from record we find that during pendency of divorce suit, plaintiff-respondent, filed paper no. 31 Ga, which is list of documents dated 30.8.2006. By means of aforesaid, plaintiff-respondent filed following documents before Court below to establish commission of cruelty upon himself by defendant-appellant on aforesaid ground:

(I) One certified copy of order dated 9.5.2005 passed by Additional Session Judge New Delhi in case State Vs. Vikas U/s 498A, 406 and 34 IPC. (paper no. 32-Ga)

(ii) One certified copy of order dated 01.6.2005 passed by Member Secretary Delhi Legal Aid Cell, Patiala Court in case State Vs. Sumeri Lal Kanojia (paper no. 33-Ga)

(iii) One certified copy of order dated 15.6.2005 passed by The Court of Additional Session Judge New Delhi in granting Anticipary Bail to Sumeri Lal Kanojia and Smt. Prem Lata. (paper no. 34-Ga)

(iv) One certified copy of order dated 06.7.2005 passed by Additional Session Judge New Delhi in case State Vs. Vikas U/s 498A, 406 and 34 IPC. (paper no. 35-Ga)

(v) One certified copy of order dated 12.8.2005 passed by Additional Session Judge New Delhi in case State Vs. Vikas U/s 498 A, 406 and 34 IPC. (paper no. 36-Ga)

(vi) One certified copy of order dated 22.8.2005 passed by Additional Session Judge New Delhi in case State Vs. Vikas U/s 498A, 406 and 34 IPC. (paper no. 37-Ga)

(vii) One certified copy of F.I.R. case Crime No. 965 of 2004 dated 05.11.2004 lodged by Dr. Sarita defendant. (paper no. 38-Ga)

(viii) One certified copy of interim application moved by the defendant in case no. 928/1 of 2003 U/s 125 Cr.P.C. in court of A.C.M.M New Delhi. (paper no. 39-Ga)

26. From perusal of order sheet of Case No. 126 of 2003 (Dr. Vikas Kannaujia Vs. Smt. (Dr) Sarita) it is apparent that on 30.8.2006, Court below passed following order:

"पुकार कराई गई पक्षकार हाजिर आये वादी की ओर से सूची 31ग 31क द्वारा 32ग ता 39ग पेपर हाजिर किये गये तथा सूची गवाह 40ग के साथ मुख्य परीक्षा शपथ पत्र पी0डब्लू01 डा0 विकास कन्नोजिया 41क तथा पी0डब्लू02 श्री महेन्द्र सिंह कन्नोजिया 42क

दाखिल हुऐ पत्रावली वास्ते जिरह 2.11.06 को पेश होवे।''

"Case was called out. Parties came up. On behalf of the plaintiff, paper nos. 32Ga to 39 Ga have been produced vide lists 31 Ga, 31 Ka. Along with the list of witnesses being 40 Ga, affidavit at examination-in-chief of P.W-1 Dr. Vikas Kannaujia being 41 ka and that of PW-2 Shri Mahendra Singh Kannaujia being 42Ka have been filed. File be produced on 02.11.2006 for cross-examination"

(English Translation by Court)

27. There is nothing in the order sheet of matrimonial case to indicate that documents filed by plaintiff-appellant vide list of documents (paper no. 31 Ga) were formally admitted in evidence.

28. Mr. Ravi Kiran Jain, learned Senior Counsel, has tried to support impugned judgement by placing reliance upon the judgement of Apex Court in K. Srinivas Vs. K. Sunita, 2014 (16) SCC 34. He has referred to paragraph 6 of the judgement, which reads as under:

"6. Another argument which has been articulated on behalf of the learned counsel for the respondent is that the filing of the criminal complaint has not been pleaded in the petition itself. As we see it, the criminal complaint was filed by the wife after filing of the husband's divorce petition, and being subsequent events could have been looked into by the court. In any event, both the parties were fully aware of this facet of cruelty which was allegedly suffered by the husband. When evidence was led, as also when arguments were addressed, objection had not been raised on behalf of the respondent wife that this aspect of cruelty was beyond the pleadings. We are, therefore, not impressed by this argument raised on her behalf." (Emphasis added)

29. On the strength of aforesaid observations made by Apex Court, learned Senior Counsel has tried to impress upon us, that in the present case also facts are similar and therefore, decree passed by Court below, cannot be faulted with on aforesaid ground.

30. Mr. Sujeet Kumar, learned counsel for defendant-appellant has vehemently opposed the submissions urged by Mr. Ravi Kiran Jain, learned Senior Counsel appearing for plaintiff-respondent. He submits that admittedly factum with regard to commission of cruelty by defendant-appellant upon plaintiff-respondent on account of initiation of false criminal case was not pleaded initially nor plaint was got amended subsequently. He further submits that pleadings decide course of evidence which is to be led by parties. Therefore, the rule "no amount of evidence can be looked into unless a fact is pleaded is applicable in this case." He thus submits that documents filed by plaintiff-respondent in respect of criminal cases initiated by defendant-appellant could not be looked into by Court below. As such, impugned judgement passed by Court below on the basis of such documents is manifestly illegal. He further submits that there is nothing on record to show that counsel for plaintiff-appellant submitted before Court below to grant decree of divorce on the ground of initiation of false criminal cases by defendant appellant. Court below has itself concluded to grant divorce decree on the said ground. In the light of aforesaid facts, judgement rendered in **K.**

Srinivas (Supra) cannot be of any help to plaintiff-respondent. Therefore, the decree passed by Court below is nonest as it is based upon facts not pleaded in plaint nor argued by counsel for plaintiff-appellant before Court below.

31. There is another aspect of matter. Documents relating to criminal cases lodged by defendant-appellant have been filed before Court below by plaintiff-respondent vide list of documents (paper no. 31 Ga). According to counsel for defendant-appellant, no reliance could be placed upon such documents by Court below unless they were admitted in evidence. There is nothing on record to show that these documents relating to criminal cases initiated by defendant-appellant were ever admitted in evidence. Consequently, the same could not be relied upon by Court below.

32. The Court is not unmindful of section 10 of Act 1984, which provides that Court may formulate its own procedure. For ready reference Section 10 of Act 1984 is reproduced herein under:

*"**10. Procedure generally.-** (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, Family Court shall be deemed to be a civil court and shall have all the powers of such court.*

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

33. Irrespective of aforesaid, there is nothing on record to indicate that documents relating to criminal proceedings, initiated by defendant-appellant were admitted in evidence as per mandate of Order XIII C.P.C. or under Sub-clause 3 of Section 10 of Act 1984. Thus, documents relating to criminal proceedings initiated by defendant-appellant did not form part of evidence adduced in suit for divorce filed by plaintiff-respondent.

34. A perusal of impugned judgement as well as order sheet of divorce suit will go to show that there is no recital indicating that documents filed vide list of documents (paper no. 31 Ga) are proposed to be admitted in evidence. As such, there was no opportunity before defendant-appellant for admission/denial of documents filed vide list of documents (paper no. 31 Ga). Learned counsel for defendant-appellant further submitted that on account of aforesaid no arguments for grant of divorce on account of initiation of false criminal cases was pressed by counsel for plaintiff-respondent. The impugned judgement does not contain any recital to establish to the contrary. Court below itself appears to have culled out

this ground for granting decree of divorce, which is not permissible in law.

35. Learned Senior Counsel has tried to support judgement and decree passed by Court below on the ground that it is proved from record that wife has committed physical/mental cruelty upon plaintiff-respondent by denying him physical pleasure on account of her cold and indifferent attitude. To buttress his submission, he has invited attention of Court to pleadings in plaint, written statement as well as finding of Court below at page 73 of respondent's paper book. He has also referred to paragraphs 18, 19, 20 and 21 of judgement in **Parveen Mehta Vs. Inderjit Mehta, 2002 (5) SCC 706** For ready reference, paragraphs 18, 19, 20 and 21 of Praveen Mehta's case (Supra) and page 73 of respondent's paper book relied upon by learned Senior Counsel are reproduced herein below:

"18. Quoting with approval the following passage from the judgment in V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] this Court observed therein: (SCC p. 347, para 16)

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

19. Clause (i-a) of sub-section (1) of Section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts (Mulla's Hindu Law, 17th Edn., Vol. II, p. 91).

20. In the case in hand the foundation of the case of "cruelty" as a matrimonial offence is based on the allegations made by the husband that right from day one after marriage the wife was not prepared to cooperate with him

in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically, she refused. As the condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations. She even abused him, scolded him and caught hold of his shirt collar in the presence of elderly persons like Shri S.K. Jain. This Court in the case of Dr N.G. Dastanev.S. Dastane[(1975) 2 SCC 326 : AIR 1975 SC 1534] observed: (SCC p. 346, para 56)

"Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment."

21. Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

.....

''क्रूरता कभी कभी ऐसे कृत्यो से भी उत्पन्न होती है जिनका कोई प्रत्यक्ष और मूर्ति रूप नही होता है और न ही साक्ष्य से स्थापित किया जा सकता है। लेकिन इनकी अनुभूति अवश्य की जा सकती हैं इस श्रेणी का तथ्य इस अभिकथन मे शामिल है कि विपक्षी ने शादी के तत्काल बाद सुहागरात और उसके बाद प्रार्थी के साथ दाम्पत्य जीवन के आनन्द की अनुभूति और अनुभव से प्रार्थी को वंचित रखा और विपक्षी ने कोई सहभागिता नही की।''"

"Cruelty sometimes arises from the acts which are not in tangible and physical state nor can they be established with evidence. But they can certainly be realised. This statement includes such a category of fact that the opposite party deprived the applicant of marital bliss, and did not ensure participation, on the wedding night immediately after the marriage and also on later occasion."

(English Translation by Court)

36. In the opinion of Court, recital contained in paragraph 3 at page 73 is not a finding but a recital regarding explanation offered by Court to the pleading raised by plaintiff-respondent. Even otherwise also when paragraphs 4, 5 and 10 of plaint relied upon by learned Senior Counsel are examined, the same appear to be contradictory to paragraphs 3 and 6 of plaint itself. In other words there is no categorical pleading regarding

denial of physical pleasure to plaintiff-appellant after marriage on account of non establishment of conjugal relationship between parties. Even in cross-examination of D.W.1, i.e. Dr. Sarita, we find that no specific question was put to her regarding aforesaid. Reliance placed upon written statement of defendant-appellant is also of no help as averments/allegations made in paragraphs 4, 5 and 10 of plaint were not admitted by defendant-appellant. Furthermore, suit filed by plaintiff-respondent has not been decreed on the ground of denial of physical pleasure. Therefore, once Court below has not taken this as a basis for passing decree of divorce, the impugned judgement and decree cannot be supported on this ground as judgement contains reasons in support of decree.

37. Mr. Ravi Kiran Jain, learned Senior Counsel has alternatively submitted that marriage of parties has broken down irretrievably as parties are living separately since 2.7.2004, therefore, decree of divorce granted by Court below should not be reversed.

38. The argument raised by learned Senior Counsel appears to be attractive at the first flush. However, upon deeper scrutiny, the same is devoid of substance.

39. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in ***First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma)*** decided on 7.2.2018, wherein it has been observed in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

40. Similarly this Court in ***First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita)*** decided on 17.11.2016 has also considered this question and observed in paragraphs 7, 8, 10, 11, 12 and 13 as under:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground

which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal, J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of

Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

41. In the case in hand, we find that parties have not been living separately on account of their own free will. The record shows, it is plaintiff-respondent, who has refused to keep defendant-appellant with him. The defendant-appellant has herself not deserted plaintiff-respondent. In this view of the matter, the argument raised by learned counsel for plaintiff-respondent that there has been an irretrievable break down of marriage has no factual foundation. That apart this Court in **Ashwani Kumar Kohli (supra)** has held that divorce cannot be granted on aforesaid ground particularly when such a plea is raised by one party alone. In addition to aforesaid, decree of divorce was not prayed for on ground of irretrievable break down of marriage as the parties are alleged to have been living separately since 17.3.2002. The plaint was presented in the year 2003 whereas, divorce petition was finally decided vide judgement and decree dated 20.12.2006, passed by Principal Judge (Family Court), Meerut in Matrimonial Case No. 127 of 2003 (Rajesh Kumar Chaudhary Vs. Savita). For a period of fourteen long years, plaintiff-respondent kept quiet and now for the first time, this issue is being raised. We are of the considered opinion that in view of what has been stated above, plaintiff-respondent is estopped from raising this plea.

42. In view of discussions made herein above, appeal is liable to succeed. It is accordingly allowed. Judgement and decree dated 20.12.2006, passed by Principal Judge, Family Court, Meerut in Matrimonial Case No. 123 of 2003 (Dr. Vikas Kannaujia Vs. Smt. (Dr.) Sarita), are hereby set aside. The suit filed by plaintiff respondent shall stand dismissed. Parties to bear their own cost.

(2019)10ILR A 947

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.12.2018

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Revision No. 95 of 2010

State of U.P. ...Revisionist
Versus
Amar Bahadur & Ors. ...Opp. Parties

Counsel for the Revisionist:
Govt. Advocate

Counsel for the Opposite Parties:

A. Cr.P.C., 1973 - Section 397/401 and Section 321 -Application for withdrawal of prosecution rejected by trial court - Public Prosecutor-Duty and powers- is not empowered to exercise his authority under Section 321 Cr.P.C. in a whimsical and arbitrary manner and to follow the command of the Government blindly but is required to apply his mind-Discretion of Trial Court - is not to be exercised mechanically and the consent applied for has not to be granted as a matter of formality or for the mere asking-Pendency of Cross Case - not in the interest of justice that no decision has been taken to withdraw from prosecution of the cross case - Trial of present case resulting in conviction of accused-Revision rendered infructuous.

(Para 16,17 & 18)

The Public Prosecutor is not empowered to exercise its authority under Section 321 Cr.P.C. in a whimsical and arbitrary manner and to follow the command of the Government blindly but he is required to apply his mind on the parameters set forth by the Apex Court and this power can only be exercised for just, reasonable and valid reasons, for public good.

Paucity of evidence is not the only ground on which a public prosecutor may withdraw from the prosecution.

The Court has to exercise its judicial discretion with reference to such material as is then available to it and in exercise of this discretion the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that the grounds urged in support of the application for withdrawal are legitimate grounds in furtherance of public justice.

The application for withdrawal from prosecution moved by prosecutor in the present case is not commensurate with the guidelines laid down by the Supreme Court in Sheo Nandan Paswan and Rajendra Kumar Jain (supra), more so when no decision has been taken to withdraw from prosecution of the cross case, therefore their appears no illegality or impropriety in the judgment of the Court below whereby the application of the Prosecutor to withdraw from prosecution has been rejected.

The Session Trial case wherein application 40-A was moved has been decided on merits by the Additional District and Session Judge Court No.3, Raibareilly vide judgment and order dated 26.04.2017 and accused persons have been convicted under section 427 IPC and sentenced with fine of Rs. 2000/- each. The adjudication of criminal case on merits also renders this criminal revision infructuous. The revision preferred by the State is devoid of merit and liable to be dismissed at the admission stage.

Criminal Revision dismissed (E-3)

Case Law relied upon/discussed: -

1. Sheo Nandan Paswan Vs St. of Bihar AIR 1987 SC Page 877

2. Ram Naresh Pandey's case 1957 SCR 279: (AIR 1957 SC 389)

3. St. of Ori. Vs Chandrika Mohapatra & ors. 1977 CRI. L. J. 773

4. Rajendra Kumar Jain Vs St. through Special Police Establishment & ors. AIR 1980 SC 1510

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

1. Heard learned A.G.A. on behalf of the State on the point of admission.

2. This Criminal Revision has been preferred by the State of U.P. against the order dated 18.01.2010 of Additional District and Sessions Judge Court No. 6, Raibareilly, whereby an application No. 40-A moved under Section 321 of the Cr.P.C. to grant permission to withdraw from prosecution of Session Trial No. 137

of 2007 (State Vs. Amar Bahadur) under Sections 147, 148, 149, 307, 427, 506 I.P.C has been rejected.
This Revision petition is pending for the last ten years at the stage of admission.

3. Brief facts necessary for the disposal of this criminal revision are that one Devendra Bahadur Singh lodged an First Information Report that on 08.02.1995 at about 7:00 p.m. accused persons Ayodhya, Amar Bahadur, Om Prakash s/o Gajadhar , Shankara and Vijay Kumar along with other persons started demolishing the boundary wall of his plot. On being confronted all accused persons fired Gun shots on him. He did not get injured in the incident however he sustained monetory loss by such demolition of the wall. On the information so provided by Sri Devendra Bahadur Singh an First Information Report was registered at Case Crime No. 46 of 1995 under Sections 147, 148, 149, 307, 427, 504, 506 I.P.C. at Police Station Lal Ganj District Raibareilly.After investigation Charge Sheet was also filed in the above mentioned sections.

4. The case being triable by the Court of Sessions was committed to the Court of Session and charges in the above mentioned sections were framed accordingly.

5. During the course of trial an application (40-A) was moved by Sri Ashok Kumar Srivastava District Government Counsel (Criminal) enclosing therewith the Government Order dated 28.02.2009 stating that accused Ayodhya Prasad and Smt. Shankara Devi had died and the nature of Fire Arms, allegdly used in the incident, have not been mentioned in the F.I.R. It is also stated that nobody had been injured in the incident and the incident had occurred in the spur of the moment, therefore, permission be granted to withdraw from the prosecution, so that the valuable time of the Court and Government money may be saved.

6. After hearing parties the Court below rejected this application by the impugned order dated 18.01.2010 on the ground that the fact whether accused persons may be convicted or acquitted can only be decided after full fledge criminal trial, there is a cross version of the incident regarding which an F.I.R. had also been lodged by the accused persons at Case Crime No. 59 of 1995 under Section 147, 504, 435, 379, 506, 307 I.P.C. Section 3(2)(5), 3(1)(10) of SC/ST Act, at Police Station Lalganj District Raibareilly.The Cross Case is pending in the Court of Additional Chief Judicial Magistrate Court No.1, Raibareilly and both these incidents are stated to have occurred on 08.02.1995.The trial Court, while rejecting the application, concluded that it is not in the interest of justice that from amongst cross cases consent be given only in one case to withdraw from prosecution.

7. The Stae Government feeling Aggrieved by this order has challenged the same in this criminal revision .

8. Sri Aniruddh Kumar Singh, learned A.G.A. overwhelmingly argued that the Court below has passed the impugned order without looking into the fact that there was no hope of conviction in the case as there were inherent weaknesses in the case and there is no bar to seek withdrawal from prosecution even if there is a cross case of the incident

remained pending. He further submits that a decision to this effect is usually taken by the prosecutor and in this case the prosecutor after applying his mind came to the conclusion that it is for the public good and Public peace and in the interest of society that he should be permitted to withdraw from the prosecution of this case, therefore, the Court below has materially erred in rejecting the application of the prosecutor moved under Section 321 of the Cr.P.C. He requested that the order of the Court below be quashed.

9. During the course of argument he also submits that the Session Trial No. 137 of 2007, wherein the above stated application for withdrawal from prosecution was moved, has also been decided on merits by Additional District and Sessions Judge Court No.3, Raibareilly vide judgment and order dated 26.04.2017 whereby the accused persons Amar Bahadur and Om Prakash have been convicted under Section 427 and had been sentencedto pay fine of Rs.2000/- each or two months simple imprisonment in default. He also submits a computerized copy of the judgment dated 26.04.2017 passed in Session Trial No. 137 of 2007 ,State Vs. Amar Bahadur and Others, which has been taken on record.

10. I have given thoughtful consideration to the submissions of Ld. A.G.A. and have also perused the record in the background of the arguments.

Section 321 of the Cr.P.C. provides as under:

"Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he hag been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

11. The scope and ambit of Section 321 of the Cr.P.C. was considered by the Full Bench of the Allahabad High Court

in a public interest litigation namely In Re withdrawal of criminal cases by State Government (State of U.P. & Others) PIL No.16507/2015 decided on 20.02.2017 where in after discussing at length various authorities on the subject the Full Bench concluded as under:

"In the background of the provisions, that have been quoted above, and various judicial pronouncement, that has been noted above, the issues referred are answerred by us as follows:

Issue No.1: State Government is not at all free to exercise its authority under Section 321 Cr.P.C. in whimsical or arbitrary manner or for extraneous considerations apart from just and valid reasons.

Issue No.II: The decision taken by the State Government for withdrawal of the case communicated to the Public Prosecutor, is open to judicial review under Article 226 of the Constitution of India on the same parameters as are prescribed for invoking the authority of judicial review.

Issue No.III: The State Government is free to act under the parameters provided for to make scrutiny of criminal cases pending in subordinate courts to find out as to whether they deserve withdrawal under Section 321 Cr.P.C. or not as it is in the realm of the policy decision, and call on the said score has to be taken by the State Government and same has to be based on the parameters required to be observed while moving an application for withdrawal of prosecution under Section 321 Cr.P.C."

12. In **Sheo Nandan Paswan vs. State of Bihar** reported in **AIR 1987 Supreme Court Page 877**, Supreme Court while expressing majority view held as under :-

"44. I respectfully agree with the legal position flowing from S. 321 of the Code of Criminal Procedure as explained by Krishna Iyer and Chinnappa Reddy, JJ. in respect of cases relating to Bansi Lal and Fernandes in R. K. Jain v. State through Special Police Establishment, (1980) 3 SCR 982 : (AIR 1980 SC 1510). In that case Chinnappa eddy, J. has summarised the true legal position thus :

"1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.

2.The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, political purposes sans Tammany Hall enterprise.

6. The Public Prosecutor is an officer of the Court and responsible to the Court.

7. The Court performs a supervisory function in granting its consent to the withdrawal.

8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal

from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

We may add it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to apprise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution.. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of S. 321, Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case."

"45. In the circumstances of this case I find it difficult to say that the Public Prosecutor had not applied his mind to the case or had conducted himself in an improper way. If in the light of the material before him the Public Prosecutor has taken the view that there was no prospect of securing a conviction of the accused it cannot be said that his view is an unreasonable one. We should bear in mind the nature of the role of a Public Prosecutor. He is not a persecutor. He is the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the land the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnest and vigour indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate one to bring about a just one. (See Berger v. United States, (1934) 295 US 78). It is a privilege of an accused that he should be prosecuted by a Public Prosecutor in all cases involving heinous charges whenever the State undertakes prosecution. The judgment of a Public Prosecutor under S. 321 of the Criminal P.C., 1973 cannot be lightly interfered with unless the Court comes to the conclusion that he has not applied his mind or that his decision is not bona fide."

"70. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent, The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes."

"75. Since S. 321 does not give any guideline regarding the grounds on which a withdrawal application can be made,

such guidelines have to be ascertained with reference to decided cases under this section as well as its predecessor S. 494. I do not propose to consider all the authorities cited before me for the reason that this Court had occasion to consider the question in all its aspects in some of its decisions. Suffice it to say that in the judgments rendered by various High Courts, public policy, interests of the administration, inexpediency to proceed with the prosecution for reasons of State and paucity of evidence were considered good grounds for withdrawal in many cases and not good grounds for withdrawal in certain other cases depending upon the peculiar facts and circumstances of the cases in those decisions. AIR 1932 Cal 699 (Giribala Dasi v. Mader Gazi), AIR 1943 Sind 161 (Emperor v. Sital Das) (Milan Mal?), AIR 1936 Cal 356 (FB) (Harihar Sinha v. Emperor), AIR 1941) Patna 233 (FB) (The King v. Moule Bux). AIR 1952 Raj 42 and AIR 1938 PC 266 are some of the cases which were brought to our notice."

13. The Court than quoted with authority the following paragraph from **Ram Naresh Pandey's case** reported in **1957 SCR 279 : (AIR 1957 SC 389)**, "His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and it is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the Court for withdrawal by the public prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by Court. It cannot be taken to place on the Court the responsibility for a prima facie determination of the triable issue. For instance the discharge that results therefrom need not always conform to the standard of "no prima facie case" under Sections 209 (1) and 253(1) or of 'groundlessness' under Sections 209 (2) and 253(2). This is not to say that a consent is to be lightly given on the application of the public prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made."

Supreme Court than quoted excerpts from, M. N. Sankaranarayanan Nair v. P. V. Balakrishnan ,AIR 1972 SC 496,Bansi Lal v. Chandan Lal, AIR 1976 SC 370,Balwant Singh v. State of Bihar ,AIR 1977 SC 2265, Subhash Chander v. State AIR 1980 SC 423, Rajendra Kumar Jain v. State, AIR 1980 SC 1510),Sheonandan Paswan. v. State of Bihar, AIR 1983 SC 1125 and hold in para "77.that all above decisions have followed the reasoning of Ram Naresh Pandey's case (AIR 1957 SC 389) and the principles settled in that decision were not doubted."

It is also desirable to place on record the minority view expressed by Chief Justice Bhagwati ,as His Lordship than was, Speking on behalf of himself and Justice Oza in following words :-

"32. When the application for consent to the withdrawal from the prosecution comes for consideration, the Court has to decide whether to grant such consent or not. The function which the Court exercises in arriving at this decision, as pointed out by this Court in State of Bihar v. Ram Naresh, (AIR 1957 SC 389), is a judicial function. The Court has to exercise its judicial discretion with reference to such material as is then

available to it and in exercise of this discretion the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that the grounds urged in support of the application for withdrawal are legitimate grounds in furtherance of public justice. The discretion has not to be exercised by the Court mechanically and the consent applied for has not to be granted as a matter of formality or for the mere asking. The Court has to consider the material placed before it and satisfy itself that the grant of consent would serve the interest of justice. That is why this Court in State of Bihar v. Ram Naresh (supra) examined the entire material which was available to it for the purpose of coming to the conclusion that there was no evidence worth the name on the basis of which the prosecution could be sustained against the accused Mahesh Desai. This Court pointed out that consent is not to be lightly given on the application of public prosecutor "without a careful and proper scrutiny of the grounds on which the application for consent is made".(Emphasis Mine)

14. Similarly in ***State of Orissa vs. Chandrika Mohapatra and others reported in 1977 CRI. L. J. 773*** Supreme Court held as under:

"6. It will, therefore, be seen that it is not sufficient for the Public Prosecutor merely to say that it is not expedient to proceed with the prosecution. He has to make out some ground which would show that the prosecution is sought to be with-drawn because inter alia the prosecution may not be able to produce sufficient evidence to sustain the charge or that the prosecution does not appear to be well founded or that there are other circumstances which clearly show that the object of administration of justice would not be advanced or furthered by going on with the prosecution. The ultimate guiding consideration must always be the interest of administration of justice and that is the touchstone on which the question must be determined whether the prosecution should be allowed to be withdrawn.

10. We have already discussed the principles which should govern cases of this kind where an application is made by the Public Prosecutor for grant of consent to the withdrawal of prosecution under Section 494 of the Criminal Procedure Code. We have pointed out that the paramount consideration in all these cases must be the interest of administration of justice. No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of justice."

15. Supreme Court again considered this issue in **Rajendra Kumar Jain vs. State through Special Police Establishment and others** reported in **AIR 1980 Supreme Court 1510** laid down the principles which will govern the issue of withdrawal of prosecution in Para 13 A and 14 of the judgment the same are produced as under:

"13-A. We may add, it shall be the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court

has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of s. 321 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to be done in each case.

14. We have referred to the precedents of this Court where it has been said that paucity of evidence is not the only ground on which the Public Prosecutor may withdraw from the prosecution. In the past, we have often known how expedient and necessary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecutions already launched. In such matters who but the Government, can and should decide in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions. If the Government decides that it would be in the public interest to withdraw from prosecutions, how is the Government to go about this task ?"

16. From the authorities cited herein above it emerges that the Public Prosecutor is not empowered to exercise its authority under Section 321 Cr.P.C. in a whimsical and arbitrary manner and to follow the command of the Government blindly but he is required to apply his mind on the parameters set forth by the Apex Court in above mentioned authorities and this power can only be exercised for just, reasonable and valid reasons, for public good, as has been specifically held in the cases of Sheo Nandan Paswan and Rajendra Kumar Jain (Supra) .Moreover, paucity of evidence is not the only ground on which a public prosecutor may withdraw from the prosecution, In fact in the case of Rajendra Kumar Jain (Supra) Supreme Court has given wide guidelines which may guide the State Government in taking the decision under Section 321 of the Cr.P.C. In Sheo Nandan Paswan (Supra) Supreme Court emphasized that when the application for consent to the withdrawal from the prosecution comes for consideration, the Court has to decide whether to grant such consent or not. The Court has to exercise its judicial discretion with reference to such material as is then available to it and in exercise of this discretion the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that the grounds urged in

support of the application for withdrawal are legitimate grounds in furtherance of public justice. The discretion has not to be exercised by the Court mechanically and the consent applied for has not to be granted as a matter of formality or for the mere asking.

17. From the principles of Law as enunciated in the authorities mentioned herein above, the application for withdrawal from prosecution moved by prosecutor in the present case is not commensurate with the guidelines laid down by the Supreme Court in Sheo Nandan Paswan and Rajendra Kumar Jain (supra), more so when no decision has been taken to withdraw from prosecution of the cross case , therefore their appears no illegality or impropriety in the judgment of the Court below whereby the application of the Prosecutor to withdraw from prosecution has been rejected. In these circumstances, this Court is of the considered view that the findings recorded by the trial Court, while rejecting the application 40-A of the prosecutor under Section 321 of Cr.P.C., could not be faulted in any manner and there is no requirement of any interference in the impugned order.

18. Moreover, during the pendency of this Revision Petition, the Session Trial case wherein application 40-A was moved has been decided on merits by the Additional District and Session Judge Court No.3, Raibareilly vide judgment and order dated 26.04.2017 and accused persons have been convicted under section 427 IPC and sentenced with fine of Rs. 2000/- each. The adjudication of criminal case on merits also renders this criminal revision infructuous. So on this score also the revision lacks merits. The net result of the above mentioned discussion is that the revision preferred by the State is devoid of merit and liable to be dismissed at the admission stage.

19. The revision is dismissed.

(2019)10ILR A 956

APPEALLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.05.2019

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal from Order No. 414 of 2018

Union of India ...Appellant
Versus
Om Prakash & Anr. ...Respondents

Counsel for the Appellant:
Sri Anuj Dayal.

Counsel for the Respondents:
Sri Anil Srivastava, Sri Divyam Krishna, Sri Indu Lal.

A. Railway Claims Tribunal Act, 1987 - Section 16 r/w Section 123(c)(2) of the Railways Act, 1989 - Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 - Claim Petition - Computation of compensation - Whether the quantum of compensation should be as per the prescribed rate of compensation *as on the date of application*/incident or *on the date of order* awarding compensation ?

Held: -Tribunal should first calculate the compensation as per the schedule operating on the date of the accident, along with a reasonable rate of interest applicable till the date of award. If the amount, so calculated is less than the amount prescribed under the schedule on the date of award, the Tribunal should award the higher of the said two amounts towards compensation. (Para 15)

On the date of accident the compensation payable for death was Rs.4 Lakhs whereas on the date of award it was enhanced to Rs.8 Lakhs – After taking Rs.4 Lakhs as basic figure, if the interest is calculated on the said amount @ 6% w.e.f. 21.9.2009 i.e. the date of accident till the date of award i.e. 12.3.2009, the amount comes to less than Rs.8 Lakhs. On the date of award, the compensation payable in case of death was Rs.8 Lakhs – Tribunal ought to have awarded the compensation of Rs.8 Lakhs – Claimants-respondents are held entitled to a sum of Rs.8 Lakhs. (Para 16, 17 & 20)

Appeal disposed of (E-5)

List of cases cited: -

1.Union of India Vs Radha Yadav (2019) 3 SCC 410

2.Union of India Vs Rina Devi (2019) 3 SCC 572

3.Rathi Menon Vs Union of India (2001) 3 SCC 714

4.A.V. Padma Vs R. Venugopal (2012) 3 SCC 378

5.Kalandi Charan Sahoo Vs South-East Central Railways (2019) 12 SCC 387

6.Union of India Vs Radha Yadav (2019) 3 SCC 410

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

1. This first appeal from order has been filed challenging the judgment and award dated 12.3.2018 passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow in Case No.OA/II/U/870/09, Om Prakash and another vs. Union of India and others.

2. The claimants-respondents filed a claim petition under Section 16 of The Railway Claims Tribunal Act, 1987 for compensation for the death of their son Umesh Kumar as a result of an untoward incident. It was alleged that on 21.9.2009, Umesh Kumar while travelling from Faizabad Railway Station to Rudauli Railway Station by train no.3 FBL Passenger (Faizabad Lucknow Passenger) accidentally fell down from the train at Deorakot Railway Station and sustained serious injuries. He was admitted in District Hospital, Faizabad, where he died during his treatment. The deceased, it was alleged, was travelling as a bona fide passenger holding valid journey ticket, which was lost during the incident.

3. A written statement was filed on behalf of the appellant denying the averments made in the claim application. Inter alia it was stated therein that the alleged incident was not an untoward incident and as such it did not fall within the ambit of Section 123(c)(2) of the Railways Act, 1989 (for short 'Act'). It was further alleged that the deceased was not a passenger of the train in question.

4. After taking into account the oral and documentary evidence led by the parties, the Tribunal, by the judgment and order dated 1.1.2017, held that the deceased was a bona fide railway passenger and he died as a result of an untoward incident in terms of the provisions of Section 123 of the Act. The tribunal held the claimants-respondents to be entitled to compensation of Rs.8 Lakhs along with interest. The relevant portion of the award is extracted below: -

"The application is allowed. The respondent railway shall pay the applicants a sum of Rs.8,00,000/- Rs.Eight lakhs) as per apportionment shown above.

The awarded sum will carry simple interest @ 6% per annum as under

keeping in view the Gazette Notification dated 22.12.2016 effective from 01.01.2017:

a) from the date of the application till 31.12.2016 on the compensation amount of Rs. 4,00,000/- existing for the period,

b) from 01.01.2017 till date of the award on the amount of Rs. 8,00,000/- existing at present,

The Respondent shall pay the aforesaid amount together with the interest to the applicant within a period of 90 days from the date of certified copy of the order, failing which, the applicant is entitled to get interest @ 9% per annum from the date of default till actual payment.

i) Out of the compensation amount payable to the applicants No. 1 & 2, namely Om Prakash and Savitri Devi (parents of the deceased), a sum of Rs.4,00,000/- lakhs each with entire proportionate interest on the compensation awarded shall be paid to them, out of which, Rs. 2,00,000/- each shall be paid to them with entire proportionate interest by means of ECS while remaining amount i.e. Rs. 2,00,000/- each shall be invested by way of fix deposit in a nationalized bank for a period of three years.

ii) No order as to costs.

iii) Applicants are directed to furnish their bank account particulars together with copy of pass book in the office of Presenting Officer of this Tribunal for making payment through ECS, failing which the applicants shall not be entitled for interest from the date of this order till submission of Bank particular.

(emphasis supplied)

5. Sri Anuj Dayal, learned counsel for the appellant, after arguing at some length, confined his arguments to the interest awarded by the Tribunal and submitted that in view of the law laid down by the Apex Court in the case o*f Union of India v. Rina Devi, (2019) 3 SCC 572* the maximum compensation to which the respondent is entitled is Rs.8 Lakhs without interest.

6. Per contra, Sri Anil Kumar Srivastava, learned counsel for the respondents has supported the impugned judgment and award.

7. Chapter XIII of the Act deals with the liability of Railway Administration for death and injury to passengers due to accidents. The first section of the Chapter, defines "untoward incident". Section 123, as far as, relevant for the present case, is as under: -

"123. Definitions.--In this Chapter, unless the context otherwise requires --

(c) **"untoward incident"** means--

(1) (i) to (iii) omitted being not relevant;

(2) the accidental falling of any passenger from a train carrying passengers.

8. Section 124-A of the Act provides as follows: -

"124-A. Compensation on account of untoward incident.--When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the Railway Administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the Railway Administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:

Provided that no compensation shall be payable under this section by the Railway Administration if the passenger dies or suffers injury due to--

(a) suicide or attempted suicide by him;

(b*) self-inflicted injury;*

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation.--For the purposes of this section, "passenger" includes--

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling, by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident."

(emphasis supplied)

9. In exercise of the powers conferred by Section 129 of the Act, the Central Government has framed rules known as Railway Accidents and Untoward Incidents (Compensation) Rules, 1990 (for short 'Rules'). The Rules provide for a schedule prescribing the amount of compensation payable in respect of death and injuries. As per the schedule in force at the time of the incident the compensation for death was Rs.4 Lakhs. During the pendency of the claim petition, by a notification dated 22.12.2016, the schedule to the Rules was amended w.e.f. 1.1.2017. The amount of compensation, which was earlier fixed at Rs.4 Lakhs in case of death was raised to Rs.8 Lakhs.

10. In *Rathi Menon v. Union of India, (2001) 3 SCC 714* the Apex Court, with reference to a claim under the Act, held that the compensation payable would be as per the rate of compensation applicable as per the rules at the time of making of the order for the payment of compensation, but in *Kalandi Charan Sahoo v. South-East Central Railways, (2019) 12 SCC 387* after referring to Rathi Menon (supra) it was held that the right to compensation arises on the date of the accident, and the applicable rate of compensation would be the one applicable at the time of filing of the claim petition. The apparent conflict between the decisions mentioned above was resolved by the Apex Court in the

case of *Rina Devi (supra).* In the said case the Apex Court inter alia considered the following questions: -

"15.1. i) Whether the quantum of compensation should be as per the prescribed rate of compensation as on the date of application/incident or on the date of order awarding compensation;

ii) Whether principle of strict liability applies;

iii) Whether presence of a body near the railway track is enough to maintain a claim;

iv) Rate of interest.

11. In relation to the first question, in paragraphs 18 and 19 of *Rina Devi (supra),* the Apex Court opined as under: -

18. ... We are of the view that law in the present context should be taken to be that the liability will accrue on the date of the accident and the amount applicable as on that date will be the amount recoverable but the claimant will get interest from the date of accident till the payment at such rate as may be considered just and fair from time to time. In this context, rate of interest applicable in motor accident claim cases can be held to be reasonable and fair. Once concept of interest has been introduced, principles of the Workmen Compensation Act can certainly be applied and judgment of the four-Judge Bench in Pratap Narain Singh Deo will fully apply. Wherever it is found that the revised amount of applicable compensation as on the date of award of the Tribunal is less than the prescribed amount of compensation as on the date of accident with interest, higher of the two amounts ought to be awarded on the principle of beneficial legislation. Present legislation is certainly a piece of beneficent legislation.

19. Accordingly, we conclude that compensation will be payable as applicable on the date of the accident with interest as may be considered reasonable from time to time on the same pattern as in accident claim cases. If the amount so calculated is less than the amount prescribed as on the date of the award of the Tribunal, the claimant will be entitled to higher of the two amounts. This order will not affect the awards which have already become final and where limitation for challenging such awards has expired, this order will not by itself be a ground for condonation of delay. Seeming conflict in Rathi Menon and Kalandi Charan Sahoo stands explained accordingly. The four-Judge Bench judgment in Pratap Narain Singh Deo holds the field on the subject and squarely applies to the present situation. Compensation as applicable on the date of the accident has to be given with reasonable interest and to give effect to the mandate of beneficial legislation, if compensation as provided on the date of award of the Tribunal is higher than unrevised amount with interest, the higher of the two amounts has to be given."

(emphasis supplied)

12. Even though the entire principle of law was lucidly explained by the Apex Court in the case o*f Rina Devi (supra), Apex Court* further clarified the law as laid down in *Rina Devi case (supra) in Union of India v. Radha Yadav, (2019) 3 SCC 410* in the following manner: -

"11. The issue raised in the matter does not really require any elaboration as in our view, the judgment of this Court in Rina Devi [Union of India v. Rina Devi, (2019) 3 SCC 572] is very clear. What this Court has laid down is that the amount of compensation payable on the date of accident with reasonable rate of interest shall first be calculated. If the amount so calculated is less than the amount prescribed as on the date of the award, the claimant would be entitled to higher of these two amounts. Therefore, if the liability had arisen before the amendment was brought in, the basic figure would be as per the Schedule as was in existence before the amendment and on such basic figure reasonable rate of interest would be calculated. If there be any difference between the amount so calculated and the amount prescribed in the Schedule as on the date of the award, the higher of two figures would be the measure of compensation. For instance, in case of a death in an accident which occurred before amendment, the basic figure would be Rs 4,00,000. If, after applying reasonable rate of interest, the final figure were to be less than Rs 8,00,000, which was brought in by way of amendment, the claimant would be entitled to Rs 8,00,000. If, however, the amount of original compensation with rate of interest were to exceed the sum of Rs 8,00,000 the compensation would be in terms of figure in excess of Rs 8,00,000. The idea is to afford the benefit of the amendment, to the extent possible. Thus, according to us, the matter is crystal clear. The issue does not need any further clarification or elaboration.

(emphasis supplied)

13. Thus, while dealing with a railway claim arising out of the death of a passenger where the claim was instituted before the amendment and the award is given post the amendment and the basic compensation of Rs.4 Lakhs, along with interest does not exceed Rs.8 Lakhs, the claimant shall be entitled to the compensation of Rs.8 Lakhs, keeping in view the beneficent nature of the legislation and the law laid down by the Apex Court in the case of *Rina Devi (supra)*. On the other hand, where the claim was instituted before amendment, but the award was given post the amendment and the basic compensation of Rs.4 Lakhs along with interest exceeds Rs.8 Lakhs, the said amount shall be payable as it is.

14. It is now to be seen as to whether the computation of compensation by the Tribunal in the present matter is in accordance with law or not.

15. In view of the settled legal position, the Tribunal ought to have first calculated the compensation as per the schedule operating on the date of the accident, along with a reasonable rate of interest applicable till the date of award. If the amount, so calculated, was less than the amount prescribed under the schedule on the date of award, the Tribunal should have awarded the higher of the said two amounts towards compensation.

16. In the case at hand, the accident and death occurred on 21.9.2009. The award was made by the Tribunal on 12.3.2018. On the date of accident the compensation payable for death was Rs.4 Lakhs whereas on the date of award it was enhanced to Rs.8 Lakhs. The Tribunal should have taken Rs.4 Lakhs as the basic figure and should have calculated the compensation by applying simple interest @ 6% per annum, as awarded by the

Tribunal in this case, from the date of filing of claim petition till the date of award.

17. After taking Rs.4 Lakhs as basic figure, if the interest is calculated on the said amount @ 6% w.e.f. 21.9.2009 i.e. the date of accident till the date of award i.e. 12.3.2009, the amount comes to less than Rs.8 Lakhs. On the date of award the compensation payable in case of death was Rs.8 Lakhs and in view of *Rina Devi (supra)*, the Tribunal ought to have awarded the compensation of Rs.8 Lakhs. The Tribunal has erred in awarding interest over and above Rs.8 Lakhs.

18. The Tribunal has apportioned the compensation between the claimants-respondents. Both of them have been awarded Rs.4 Lakhs each. The Tribunal has issued directions for the payment of half the amount of compensation to the claimants and for the balance amount to be invested in a fixed deposit account in some nationalized bank for a period of three years.

19. The claimants-respondent nos.1 and 2 are 54 and 51 years of age respectively. More than 10 years have passed since the unfortunate incident occurred. There is evidence on record that respondent no.1 is suffering from severe lung disorder and his kidney is also affected and the respondents are in dire need of money to take care of medical expenses of respondent no.1.

20. In view of the above, the judgment and award dated 12.3.2018 is modified and the claimants-respondents are held entitled to a sum of Rs.8 Lakhs as per the apportionment mentioned in the award and in view of the law laid down by the Apex Court in the case of *A.V. Padma v. R. Venugopal, (2012) 3 SCC 378* the appellant is directed to release the entire decretal amount of Rs.8 Lakhs in favour of the claimants-respondents forthwith.

21. No order as to costs.

22. The appeal stands disposed of accordingly.

(2019)10ILR A 962

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.07.2019

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 36266 of 2018

Ramesh Chandra Chaubey & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Laltaprasad Misra, Sri Om Prakash Misra.

Counsel for the Respondents:
C.S.C., Sri Ashok Shukla.

A. Latches/ Delay - number of posts advertised for the post of Sub - Registrar and Auditor Panchayat were reduced by the respondents - petitioner joined the post of Auditor Panchayat on bonafide belief of reduction of vacancies on genuine grounds - reduction in vacancies were challenged by one named Anoop Singh before the Court - petitioner claims parity with Anoop Singh after a lapse of 15 years - law leans in favour of those who are alert and vigilant

Although there is no period of limitation provided for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable period of time. Delay and latches are relevant factor for a Court of Law to determine the question as to whether the petitioners are entitled to the benefit which has been provided to others or not. (Para 34 & 36)

Writ Petition dismissed(E-10)

Cases Cited: -

1. Prem Chandra & ors Vs St of U.P. & ors Special Appeal No. 377 of 2008

2. St of U.P. & ors Vs Santosh Kumar Mishra & anr (2010) 9 SCC 52

3. K.C. Sharma & ors Vs UOI & ors (1997) 6 SCC 721

4. Inder Pal Yadav & ors Vs UOI & ors (1985) 2 SCC 648

5. St of Karnataka & ors Vs C. Lalitha (2006) 2 SCC 747

6. U.P. Jal Nigam & anr Vs Jaswant Singh & anr (2006) 11 SCC 464

7. State of Uttaranchal & anr Vs Shiv Charan Singh Bhandari & ors (2013) 12 SCC 179

8. New Delhi Municial Council Vs Pan Singh & ors AIR (2007) Supreme Court 1365

9. Tridip Kumar Dingal & ors Vs State of W.B. & ors (2009) 1 SCC 768

10. St of U.P. thru Secy (Revenue Deptt.) Lko & ors Vs Dan Bahadur Singh Special Appeal Defective No. 17 of 2016

11. St of U.P. thru Secy (Revenue Deptt.) Lko & ors Vs Shyam Lal Special Appeal Defective No. 147 of 2016

(Delivered by Hon'ble Irshad Ali, J.)

1). Heard Sri L.P. Mishra, learned counsel for the petitioners and to Sri Kuldeep Pati Tripathi, learned Additional Advocate General for the State-respondents and Sri Ashok Shukla, learned counsel for the respondent-Commission.

2). Brief fact of the case is that 49 vacancies were requisitioned to the Commission for initiation of selection proceeding on the post of Sub Registrar and Auditor Panchayat. In pursuance thereof, an advertisement was issued inviting applications from the eligible and qualified candidates in the year 2001. The petitioners having eligibility criteria as prescribed under the advertisement applied for the post of Sub Registrar as well as on the post of Auditor Panchayat.

3). A selection proceeding was conducted and result of the same was declared by reducing the vacancies from 49 to 10. In the said selection, the petitioners were selected on the post of Auditor Panchayat and joined the post under bonafide belief that the vacancies have been reduced on genuine grounds. One Anoop Kumar Singh filed Writ Petition No.1697 (SB) of 2010 (Anoop Kumar Singh Vs. State of U.P. and others), wherein after exchange of affidavits, this Court passed a judgment with the following direction:

"Resultantly, the writ petition is allowed in the following terms.

1. Since no other candidate, who participated in the selection/examination held pursuant to the advertisement issued in the month of February, 2001, has approached this Court, the directions which are being issued in this judgment and order shall be confined to the petitioner alone.

2. U.P. Public Service Commission shall consider the candidature of the petitioner for his selection to the post of Sub-Registrar in accordance with his merit on the basis of U.P. State Combined Subordinate Services Examination-2001 and in case based on his merit, the petitioner gets selected to the post of Sub-Registrar, recommendation to the State Government for his appointment shall be made by the Commission.

3. The recommendation which may be made by the Commission in respect of the petitioner's appointment to the post of Sub-Registrar shall thereafter be considered by the State Government in accordance with the law and in case the petitioner is found suitable and fit, he shall be appointed on the post of Sub-Registrar against an existing vacancy. However, in case at present no vacancy is available, he shall be appointed and adjusted against any other future vacancy which may occur. The aforesaid exercise shall be completed by the State Government and the Commission within a period of four months from the date of presentation of a certified copy of this order."

4). After the judgment passed on 29.11.2017, the reasons in regard to reducing of vacancies from 49 to 10 came in the knowledge of the petitioners and thereafter, the present writ petition was filed before this Court with the prayer to quash the decision taken by the respondents in reducing the number of vacancies of the post of Sub Registrar from 49 to 10 for which the combined state public service examination was conducted with the prayer for issuance of writ of mandamus commanding the respondents to appoint the petitioners on the post of Sub Registrar on the ground considered by this Court in the judgment referred herein above.

5). Learned counsel for the petitioners submitted that at the time of reducing the vacancies, the reasons were not known to the petitioners. It came in the knowledge of the petitioners, when the judgment by this Court was delivered, wherein the ground was placed before this Court and was recorded in the judgment. Therefore, there are no latches on the part of the petitioners in approaching to this Court. At earlier point of time, the reasons were not known to the petitioners, therefore, they cannot be blamed for the same.

6). His next submission is that the proceeding under Article 226 of the Constitution of India is the proceeding of equity jurisdiction and in case there is arbitrariness on the part of the State and after coming to know the illegalities committed, the person aggrieved has right to come to this Court. He further submitted that no discrimination or distinction can be carved out between the candidates, who are on equal footing and have participated in a selection proceeding under bonafide belief that their right shall not be curtailed on the discrimination created by the State Government. He placed reliance upon certain judgments, which are as under:

i) Prem Chandra and others Vs. State of U.P. and others; Special Appeal No.377 of 2008.

ii) State of Uttar Pradesh and another Vs. Santosh Kumar Mishra and another; (2010) 9 SCC 52.

iii) K.C. Sharma and others Vs. Union of India and others; (1997) 6 SCC 721.

iv) Inder Pal Yadav and others Vs. Union of India and others; (1985) 2 SCC 648.

v) State of Karnataka and others vs. C. Lalitha; (2006) 2 SCC 747.

7). On the other hand, learned Additional Advocate General and Sri Ashok Shukla, learned counsel for the respondents submitted that the petitioners have approached to this Court after a long delay of almost 15 years, as the advertisement was issued in the year 2001 and the selection was completed in the year 2003, therefore, they are not entitled to get relief, as claimed in the present writ petition.

8). Learned Additional Advocate General placed reliance upon certain judgments on the point that under Article 226 of the Constitution of India, writ petition is not maintainable on the ground of latches in regard to those persons, who are not vigilant in regard to their rights. The judgments relied upon by learned Additional Advocate General are referred herein below:

i) U.P. Jal Nigam and another Vs. Jaswant Singh and another; (2006) 11 SCC 464.

ii) State of Uttaranchal and another Vs. Shiv Charan Singh Bhandari and others; (2013) 12 SCC 179.

iii) New Delhi Municipal Council Vs. Pan Singh and others; AIR 2007 Supreme Court 1365.

iv) Tridip Kumar Dingal and others Vs. State of West Bengal and others; (2009) 1 SCC 768.

v) State of U.P. through its Secretary (Revenue Deptt.) Lko. and others Vs. Dan Bahadur Singh 680 (SS) 2015; Special Appeal Defective No.17 of 2016.

vi) State of U.P. through its Secretary (Revenue Deptt.) Lko. and others Vs. Shyam Lal 425 (SS) 2011 (Special Appeal Defective No.147 of 2016).

9). Having heard the rival contentions advanced by learned counsel for the parties, I perused the material on record and the judgments relied upon by learned counsel for the parties.

10). To resolve the controversy involved in the present writ petition, relevant portion of the judgments relied upon by learned counsel for the parties are being quoted below;

:- The judgments relied upon by learned counsel for the petitioners:

i) Prem Chandra and others Vs. State of U.P. and others (Supra):

"A peculiar and a piquant situation has arisen in the instant case, where it is not the case, that an aspirant of the higher post in service on becoming eligible for promotion or a person seeking direct appointment on the date when he is to be considered for such a promotion or appointment, seeks to interpret the rule of recruitment in a particular manner, looking to the past practice, to his advantage, but here is a case, where the appellants were excluded from

consideration of their appointment at the relevant time earlier, by interpreting the rule to their disadvantage, and were made to believe that likewise their candidature shall be considered later on, for which various circulars and instructions were also issued by the State Government, but when their turn came for getting employment, they are again being put out of consideration, by interpreting the rule in a different manner.

Injustice thus, caused to them, in the hands of the State Government, therefore, requires to be corrected.

We also take notice of the fact that under the present advertisement, 766 vacancies have been notified, therefore, the present appellants, who are much less in number, can also be considered for appointment, leaving sizeable vacancies for the rest of the candidates.

We, therefore, dispose of these special appeals with the direction that the appellants' cases shall be considered in accordance with the pre-existing practice by considering their appointment on the basis of their merit taking their batches into consideration as was being done earlier but this process would be available only for the appellants and they would be accommodated if they are otherwise found eligible and the remaining vacancies would be filled in by following Rule 15 (2) strictly as directed by the learned Single Judge."

ii) State of Uttar Pradesh and another Vs. Santosh Kumar Mishra and another Supra:

"41. It is on account of a deliberate decision taken by the State Government that the private Respondents were left out of the zone of consideration for appointment as Pharmacists in order to accommodate those who had obtained their diplomas earlier. The decision taken by the State Government at that time to accommodate the diploma- holders in batches against their respective years can no doubt be discontinued at a later stage, but not to the disadvantage of those who had been deprived of an opportunity of being appointed by virtue of the same Rules. In our view, the same decision which was taken to deprive the private Respondents from being appointed, could not now be discarded, once again to their disadvantage to prevent them from being appointed, introducing the concept of merit selection at a later stage. The same may be introduced after the private Respondents and those similarly-situated persons have been accommodated."

iii) K.C. Sharma and others Vs. Union of India and others (Supra):

"6. Having regarding to the facts and circumstances of the case, we are of the view that this was a fit case in which the Tribunal should have condoned the delay in the filing of the application and the appellants should have been given relief in the same terms as was granted by the Full Bench of the Tribunal. The appeal is, therefore, allowed, the impugned judgment of the Tribunal is set aside, the delay in filing of O.A. No. 774 of 199 is condoned and the said application is allowed. The appellants would be entitled to the same relief in matter of pension as has been granted by the Full Bench of the Tribunal in its judgment dated December 16, 1993 in O.A. Nos. 395-403 of 1993 and connected matters. No order as to costs."

iv) Inder Pal Yadav and others Vs. Union of India and others (Supra):

"5. The scheme envisages that it would be applicable to casual labour on projects who were In service as on January 1, 1984. The choice of this date does not commend, for it is likely to introduce an invidious distinction between similarly situated persons and expose some workmen to arbitrary discrimination flowing from fortuitous court's order, since, in some matters, the court granted interim stay before the workmen could be retrenched while some other were not so fortunate. Those in respect of when the Court granted interim relief by stay suspension of the order of retrenchment, they would be treated in service on January 1, 1984 while others who fail to obtain interim relief though similarly situated would be pushed down in the implementation of the scheme. Therefore, those who could not come to the Court need not be at a comparative disadvantage to those who rushed in here. If they are otherwise similarly situated, they are entitled to similar treatment. Keeping in view all the aspects of the matter, the Court modifies part 5.1 (a) (i) of the scheme by modifying the date from 1.1.1984 to 1.1. 1981. With this modification and consequent rescheduling in absorption from that date onward, the scheme framed by Railway Ministry is accepted and a direction is given that it must be implemented by re-casting the stages consistent with the change in the date as herein directed."

v) State of Karnataka and others vs. C. Lalitha (Supra):

"29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well-settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I Post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

:- Sri Kuldeep Pati Tripathi, learned Additional Advocate General placed reliance in support of his submissions on following judgments:

i) U.P. Jal Nigam and another Vs. Jaswant Singh and another (Supra):

"4. It appears that during the pendency of the appeals and writ petitions before this Court and after disposal of the same by this Court, a spate of writ petitions followed in the High Court by the employees who had retired long back. Some of the petitions were filed by the employees who retired on attaining the age of 58 years long back. However, some were lucky to get interim orders allowing them to continue in service. Number of writ petitions were filed in the High Court in 2005 on various dates after the judgment in the case of Harwindra Kumar (supra) and some between 2002 and 2005. All those writ petitions were

disposed of in the light of the judgment in the case of Harwindra Kumar (supra) and relief was given to them for continuing in service up to the age of 60 years. Hence, all these appeals arise against various orders passed by the High Court from time to time.

5. So far as the principal issue is concerned, that has been settled by this Court. Therefore, there is no quarrel over the legal proposition. But the only question is grant of relief to such other persons who were not vigilant and did not wake up to challenge their retirement and accepted the same but filed writ petitions after the judgment of this Court in the case of Harwindra Kumar (supra). Whether they are entitled to same relief or not ? Therefore, a serious question that arises for consideration is whether the employees who

did not wake up to challenge their retirement and accepted the same, collected their post retirement benefits, can such persons be given the relief in the light of the subsequent decision delivered by this Court ?

6. The question of delay and laches has been examined by this Court in a series of decisions and laches and delay has been considered to be an important factor in exercise of the discretionary relief under Article 226 of the Constitution. When a person who is not vigilant of his rights and acquiesces with the situation, can his writ petition be heard after a couple of years on the ground that same relief should be granted to him as was granted to person similarly situated who was vigilant about his rights and challenged his retirement which was said to be made on attaining the age of 58 years. A chart has been supplied to us in which it has been pointed out that about 9 writ petitions were filed by the employees of the Nigam before their retirement wherein their retirement was somewhere between 30.6.2005 and 31.7.2005. Two writ petitions were filed wherein no relief of interim order was passed. They were granted interim order. Thereafter a spate of writ petitions followed in which employees who retired in the years 2001, 2002, 2003, 2004 and 2005, woke up to file writ petitions in 2005 & 2006 much after their retirement. Whether such persons should be granted the same relief or not ?"

8. Our attention was also invited to a decision of this Court in the case of State of Karnataka & Ors. v. S.M. Kotrayya & Ors. reported in (1996) 6 SCC 267. In that case the respondents woke up to claim the relief which was granted to their colleagues by the Tribunal with an application to condone the delay. The Tribunal condoned the delay. Therefore, the State approached this Court and this Court after considering the matter observed as under :

" Although it is not necessary to give an explanation for the delay which occurred within the period mentioned in sub-section (1) or (2) of Section 21, explanation should be given for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should satisfy itself whether the explanation offered was proper. In the instant case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper

explanation at all. What was required of them to explain under sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of their grievances before the expiry of the period prescribed under sub-section (1) or (2). That was not the explanation given. Therefore, the Tribunal was wholly unjustified in condoning the delay."

9. Similarly, in the case of Jagdish Lal & Ors. v. State of Haryana & Ors. reported in (1997) 6 SCC 538, this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the Court, then such person cannot stand to benefit. In that case it was observed as follows :

" The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from Vir Pal Singh Chauhan case. The appellants' desperate attempt to redo the seniority is not amenable to judicial review at this belated stage."

17. The benefits shall only be confined to above mentioned persons who have filed writ petitions before their retirement or they have obtained interim order before their retirement. The appeals filed against these persons by the Nigam shall fail and the same are dismissed. Rest of the appeals are allowed and orders passed by the High Court are set aside. There would be no order as to costs."

ii) State of Uttaranchal and another Vs. Shiv Charan Singh Bhandari and others (Supra):

"23. In State of T.N. v. Seshachalam, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus: -

"16. ....filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

24. There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated in Ghulam Rasool Lone v. State of Jammu and another.

25. In New Delhi Municipal Council v. Pan Singh and others, the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction."

iii) New Delhi Municipal Council Vs. Pan Singh and others (Supra):

"16. There is another aspect of the matter which cannot be lost sight of. Respondents herein filed a Writ Petition after 17 years. They did not agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They did not implead themselves as parties even in the reference made by the State before the Industrial Tribunal. It is not their case that after 1982, those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. After such a long time, therefore, the Writ Petitions could not have been entertained even if they are similarly situated. It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the Court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction. See Govt. of W.B. v. Tarun K. Roy and others [(2004) 1 SCC 347], Chairman, U.P. jal Nigam & Anr. v. Jaswant Singh and anr.[2006 (12) SCALE 347] and Karnataka Power Corpn. Ltd. through its Chairman & Managing Director and Another v. K. Thangappan and Another [(2006) 4 SCC 322]."

iv) Tridip Kumar Dingal and others Vs. State of West Bengal and others (Supra):

"56. We are unable to uphold the contention. It is no doubt true that there can be no waiver of fundamental right. But while exercising discretionary jurisdiction under Articles 32, 226, 227 or 136 of the Constitution, this Court takes into account certain factors and one of such considerations is delay and laches on the part of the applicant in approaching a writ-Court. It is well settled that power to issue a writ is discretionary. One of the grounds for refusing reliefs under Article 32 or 226 of the Constitution is that the petitioner is guilty of delay and laches.

57. If the petitioner wants to invoke jurisdiction of a writ-Court, he should come to the Court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where the rights of third parties have accrued in the meantime [vide State of M.P. & Anr. V. Bhailal Bhai, (1964) 6 SCR 261; Moon Mills v. Industrial Court, Bombay, AIR 1967 SC 1450; Bhoop Singh v. Union of India & Ors., (1992) 2 SCR 969]. This principle applies even in case of an infringement of fundamental right (vide Trilokchand Motichand v. H.B. Munshi, (1969) 1 SCC 110; Durga Prasad v. Chief Controller, (1969) 1 SCC 185; Rabindranath Bose v. Union of India).

58. There is no upper limit and there is no lower limit as to when a person can approach a Court. The question is one of discretion and has to be decided on the basis of facts before the Court depending on and vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose.

59. We are in respectful agreement with the following

observations of this Court in P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152;

"It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extra-ordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters"

62. Though there is considerable force in the argument of the learned counsel for the State and contesting respondents that there is substantial delay on the part of the appellants in approaching this Court, in the light of factual scenario and the direction which we are inclined to issue, we have thought it fit not to dismiss Special Leave Petitions on the ground of delay but considering merits of the case, we are issuing necessary directions granting relief to the appellants who were vigilant about their rights."

v) State of U.P. through its Secretary (Revenue Deptt.) Lko. and others Vs. Dan Bahadur Singh (Supra):

"In our view, the case of Pratap Narain Pandey is clearly distinguishable having due regard to the fact that in that case the candidate, who was aggrieved, had pursued his legal remedies with reasonable dispatch. The judgment of the learned Single Judge in Pratap Narain Pandey's case was delivered on 19 August 2006 in regard to two writ petitions. The first writ petition was filed by Pratap Narain Pandey as far back as in 1990 (Writ Petition No.10539 (S/S) of 1990). Apart from this writ petition, he had filed another writ petition in 2001 (Writ Petition No.4031 (S/S) of 2001). Both the writ petitions had been clubbed together and were disposed of on 19 August 2006.

On the other hand, the respondent filed his writ petition on 22 February 2015, seeking the benefit of the judgment and order dated 19 August 2006 delivered in the writ petition filed by Pratap Narain Pandey. By that judgment, the petitioner in the earlier proceedings was directed to be given appointment on the post of regular Collection Amin and to be treated as a regular Collection Amin in service since 5 June 1986 for the purposes of seniority etc. except the salary for the period for which he had not worked. In the writ petition which has been filed by the respondent before the learned Single Judge, there is absolutely no explanation much less a cogent explanation in regard to reasons which led the respondent to wait for nearly twenty nine years since 1986 before he filed a writ petition in 2015. The fact that other persons may have been granted the benefit of the judgment in Pratap Narain Pandey in the interregnum would not absolve the respondent of his own duty to explain why he chose to remain silent in the pursuit of his own rights. In a situation of this nature where a delay has been completely unexplained, a writ petition which was filed in 2015 seeking the benefit of parity with a case which had been decided in 2006 and where the petitioner in the earlier round had been

vigilant enough in espousing his rights since 1990, could not have been entertained. There was evidently no parity with the case of Pratap Narain Pandey.

The learned counsel appearing on behalf of the respondent has relied upon a judgment of a Division Bench of this Court dated 8 August 2014 in a batch of special appeals filed by the State of Uttar Pradesh (Special Appeal Defective No.110 of 2012 :State of Uttar Pradesh Vs Mohd. Usman Ansari) and connected cases). In that batch of cases, the learned Single Judge had granted the benefit of the decision in Pratap Narain Pandey in various writ petitions. In fact, the judgment of the Division Bench would indicate that several of those writ petitions had been filed as far back as in 1991 (Writ Petition No.4587 (S/S) of 1991, Writ Petition No.6472 (S/S) of 1991 and Writ Petition No.3764 (S/S) of 1991) which had been decided by the learned Single Judges on 28 October 2010, 12 May 2010 and 12 May 2010 respectively. Those petitioners had again been vigilant enough to pursue their rights and the writ petitions had remained pending before this Court. Undoubtedly, one of those writ petitions in the batch (Writ Petition No.1595 (S/S) of 2008) had been dismissed on 26 March 2008 by a learned Single Judge on the ground of laches and the special appeal which had been filed by the State (Special Appeal No.311 of 2008) was disposed of by holding that the dismissal of the writ petition on the ground of laches was erroneous in view of the submission of the learned Standing Counsel that the case was identical to Pratap Narain Pandey which had attained finality and that the benefit had been granted to other similarly situated persons. The case proceeded entirely on a concession which was made and it would appear that no effort was made on the part of the State even to submit before the Division Bench that there was a factual difference between the case at hand and in the case of Pratap Narain Pandey. The judgment of the Division Bench does not lay down the principle that a writ petition which had been filed without any cogent explanation for a delay, as in the present case, must still be entertained merely on the ground of the decision in Pratap Narain Pandey. Hence, the judgment of the Division Bench will not assist the case of the respondent.

The learned counsel appearing on behalf of the respondent has relied upon a judgment of the Supreme Court in Basanti Prasad Vs Chairman, Bihar School Examination Board2. In that case, the husband of the appellant, who was an employee of the School Examination Board, was convicted of offences under Sections 467, 468, 471 and 120-B of the Penal Code on 7 February 1989 against which, a criminal appeal was filed before the Additional Sessions Judge. When the appeal was pending, his services were terminated in 1992. The husband of the appellant died during the pendency of the appeal before the Sessions Court and with the permission of the Court, the appellant continued to prosecute the criminal appeal. After he was acquitted by the Sessions Court, the appellant moved the Examination Board for an order that he would be deemed to have remained in service till the date of his retirement and that all the consequential retiral benefits of her late husband be paid. "

vi) State of U.P. through its Secretary (Revenue Deptt.) Lko. And

others Vs. Shyam Lal, 425 (SS) 2011 (Supra):

"Facts and issues involved herein are same as have already been considered by us while deciding another Special Appeal (Defective) No.17 of 2016 and Special Appeal (Defective No.19 of 2016 filed by the State against a similar order passed in writ petition No.333(SS) of 2013, Dinesh Chandra Pathak v. State of U.P., and writ petition no.680(S) of 2015, Dan Bahadur Singh v. State of U.P. & ors., and the judgments passed by the writ court were set aside. Relevant extracts of the judgment dated 10.1.2016 passed in Special Appeal (Defective) No.17 of 2016 are quoted hereinbelow:

"In our view, the case of Pratap Narain Pandey is clearly distinguishable having due regard to the fact that in that case the candidate, who was aggrieved, had pursued his legal remedies with reasonable dispatch. The judgment of the learned Single Judge in Pratap Narain Pandey's case was delivered on 19 August 2006 in regard to two writ petitions. The first writ petition was filed by Pratap Narain Pandey as far back as in 1990 (Writ Petition No.10539 (S/S) of 1990). Apart from this writ petition, he had filed another writ petition in 2001 (Writ Petition No.4031 (S/S) of 2001). Both the writ petitions had been clubbed together and were disposed of on 19 August 2006.

On the other hand, the respondent filed his writ petition on 22 February 2015, seeking the benefit of the judgment and order dated 19 August 2006 delivered in the writ petition filed by Pratap Narain Pandey. By that judgment, the petitioner in the earlier proceedings was directed to be given appointment on the post of regular Collection Amin and to be treated as a regular Collection Amin in service since 5 June 1986 for the purposes of seniority etc. except the salary for the period for which he had not worked. In the writ petition which has been filed by the respondent before the learned Single Judge, there is absolutely no explanation much less a cogent explanation in regard to reasons which led the respondent to wait for nearly twenty nine years since 1986 before he filed a writ petition in 2015. The fact that other persons may have been granted the benefit of the judgment in Pratap Narain Pandey in the interregnum would not absolve the respondent of his own duty to explain why he chose to remain silent in the pursuit of his own rights. In a situation of this nature where a delay has been completely unexplained, a writ petition which was filed in 2015 seeking the benefit of parity with a case which had been decided in 2006 and where the petitioner in the earlier round had been vigilant enough in espousing his rights since 1990, could not have been entertained. There was evidently no parity with the case of Pratap Narain Pandey.

The learned counsel appearing on behalf of the respondent has relied upon a judgment of a Division Bench of this Court dated 8 August 2014 in a batch of special appeals filed by the State of Uttar Pradesh (Special Appeal Defective No.110 of 2012 :State of Uttar Pradesh Vs Mohd. Usman Ansari) and connected cases). In that batch of cases, the learned Single Judge had granted the benefit of the decision in Pratap Narain Pandey in various writ petitions. In fact, the judgment of the Division Bench would indicate that several of those writ petitions had been filed as far back as in

1991 (Writ Petition No.4587 (S/S) of 1991, Writ Petition No.6472 (S/S) of 1991 and Writ Petition No.3764 (S/S) of 1991) which had been decided by the learned Single Judges on 28 October 2010, 12 May 2010 and 12 May 2010 respectively. Those petitioners had again been vigilant enough to pursue their rights and the writ petitions had remained pending before this Court. Undoubtedly, one of those writ petitions in the batch (Writ Petition No.1595 (S/S) of 2008) had been dismissed on 26 March 2008 by a learned Single Judge on the ground of laches and the special appeal which had been filed by the State (Special Appeal No.311 of 2008) was disposed of by holding that the dismissal of the writ petition on the ground of laches was erroneous in view of the submission of the learned Standing Counsel that the case was identical to Pratap Narain Pandey which had attained finality and that the benefit had been granted to other similarly situated persons. The case proceeded entirely on a concession which was made and it would appear that no effort was made on the part of the State even to submit before the Division Bench that there was a factual difference between the case at hand and in the case of Pratap Narain Pandey. The judgment of the Division Bench does not lay down the principle that a writ petition which had been filed without any cogent explanation for a delay, as in the present case, must still be entertained merely on the ground of the decision in Pratap Narain Pandey. Hence, the judgment of the Division Bench will not assist the case of the respondent."

....

"In the present case, we find from the record that the writ petition which was filed by the respondent was without any explanation for the delay. The delay of nearly twenty nine years in filing the writ petition was completely unexplained. Merely because certain other individuals have been granted the benefit in the meantime, would not justify such a writ petition having been entertained in 2015. Hence, we hold that the respondent's writ petition ought to have been dismissed only on the ground of laches.

We, accordingly, allow the special appeal and set aside the impugned judgment and order of the learned Single Judge dated 26 February 2015. In consequence, the writ petition filed by the respondent (Service Single No.680 of 2015) shall stand dismissed. There shall be no order as to costs."

In the facts of the case cause of action, if any, arose in favour of the respondent in the year 1986 or at best in 1989, but the petitioner did not approach the court claiming the status of a regular employee. Instead as has been averred in paragraph 18 of the writ petition certain proceedings were initiated by him seeking regularization of his services which impliedly is an admission of the fact that his initial appointment was not a regular one. However, it appears that on account of the writ petition filed by Pratap Narain Pandey bearing writ petition No.4031(SS) of 2001 and a subsequent writ petition bearing No.8672(SS) of 2006 by a similarly situated person, having been allowed, the petitioner approached this court seeking the same relief albeit after a delay of nineteen years without any plausible explanation for the same.

We have already noted in our earlier judgment, quoted hereinabove,

that Pratap Narain Pandey had been pursuing the matter diligently and promptly having filed a writ petition firstly in the year 1990 followed by subsequent writ petitions whereas the respondent herein was indolent in the matter and approached this court only after a delay of nineteen years.

We have already observed in our earlier judgment that such a writ petition could not have been entertained by the writ court. There was evidently no parity with the case of Pratap Narain Pandey. Same is the case herein also. Therefore, for the reasons already mentioned in the earlier judgment and those mentioned hereinabove, the judgment passed by the writ court on 9.9.2011 in writ petition no.425(SS) of 2011 cannot be sustained. Same is hereby quashed. Special appeal is allowed. Writ Petition no.425(SS) of 2011 stands dismissed."

11. On perusal of the judgments relied upon by learned counsel for the petitioners in the case of **Prem Chandra and others (Supra),** it is transpired that a selection proceeding was initiated on the post of pharmacist against 766 vacancies and in accordance with Rule 15(2) of U.P. Pharmacists Service Rules, 1980 the selection was proceeded to be held. The matter was considered by the Division Bench of this Court and thereafter, direction was issued that the case of the appellants shall be considered in accordance with pre-existing practice by considering their appointment on the basis of merit taking their batches into consideration, as was being done earlier but this process would be available only for the appellants and they would be accommodated, if they are otherwise found eligible and remaining vacancies would be filled in by following Rule 15(2) strictly, as directed by the learned Single Judge.

12. The judgment passed by the Division Bench of this Court in the case of Prem Chandra and others (Supra), was considered by the Hon'ble Supreme Court in the case of **State of Uttar Pradesh and another Vs. Santosh Kumar Mishra and another (Supra),** wherein the Hon'ble Supreme Court has held that the decision, which was taken to deprive the private respondents from being appointed could now be discarded once again to their disadvantage to prevent them from being appointed introducing the concept of merit selection at a later stage. The same may be introduced after the private respondents and those similarly situated persons have been accommodated.

13. In the present case, the only objection on the State side is that the petitioners are claiming parity of a judgment passed in the case of Sri Anoop Kumar Singh (Supra), wherein direction was issued for consideration of his claim on a writ petition filed at the time of not providing appointment on the post of Sub Registrar.

14. In the opinion of this Court, the selection process was initiated in the year 2001 and was completed in the year 2004. The petitioners do not approach to the competent Court of law for redressal of their grievances within reasonable time. In the case of **Sri Anoop Kumar Singh (Supra)**, by filing counter affidavit, the statement of fact was brought on record that 39 vacancies were backlog vacancies, therefore, the decision was taken for curtailing of vacancies and the selection

was made against 10 vacancies. It has been held that action of the State in decreasing the number of vacancies was not justifiable in law and directed for consideration of grant of appointment to Sri Anoop Kumar Singh.

15. In the present case, the petitioners after lapse of almost 15 years have approached to this Court seeking the same relief as was granted in the case of **Anoop Kumar Singh (Supra).**

16. On perusal of the judgment in the case of **K.C. Sharma and others Vs. Union of India and others (Supra),** the fact of the case was that certain employees were employed as Guards in the Northern Railway and they retired as Guards during the period 1980 to 1988. They felt aggrieved by notification dated 05.12.1988, wherein Rule 2544 of Indian Railways Establishment Code was amended and for the purpose of calculation of average emoluments the maximum limit in respect of running allowances was reduced from 75% to 45% in respect of period from 01.01.1973 to 31.03.1979 and 55% for the period from 01.04.1979 onwards.

17. The notification issued on 05.12.1988 was challenged and was considered by the full Bench of the tribunal in its judgment in the case of **C.R. Rangadhamaiah & others Vs. Chairman, Railway Board & others** and connected matters and said notifications in so far as they gave retrospective effect to the amendments were held to be invalid being violative of Article 14 and 16 of the Constitution of India.

18. The appellants in the case of **K.C. Sharma and others (Supra)** filed a representation along with full Bench judgment before the railway administration and when no relief was granted, they approached to the tribunal in April, 1994. The application filed before the tribunal was dismissed being barred by limitation and the tribunal refused to condone the delay in filing the original application.

19. Hon'ble the Supreme Court considering the fact that the full Bench decision has been affirmed, held that the tribunal should have been condoned the delay in filing the application and the appellants should have been given relief in same terms, as was granted by the full Bench of the tribunal and allowed the appeal.

20. On perusal of the above referred judgment, the full Bench decided the case vide judgment and order dated 16.12.1993. The petitioner by way of representation approached to the railway administration and when no consideration was made, they immediately approached by filing Original Application No.774 of 1994 seeking parity of full Bench judgment of the tribunal. There was no inordinate delay in approaching the tribunal to get the benefit of full Bench judgment.

21. Here, in the present case, the delay is of 15 years in approaching to this Court, therefore, the ratio of the above referred judgment is not applicable to the facts and circumstances of the present case.

22. In the case of **Inder Pal Yadav and others Vs. Union of India and others (Supra),** the controversy under consideration was that Project Casual Labours after putting continuous service

for years on the end to wit ranging from 1974 till 1983, yet their services were terminated with impunity under the specious plea that the project on which they were employed has been wound up on its completion and their services were no more needed.

23. The Railway Ministry framed a scheme and circulated the same amongst others to all the General Managers of Indian Railways including production units as per its circular dated 01.06.1984. In the Scheme, it was stated that all the General Managers were directed to implement the decision of the Railway Ministry by the target dates. It was further stated that a detailed letter regarding group 5 1(ii) would follow. Such a letter was issued on June 25, 1984.

24. The question for consideration was that whether the similarly situated persons and the expose some workmen to arbitrary discrimination flowing from fortuitous court's order, wherein, in some matters, the court granted interim stay before the workmen could be retrenched while some other were not so fortunate. Some of the retrenched workmen failed to knock at the doors of the court of justice because these doors do not open unless huge expenses are incurred. Thus, the Court held that those who could not come to the court, need not be at a comparative disadvantage to those who rushed in here.

25. Here, in the present case, the petitioners were selected on the post of Auditor Panchayat. They were very well aware about their non selection on the post of Sub Registrar and they joined with their own will on the said post without raising objection before any competent authority or competent Court of law.

26. In the case of **State of Karnataka and others vs. C. Lalitha (Supra),** the point under consideration was that an application was filed before the Karnataka Administrative Tribunal claiming appointment as Assistant Commissioner although in terms of the revised reservation policy, the applicant was appointed as Tehsildar. The original application having been dismissed, a special leave petition was filed before Hon'ble the Supreme Court, which was allowed by setting aside the order passed by the Karnataka Administrative Tribunal by allowing the appeal with the direction that the appellant has since been promoted on Class-I post of Assistant Commissioner, if no vacancies are available, the State Government will create a supernumerary post for the appellant's appointment with the further direction that for the purpose of seniority, the appellant shall be placed below the last candidate appointed in 1976 but she will not be entitled to any back wages. It was further provided that the appellant will be considered for promotion, if otherwise found suitable.

27. On a review petition, Hon'ble Supreme Court held that service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It has further been held that it is well established that the question of seniority shall be governed by rules and after consideration of material on record, allowed the appeal by holding that justice demands that a person should not be allowed to turn any undue advantage over other employees. The concept of

justice is that one should get what is due to him or her in law. The concept of justice cannot be stretched so as to cause heart-burning to more meritorious candidates and therefore, the direction was issued by Hon'ble Supreme Court that the matter of seniority be considered in terms of the order passed by Hon'ble Supreme Court on 15.03.1994.

28. Sri Kuldeep Pati Tripathi, learned Additional Advocate General appearing for the State-respondents by placing reliance upon certain judgments has submitted that after lapse of 15 years, no parity can be granted to a person, who is sleeping and is not vigilant of his rights.

29. On perusal of the judgments relied upon by learned counsel for the parties, the question is for grant of relief to some other persons, who were not vigilant and did not wake up to challenge the curtailment of vacancies from 49 to 10. The issue before this Court is that whether they are entitled to get some relief as was granted in the case of **Anoop Kumar Singh (Supra)** or not?

30. A serious question, which arose for consideration is that the benefit, as has been provided to one Anoop Kumar Singh, can be provided in the light of the decisions delivered by this Court to the petitioners, who did not wake up to challenge the reducement of vacancies of the post of Sub Registrar.

31. The question of delay and latches has been examined by Hon'ble Supreme Court in the series of decisions referred herein above and relied upon by learned Additional Advocate General, wherein latches and delay has been considered to be an important factor in exercise of discretionary power under Article 226 of the Constitution of India.

32. When a person is not vigilant of his rights and acquiesces with the situation, whether his writ petition can be heard after a long lapse of time on the ground that the relief granted in the similar petition to a petitioner, who was vigilant about his rights and challenged the denial of appointment on the post of Sub Registrar, should be granted to him?

33. In the present case, the petitioners woke up to claim the relief after a long spell of time only on the ground that they came to know the reasons of curtailment of vacancies from 49 to 10 after the judgment was rendered in the case of Anoop Kumar Singh (Supra) on 29.11.2017. The reason that 39 vacancies advertised were backlog vacancies, therefore, the selection could not be made, first time came into knowledge of the petitioners on the finding returned in the case of Anoop Kumar Singh (Supra) and immediately thereafter, the writ petition in hand was filed claiming rights on the post of Sub Registrar.

34. This Court considered the submissions advanced and law reports relied upon by learned counsel for the parties and came to the conclusion that the delay and latches are relevant factor for a Court of law to determine the question as to whether the claim made by an applicant deserves consideration or not. Delay and / or latches on the part of petitioners may deprive them of the benefit, which has been provided to others.

35. Article 14 of the Constitution of India would not, in a situation of that

nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant. The relief of equality should be made within a reasonable time.

36. In the opinion of this Court, there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the present case, the selection proceeding was initiated in pursuance to an advertisement issued in the year 2001 and completed in the year 2004. The petitioners did not raise their grievances before appropriate forum at any level in regard to curtailment of vacancies from 49 to 10 and this writ petition has been filed after a long delay of almost 15 years.

37. This Court takes into account that there is inordinate delay and latches on the part of the petitioners in approaching to this Court. It is well settled that power to issue a writ is discretionary. One of the ground for refusing the relief under Article 226 of the Constitution of India is that the petitioners are guilty of delay and latches. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction, as the object of this Court is not to encourage agitation of stale claims, which have already been settled or where the rights of third parties have accrued in the meantime.

38. This Court while considering the issue of parity and discrimination has considered the judgment relied upon by learned counsel for the petitioners and has recorded that discrimination would not in a situation of the present nature be attracted, as it is well known that law leans in favour of those, who are alert and vigilant. The relief of equality should be made within reasonable time. Thus, in the opinion of this Court, the judgments relied upon by learned counsel for the petitioners are not applicable to the facts and circumstances of the present case.

39. This Court, on perusal of the material on record, is satisfied that the petitioners are not vigilant of their rights and acquiesce with the situation claiming relief, as prayed for in the present writ petition and waited for 15 years, thus, this Court refuses to exercise discretionary jurisdiction under Article 226 of the Constitution of India.

40. Accordingly, the writ petition lacks merit and is hereby dismissed.

(2019)10ILR A 979

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 30518 of 2018

The Chairman U.P. State Bridge Ltd. Lko & Anr. ...Petitioners

Versus

Subhash Pratap Bagri & Ors. ...Respondents

Counsel for the Petitioners:
Sri Nishant Shukla

Counsel for the Respondents:
C.S.C., Sri Ashok Shukla

A. Service Law - Natural Justice - enquiry officer failed to conduct Regular Enquiry - The Court held that the principles of natural justice has to be followed in departmental/ disciplinary proceedings

The Regular enquiry has to be conducted and principles of natural justice has to be followed in the disciplinary proceedings by the enquiry officer, which includes an opportunity to the employee to examine the witnesses of department, those are required to prove the charges and documents relied upon in the charge sheet, as also an opportunity to produce his witnesses in his defence and an opportunity of being heard in person. (Para 17)

Writ petition partly allowed (E-10)

Cases Cited:-

1. Raj Kumar Mehrotra vs. St. of Bihar (2006) SCC (L&S) 679

2. Chairman, LIC and others vs. Masilamani (2013) 6 SCC 530

3. St. of U.P. Vs. Deepak Kumar Writ Petition No. 34093 (S/B) of 2018

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Nishant Shukla, learned counsel for the petitioners, learned Standing Counsel for the opposite party nos.2 and 3 and Shri Ashok Shukla, learned counsel for the claimant-opposite party no.1.

2. By means of the present writ petition, the petitioners have challenged the judgment and order dated 01.08.2018 passed by the State Public Services Tribunal, Lucknow (in short "Tribunal") in the Claim Petition No.58 of 2016 (Subhash Pratap Bagri vs. State of U.P. & Ors.).

3. Facts in brief of the present case are that opposite party no.1/Subhash Pratap Bagri was appointed and joined as Assistant Engineer on 12.06.1989 and thereafter was promoted to the post of Deputy Project Manager on 30.06.1998. While the opposite party no.1 was posted as Unit In-charge in the Construction Unit, Gorakhpur during the period between 04.01.2005 to 12.08.2005, he was found responsible for gross negligence in the construction of Bridge over river Burhi Rapti. The charge sheet was issued on 11.03.2011 which was served on the opposite party no.2. The charge against the opposite party no.1 was that the curves found on the pillars were not made on correct place, as a result of which, there was a variation/gap between the concerned pillars from 28.25 meter to 31.79 meter and 24.6 meter respectively. However, the opposite party no.1 continued the work without taking correct measurement and without getting approval of revised drawing from his superiors and this act of the opposite party resulted in heavy additional expenditure. The opposite party no.1 submitted a reply to the charge sheet dated 11.03.2011 on 02.06.2011. Thereafter, in the matter in question, an enquiry was conducted and vide order dated 06.02.2015, disciplinary authority awarded a censure entry to the opposite party no.1 and also directed to recover a sum of Rs.13,27,000/- from him.

4. Aggrieved by the order dated 06.02.2015, the opposite party no.1 had filed a Claim Petition No.58 of 2016 before the Tribunal.

5. The Tribunal interfered in the order of punishment dated 06.02.2015 on the following grounds.

(i) The Enquiry Officer failed to conduct the Regular Enquiry by fixing

date, time and place for proving the charges and documents relied upon. Witnesses were not examined. The Enquiry Officer only on the basis of the reply of the charged employee and statement of cane operator submitted the enquiry report and based on the same, the order of punishment has been passed.

6. On the aforesaid, the Tribunal considered Rule 7 of the U. P. Government Servants (Discipline and Appeal) Rules, 1999 and judgments on issue.

7. After considering the material on record, particularly the enquiry report, the Tribunal, in its order dated 01.08.2018, on the procedure adopted by the Enquiry Officer, observed as under :

"मेरे द्वारा पत्रावली पर उपलब्ध जाँच आख्या का भलीभांति अवलोकन किया गया जिससे स्पष्ट होता है कि जाँच अधिकारी द्वारा याची को सुनवाई हेतु समय, स्थान व तिथि नियत नहीं किया गया और न ही उसको साक्षियों से परीक्षण/प्रतिपरीक्षण करने का अवसर दिया गया तथा मात्र याची द्वारा दिये गये आरोप पत्र के स्पष्टीकरण एवं क्रेन ऑपरेटर के कथन के आधार पर जाँच अधिकारी द्वारा जाँच पूर्णकर जाँच आख्या दण्डाधिकारी के समक्ष प्रस्तुत की गयी है। अतः स्पष्ट है कि जाँच अधिकारी द्वारा की गयी जाँच नियम विरुद्ध है और नियम विरुद्ध जाँच आख्या के आधार पर पारित दण्डादेश स्वतः निरस्त होने योग्य है।"

(ii) The order of punishment dated 06.02.2015 is unreasoned and non-speaking order.

8. On this aspect, the Tribunal after considering the judgment of the Hon'ble Apex Court in the case of ***Raj Kumar Mehrotra vs. State of Bihar reported in 2006 SCC (L&S) 679*** and the order dated 06.02.2015 came to the conclusion that order dated 06.02.2015 is a non-speaking and unreasoned order. The observation of Tribunal in this regard reads as under.

"उपरोक्त के सम्बन्ध में प्रश्नगत दण्डादेश के अवलोकन से स्पष्ट है कि दण्डाधिकारी ने दण्डादेश में याची को निर्गत आरोप पत्र एवं जांच अधिकारी द्वारा दी गयी जाँच आख्या के कथनों का उल्लेख करते हुए मात्र यह कहा है कि "जांच अधिकारी द्वारा प्रेषित आख्या एवं जाँच आख्या पर प्राप्त अपचारी के अभ्यावेदन पर सम्यक विचारोपरान्त श्री एस पी बागडी के वेतन /देयकों में से किये जाने के आदेश एतद्द्वारा पारित किये जाते है" जिसे किसी भी प्रकार से सकारण आदेश के अभाव में पारित किया गया दण्डादेश विधि के अंतर्गत मान्य नहीं है तथा निरस्त किये जाने योग्य है।

इस तरह उपरोक्त विवेचना के आधार पर यह स्पष्ट है कि याची के विरुद्ध लगाये गये लापरवाही व विदुषित कार्य प्रणाली के आरोप के सम्बन्ध में जाँच अधिकारी द्वारा न तो कोई साक्ष्य दिया गया और न ही उसे दोषी पाया गया है परन्तु दण्डाधिकारी द्वारा बिना किसी साक्ष्य के आधार पर अपना मत स्थिर करके शासकीय क्षति का स्वतः निर्धारण करते हुए याची के विरुद्ध बिना कोई नोटिस निर्गत किये वसूली का आदेश पारित कर दिया गया जो मेरे विचार से प्राकृतिक न्याय के सिद्धांतों के विपरीत है। ऐसी दशा में प्रश्नगत दण्डादेश नियम विरुद्ध होने के कारण निरस्त किये जाने योग्य है। तदनुसार याचिका स्वीकार किये जाने योग्य है।"

9. After recording specific findings, as stated herein above, by means of the order dated 01.08.2018, the Tribunal

allowed the claim petition with the following direction :-

"याचिका स्वीकार की जाती है | आलोच्य दण्डादेश दिनांकित 06.02.2015 (संलग्नक स. -ए -1) निरस्त किया जाता है | याची समस्त पारिणामिक सेवा लाभ पाने का अधिकारी है जो इस आदेश द्वारा रोके गये हो| विपक्षीगण को यह निर्देशित किया जाता है कि यदि उक्त आदेश के क्रम में याची से कोई वसूली की जा चुकी हो तो उसे इस निर्णय की सत्यप्रतिलिपि प्राप्ति के तीन माह के अन्दर वापस करना सुनिश्चित करें|

10. Assailing the order dated 01.08.2018, it is submitted by learned counsel for the petitioner that the Model Conduct, Discipline and Appeal Rules For Public Undertakings are applicable in the present case and the Tribunal wrongly considered the Rules known as U.P. Government Servants (Discipline & Appeal) Rules, 1999 and as such the order dated 01.08.2018 based on the Rules of 1999 is unsustainable.

11. The learned counsel for the petitioner further submitted that the impugned order dated 01.08.2018 passed by the State Public Service Tribunal, Lucknow is contrary to law laid down by Hon'ble the Apex Court in the case of Chairman, Life Insurance Corporation of India and others vs. A. Masilamani, (2013) 6 SCC 530, wherein it has been, held as under :-

"15. In view of the issues raised by the learned Counsel for the parties, the following questions arise for our consideration:

15.1 When a court/tribunal sets aside the order of punishment imposed in a disciplinary proceeding on technical grounds, i.e., non-observance of statutory provisions, or for violation of the principles of natural justice, then whether the superior court, must provide opportunity to the disciplinary authority, to take up and complete the proceedings, from the point that they stood vitiated ; and

15.2 If the answer to question No. 1 is, that such fresh opportunity should be given, then whether the same may be denied on the ground of delay in initiation, or in conclusion of the said disciplinary proceedings.

16. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee. It must remit the concerned case to the disciplinary authority, for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide: Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc., AIR 1994 SC 1074; Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls and Ors. : (2002) 10 SCC 293; U.P. State Spinning C. Ltd. v. R.S. Pandey and Anr., (2005) 8 SCC 264; and Union of India v. Y.S. Sandhu, Ex-Inspector, AIR 2009 SC 161).

17. The second question involved herein, is also no longer res integra. Whether or not the disciplinary authority should be given an opportunity, to complete the enquiry afresh from the point that it stood vitiated, depends upon the gravity of delinquency involved. Thus, the court must examine, the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that

courts/tribunals, are not competent to quash the charge-sheet and related disciplinary proceedings, before the same are concluded, on the aforementioned grounds.

18. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limitation of judicial review. In the event that, the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court. The same principle is applicable, in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question, have to be examined, taking into consideration the gravity/magnitude of charges involved therein. The essence of the matter is that the court must take into consideration, all relevant facts and to balance and weigh the same, so as to determine, if it is infact in the interest of clean and honest administration, that the judicial proceedings are allowed to be terminated, only on the ground of delay in their conclusion. (Vide: State of U.P. v. Brahm Datt Sharma and Anr. AIR 1987 SC 943; State of Madhya Pradesh v. Bani Singh and Anr. AIR 1990 SC 1308; Union of India and Anr. v. Ashok Kacker : 1995 (1) SCC 180; Secretary to Government, Prohibition & Excise Department v. L. Srinivasan (1996) 3 SCC 157; State of Andhra Pradesh v. N. Radhakishan AIR 1998 SC 1833; M.V. Bijlani v. Union of India and Ors. AIR 2006 SC 3475; Union of India and Anr. v. Kunisetty Satyanarayana AIR 2007 SC 906; and The Secretary, Ministry of Defence and Ors. v. Prabash Chandra Mirdha AIR 2012 SC 2250)."

12. Per contra learned counsel for the claimant/respondent, on the basis of the record, submitted that order of Tribunal is not liable to be interfered as the same is perfectly valid being passed after considering the material available on record. The Tribunal after considering the order dated 06.02.2015 and judgment on the issue of requirement of reasonsed order recorded specific finding that the order dated 06.02.2015 is a non speaking order and this is evident from the same. The finding on the procedure of holding the enquiry is also perfectly valid and requires not interference. In this regard he placed reliance of paras 4.5 and 4.6 of the claim petition and reply to the same given in para 8 of written statement. Further submitted that the matter is old and no fruit full purpose would be served in remanding the matter, in facts of the case. Prayer to dismiss the writ petition.

13. The reasons and findings given by the Tribunal on the issue to the effect that the order of punishment dated 06.02.2015 is a non-speaking and unreasoned order, have not been assailed by the counsel for the petitioner.

14. We have learned counsel for the parties and gone through the records.

15. On the findings of the Tribunal which has been assailed by the petitioner, on the issues of holding the proper regular enquiry and applicability of Rules of 1999, we have considered the Rules of 1999 and Model Conduct Rules. We find that Model Conduct Rules are applicable.

16. For the purposes of adjudication for present case, we would like to refer the relevant Rule/Clause i.e. Rule/Clause 35 of the Model Conduct Rules, the same on reproduction reads as under :

*"**Rule/Clause 35 (1)** No order imposing any of the major penalties specified in Clauses (e), (f) and (g) of Rule 33 shall be made except after an inquiry is held in accordance with this rule.*

2. Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against an employee, it may itself enquire into, or appoint any public servant (hereinafter called the inquiring authority) to inquire into the truth thereof.

3. Where it is proposed to hold an inquiry, disciplinary authority shall frame definite charges on the basis of the allegations against the employee. The charges, together with a statement of the allegations, on which they are based, a list of document by which and a list of witnesses by whom, the articles of charge are proposed to be sustained, shall be communicated in writing to the employee, who shall be required to submit within such time as may be specified by the Disciplinary Authority (not exceeding 15 days), a written statement whether he admits or denies any of or all the articles of charge.

Explanation--It will not be necessary to show the documents listed with the charge-sheet or any other document to the employee at this stage.

4. On receipt of the written statement of the employee, or if no such statement is received within the time specified, an enquiry may he held by the Disciplinary Authority itself, or by any other public servant appointed as an Inquiring Authority under Sub-clause (2) :

Provided that it may not be necessary to hold an enquiry in respect of the charges admitted by the employee in his written statement. The disciplinary authority shall, however, record its findings on each such charge.

(5) Where the disciplinary authority itself inquires or appoints an inquiring authority for holding an inquiry, it may, by an order appoint a public servant to be known as the 'Presenting Officer' to present on its behalf the case in support of the articles of charge.

(6) The employee may take the assistance of any other public servant but may not engage a legal practitioner for the purpose.

(7) On the date fixed by the inquiring authority, the employee shall appear before the Inquiring Authority at the time, place and date specified in the notice. The Inquiring Authority shall ask the employee whether he pleads guilty to any of the articles of charge the inquiring authority shall record the plea, sign the record and obtain the signature of the employee concerned thereon. The inquiring Authority shall return a finding of guilt in respect of those articles of charge to which the employee concerned pleads guilty.

(8) If the employee does not plead guilty, the inquiring authority shall adjourn the case to a later date not in exceeding thirty days after recording an order that the employee may for the purpose of preparing his defence :-

(i) inspect the document listed with the charge-sheet ;

(ii) submit a list of additional documents and witnesses that he wants to examine ;

(iii) be supplied with the copies of the statements of witnesses, if any listed the charge-sheet.

Relevancy of the additional documents and the witnesses referred to in sub-clause D (ii) above will have to be given by the employee concerned and the documents and the witnesses shall be summoned if the Inquiring Authority is satisfied about their relevance to the charges, under inquiry.

(9) The Inquiring Authority shall ask the authority in whose custody or possession the documents are kept, for the production of the documents on such date as may be specified.

(10) The authority in whose custody or possession the requisitioned documents are, shall arrange to produce the same before the inquiring authority on the date place and time specified in the requisition.

Provided that the authority having the custody or possession of the requisitioned documents may claim privilege if the production of such documents will be against the public interest or the interest of the Corporaton/Company. In that event, it shall inform the inquiring authority accordingly.

(11) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the employee. The Presenting Officer shall be entitled tore-examine the witnesses on any points on which they have been cross-examined, but not on a new matter, without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit.

(12) Before the close of the prosecution case, the inquiring authority may, in its discretion, allow Presenting Officer to produce evidence not included in the charge-sheet or may itself call for new evidence or recall or re-examine any witness. In such case the employee shall be given opportunity to inspect the documentary evidence before it is taken on record ; or to cross-examine a witness, who has been so summoned.

(13) When the case for the disciplinary authority is closed, the employee may be required to state his defence, orally or in writing, as he may refer. If the defence is made orally, it shall be recorded and the employee shall be required to sign the record. In either case a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.

(14) The evidence on behalf of the employee shall then be produced. The

employee may examine himself or take the assistance of another employee as given in rule 32 (6) to examine on his behalf if he so prefers. The witnesses produced by the employee shall then be examined and shall be liable to cross-examination, re-examination and examination by the inquiring authority according to the provision applicable to the witnesses for the disciplinary authority.

(15) The Inquiring Authority may, after the employee closes his case, and shall, if the employee has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purposes of enabling the employee to explain any circumstances appearing in the evidence against him.

(16) After the completion of the production of the evidence, the employee and the Presenting Officer may file written briefs of their respective cases within 15 days of the date of completion of the production of evidence.

(17) If the employee does not submit the written statement of defence referred to in sub-rule 93) or before the date specified for the purpose or does not appear in person, or through the assisting offer or otherwise fails or refuses to comply with any of the provisions of those rules, the inquiring authority may hold the enquiry ex parte.

(18) Whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry ceases to exercise jurisdiction therein, and is succeeded by another inquiry authority which has and which exercise, such jurisdiction, the inquiring authority so succeeding may act on the evidence so recorded by its predecessor, or partly recorded by its predecessor and partly recorded by itself.

Provided that if the succeeding inquiring authority is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, it may recall, examine, cross-examine and re-examine and such witnesses as here in before provided.

(19) (i) After the conclusion of the enquiry, report shall be prepared and it shall contain -

(a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehaviour ;

(b) a gist of the defence of the employee in respect of each article of charge ;

(c) an assessment of the evidence in respect of each article of charge ;

(d) the findings of each article of charge and the reasons therefore.

Explanation :- If in the opinion of the inquiring authority the proceedings of the inquiry establish any article of charge different from the original articles of the charge, if any record its findings on such article of charge ;

Provided that the findings on such articles of charge shall not be recorded unless the employee has either admitted the facts on which such article of

charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(ii) The enquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall include :-

(a) The report of the inquiry prepared by it under sub-clause (i) above ;

(b) The written statement of defence, if any submitted by the employee referred to in sub-rule (13) ;

(c) The oral and documentary evidence produced in the course of the inquiry ;

(d) Written briefs referred to in sub-rule (16), if any ; and

(e) The orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry."

17. The above quoted provision speaks that regular enquiry has to be conducted and principles of natural justice have to be followed in the disciplinary proceedings by the enquiry officer, which includes an opportunity to the employee to examine the witnesses of department, those are required to prove the charges and documents relied upon in the charge sheet, as also an opportunity to produce his witnesses in his defence and an opportunity of being heard in person.

18. In what manner the principles of natural justice have to be followed in the departmental/disciplinary proceedings has already explained by the Apex Court as well as by this Court.

19. The Division Bench of this Court, after considering the catena of judgments on the issue of holding the disciplinary enquiry i.e. a regular enquiry, in the judgment dated 28.11.2018 passed in Writ Petition No.34093 (S/B) of 2018 (State of U.P. v. Deepak Kumar) has observed asunder:-

"It is settled by the catena of judgments that it is the dutyof Enquiry Officer to hold ''Regular Enquiry'. Regularenquiry means that after reply to the charge-sheet theEnquiry Officer must record oral evidence with anopportunity to the delinquent employee to cross-examinethe witnesses and thereafter opportunity should be given tothe delinquent employee to adduce his evidence in defence.The opportunity of personal hearing should also begiven/awarded to the delinquent employee. Even if thecharged employee does not participate/co-operate in theenquiry, it shall be incumbent upon the Enquiry Officer toproceed ex-parte by recording oral evidence. For regularenquiry, it is incumbent upon the Enquiry Officer to fixdate, time and place for examination and cross-11S.A. No. 175 of 2005examination of witnesses for the purposes of proving ofcharges and documents, relied upon and opportunity todelinquent employee should also be given to produce hiswitness by fixing date, time and place. After completion ofenquiry the Enquiry Officer is required to submit its report,stating therein all the relevant facts, evidence andstatement of findings on each charge and reasons thereof,and thereafter, prior to imposing

any punishment, the copyof the report should be provided to charged officer for thepurposes of submission of his reply on the same. Thepunishment order should be reasoned and speaking andmust be passed after considering entire material on record.(vide: Jagdish Prasad Vs. State of U.P. 1990 (8) LCD 486;Avatar Singh Vs. State of U.P. 1998 (16) LCD 199; TownArea Committee, Jalalabad Vs. Jagdish Prasad 1979 Vol. ISCC 60; Managing Director, U.P. Welfare HousingCorporation Vs. Vijay Narain Bajpai 1980 Vol. 3 SCC459; State of U.P. Vs. Shatrughan Lal 1998 (6) SCC 651;Chandrama Tewari Vs. Union of India and others AIR1998 SC 117; Anil Kumar Vs. Presiding Officer and othersAIR 1985 SC 1121; Radhey Kant Khare Vs. U.P. Co-operative Sugar Factories 2003 (21) LCD 610; RoopSingh Negi Vs. Punjab National Bank and others (2009) 2SCC 570; M.M. Siddiqui Vs. State of U.P. and others 2015(33) LCD 836; Moti Ram Vs. State of U.P. and others 2013(31) LCD 1319; Kaptan Singh Vs. State of U.P. and others2014 (4) ALJ 440."

20. Taking into account the relevant provision i.e. Rule/Clause 35 of Model Conduct Rules and principles settled on the issue of holding of departmental enquiry, we find from the record, particularly para 4.5 & 4.6 of claim petition and reply to the same given in para 8 of the written statement of the petitioner filed before the Tribunal as well as as enquiry report on record, that Enquiry Officer failed to conduct the regular enquiry and thus enquiry report is vitiated and being so subsequent order based on the same are unsustainable.

21. In regard to the finding of the Tribunal to the effect that order dated 06.02.2015 is a non-speaking order, though not assailed by the learned counsel for the petitioner, we have perused the order dated 06.02.2015 and we find that reasons for coming to the conclusion have not mentioned in the order dated 06.02.2015, order of punishment and being so the finding of the Tribunal in this regard is perfectly valid. The relevant portion of order dated 06.02.2015 reads as under :-

"अतः जाँच अधिकारी द्वारा प्रेषित आख्या एवं जाँच आख्या पर प्राप्त अपचारी के अभ्यावेदन पर सम्यक विचारोपरान्त श्री एस. पी. बागड़ी। उप परियोजना प्रबन्धक (सिविल) को परिनिन्दित करते हुये शासकीय क्षति रू. 13. २७ लाख (तरह लाख सत्ताईस हजार मात्र) की वसूली श्री एस. पी. बागड़ी, के वेतन/देयको में से किये जाने के आदेश एतद्द्वारा पारित किये जाते है।"

22. Considering the facts of the case including the contents of charge sheet and finding recorded by the Tribunal as well as by us in the preceeding paras and the law laid down by the Hon'ble Apex Court in the case of ***Chairman, Life Insurance Corporation of India (supra),*** we are of the considered opinion that the order dated 01.08.2018 passed by the Tribunal is contrary to law and being is liable to be partly set aside/modified.

23. For the foregoing reasons, writ petition is partly allowed and the impugned order dated 01.08.2018 passed by State Public Service Tribunal, Lucknow is set aside to the extent it provides consequential benefits and refund of amount recovered. The matter is remanded back to the opposite party no.2 to conduct the enquiry afresh from the stage of submitting the charge sheet dated 11.03.2011. Issue of providing

consequential benefits and refund of amount would considered by the appointing authority after conclusion/final outcome of the enquiry proceeding.

24. Further, till the passing of the final order in the matter in question by the disciplinary authority, no recovery shall be made from the claimant/opposite party no.1 and the amount recovered from the opposite party no.1, in pursuance to the order dated 06.02.2015, shall be subject to outcome of the final order passed by the disciplinary authority.

25. The disciplinary authority is directed to conclude the entire proceeding within six months from the date of receipt of a certified copy of this order.

(2019)10ILR A 989

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 567 of 2012

Atul Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.P. Singh, Sri S.P. Singh.

Counsel for the Respondents:
C.S.C., Sri Amit Dwivedi, Sri Manik Sinha, Sri Manish Sinha, Sri Sameer Kalia, Sri Uttam Kumar Verma

A. Service Jurisprudence - appointment - petitioner's services stand terminated when regular selection was to be made on the post of Manager, Printing Press - he was alternatively adjusted against the post of Research Assistant in the Department of Dairy and Animal Husbandry - appointment under challenge - petitioner lacks requisite qualification for the post of Research Assistant

Held:- The submissions of the petitioner that due opportunity to defend his case was not accorded to him is covered under the phrase "Useless Formality Theory" as the petitioner do not possess required qualification for the post of Research Assistant. (Para 19)

The principle of Negative Equality envisaged in *State of Orissa Vs. Mamta Mohanty* wherein it was observed that if similarly situated persons were granted some benefit inadvertently or by mistake, that order do not confer any legal right on the petitioner to get some relief. However, under such circumstance, the court is duty bound to rectify the mistake rather than perpetuate the same. (Para 20).

Writ Petition dismissed (E-10)

Cases Cited:-

1. Ajay Singh Vs St of U.P. (2011) SCC OnLine All 2201

2. St of Orissa Vs Mamta Mohanty (2011) 3 SCC 436

3. Aligarh Muslim University Vs Mansoor Ali Khan (2000) 7 SCC 529

4. St of Bihar & ors Vs Kameshwar Prasad Singh & anr AIR (2000) SC 2306

5. U.O.I. & anr Vs International Trading Co. & anr AIR (2003) SC 3983

6. Lalit Mohan Pandey Vs Pooran Singh & ors AIR (2004) SC 2303

7. M/s Anand Buttons Ltd. Etc. Vs St of Har & ors AIR (2005) SC 5565

8. Kastha Niwarak G.S.S. Maryadit, Indor Vs President, Indore Development Authority AIR (2006) SC 1142

9. Gulam Rasool Lone Vs St of J & K JT (2009) (13) SC 422

(Delivered by Hon'ble Anil Kumar, J.
Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioner, learned State Counsel for the opposite party No. 1, Sri Sameer Kalia, learned counsel for the opposite party No. 2 and Sri Uttam Kumar Verma, learned counsel for the opposite party Nos. 3 and 4.

2. By means of the present writ petition, the petitioner has challenged the orders dated 02.08.2011 and 17.03.2012, passed by the opposite party Nos. 2 and 4 (Annexure Nos. 1 and 2 to the writ petition).

3. Facts, in brief, of the present case are to the effect that initially on 14.12.1987, the petitioner was appointed on the post of Manager, Printing Press in the pay-scale of Rs. 500-900. Vide letter dated 03.01.1991, one post of Manager, Printing Press was sanctioned and it was directed that on the said post, regular selection be made and after making regular selection, the services of the petitioner shall be terminated.

4. On 31.07.1997, an order was passed in the Writ Petition No. 4138 of 1997 filed by the petitioner before this Court challenging the advertisement for holding regular selection for the post of Manager. Relevant portion of the order dated 31.07.1997 reads as under:-

"In the meantime no result shall be declared nor shall any appointment be made in pursuance of the advertisement dated 4th December, 1992 for which the meeting is scheduled to be held on 31.01.1997 for the post of manager printing press in the University concerned."

5. In the aforesaid writ petition, counter affidavit was filed in the year 1998 on behalf of opposite party No. 3 stating therein that the regular appointment on the post of Manager, Printing Press has been made and the petitioner has been adjusted against the post of Research Assistant in pay-scale of Rs. 500-900. The writ petition was dismissed by this Court vide order 06.12.2000.

6. Thereafter, the petitioner was transferred along with his post of Research Assistant in the Department of Dairy and Animal Husbandry and it was directed that the work shall be taken from the petitioner. Thereafter, on a complaint dated 16.08.2010 under Section 23 of the U.P. Krishi Evam Praudyogik Vishwavidyalaya Adhiniyam, 1958, with regard to the appointment/adjustment of the petitioner on the post of Research Assistant, the opposite party No. 2 issued the order dated 02.08.2011, whereby directed the opposite party No. 3 to take appropriate decision in the matter of appointment of the petitioner keeping in view the report of University and direction of the State Government. Thereafter, vide order dated 15.04.2011, the opposite party No. 1 refused to provide the revised pay-scale on the ground that the appointment of the petitioner on the post of Research Assistant is in violation of Government Orders dated 03.01.1990, 27.02.1991 and 30.08.1990. Thereafter, vide order dated 27.06.2011, a Committee was constituted by the opposite party No. 3 to inquire into the matter/appointment of the petitioner on the post of Research Assistant.

7. The Committee so constituted submitted its report dated 31.10.2011. Considering the report of the Committee dated 31.10.2011, the petitioner was asked to submit his reply, which he submitted on 06.12.2011, and he was provided personal hearing fixing 07.12.2012, on which date the petitioner was heard. Thereafter, vide order dated 17.03.2012, the services of the petitioner were terminated.

8. In view of the aforesaid factual background, the present writ petition has been filed before this Court.

9. Learned counsel for the petitioner submitted that the petitioner has not been given adequate opportunity to defend his case.

10. Learned counsel for the petitioner further submitted that the service of the petitioner has been terminated, which is a major penalty and before terminating the petitioner, a full-fledged enquiry should have been done in the matter. However, no such steps were taken by the respondents, as such, the impugned order dated 17.03.2012, terminating the services of the petitioner, is violative of principles of natural justice and arbitrary in nature.

11. Learned counsel for the petitioner further submitted that in identical circumstances, four persons, who did not possess the requisite qualification, have been retained in service and the petitioner was terminated from service.

12. The prayer is to allow the writ petition.

13. Learned counsel for the respondents while opposing the submission made by learned counsel for the petitioner submitted that the petitioner did not possess the requisite qualification, which was to be possessed by a person to be appointed on the post of Research Assistant i.e. B.Sc Krishi. In view of the said fact and after conducting the enquiry wherein, the petitioner was given the opportunity to defend his case, and considering his reply, the impugned order of termination was passed, which is just and proper in the facts of the case.

14. We have heard the learned counsel for the parties and gone through the record carefully.

15. Needless to mention here that learned counsel for the petitioner has not disputed the fact that for the post of Research Assistant, the requisite qualification is B.Sc. Krishi and the petitioner did not possess the said qualification. Rather the petitioner possessed the qualification of M.A. and Ph.D.

16. In view of the aforesaid facts, the admitted position emerges out to the effect that the petitioner did not possess the requisite qualification to be appointed on the post of Research Assistant in the Chandrasekhar Azad Agriculture and Technology University, Kanpur and also the minimum qualification for the said post cannot be relaxed, contrary to this, no Rule has been placed before us.

17. In this regard, this Court in the case of ***Ajay Singh v. State of U.P. reported in 2011 SCC OnLine All 2201 : (2011) 3 All LJ 38 : (2011) 87 ALR (SUM 14) 7 : 2011 Lab IC 3113,*** observed as under:-

"11. Before going into the question as to whether the respondents

were justified in making appointment of respondent No. 5 by permitting relaxation in the qualification even if this Court assume that such relaxation was permissible under 1986 Rules, the fact remains that before acting thereon, no modification, amendment or readvertisement of the post in question took place with modified qualification. This resulted ex facie denial of opportunity to such other persons who could have satisfied the relaxed qualification but failed to apply since the advertisement which was actually made did not contain such qualification. This also makes appointment of respondent No. 5 pursuant to the relaxed qualification illegal being violative of Articles 15 and 16 of Constitution of India having resulted in denial of equal opportunity of employment to others. Even cases where there is some change in the qualification etc. under the Rules etc. after an advertisement is made, it has consistently been the view of the Court that in such a case afresh advertisement or modified advertisement, as a rule, must be published so as to give opportunity to the people at large who satisfy the altered, modified or changed qualification to apply. This is consistent with the constitutional requirement of giving equal opportunity of employment to all.

12. In State of M.R v. Shyama Pardi, (1996) 7 SCC 118 : (AIR 1996 SC 2219) the Apex Court held that an appointment made in the absence of requisite qualification prescribed under Rules is void ab initio and neither it confers any right upon the person concerned to hold the post or continue if he/she has been appointed though did not possess requisite qualification nor any direction for payment of salary can be issued in such cases.

13. A similar controversy arose in the case of Mohd. Sartaj v. State of U.P., JT 2006 (1) SC 331 : (AIR 2006 SC 3492) and the Apex Court held that an appointment lacking requisite qualification would be a nullity. A question also raised before the Apex Court that if subsequently the candidate has attained the requisite qualification whether that would validate the appointment but it was replied by the Apex Court that the validity of an appointment has to be considered at the time of appointment and if the appointment was made by ignoring the requisite qualification or if it is found that the candidate did not possess requisite qualification at that time of appointment, the appointment would be void ab initio.

17. Learned Standing Counsel or Sri R.L. Verma, Advocate appearing on behalf of respondent No. 5 also could not place any pro vision to show that the Rules pertaining to recruitment under 1986 Rules could have been relaxed by the Director General. Rule 25 of 1986 Rules confers power of relaxation relating to Rules regulating conditions of service and reads as under:

"25. Relaxation in the conditions of service. Where the State Government is satisfied that the operation of any Rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, not withstanding anything contained in the Rules applicable to the case, by order, dispense with or relax the requirements of that Rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner."

18. The distinction between Rules, pertaining to recruitment and condition of service came up for

consideration before the Apex Court in the case of Keshav Chandra Joshi v. Union of India, 1992 Supp (1) SCC 272 : (AIR 1991 SC 284) where the Rule permitted relaxation of conditions of service and it was held that the Rule did not permit relaxation of recruitment Rules. It was reiterated in Syed Khalid Rizvi v. Union of India, 1993 Supp (3) SCC 575 wherein it was held:--

"Conditions of recruitment and conditions of service are distinct and the latter is precedent by an appointment according to Rules. Former cannot be relaxed."

19. In Keshav Chandra Joshi (supra) the Apex Court also says that Rules permitting relaxation of provisions regulating conditions of service cannot be invoked to suggest relaxation of Rules regulating recruitment. The Rules relating to age, qualification, other eligibility process of selection etc. that is all the steps anterior to appointment constitute Rules regulating recruitment. Under 1986 Rules, firstly the Rules relating to recruitment cannot be relaxed and secondly even Rule 25 of 1986 Rules which permits relaxation of Rules regulating conditions of service authorises the State Government or Director General to do so hence such relaxation by Director General is impermissible."

18. We also like to refer the judgment passed by the Apex Court in the case of State of Orissa v. Mamata Mohanty reported in (2011) 3 SCC 436. The relevant paras are reproduced hereunder:-

"Appointment/employment without advertisement

35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386 : AIR 1992 SC 789] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403 : AIR 1992 SC 2130] , Excise Supdt. v. K.B.N. Visweshwara Rao [(1996) 6 SCC 216 : 1996 SCC (L&S) 1420] , Arun Tewari v. Zila Mansavi Shikshak Sangh [(1998) 2 SCC 332 : 1998 SCC (L&S) 541 : AIR 1998 SC 331] , Binod Kumar Gupta v. Ram Ashray Mahoto [(2005) 4 SCC 209 : 2005 SCC (L&S) 501 : AIR 2005 SC 2103] , National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152 : AIR 2006 SC 2319] , Telecom District Manager v. Keshab Deb [(2008) 8 SCC 402 : (2008) 2 SCC (L&S) 709] , State of Bihar v. Upendra Narayan

Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and State of M.P. v. Mohd. Abrahim [(2009) 15 SCC 214 : (2010) 1 SCC (L&S) 508].)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

Order bad in inception

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide Upen Chandra Gogoi v. State of Assam [(1998) 3 SCC 381 : 1998 SCC (L&S) 872 : AIR 1998 SC 1289] , Mangal Prasad Tamoli v. Narvadeshwar Mishra [(2005) 3 SCC 422 : AIR 2005 SC 1964] and Ritesh Tewari v. State of U.P. [(2010) 10 SCC 677 : (2010) 4 SCC (Civ) 315 : AIR 2010 SC 3823])

38. The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. [Vide M.S. Patil (Dr.) v. Gulbarga University [(2010) 10 SCC 63 : (2010) 2 SCC (L&S) 785 : AIR 2010 SC 3783] .]

Eligibility lacking

39. In Prit Singh (Dr.) v. S.K. Mangal [1993 Supp (1) SCC 714 : 1993 SCC (L&S) 246 : (1993) 23 ATC 783] this Court examined the case of a person who did not possess the requisite percentage of marks as per the statutory requirement and held that he cannot hold the post observing: (SCC pp. 718-19, paras 12-13)

"12. ... It need not be pointed out that the sole object of prescribing qualification that the candidate must have a consistently good academic record with first or high second class Master's degree for appointment to the post of a Principal, is to select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration. ... The appellant had not secured even second class marks in his

Master of Arts Examination whereas the requirement was first or high second class (55%). The irresistible conclusion is that on the relevant date the appellant did not possess the requisite qualifications.

13. ... on the date of the appointment the appellant did not possess the requisite qualifications and as such his appointment had to be quashed."

(emphasis added)

40. In Pramod Kumar v. U.P. Secondary Education Services Commission [(2008) 7 SCC 153 : (2008) 2 SCC (L&S) 244 : AIR 2008 SC 1817] this Court examined the issue as to whether a person lacking eligibility can be appointed and if so, whether such irregularity/illegality can be cured/condoned. After considering the provisions of the U.P. Secondary Education Services Commission Rules, 1983 and the U.P. Intermediate Education Act, 1921, this Court came to a conclusion that lacking eligibility as per the rules/advertisement cannot be cured at any stage and making appointment of such a person tantamounts to an illegality and not an irregularity, and thus cannot be cured. A person lacking the eligibility cannot approach the court for the reason that he does not have a right which can be enforced through court.

41. This Court in Pramod Kumar [(2008) 7 SCC 153 : (2008) 2 SCC (L&S) 244 : AIR 2008 SC 1817] further held as under: (SCC p. 160, para 18)

"18. If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularised, particularly, when the statute in no unmistakable term says so. Only an irregularity can be. [See State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] , National Fertilizers Ltd. v. Somvir Singh [(2006) 5 SCC 493 : 2006 SCC (L&S) 1152 : AIR 2006 SC 2319] and Post Master General v. Tutu Das (Dutta) [(2007) 5 SCC 317 : (2007) 2 SCC (L&S) 179] .]"

Relaxation

42. In J.P. Kulshrestha (Dr.) v. Allahabad University [(1980) 3 SCC 418 : 1980 SCC (L&S) 436 : AIR 1980 SC 2141] issue of relaxation of eligibility came up for consideration before this Court wherein it was held as under: (SCC pp. 425-26, paras 15-16)

"15. ... We regretfully but respectfully disagree with the Division Bench and uphold the sense of high second class attributed by the learned Single Judge. The midline takes us to 54% and although it is unpalatable to be mechanical and mathematical, we have to hold that those who have not secured above 54% marks cannot claim to have obtained a high second class and are ineligible.

16. ... We have earlier held that the power to relax, as the Ordinance now runs, insofar as high second class is concerned, does not exist. Inevitably, the appointment of the 3 respondents violate the Ordinance and are, therefore, illegal."

(emphasis added)

43. In Rekha Chaturvedi v. University of Rajasthan [1993 Supp (3) SCC 168 : 1993 SCC (L&S) 951 : (1993)

25 ATC 234] this Court again dealt with the power of relaxation of minimum qualifications as the statutory provisions applicable therein provided for relaxation, but to what extent and under what circumstances, such power could be exercised was not provided therein. Thus, this Court issued the following directions: (SCC p. 176, para 11)

"A. The University must note that the qualifications it advertises for the posts should not be at variance with those prescribed by its Ordinance/Statutes.

B. The candidates selected must be qualified as on the last date for making applications for the posts in question or on the date to be specifically mentioned in the advertisement/notification for the purpose. ...

C. When the University or its Selection Committee relaxes the minimum required qualifications, unless it is specifically stated in the advertisement/notification both that the qualifications will be relaxed and also the conditions on which they will be relaxed, the relaxation will be illegal.

D. The University/Selection Committee must mention in its proceedings of selection the reasons for making relaxations, if any, in respect of each of the candidates in whose favour relaxation is made.

E. The minutes of the meetings of the Selection Committee should be preserved for a sufficiently long time, and if the selection process is challenged until the challenge is finally disposed of. An adverse inference is liable to be drawn if the minutes are destroyed or a plea is taken that they are not available."

(emphasis added)

44. In P.K. Ramachandra Iyer v. Union of India [(1984) 2 SCC 141 : 1984 SCC (L&S) 214 : AIR 1984 SC 541] this Court while dealing with the same issue, held that once it is established that there is no power to relax the essential qualifications, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised.

45. In A.P. Public Service Commission v. B. Swapna [(2005) 4 SCC 154 : 2005 SCC (L&S) 452] this Court held that: (SCC p. 160, para 15)

"15. Another aspect which this Court has highlighted is scope for relaxation of norms. ... Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated."

(emphasis supplied)

46. This Court in Kendriya Vidyalaya Sangathan v. Sajal Kumar Roy [(2006) 8 SCC 671 : (2007) 1 SCC (L&S) 23] held: (SCC p. 675, para 11)

"11. ... The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age-limits. ... The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary

jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof."

(emphasis added)

47. In Food Corpn. of India v. Bhanu Lodh [(2005) 3 SCC 618 : 2005 SCC (L&S) 433 : AIR 2005 SC 2775] this Court held: (SCC p. 628, para 12)

*"12. ... Even assuming that there is a power of relaxation under the Regulations, ... the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases.... We do not think that they are intended as an ''open sesame' for all and sundry. The wholesale go-by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government under Section 6(2) of the Act." *

48. In Bhanu Prasad Panda (Dr.) v. Sambalpur University [(2001) 8 SCC 532 : 2002 SCC (L&S) 14] one of the questions raised has been as to whether a person not possessing the required eligibility of qualification i.e. 55% marks in Master's degree can be appointed in view of the fact that UGC refused to grant relaxation. On the issue of relaxation of eligibility, the Court held as under: (SCC p. 536, para 5)

"5. ... the essential requirement of academic qualification of a particular standard and grade viz. 55%, in the ''relevant subject' for which the post is advertised, cannot be rendered redundant or violated.... ... The rejection by UGC of the request of the Department in this case to relax the condition relating to 55% marks at postgraduation level ... is to be the last word on the claim of the appellant and there could be no further controversy raised in this regard."

(emphasis added)

49. In view of the above, this Court held that the appointment of the appellant therein has rightly been quashed as he did not possess the requisite eligibility of 55% marks in Master's course.

50. In the absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the statute, it cannot be exercised arbitrarily. (See Union of India v. Dharam Pal [(2009) 4 SCC 170 : (2009) 1 SCC (L&S) 790] .) Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the statute. Such power can be exercised only to make such legislation effective so that the ultimate power will not become illusory, which otherwise would be contrary to the intent of the legislature. (Vide Matajog Dobey v. H.S. Bhari [AIR 1956 SC 44 : 1956 Cri LJ 140] and State of Karnataka v. Vishwabharathi House Building Coop. Society [(2003) 2 SCC 412] .)

51. More so, relaxation in this manner is tantamount to changing the

selection criteria after initiation of selection process, which is not permissible at all. Rules of the game cannot be changed after the game is over. (Vide K. Manjusree v. State of A.P. [(2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841 : AIR 2008 SC 1470] and Ramesh Kumar v. High Court of Delhi [(2010) 3 SCC 104 : (2010) 1 SCC (L&S) 756 : AIR 2010 SC 3714] .)"

19. So far as the argument raised by the learned counsel for the petitioner to the effect that the petitioner was not given the proper opportunity to defend his case nor proper enquiry was done in the matter in question is concerned, the same has got no force because in the present case, as per the pleadings on record as well as the arguments advanced by the learned counsel for the parties, the position emerges out is to the effect that the petitioner did not possess the requite qualification to be appointed on the post of Research Assistant i.e. B.Sc. Krishi, as such, giving opportunity of hearing was a mere formality. The present case, in facts of the case, is covered under the phrase "useless formality theory".

20. With regard to phrase "useless formality theory", the Apex Court in the case judgment passed in the case of Aligarh Muslim University v. Mansoor Ali Khan reported in (2000) 7 SCC 529, observed as under:-

"Point 5

20. This is the crucial point in this case. As already stated under Point 4, in the case of Mr Mansoor Ali Khan, notice calling for an explanation had not been issued under Rule 5(8)(i) of the 1969 Rules. Question is whether interference is not called for in the special circumstances of the case.

21. As pointed recently in M.C. Mehta v. Union of India [(1999) 6 SCC 237] there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in Gadde Venkateswara Rao v. Govt. of A.P. [AIR 1966 SC 828 : (1966) 2 SCR 172] it is not necessary to quash the order merely because of violation of principles of natural justice.

22. In M.C. Mehta [(1999) 6 SCC 237] it was pointed out that at one time, it was held in Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 (HL)] that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] Chinnappa Reddy, J. followed Ridge v. Baldwin [1964 AC 40 : (1963) 2 All ER 66 (HL)] and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in S.L. Kapoor case [(1980) 4 SCC 379] laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43 : 1984 SCC (L&S) 62] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

"[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] . In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P. [(1996) 5 SCC 460]

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta [(1999) 6 SCC 237] referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa

Reddy, J. in S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] , namely, that on the admitted or indisputable facts, only one view is possible. In that event no prejudice can be said to have been caused to Mr Mansoor Ali Khan though notice has not been issued."

21. It is well settled that if a wrong has been committed by the respondents in respect to some other persons, that will not provide a cause of action to claim parity on the ground of equal treatment since the equality in law under Article 14 is applicable for claiming parity in respect to legal and authorized acts. Two wrongs will not make one right. (See: ***State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306; Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983; Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303; M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 5565; and Kastha Niwarak G.S.S. Maryadit, Indor Vs. President, Indore Development Authority, AIR 2006 SC 1142).***

22. Hon'ble the Apex Court in the case of ***Gulam Rasool Lone v. State of Jammu & Kashmir reported in JT 2009 (13) SC 422 in para 11 and 12*** held as under:-

"11. There cannot be any doubt whatsoever that keeping in view the equal protection clause contained in Articles 14 of the Constitution of India as also Article 16 thereof, all the employees should be treated equally. Equality clause however, must be enforced in legality and not illegality.

12. There cannot furthermore be any doubt that Article 14 is a positive concept. The Constitution does not envisage enforcement of the equality clause where a person has got an undue benefit by reason of an illegal act."

23. In the case of ***State of Orissa v. Mamata Mohanty reported in (2011) 3 SCC 436, the Apex Court*** observed as under:-

*"**Article 14***

56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Admn. v. Jagjit Singh [(1995) 1 SCC 745 : AIR 1995 SC 705] , Yogesh Kumar v. Govt. of NCT of Delhi [(2003) 3 SCC 548 : 2003 SCC (L&S) 346 : AIR 2003 SC 1241] , Anand Buttons Ltd. v. State of Haryana [(2005) 9 SCC 164 : AIR 2005 SC 565] , K.K. Bhalla v. State of M.P. [(2006) 3 SCC 581 : AIR 2006 SC 898] , Krishan Bhatt v. State of J&K [(2008) 9 SCC 24 : (2008) 2 SCC (L&S) 783] , Upendra Narayan Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and Union of India v. Kartick Chandra Mondal [(2010) 2 SCC 422 : (2010) 1 SCC (L&S) 385 : AIR 2010 SC 3455].)

57. This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in Hotel Balaji v. State of A.P.

[1993 Supp (4) SCC 536 : AIR 1993 SC 1048] observed as under: (SCC p. 551, para 12)

"12. ... "2. ... To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter [1 NY 3 (1847) : A.M.Y. p. 18] at p. 18:

"a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".' [As observed in Distributors (Baroda) (P) Ltd. v. Union of India, (1986) 1 SCC 43, p. 46, para 2.] "

(See also Ministry of Information & Broadcasting, In re [(1995) 3 SCC 619] , Nirmal Jeet Kaur v. State of M.P. [(2004) 7 SCC 558 : 2004 SCC (Cri) 1989] and Mayuram Subramanian Srinivasan v. CBI [(2006) 5 SCC 752 : (2006) 3 SCC (Cri) 83 : AIR 2006 SC 2449].)"

24. Keeping in view the admitted fact that the petitioner is not qualified for the post of Research Assistant, as he does not possess the degree of B.Sc. Agriculture, and settled legal proposition regarding relaxation of eligibility/qualification prescribed for a particular post to the effect that the same can not be relaxed and appointment of a person who does not possess the qualification of the post would be void as well as the principles related to "Useless Formality Theory" and principle of "Negative Equality", which are applicable in the facts of the present case, we are not inclined to interfere in the impugned orders dated 02.08.2011 and 17.03.2012 passed by respondent Nos. 2 and 3 respectively.

25. For the foregoing reasons, we do not find any illegality in the impugned orders dated 02.08.2011 and 17.03.2012, passed by the opposite party Nos. 2 and 3 (Annexure Nos. 1 and 2 to the writ petition).

26. Resultantly, the writ petition for it lacks merit. Hence, ***dismissed*** with no order as to costs

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(2019)10ILR A 1001

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 6 of 2006

Union of India & Ors. ...Petitioners
Versus
Sati Nath Khan & Anr. ...Respondents

Counsel for the Petitioners:
Sri Anil Srivastava, Sri Amit Sharma, Sri Neerav Chitravanshi, Sri S.P. Maurya.

Counsel for the Respondents:
Sri Prayas Srivastava, Sri R.C. Saxena.

A. Service Law - disciplinary proceedings - Railway Servants (Discipline & Appeal) Rules, 1968 - enquiry officer exonerated the applicant-respondent as no charges were proved - disciplinary authority dissatisfied with the enquiry report

issued "disagreement memo" to the applicant-respondent - ordered for compulsory retirement - no opportunity to rebut the findings recorded by the disciplinary authority was given to the applicat-respondent

In light of the catena of judgments on this point, the Court observed that before the issuance of "disagreement memo" by the disciplinary authority, an opportunity of hearing has to be given to the delinquent employee to the reversed findings of the enquiry officer having failed to grant the opportunity would violate the principles of natural justice. Requirement of affording an opportunity of hearing is a consequential right to be heard. (Para 29)

Writ Petition dismissed (E-10)

Cases Cited:-

1. Yoginath D. Bagde Vs St of Mah & anr (1999) 7 SCC 739

2. S.P. Malhotra Vs P N B (2013) 7 SCC 251

3. K.I. Shephard Vs U.O.I. (1987) 4 SCC 431

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Amit Sharma, learned counsel for the petitioners and Sri R.C. Saxena, learned counsel for the opposite parties.

2. By means of the present writ petition, the petitioners have challenged the judgment and order dated 13.09.2005, passed in the Original Application No. 256 of 2005 (in short "OA") (Sati Nath Khan v. Union of India and others) filed before the Central Administrative Tribunal, Lucknow Bench, Lucknow (in short "Tribunal") under Section 19 of the Administrative Tribunal Act, 1985.

3. The Tribunal while passing the impugned order dated 13.09.2005 considered the issue related to disagreement memo issued by the Disciplinary Authority to the applicant-respondent through the letter dated 08.06.2004 in relation to the findings recorded by the Enquiry Officer in the Enquiry Report submitted by him vide letter dated 16.04.2003. The Tribunal while partly allowing the OA considered the disagreement memo in the light of the decision of the Apex Court in the case of ***Yoginath D. Bagde v. State of Maharashtra and another; (1999) 7 SCC 739.*** The Tribunal while partly allowing the OA recorded the specific observation, which reads as under:-

"In the light of the decision of the Apex Court in Yogi Nath D. Bagde v. State of Maharashtra JT 1999 (7) SC-62, if before disagreeing with the Enquiry Officer the disciplinary authority has not followed the due process of law it vitiates the order of punishment. Non following the due process and denial of reasonable opportunity has caused prejudice to applicant and is infraction to the principle of natural justice, which are inbuilt in the Rules if not specifically provided.

In the light of our taking a final view of the matter, the applicant has been denied opportunity to show cause."

4. The Tribunal after interfering in the order of punishment imposing the punishment of compulsory retirement, affirmed in the appeal, passed by the Disciplinary Authority as well as the Order of Appellate Authority, granted the liberty to the petitioners to proceed in the matter in accordance with law. The operative portion of the impugned order dated 13.09.2005 is quoted below for ready reference:-

"In the light of the decision in Bagde case (supra) and the disagreement

of the disciplinary authority with the enquiry officer, this O.A. is partly allowed on this issue. The order imposing the compulsory retirement as affirmed in appeal is set aside. The respondents are directed to forthwith reinstate the applicant in service. However, if so advised, the respondents may proceed in accordance with law. The intervening period shall be regulated as per rules and regulation on the subject. No costs."

5. Aggrieved by the Order dated 13.09.2005, the petitioners have filed the present writ petition.

6. The brief facts of the case, which are relevant for the purposes of the proper adjudication of the issue involved, which relate to "disagreement memo" as well as the present writ petition, are to the effect that the disciplinary proceedings were initiated against the applicant-respondent vide charge-sheet dated 08.05.2002. At the time of issuance of charge-sheet, the applicant-respondent was working on the post of Reservation Clerk in the Northern Railway at Lcuknow. Needless to say that the applicant-respondent prior to issuance of the charge-sheet dated 08.05.2002, was suspended vide order dated 18.10.2001. It appears from the charge-sheet that against the applicant-respondent, three charges were levelled. The same reads as under:-

"(1) He defrauded the Rly. by manipulating in BPT No. 671646 as he had indicated Rs.4410-00 passenger foil, whereas record foil showing amounting Rs.107-00 only. Thus by fraudulently means he pocketed rs.4303-00.

(2) He intentionally mislead the requisition from on which he generated PNR No.213-0435999 of zero amount against BPT No.671646 which was manipulated by him.

(3) To cover-up his fraudulent activity, he has prepared a requisition form in the name of Rani Jha of 3050 dated 15/3/00 from LKO to Sakaldia and kept on record so as to justified that BPT amounting Rs. 107-00, but no such name of BPT No. found indicated in the chart of 3050."

7. With regard to conducting the disciplinary proceedings pursuant to the charge-sheet dated 08.05.2002, Sri S.P. Sethi, Enquiry Officer was appointed by the Disciplinary Authority. The Enquiry Officer conducted the disciplinary proceedings and after considering the relevant material on record before him, submitted his Report to the Disciplinary Authority. The copy of the Enquiry Report was also provided to the applicant-respondent vide letter dated 16.04.2003.

8. It is pertinent to point out here that the Enquiry Officer exonerated the applicant-respondent with respect to all the charges levelled against the applicant-respondent in the charge-sheet. The relevant portion of the Enquiry Report is quoted below for ready reference:-

"Conclusion and Findings.

For the reasons recorded, I have come to the conclusion that:-

Charge-1. Stands not proved.

Charge-2. Stands not proved.

Charge-3. Also stands not proved."

9. The Disciplinary Authority considered the Enquiry Report and on

being dissatisfied with the findings recorded by the Enquiry Officer, issued the disagreement memo to the applicant-respondent vide letter dated 08.06.2004. As issue involved in the present case is related with the disagreement memo, so the same is reproduced hereunder:-

"After going through the enquiry report, relied upon documents (RUDs) and proceedings of the enquiry, my considered views are as under:-

The charges brought out against Sh. S.N. Khan, ERC/LKO are as under:-

1. Article No.1

He defrauded the Railway by manipulating via BPT No.671646 as he had indicated Rs. 4410/- in passenger foil whereas record foil showed amount of Rs. 107/- only. Thus, by fraudulent means he pocketed Rs. 4309/-.

IO in his enquiry report has concluded that the charge remains unsubstantiated. The reason for this charge remaining unsubstantiated, as indicated in the enquiry report, is the absence of original RUDs. IO has also referred the judgment of the Hon'ble CAT directing the Rly to produce original RUDs.

Upon perusal of Hon'ble CAT's judgment, it is observed that the documents to be produced in original are not specifically mentioned. Therefore, IO has erred in his judgment wherein instaed of examining the defence vis a vis the article of charges brought out, he has mis interpreted Hon'ble CAT's judgment without making reference to the demand of the C.O. submitted during enquiry in line with Hon'ble CAT's directives.

It is noted from the proceedings of the enquiry that in his defence statement Sh. S.N. Khan had pointed out that documents referred to at S.Nos.1, 2 and 4 of Annexure-III of the charge sheet were required to be produced in original. The documents listed at S.Nos.1, 2 & 4 of Annexure-III are as under: -

1. PNR No.213-0435999 of AC 3 tier ex NZM to SBC.

2. Passenger foil of BPT No.671646 dated 24.03.2000.

3. TDL No.045616 issued by SS/JHS against PNR No.213-0435999 dated 19.04.2000.

*It is observed from the above that original B**PT, TDR** and **PNR** existed. It is also a matter of record that Sh. A.K. Saxena, CVI/N.Rly. had visited CCM/Refund Office/C.Rly., on **16.11.2000**, during investigations in this regard. Sh. A.K. Saxena, CVI/N.Rly was successful in obtaining photocopies of these documents, which is on record. It appears that the originals were misplaced during transit in dak from C. Rly. Vigilacne to N.Rly. Vigilance. However, I am inclined to give benefit of doubt to Sh. S.N. Khan, ERC/LKO since prosecution could not produce these 3 original demanded RUDs after their misplacement/loss in transit, in line with Hon'ble CAT's judgment. I agree with the IO's findings in respect of this charge.*

Article No.11

*He intentionally misplaced the requisition on which he generated P**NR No.2130-0435990** of zero amount against BPT.*

IO in his enquiry report has concluded that the charge remains unsubstantiated. The reason for this charge remaining unsubstantiated, as indicated in the enquiry report, is the absence of original BPT. IO has accepted plea of the CO that he kept it on record and how it was misplaced he was not responsible.

In this context, perusal of enquiry proceedings reveals the fact that there was manipulation in the BPT. Defence has never disputed this fact that there was manipulation in the BPT. CO during general examination by IO had admitted in reply to Q.NO.4 that some body might have played a mischief and might have booked on 24.03.00 when he had gone out for urinal or for drinking water.

The plea of the CO is not acceptable due to the following reasons:-

(i) There is a provision of temporary locking of the computer by the operator, which is resorted to by the operator in case he has to leave the seat for any emergency. CO should have locked it while leaving his seat. It is further noted that C.O. has failed to provide details of documentary evidence to support his claim. Clearly it is an after thought, which has no legs to stand in the eyes of law.

(ii) BPT book remains in the personal custody of the person to whom it is issued. How any other person can have access to this BPT book and at the same time the person concerned would exactly know the BPT no. issued on 15.3.2000 and make reservations on this BPT on 24.3.2000 during the brief spell of absence of the C.O. is a mystery.

*(iii) Sh. S.N. Khan, ERC/LKO in his statement vide Ex P-5 (A) had stated that he new Dr. Renu Makkar personally. It was the same person in whose name reservation was made on BPT No.**671646** ex NZM to SBC dated 24.03.2000. Sh. S.N. Khan, ERC/LKO had further admitted that he had issued PNR NO.**213-0435999** by train NO.2430 ex NZM to SBC.*

*(iv) Sh. S.N. Khan, ERC/LKO did not use double-sided carbon for preparing BPT as evident from the office copy of the BPT NO.**671646**, which bears the amount of Rs.**107/-**. In his defence, Sh. S.N. Khan has submitted that double sided carbon paper had not been issued by the office. The explanation of Sh. Khan is hardly tenable in view of the fact that use of double-sided carbon is a normal practice and under the circumstances of the case, it appears to be a deliberate attempt on the part of Sh. Khan to hide his mis deeds.*

Under the above circumstances, misplacement of requisition form clearly indicates that it was an intentional act done deliberately with malafide intentions.

In view of the facts, evidence on record and circumstances brought out as above, I do not agree with the findings of the IO in respect of this charge since he has failed to analyse the evidence on record. I hold the CO guilty of this charge.

Article No.III

To cover up this fraudulent activity, he had prepared a requisition form in th name of Ms. Rani Jha in train no.3050 dated ***15.03.2000*** *ex LKO to Sakaldia and kept on record so as to justify the BPT amounting to Rs.* ***107/-*** *but no such name or BPT no. was found indicated in the chart of train no.****3050.***

IO in his enquiry report has concluded that the charge remains unsubstantiated. The reason for this charge remaining unsubstantiated, as indicated in the enquiry report, is the non-availability of original BPT. IO has not accepted the prosecution plea that the CO had prepared requisition in the name of Ms. Rani Jha in train No. ***3050*** *dt.* ***15.3.2000*** *to cover up his fraudulent activity.*

CO did not dispute issue of BPT No. ***671646*** *amount Rs.* ***107/-*** *dt.* ***15.3.2000*** *ex LKO to Sakaldia. CO also did not dispute making reservation for the passenger concerned by generating PNR of zero amount on the strength of BPT No.* ***671646*** *amount Rs.* ***107/-*** *dt.* ***15.3.2000.*** *CO has further submitted that the reason for non-existence of the name of Ms. Rani Jha in the chart of train No.* ***3050*** *is that he had made the entry in the working chargt.*

Ex P-8 *is the requisition form said to have been submitted by the passenger fro reservation in train No.* ***3050.*** *Perusal of* ***Ex P-8*** *reveals that it does not indicate the authority on the strength of which reservation was made by generating PNR of zero amount. Even if BPT No. was endorsed by the CO in the working chart, the same ought to have been indicated in the requisition form, which was mandatory in view of the fact that zero amount PNR was being generated. Non-indication of BPT no on* ***Ex P-8*** *clearly indicates malafides on the part of the CO as brought out in the charge sheet.*

In view of the facts, evidence on record and circumstances brought out as above, I do not agree with the findings of the IO in respect of this article of charge since he has failed to analyse the evidence on record. I hold the CO guilty of this charge.

In view of the facts, evidence on record and circumstances as brought out and discussed above, I do not agree with the findings of the IO in respect of the article of charges II & III. I hold Sh. S.N. Khan, ERC/LKO guilty of the charges brought out against him under article of charges II & III."

10. After the issuance of the disagreement memo, the applicant-respondent submitted his detailed reply dated 08.07.2004. Thereafter, the Disciplinary Authority vide order dated 28.10.2004 awarded the punishment of compulsory retirement from Railway services.

11. The applicant-respondent aggrieved by the order dated 28.10.2004, filed the departmental appeal and the Appellate Authority dismissed the appeal vide order dated 10.02.2005.

12. Aggrieved by the orders dated 28.10.2004 and 10.02.2005, the applicant-respondent filed an OA No. 256 of 2005 before the Tribunal at Lucknow, which was partly allowed vide impugned judgment and order dated 13.09.2005.

13. While entertaining the present writ petition, this Court has passed an

interim order in favour of the petitioners on 04.01.2006, which reads as under:-

"Sri Prayas Srivastava, who has filed short counter affidavit on behalf of opposite party No. 1 is directed to file counter affidavit within three weeks. The petitioner may file rejoinder affidavit within two weeks thereafter.

List/put up this case on 07.03.2006, on which date the petitioner's counsel shall produce the record relating to the disciplinary enquiry.

Till then the impugned judgment and order dated 13.9.2005 passed by the Central Administrative Tribunal, Lucknow, shall remain in abeyance. The petitioner shall pay all the retiral benefits, which are payable to an employee against whom compulsory retirement order has been passed and the opposite party No. 1 shall complete the necessary formalities at the earliest."

14. Assailing the judgment and order dated 13.09.2005, passed by the Tribunal, Sri Amit Sharma, learned counsel for the petitioners, on the basis of the pleadings on record, submitted that the Tribunal misread the material on record. The applicant-respondent, in enquiry proceedings, was given full opportunity in accordance with provisions of the Railway Servants (Discipline & Appeal) Rules, 1968 and principles of natural justice to defend himself in the disciplinary proceedings were followed. Even the Disciplinary Authority and Appellate Authority, while dealing with the case of the applicant-respondent, applied their mind.

15. He further submitted that the Tribunal has acted illegally as an Appellate Authority and looked into the material on which the Competent Authority arrived at a conclusion that the applicant-respondent is guilty of charges levelled against him.

16. He further submitted that the Tribunal has failed to take note of the fact that the reasons recorded by the Disciplinary Authority were sound and the applicant-respondent had failed to satisfy by means of representation dated 08.07.2004. Otherwise also, the applicant-respondent could not satisfy that as to what prejudice has been caused to him.

17. He further submitted that the Tribunal has failed to appreciate that the Disciplinary Authority acted in accordance with the settled position of law and communicated a detailed disagreement memo indicating the reasons for disagreement from the finding of the Enquiry Officer.

18. It is further submitted that the Tribunal has failed to take note of the fact that the disagreement memo prepared by the Disciplinary Authority was clear on each issue and the same does not suffer from any lacuna especially when the applicant-respondent responded in response to the said disagreement memo and preferred a representation dated 08.07.2004.

19. Learned counsel for the petitioners lastly submitted that the Tribunal has erred in applying the ratio of Yoginath D. Bagde's case in the present matter. In the matter of Yoginath D. Bagde, the Disciplinary Authority had failed to issue any disagreement memo whereas in the present case, the Disciplinary Authority had issued a

detailed disagreement memo to the applicant-respondent.

20. Per contra, learned counsel for the applicant-respondent, Sri R.C, Saxena submitted that the case of the petitioners is squarely covered under the judgment passed in the case of ***Yoginath D. Bagde (supra)***.

21. In order to support his submissions, learned counsel for the applicant-respondent placed relevant contents of the disagreement memo, which are quoted hereinabove. On the basis of the contents of the disagreement memo as well as the law laid down by the Apex Court in the case of ***Yoginath D. Bagde (supra)***, learned counsel for the applicant-respondent submitted that the tentative reasons of disagreement to the findings recorded by the Enquiry Officer are required to be mentioned in the disagreement memo and if the Disciplinary Authority records a conclusion/finding then it would be improper and illegal and would be violative to the principles of natural justice. He pointed out that after recording reasons, the Disciplinary Authority in the disagreement memo has recorded specific conclusion/finding with respect to the charge Nos. 2 and 3 levelled against the applicant-respondent.

22. Learned counsel for the applicant-respondent further submitted that considering the conclusion drawn by the Disciplinary Authority as well as the findings recorded in the disagreement memo by the Disciplinary Authority, the Tribunal interfered in the impugned orders and passed the judgment and order dated 13.09.2005, under challenge.

23. It is further submitted that the Tribunal has followed the law laid down by the Apex Court, which is applicable in the facts and circumstances of the case and as such, there is no illegality and infirmity in the impugned order dated 13.09.2005.

24. It is further submitted that at the time of filing of OA, the applicant-respondent was 56 years old i.e. in the year 2005 and during the pendency of the writ petition, the applicant-respondent has attained the age of superannuation, as such, in the interest of substantial justice, the matter may not be remanded back to the petitioners to reanimate the issue. Accordingly, the prayer is to dismiss the writ petition.

25. We have considered the rival submissions of learned counsel for the parties and gone through the record carefully.

26. We are not dwelling on other issues involved in the present writ petition, as the learned counsel for the parties have addressed this Court only on the issue related to the disagreement memo issued by the Disciplinary Authority and considered by the Tribunal while partly allowing the OA of the applicant-respondent.

27. As the Tribunal has relied upon the principles settled by the Apex Court in the case of ***Yoginath D. Bagde (supra)***, as such, we think it proper to reproduce the relevant portion of the same:-

"28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings.

Where the enquiring authority has found the delinquent officer guilty of the charges framed against him and the disciplinary authority agrees with those findings, there would arise no difficulty. So also, if the enquiring authority has held the charges proved, but the disciplinary authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "tentative" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with.

30. Recently, a three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Misra [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] relying upon the earlier decisions of this Court in State of Assam v. Bimal Kumar Pandit [AIR 1963 SC 1612 : (1964) 2 SCR 1] , Institute of Chartered

Accountants of India v. L.K. Ratna [(1986) 4 SCC 537 : (1986) 1 ATC 714] as also the Constitution Bench decision in Managing Director, ECIL v. B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and the decision in Ram Kishan v. Union of India [(1995) 6 SCC 157 : 1995 SCC (L&S) 1357 : (1995) 31 ATC 475] has held that: (SCC p. 96, para 17)

"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."

The Court further observed as under: (SCC p. 96, para 18)

"When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."

The Court further held that the contrary view expressed by this Court in State Bank of India v. S.S. Koshal [1994 Supp (2) SCC 468 : 1994 SCC (L&S) 1019 : (1994) 27 ATC 834] and State of Rajasthan v. M.C. Saxena [(1998) 3 SCC 385 : 1998 SCC (L&S) 875] was not correct.

31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter,

namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution.

34. Along with the show-cause notice, a copy of the findings recorded by the enquiry officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

35. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to the findings on the two charges framed against him, the principles of natural justice, as laid down by a three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Misra [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] referred to above, were violated.

37. The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel. What is ignored by the learned counsel is that a final decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show cause against the major punishment of

dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of Punjab National Bank [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] in which it had been categorically provided, following earlier decisions, that if the disciplinary authority does not agree with the findings of the enquiry officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the disciplinary authority that the findings already recorded by the enquiry officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case.

38. The Disciplinary Committee consisted of five seniormost Judges of the High Court which also included the Chief Justice. The Disciplinary Committee took a final decision that the charges against the appellant were established and recorded that decision in writing and then issued a notice requiring him to show cause against the proposed punishment of dismissal. The findings were final; what was tentative was the proposal to inflict upon the appellant the punishment of dismissal from service."

28. In the case of S.P. Malhotra Vs. Punjab National Bank, reported in (2013) 7 SCC 251: (2013) 2 SCC (L & S) 673, the Apex Court reiterated the earlier view on the issue related to disagreement memo. The relevant paras read as under:-

"13. In ECIL [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704 : AIR 1994 SC 1074] , only the first issue was involved and in the facts of this case, only second issue was involved. The second issue was examined and decided by a three-Judge Bench of this Court in Kunj Behari Misra [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] wherein the judgment of ECIL [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704 : AIR 1994 SC 1074] has not only been referred to, but extensively quoted, and it has clearly been stipulated that wherein the second issue is involved, the order of punishment would stand vitiated in case the reasons so recorded by the disciplinary authority for disagreement with the enquiry officer had not been supplied to the delinquent and his explanation had not been sought. While deciding the said case, the Court relied upon the earlier judgment of this Court in Institute of Chartered Accountants of India v. L.K. Ratna [(1986) 4 SCC 537 : (1986) 1 ATC 714 : AIR 1987 SC 71] .

14.Kunj Behari Misra [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] itself was the case where the disciplinary authority disagreed with the findings recorded by the enquiry officer on 12-12-1983 and passed the order on 15-12-1983 imposing the punishment, and immediately thereafter, the delinquent officers therein stood superannuated on 31-12-1983. In Kunj Behari Misra [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] this Court held as under: (SCC p. 97, para 19)

"19. The result of the aforesaid discussion would be that the principles of

natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."
(emphasis supplied)

15. The Court further held as under: (Kunj Behari Misra case [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] , SCC p. 97, para 21)

"21. Both the respondents superannuated on 31-12-1983. During the pendency of these appeals, Misra died on 6-1-1995 and his legal representatives were brought on record. More than 14 years have elapsed since the delinquent officers had superannuated. It will, therefore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings."

16. The view taken by this Court in the aforesaid Kunj Behari Misra case [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] has consistently been approved and followed as is evident from the judgments in Yoginath D. Bagde v. State of Maharashtra [(1999) 7 SCC 739 : 1999 SCC (L&S) 1385 : AIR 1999 SC 3734] , SBI v. K.P. Narayanan Kutty [(2003) 2 SCC 449 : 2003 SCC (L&S) 185 : AIR 2003 SC 1100] , J.A. Naiksatam v. High Court of Bombay [(2004) 8 SCC 653 : 2004 SCC (L&S) 1190 : AIR 2005 SC 1218] , P.D. Agrawal v. SBI [(2006) 8 SCC 776 : (2007) 1 SCC (L&S) 43 : AIR 2006 SC 2064] and Ranjit Singh v. Union of India [(2006) 4 SCC 153 : 2006 SCC (L&S) 631 : AIR 2006 SC 3685] .

17. In Canara Bank v. Debasis Das [(2003) 4 SCC 557 : 2003 SCC (L&S) 507 : AIR 2003 SC 2041] this Court explained the ratio of the judgment in Kunj Behari Misra [Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] , observing that it was a case where the disciplinary authority differed from the view of the inquiry officer.

"26. ... In that context it was held that denial of opportunity of hearing was per se violative of the principles of natural justice." (Debasis Das case [(2003) 4 SCC 557 : 2003 SCC (L&S) 507 : AIR 2003 SC 2041] , SCC p. 578, para 26)

18. In fact, not furnishing the copy of the recorded reasons for disagreement from the enquiry report itself causes prejudice to the delinquent and therefore, it has to be understood in an entirely different context than that of the issue involved in ECIL [ECIL v. B.

Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704 : AIR 1994 SC 1074] ."

29. In the light of the judgment rendered by the Apex Court with regard to issuance of "Disagreement Memo", we hold as under:-

(i) An opportunity of hearing has to be given to a charged employee for reversing the findings of the Enquiry Officer.

(ii) Denial of opportunity of hearing to the charged employee before reversing the findings of Enquiry Officer would be violative of the principles of natural justice. Requirement of affording of opportunity of hearing is a consequential right to be heard.

(iii) Disciplinary Authority before framing its final opinion, has to convey its tentative reasons for disagreeing with the findings of Enquiry Officer to the charged employee and ask for his reply.

(iv) After taking note of reply, if any, to the tentative reasons for disagreeing with the findings of Enquiry Officer provided to the charged employee, the reasoned and speaking order has to be passed.

30. The Hon'ble Apex Court in the case of ***K.I. Shephard v. Union of India; (1987) 4 SCC 431*** in regard to principle of opportunity of hearing held as under:-

"15. Fair play is a part of the public policy and is a guarantee for justice to citizens. In our system of Rule of Law every social agency conferred with power is required to act fairly so that social action would be just and there would be furtherance of the well-being of citizens. The rules of natural justice have developed with the growth of civilisation and the content thereof is often considered as a proper measure of the level of civilisation and Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring into the community the concept of fairness and it has taken scores of years for the rules of natural justice to conceptually enter into the field of social activities. We do not think in the facts of the case there is any justification to hold that rules of natural justice have been ousted by necessary implication on account of the time frame. On the other hand we are of the view that the time limited by statute provides scope for an opportunity to be extended to the intended excluded employees before the scheme is finalised so that a hearing commensurate to the situation is afforded before a section of the employees is thrown out of employment."

31. In the light of principles settled on the issue related to reversing of findings of Enquiry Officer and issuance of disagreement memo, we have to consider the disagreement memo for coming to the conclusion that whether the same is in accordance with law or not. Accordingly, we would like to quote the relevant portion of the disagreement of memo, which reads as under:-

"In view of the facts, evidence on record and circumstances brought out as above, I do not agree with the findings of the IO in respect of this article of charge since he has failed to analyse the evidence on record. I hold the CO guilty of this charge.

In view of the facts, evidence on record and circumstances as brought out

and discussed above, I do not agree with the findings of the IO in respect of the article of charges II & III. I hold Sh. S.N. Khan, ERC/LKO guilty of the charges brought out against him under article of charges II & III."

32. From the above quoted portion of the disagreement memo, it is apparent/evident that the Disciplinary Authority before considering the reply of the charged employee has recorded the findings/conclusion and by the same reversed the findings of the Enquiry Officer. The same is contrary to settled principles of Law.

33. Considering the principles laid down by the Apex Court in the above referred judgments as well as the conclusion drawn by the Disciplinary Authority, quoted hereinabove, in the disagreement memo, we find that the present case is squarely covered under the aforesaid judgments.

34. For foregoing reasons, we do not find any force in the submissions of the learned counsel for the petitioners, Sri Amit Sharma to the effect that the case of the applicant-respondent is on different footing and the ratio laid down by the Apex Court in the case of ***Yoginath D. Bagde (supra)*** would not apply.

35. For the reasons and findings recorded hereinabove, we are of the view that the interference is not required in the judgment and order passed by the Tribunal. The writ petition for it lacks merit. Hence, ***dismissed*** with no order as to costs.

36. However, in fact of the case i.e. age of litigation and litigant, we are not remitting the matter back to the petitioners for considering the case of the applicant-respondent in accordance with law. In the interest of substantial justice, we direct that the period w.e.f. the date of order of punishment till attaining the age of superannuation would only be counted for the purposes of pensionary/post retiral dues and other benefits and the applicant-respondent would not be entitled for the salary with respect to the said period.

(2019)10ILR A 1015

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2018

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE IRSHAD ALI, J.

First Appeal From Order No. 4035 of 2012

Smt Seema Devi ...Appellant
Versus
Smt. Jyoti Gupta & Anr. ...Respondents

Counsel for the Appellant:
Sri Amit Kumar Sinha

Counsel for the Respondents:
Sri Pranjal Mehrotra, Sri Virendra Kumar Gupta, Sri Pawan Kumar Mishra

A. Motor Vehicle Act,1988 - Compensation - notional income of deceased driver - driving being skilled job - notional income fixed at Rs. 6000/- per month.

Held: -Job of driver being skilled job, in the absence of any documentary evidence for proving the monthly income of the deceased – the notional income of the deceased should be fixed at Rs. 6000/- per month for the purpose of awarding just and reasonable compensation. (Para 13)

Appeal Partly allowed (E-5)

List of cases cited: -

1. National Insurance Company Ltd. Vs Pranay Sethi & ors. reported in (2017) 4 TAC 637 (SC)

2.Sarla Verm Vs Delhi Transport Corporation 2009 ACJ 1298 (SC)

3.Minu Rout & anr. Vs Satya Pradyumna Mohapatra & ors. (2013) 10 SCC 695

(Delivered by Hon'ble Bala Krishna Narayana, J. & Hon'ble Irshad Ali, J.)

1. Heard Sri Amit Kumar Sinha, learned counsel for the appellant, Sri Pawan Kumar Mishra, holding brief of Sri Sri Pranjal Mehrotra for respondent no. 2. None has appeared on behalf of the respondent no. 1.

2. This appeal has been filed by the appellant claimant against the judgement and order dated 10.7.2012 passed by the Motor Accident Claim Tribunal / Special Judge (S.C./S.T.) Act, Allahabad (in short the 'tribunal') in M.A.C.P. No. 659 of 2011 questioning the correctness of the amount of compensation awarded by the tribunal for the death of Shyam Babu Goshwami in an accident.

3. The brief facts of the case are that on 12.7.2011 at about2.30 a.m., deceased Shyam Babu Goshwami, husband of the claimant appellant, who was the driver of Truck No. U.P. 70 B.T. 0291, after parking his truck in village Mankahari Naya Gate railway gate, P.S. Rampur Baghelna, District Satana, Madhya Pradesh was resting under his truck when a Truck No. U.P. 78 B.T. 1960 (hereinafter referred to as 'offending vehicle') which was being driven rashly and negligently by its driver collided with the deceased's truck from behind as a result the deceased was crushed under the wheals of the truck and sustained serious injuries. He was taken to the M.P. Birla Hospital where he died during treatment; at the time of his death the deceased Shyam Babu Goshwami was aged about 28 years and was earning a sum of Rs. 7000/- per month as salary while working as driver of truck No. U.P. 70 B.T. 0291, the deceased had left behind his wife Smt. Seema Devi aged about 25 years, daughters Ku. Poonam aged about 6 years, Ku. Neha aged about 5 years and sons Vikas Goshwami aged about 4 years and Suraj Goshwami aged about 2 years. Swami Nath aged about 54 years and Smt. Munni Devi aged about 52 years parents of the deceased who were dependents upon him.

4. The first information report of the accident was lodged by one Pintu Dube at P.S. Rampur Beegha, District Satna Madhya Pradesh which was registered as Case Crime No. 382 of 2011, under Sections 279, 337 I.P.C. against the driver of the offending vehicle. Stating the aforesaid facts the appellant filed M.A.C.P. No. 659 of 2011 claiming Rs. 20,00,000/- as compensation for the death of her husband.

5. The appellant's claim was contested by opposite party nos. 1 and 2, who filed their written statements paper nos. 41-A and 10-A respectively.

6. Opposite party no. 1 Jyoti Gupta in her written statement denied the allegations made in the claim petition and further pleaded that the liability if any, to pay the compensation to the claimant appellant was that of the opposite party no. 2, the insurer of the offender truck.

7. The opposite party no. 2 in his written statement apart from denying the allegations made in the claim petition due to lack of proper knowledge denied its liability to pay the compensation on various counts.

8. On the basis of the pleadings of the parties, tribunal framed as many as four issues.

9. The claimant appellant in order to prove her case examined herself as P.W. 1 and one Vinod Kumar Goswami eye witness of the accident as P.W. 2. Documentary evidence which was filed by the claimant appellant before the tribunal comprised of copy of F.I.R. of the incident which was registered as Case Crime No. 382 of 2011, inquest report of deceased Shyam Babu and memo dated 13.7.2011 showing that the deceased was admitted to M.P. Birla Hospital as an injured patient, application given by the police department of Madhya Pradesh Administration for conducing post mortem on the body of the deceased and papers pertaining to the treatment of deceased in M.P. Birla Hospital, Madhya Pradesh.

10. Opposite party no. 1 the owner of the vehicle did not examine any witnesses. She filed the registration certificate of the offending truck, driving license of its driver, fitness certificate, national permit, Insurance policy and pollution control certificate.

11. The tribunal after considering the submissions made before it by the learned counsel for the parties and scrutinizing the evidence on record, allowed the claim petition in part awarding a sum of Rs. 3,93,500/- as compensation to the claimant appellant against the opposite party nos. 1 and 2 to be paid by the respondent no. 2.

12. Learned counsel for the appellant has challenged the quantum of compensation as awarded by trubunal on the following grounds :

(i) The job of driver being skilled job, in the absence of any documentary evidence on record in support of the appellant's claim that the deceased was earning Rs. 7000/- per month as driver, the notional income of the deceased should have been fixed at Rs. 6000/- per month for the purpose of awarding just and reasonable compensation instead of Rs. 3000/- per month has held by the tribunal.

(ii) The tribunal has not awarded any amount towards future prospect of the deceased. Considering the fact that the deceased at the time of his death aged about 28 years, the tribunal while determining the income of the deceased, who was self employed ought to have added 40% of the established income towards future prospect.

(iii) The amount awarded under the conventional heads, namely, loss of estate, loss of consortium and funeral expenses awarded by the tribunal is too meager.

13. In support of his aforesaid contentions, learned counsel for the appellant has placed reliance upon in the case of ***Minu Rout and another vs. Satya Pradyumna Mohapatra and others (2013) 10 SCC 695*** as well as in the case of ***National Insurance Company Limited Vs. Pranay Sethi and others reported in 2017 (4) TAC 637 (SC)***

14. Per contra learned counsel for the respondents made their submissions in support of the impugned judgement and award.

15. We have heard learned counsel for the parties and perused the impugned judgement and award as well as the material brought on record.

16. While dealing with the issue regarding monthly income of the the deceased who was doing a skilled job and where there was no documentary evidence for proving the monthly income of the deceased, the Apex Court in paragraph 119 and 20 of the case ***Minu Rout and another vs. Satya Pradyumna Mohapatra and others (supra)*** held as hereunder:

"19. The appellants claimed compensation under the heading of loss of dependency as they were all dependents upon the earnings of the deceased Susil Rout. It is an undisputed fact that Susil Rout was working as a driver of the car which is a skilled job. Appellants have stated in the claim petition and in the evidence of PW-1 that the deceased was earning Rs.5,000/- per month. The oral evidence of PW-1 is not accepted by the Tribunal, solely for the reason that the appellants did not produce documentary evidence to prove the monthly salary of the deceased as Rs.5,000/- per month as claimed by them. However, it had taken monthly income of the deceased at Rs.3,000/-, for the purpose of determining the multiplicand. Out of Rs.3,000/- p.m., 1/3rd amount was deducted towards personal expenses of the deceased and arrived at Rs.3,84,000/- towards loss of dependency. Out of that compensation, 50% was deducted towards contributory negligence on the part of the deceased and Rs.1,92,000/- was awarded under the above heading. The compensation awarded by the Tribunal is approved by the High Court, which is not only erroneous in law but also suffers from error in law.

20. The Tribunal ought to have taken the salary of the deceased driver at Rs.6,000/- by taking judicial notice of the fact that the post of a driver is a skilled job. Though the claim of the appellants is Rs.5000/- as monthly salary of the deceased for the purpose of determining the loss of dependency, the actual entitlement of the salary of the deceased should have been taken at Rs.6000/- per month by the Tribunal for awarding just and reasonable compensation, which is the statutory duty of the Tribunal and the Appellate Court. In view of the law laid down by this Court in Santosh Devi vs. National Insurance Company Ltd. & Ors.; 30% of future prospects of the deceased should be added to the monthly income. If 30% is added to the monthly income, it would amount to Rs.7,800/- p.m. From the same, 1/3rd should be deducted towards the personal expenses of the deceased, then the remaining amount would come to Rs.5,200/- per month. The same is multiplied by 12 amounting to Rs.62,400/- which would be the multiplicand. The same must be multiplied by 16 multiplier as the Tribunal has taken the age of the deceased at 35 as mentioned in the post mortem report, which is produced as Exh.5. According to the decision of this Court in Sarla Verm vs. Delhi Transport Corporation Sarla Verma vs. Delhi Transport Corporation, the multiplier of 16 taken by the Tribunal for computation of loss of dependency is correct. If the 16

multiplier is applied to the multiplicand of Rs.62,400/-, it comes to Rs.9,98,400/- which amount is awarded towards the loss of dependency of the appellants."

17. Thus, we hold that the tribunal committed a patent error of law in holding the notional income of the deceased to be Rs. 3000/- whereas in accordance with principles propounded by the Apex Court in the case of***Minu Rout and another Vs. Satya Pradyumna Mohapatra and others (supra)t***he income of the deceased considering the skilled job of the deceased should be Rs. 6000/- per month.

18. The constitutional bench of the Apex Court in the case of ***National Insurance Company Limited Versus Pranay Sethi and Others reported in 2017 (4) T.A.C. 637 (S.C.)*** in sub-paragraph (iii) to (viii) of paragraph 61 has ruled inter-alia; that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax; in case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component; for determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 14 to 15 of ***Sarla Verma, 2009 ACJ 1298 (SC);*** the selection of multiplier shall be as indicated in the Table in ***Sarla Verma, 2009 ACJ 1298 (SC)*** read with para 21 of that judgment; the age of the deceased should be the basis for applying the multiplier; reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.

19. Thus in view of the legal principles propounded by the Apex Court in the Constitutional Bench Judement in the case of ***National Insurance Company Limited Versus Pranay Sethi and Others (supra),*** we find that while determining the monthly income of the deceased the tribunal should have added 40% of the deceased's established income towards future prospect and the amount awarded by the tribunal under the conventional heads of loss of estate, loss of consortium and funeral expenses is also too meagre and liable to be enhanced.

20. In view of the foregoing discussion, we **allow** this appeal in part and re-calculate the compensation by applying the principles laid down by the Apex Court in the case of **National Insurance Company Limited (supra)**. As noticed above, the notional income of the deceased was fixed at Rs. 15,000/- per month or Rs. 1,80,000/- p.a. by adding 40% towards future prospects as the deceased was less than 40 years of age,

the deemed gross income of the deceased would be 40% of Rs. 15,000/- = Rs. 6,000/- + Rs. 15,000/- i.e. Rs. 21,000/- per month or Rs. 2,54,000/- p.a. After deducting 1/3rd amount (i.e. 21,000-7000) towards the personal and living expenses of the deceased, his contribution to the family is determined as Rs. 14,000/- per month or Rs. 1,68,000/- p.a. After applying the multiplier of 16, the total loss of dependency is assessed at Rs. 26,88,000/-. We further award a sum of Rs. 15,000/- towards funeral expenses and Rs. 40,000/- under the head of loss of consortium. We accordingly increase the compensation awarded to the claimants/appellants by the Tribunal from Rs. 16,87,000/- to Rs. 27,42,000/-. The claimants/appellants shall further be entitled to interest @ 7% p.a. on the increased amount of compensation from the date of filing of the claim.

21. The impugned judgement and award stands modified to the extent indicated hereinabove.

22. The parties shall bear their own costs.

(2019)10ILR A 1020

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

First Appeal From Order No. 3382 of 2003

Smt. Geeta Devi & Ors. ...Appellants
Versus
U.P. S.R.T.C. & Anr. ...Respondents

Counsel for the Appellants:
Sri H.P. Gupta, Sri Ramesh Rai

Counsel for the Respondents:
Sri Dinkar Mani Tripathi.

A. Motor Vehicle Act,1988 - Compensation - Enhancement - handicap person meeting with an accident while crossing the road - Not an act of God - At the most deceased can be held to be 20 per cent negligent.

Held:- Question is whether the said accident would fall within the definition of act of God - Answer is no - It cannot be said that the deceased died by the act of God - Deceased being handicapped person, the driver of the bus should have taken proper cure and caution in driving the bus on the public road - At the most deceased not able to cross the road, he can be held to be 20 per cent negligent - Claimants are entitled to a total compensation of Rs.4,54,080/-. (Para 9 & 10)

B. Motor Vehicle Act,1988 - Compensation - Rate of interest would be 7.5% - from the date of filing of the claim petition till the amount is deposited. (Para 11)

First Appeal From Order Partly allowed (E-5)

List of cases cited: -

1.Smt. Gulshan Jahan & ors. Vs Om Prakash & anr. (2011) 2 ADJ 12 (DB)

2.Smt. Kaushnuma Begum & ors. Vs The New India Assurance Co. Ltd. & ors. (2001) 1 SCC 5

3. Bajaj Allianz Gen. Insurance Co. Ltd. Vs Smt. Renu Singh & ors. F.A.F.O. No. 1818 of 2012 decided on 19.7.2016

4.National Insurance Co. Ltd. Vs Mannat Johal & ors. (2019) 2 T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Serve Singh assisted by Sri Harish Prasad Gupta, learned counsel

for the appellants and Sri Dinkar Mani Tripathi, learned counsel for the U.P.S.T.C..

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 04.09.2003 passed by Motor Accident Claims Tribunal/Additional District Judge, Gorakpur (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 03 of 2002.

3. The grounds raised in the memo of appeal for claiming higher compensation are as enumerated in para 4, 5, 6,7 which read as follows:-

"(4). The deceased was business man and has been earning more than 150 per day and was only aged about 35 years, being survived by 2 minor sons, 1 minor daughter, 1 wife, mother and one brother and all are the dependent of the deceased, and there is much loss to the deceased family, after the death of deceased, and the learned Tribunal has ignored this aspect of the matter, while making the award.

(5). The appellants have fully established their case for multiplying the claim according to the earning of the deceased, and of his age, but the learned Tribunal illegally and erroneous did not multiplier the claim of the appellants, hence award is wholly wrong liable be to interfered by the Hon'ble Court.

(6). Only on the grounds of being handicap a various liabilities should not be sifted, as has been done in the impugned award, by the learned Tribunal, hence the impugned award is wholly illegal, erroneous and liable to be interfered by the Hon'ble Court.

(7). The learned Tribunal erroneously and manifestly mis-interpretated the evidence made by the appellants, and recorded of perverse findings of no fault case. Hence the impugned order is wholly illegal, erroneous, and illegal."

The learned Advocate for the appellants has cited the following judgments in the case of **Smt. Gulshan Jahan and Others Vs. Om Prakash and Another [2011 (2) ADJ 12 (DB)]** decided on 7th January, 2011, **Smt. Kaushnuma Begum & Ors. Vs. The New India Assurance Co. Ltd. & Ors [2001 (1) SCC 5** decided on 03.01.2001 and has contended that the finding of the Commissioner of the Motor Accidental Claims Tribunal is bad and has contended that the Tribunal has granted a paltry sum of Rs.55,000/- for the death of person aged 35 and was having his own business of stationary he was survived by six persons and was earning Rs.3,000/- per month. It has further contended that the finding of fact that as the deceased was handicapped and was unable to cross the road it was an act of God and he was person responsible for the accident having taken place. Though the Tribunal believed that the bus was involved in the accident belonging to U.P.S.R.T.C. it granted only Rs.55,000/- as compensation.

4. The principle of negligence enunciated here in below will have to be looked into as the Insurance company in memo of appeal has come with the stand that there was a head on collision and it was a case of contributory negligence and, therefore, there is error apparent on the face of record and erred in not framing any issue on that count.

5. The concept of negligence has been time and again enunciated by

different Courts and the word 'negligence' will have to be viewed from the decision in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330*** which has been time and again referred by the Courts in India.

6. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

7. The term negligence has been discussed time and again. A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.

8. The Division Bench of this Court in **F.A.F.O. No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also

provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, the view that even if courts may not by interpretation ***displace the principles of law which are considered to*** *be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits* ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

emphasis added

9. The deceased was a handicapped person and trying to cross the road and at that juncture met with an accident. The claims Tribunal held that not been able to cross the road and meeting with an accident as he was a handicapped person it was an act of God and therefore held that the deceased was himself negligent and granted the amount under no fault liability to the claimants and added

Rs.5,000/- towards non-pecuniary damages. The question is whether the said accident would fall within the definition of act of God. The answer is no. In this case the driver of the bus has disputed his liability rather the driver of the bus and the owner have come out with a another story that the deceased was hit by some other vehicle and they have been illegally roped in. While going through the record it is clear that the accident occurred by the involvement of the bus as F.I.R. and charge sheet were laid against the driver of the bus. Death occurred due to the involvement of the bus. The deceased being handicapped person the driver of the bus should have taken proper cure and caution in driving the bus on the public road. At the most if we hold the deceased not able to cross the road, he can be held to be 20 per cent negligent whereas a driver driving a bus in such a area should have been cautious which he has failed to follow and therefore, not granting proper compensation is bad in eye of law. The compensation will have to be reevaluated as it cannot be said that the deceased died by the act of God. The decisions cited by the counsel for claimants namely **Smt. Gulshan Jahan and Others Vs. Om Prakash and Another (supra)** and **Smt. Kaushnuma Begum & Ors. Vs. The New India Assurance Co. Ltd. & Ors (supra)** will apply in full force and therefore the amount is recalculated.

10. After hearing the learned counsel for the parties and perusing the judgment and order impugned, this Court feels that the income of the deceased, in the year of accident, should have been at least Rs.3,000/- per month namely Rs.36,000/- per year, to which as the deceased was below 35 years of age, 40% of the income i.e. Rs.14,400/- requires to be added as future income which would come to Rs.36,000+14,400=50,400/-. The deduction of 1/3 towards personal expenses of the deceased would be just and proper as he was survived by six dependents. Hence, after deduction of 1/3, the annual datum figure available to the family would be Rs.33,600/-. The multiplier of 16 requires to be granted looking to the age of the deceased is just and proper. Rs.5,000/- granted by the Tribunal under the head of non-pecuniary damages is required to be enhanced. Hence, the claimants are entitled to a total compensation of Rs.33,600X16+30,000= 5,67,600-Rs.1,13,520= Rs.4,54,080/-.

11. However, the rate of interest which is 8% would be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

12. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The

amount be recalculated and deposited with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount be deposited within a period of 12 weeks from today. The amount already deposited be deducted from the amount to be deposited.

13. The record and proceedings be send back to the Tribunal forthwith

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(2019)10ILR A 1025

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2016

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

First Appeal From Order No. 622 of 2005

Union of India Insurance Company Ltd.
...Appellant
Versus
Surya Narayan Shukla & Ors.
...Respondents

Counsel for the Appellant:
Sri Tarun Kumar Misra, Sri Pankaj Pandey, Sri R.B. Pandey.

Counsel for the Respondents:
Sri Pankaj Verma, Sri Pankaj Pandey

A. Motor Vehicles Act, 1988 - Deduction - Deceased being bachelor - deduction towards personal and living expenses, ordinarily in the case of a bachelor is 50%.

Held: - Deceased being a bachelor and the claimants being parents, the deduction of 50% should have been made under the head of personal and living expenses. (Para 13)

B. Motor Vehicles Act, 1988 - Multiplier - Multiplier should be based on the age of the deceased and not on the basis of the age of the dependent - Multiplier to be used should be as mentioned in column (4) of the table of the Sarla Verma judgment which starts with an operative multiplier of 18.

Held: - As the age of the deceased at the time of the death was 20 years, the multiplier of 18 ought to have been applied. (Para 15)

Appeal Partly allowed (E-5)

List of cases cited: -

1.Sarla Verma Vs DTC (2009) 6 SCC 121

2.Reshma Kumari Vs Madan Mohan (2013) 9 SCC 65

3.Amrit Bhanu Shali Vs National Insurance Co. Ltd. (2012) 11 SCC 738

4.Ranjana Prakash Vs Divl. Manager (2011) 14 SCC 639

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

1. List has been revised. No one appears on behalf of the respondent nos.1 and 2.

2. Heard Sri Tarun Kumar Mishra, learned counsel for the appellant and Sri Pankaj Pandey, learned counsel appearing on behalf of respondent nos.3 and 4.

3. This first appeal from order under section 173 of the Motor Vehicles Act, 1988 (for short "Act'), has been filed by the United India Insurance Company Limited against the judgment and award dated 05.05.2005 passed by the Motor Accident Claims Tribunal/Additional District Judge/Special Judge (E.C. Act), Gonda in MACP No.29 of 2004 (Surya Narayan Shukla and another versus Shiva Shankar Mishra and others), whereby a sum of Rs.3,62,000/- along with interest

at the rate of 9% has been awarded to the respondent nos.1 and 2.

4. The deceased, Dinesh Kumar Shukla, is the son of the respondent nos.1 and 2. On 02.02.2004, at about 2.30 in the afternoon, the deceased and Shyama Prasad were riding a bicycle on their way home. When they reached Tikri turn, a truck no.UP 62 C 5079, came from the opposite direction and hit the bicycle. As a result of the accident Dinesh Kumar Shukla died on the spot.

5. The parents of the deceased Dinesh Kumar Shukla, filed a claim petition under Section 166 of the Act claiming compensation to the tune of Rs 67,75,000/-. They pleaded that the accident was caused due to rash and negligent driving of the truck, owned by respondent no.3 and driven by respondent no.4 and that, at the time of his death the age of the deceased was 20 years and he was a student of B.Com and had a diploma in computer application and was earning Rs.4,000 per month.

6. By their joint written statement, respondent nos.3 and 4 denied the averments made in the claim petition. It was inter alia stated by them that the alleged accident never took place and that they were falsely implicated on account of some dispute with the police of the local Police Chowki, Katra. The appellant also filed its written statement stating that the driver of the truck did not possess a valid driving license and that the truck was not insured with them and also that the accident was caused due to negligence on the part of the deceased.

7. The tribunal framed the following issues:

(1) क्या दिनांक 2–2–04 को समय लगभग 2.30 बजे दिन विपक्षी सं02 ट्रक संख्या यू0पी0 62 सी 5079 तेज रफ्तार व लापरवाही से चलाता हुआ याची के पुत्र दिनेश कुमार शुक्ला को टक्कर मार दिया जिससे उसकी मौके पर ही दुर्घटना स्थल पर ही मृत्यु हो गई?

(2) क्या चालक के पास वैद्य चालक अनुज्ञापत्र था?

(3) क्या दुर्घटना के समय गत वाहन विपक्षी संख्या 3 के यहॉ बीमित थी और उसे बीमा की शर्तों के अधीन चलाया जा रहा था?

(4) क्या याचीगण किसी प्रतिकर को पाने के हकदार हैं। यदि हॉ तो कितना और किससे?

8. In support of the claim petition the first respondent examined himself as PW 1, Vinod Kumar Upadhyay as PW 2 and Shyama Prasad Pathak, who had witnessed the accident, as PW 3. The respondents nos.1 and 2 also field documentary evidence in support of their case. No one appeared on behalf of respondent nos.3 and 4, and as such, the claim proceeded ex parte against them.

9. After analyzing the evidence, the Tribunal decided issue no.1 in the affirmative and held that the accident was caused due to rash and negligent driving of the truck owned by the third respondent.

10. While dealing with issue no.2, the Tribunal arrived at a finding that the income of the deceased was Rs.3,000/-. It also determined that the deceased was a bachelor. The Tribunal deducted 1/3rd of his monthly salary and determined the loss of earnings to the family at Rs.2,000/-. The Tribunal then applied the multiplier 15 and declared that the

claimants are entitled to get compensation of Rs.3,62,000/- along with interest at the rate of 9% per annum from the date of the claim petition.

11. On the issue of deduction towards personal and living expenses in *Sarla Verma v. DTC, (2009) 6 SCC 121,* the Apex Court has held that:

"31. ... In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father."

12. The deduction ordinarily in the case of a bachelor at 50% has been recently approved by a three-Judge Bench decision of the Apex Court in *Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65.* Paragraph 41 and 42 of the said report are as follows:

"41. The above does provide guidance for the appropriate deduction for personal and living expenses. One must bear in mind that the proportion of a man's net earnings that he saves or spends exclusively for the maintenance of others does not form part of his living expenses but what he spends exclusively on himself does. The percentage of deduction on account of personal and living expenses may vary with reference to the number of dependent members in the family and the personal living expenses of the deceased need not exactly correspond to the number of dependants.

42. In our view, the standards fixed by this Court in Sarla Verma on the aspect of deduction for personal living expenses in paras 30, 31 and 32 must ordinarily be followed unless a case for departure in the circumstances noted in the preceding paragraph is made out."

13. Admittedly, both the parents, namely, the respondent nos.1 and 2 herein have been held to be dependent on the deceased Dinesh Kumar Shukla and therefore, the Tribunal held that they have the right to get the compensation. The Tribunal has made a deduction of 1/3rd only towards personal and living expenses of the deceased. Whereas, in view of the settled legal position, the deceased being a bachelor and the claimants being parents, the deduction of 50% should have been made under the head of personal and living expenses.

14. Though the counsel for the respondent nos.1 and 2 is not present, however, while going through the impugned award it has transpired that the Tribunal has applied the multiplier of 15 on the basis of the age of the parents/ claimants. In *Amrit Bhanu Shali v. National Insurance Co. Ltd., (2012) 11 SCC 738,* the Apex Court has held as follows:

"15. The selection of multiplier is based on the age of the deceased and

not on the basis of the age of the dependent. There may be a number of dependents of the deceased whose age may be different and, therefore, the age of the dependents has no nexus with the computation of compensation."

15. In *Sarla Verma (supra)* the Apex Court in paragraph 42 of the said report has held that the multiplier to be used should be as mentioned in column (4) of the table of the said judgment which starts with an operative multiplier of 18. As the age of the deceased at the time of the death was 20 years, the multiplier of 18 ought to have been applied. The Tribunal taking into consideration the age of the deceased wrongly applied the multiplier of 15.

16. In *Ranjana Prakash v. Divl. Manager, (2011) 14 SCC 639,* the Apex Court has laid down that in an appeal filed by the owner / insurer the claimants can defend the quantum of compensation awarded by the Tribunal by pointing out other errors or omissions in the award. Paragraphs 6, 7 and 8 of the report are reproduced below:

"6. We are of the view that the High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of the future prospects and add 30% to the annual income of the deceased. But the claimants were not aggrieved by Rs 23,134 being taken as the monthly income. *There was therefore no need for them to challenge the award of the Tribunal. But where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation.* Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that the claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the

insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. *The High Court cannot obviously increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."* (emphasis supplied)

17. The Tribunal has assessed the monthly income of the deceased at Rs.3000/-. The Tribunal has rightly taken into consideration the aforesaid income for computing the compensation. The annual income comes to Rs.36,000/-. If 50% of the said income is deducted towards personal and living expenses of the deceased, the contribution to the family will be Rs.18,000/-. At the time of the accident, the deceased Dinesh Kumar Shukla was a bachelor of about 20 years old. Hence on the basis of the decision in Sarla Verma (supra) applying the multiplier of 18, the amount will come to Rs.3,24,000/-. Besides this amount the claimants have been held entitled to Rs.2,000/- on account of funeral and ritual expenses. Therefore, the total amount comes to Rs.3,26,000/- and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the claim petition till realization.

18. In view of the above, the appeal is partly allowed. The impugned judgment and award stands modified to the above extent. The amount which has already been received by the respondents nos.1 and 2 shall be adjusted and the rest of the amount be paid at an early date. No order as to cost.

19. The original record shall be returned to the Tribunal forthwith.

(2019)10ILR A 1029

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.10.2019

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 16 of 2004

Gaya Prasad ...Appellant
Versus
Smt. K. Trivedi & Anr. ...Respondents

Counsel for the Appellant:
Sri M. Saeed

Counsel for the Respondents:
Sri R.C. Sharma

A. Motor Vehicles Act,1988 - Section 163-A - Notional Income - Notional income has to be determined on the basis of Second Schedule of Section 163-A of the Motor Vehicles Act. (Para 10)

B. Motor Vehicles Act, 1988– Multiplier for Age upto 15 years - Multiplier of 15

Held:-In cases where the age of the deceased is upto 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in Sarla Verma should be followed. (Para 12)

Appeal Partly allowed (E-5)

List of cases cited: -

1.Kishan Gopal & anr. Vs Lala (2013) 4 T.A.C. 5 (S.C.)

2.Reshma Kumari & ors. Vs Madan Mohan & anr. (2013) 9 SCC 65

3.National Insurance Company Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

4.M/s Royal Sundaram Alliance Insurance Company Ltd. Vs Mandala Yadagiri Goud & ors. (2019) 5 SCC 554,

5.Khalil Ahmad & anr. Vs Jitendra Bhushen Pandey & anr. F.A.F.O. No.377 of 2001

6.Om Prakash Verma Vs Smt. Krishna Goel F.A.F.O. No.285 of 2009

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Sri M. Saeed, learned counsel for the appellant and Sri R.C. sharma, learned counsel for the respondents.

2. The instant first appeal from order has been preferred against the judgment and award dated 07.10.2003 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.9 in Motor Accident Claim Petition No. 259 of 2001(Gaya Prasad versus smt. K. Trivedi and another) for enhancement of the awarded amount.

3. Brief facts of the case are that the deceased Ashish Kumar,son of the appellant/claimant, had died in an accident by Jeep No. U.P. 78 T 1182 on 19.08.2001. Therefore the claim petition was filed by the appellant/claimant claiming compensation. The respondents had filed the written statement.

4. On the basis of the pleadings of the parties, four issues were framed. After evidence and hearing learned counsel for the parties, learned Tribunal has allowed the claim petition partly and awarded the amount of Rs. 55,000/- as compensation alongwith interest at the rate of 8% per annum, out of which 27500 is to be paid to the appellant/claimant and Rs.27,500/- to his wife, i.e., the mother of the deceased. Being aggrieved by the compensation awarded by learned Tribunal, the present appeal has been filed for enhancement of compensation.

5. Submission of learned counsel for the appellant is that the deceased Ashish Kumar was aged about 14 years at the time of accident and he was studying in Class VIII and was a bright student. There were 6 dependents. If he would have been alive, earned a lot and helped the appellant but the learned Tribunal wrongly and illegally assessed the notional income of the deceased as Rs.15,000/- which should have been

higher in view of ***Kishan Gopal and Another versus Lala; 2013(4) T.A.C.,5 (S.C).*** He further submitted that the multiplier of 5 has wrongly been applied by the learned Tribunal on the age of the father of the deceased while it should have been applied according to the age of the deceased or if the parents are the claimants, then on the age whose age was less at the time of death and, accordingly, the multiplier is liable to be modified. He further submitted that the lesser amount has been awarded towards conventional heads, namely loss of estate, loss of consortium and loss of funeral expenses, which are also liable to be enhanced. Accordingly, learned counsel for the appellant submitted that the appeal may be allowed and the impugned judgment and award passed by the learned Motor Accident Claims Tribunal may be modified and the amount of compensation be enhanced.

6. Learned counsel for the appellant/claimant relying on the judgment of the Honb'le Apex Court in the case of ***Reshma Kumari and others versus Madan Mohan and another; (2013) 9 SCC 65*** submitted that the multiplier of 15 is liable to be applied in the present case.

7. Per contra, learned counsel for the respondent submitted that the deceased was aged about 14 years, as such, he was minor at the time of death. Therefore the notional income of Rs. 15,000/- has rightly been assessed and the multiplier has rightly been applied on the age of the father. However, relying on the judgment of this Court in the case of ***Khalil Ahmad and another versus Jitendra Bhushen Pandey and another; F.A.F.O. No.377 of 2001 and Om Prakash Verma versus Smt. Krishna Goel; F.A.F.O. No.285 of 2009*** submitted that the appellant is entitled only for a fixed compensation of

8. I have considered the submission of learned counsel for the parties and perused the records.

9. The deceased Ashish Kumar and one Radheylal were going back from Mela in Achalganj on 19.08.2001 at about 5:00 p.m. from a Vikram. When they stepped down from the Vikram near Mawaiya Minor Puliya,Jeep No. 78AT 1182 which was coming from the side of Unnao towards Achalganj smashed the deceased Ashish Kumar, the son of the claimant who died on the same day in the Sadar Hospital, Unnao. On account of the death in the accident, the claim petition was filed which has been allowed partly by the claims tribunal. The factum of accident has not been disputed by anybody and the instant appeal has been filed only for enhancement of the amount of compensation.

10. Admittedly, the deceased was aged about 14 years at the time of accident. The learned Tribunal has assessed the notional income of the deceased as Rs.15,000/- as no evidence was adduced in regard to the income of the deceased. The income has been determined on the basis of Second Schedule of Section 163-A of the Motor Vehicles Act because nothing has been brought on record nor any evidence was adduced in regard to the income of the deceased or about the career of the deceased. Therefore the income has rightly been determined on the basis of the second schedule. The case of ***Kishan Gopal and another versus Lala(supra)*** is not applicable on the facts and

circumstances of the present case because in that case the deceased was assisting the appellants in their agricultural occupation while in the present case the deceased was doing nothing.

11. The learned Tribunal has allowed the mulitplier of 5 considering the age of father of the deceased while as per settled proposition of law it should be applied on the basis of the age of the deceased. In the case of ***National Insurance Company Ltd. versus Pranay Sethi and others; (2017) 16 SCC 680 in paragraph 59.7 and M/s Royal Sundaram Alliance Insurance Company Limited versus Mandala Yadagiri Goud and others; (2019) 5 SCC 554,*** the Hon'ble Apex Court has held that the multiplier should be applied on the age of the deceased.

12. The deceased was aged 14 years of age at the time of accident. Therefore the question arises as to what multiplier should be applied because the Hon'ble Apex Court in the case of ***Sarla Verma(Smt.) and others versus Delhi Transport Corporation and another; 2009 6 SCC 121*** has provided the multiplier in paragraph 42 from the age of 15 years. The Hon'ble Apex Court in the case of ***Reshma Kumar and ohters versus Madan Mohan (supra)*** has held in paragraph 43.2 that in cases where the age of the deceased is upto 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in Sarla Verma should be followed. The paragraph 43.2 is reproduced as under:-

"43.2 In cases where the age of the deceased is upto 15 years, irrespective of Section 166 or Section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the Table in Sarla Verma should be followed."

13. In view of above this Court is of the view that the multiplier of 15 is to be applied in the present case in place of 5.

14. So far as the future prospects are concerned the learned Tribunal has allowed Rs. 2,000 towards the funeral expenses and Rs. 3.000/ towards the loss of consortium, while the Hon'ble Apex Court in the case of ***National Insurance Company Ltd. versus Pranay Sethi and others (supra)*** has allowed Rs.15,000/- Rs.40,000/- and Rs. 15,000/- towards loss of estate, loss of consortium and funeral expenses under the conventional heads. The Hon'ble Apex Court in the case of ***Kishan Gopal and another versus Lala and others(supra)*** has allowed Rs. 50,000 towards the conventional heads in case of accident on 19.04.1992 in which the parents had lost their son at the age of 10 years. In the present case the accident had occurred on 19.08.2001. Therefore this Court is of the considered view that the appellants are entitled for Rs.15,000/-, Rs.40,000/- and Rs.15,000/- under the conventional heads in view of ***National Insurance Company Ltd. versus Pranay Sethi and others(supra)*** in place of Rs.2000/- and Rs.3,000/-.

15. On the basis of above, this Court is of the considered opinion that the compensation determined by the learned Tribunal is insufficient and the assessment should be made on the basis of notional income of Rs.15,000/- and

applying the multiplier of 15 alongwith the amount under the conventional heads as indicated above. Therefore the judgment and award passed by the learned Tribunal is liable to be modified and the appellant/ claimant is held entitled to a compensation which is calculated as follows:.

1	Income	Rs.15,000/-
2	After deduction @ 1/3rd	Rs.10,000/-
3	Multiplier(15);10,000/-x15	Rs.1,50,000/-
4	Loss of estate	Rs.15,000/-
5	Loss of consortium	Rs.40,000/-
6	Funeral expenses	Rs.15,000/-
	Total (3+4+5+6)	Rs.2,20,000/-

16. In view of above, the F.A.F.O No.16 of 2004: Gaya Prasad versus Smt. K. Trivedi and another is **partly allowed** and judgment and award dated 07.10.2003 passed by Additional District Judge, Court No.9/ Motor Accident Claim Tribunal in Motor Accident Claim Petition No. 259 of 2001(Gaya Prasad versus Smt. K. Trivedi and another) **stands modified** to the extent indicated above in paragraph 15. The appellants are entitled for Rs.2,20,000/- as compensation alongwith interest at the rate of 8% per annum awarded by the Tribunal, which shall be paid by the respondents after adjusting the amount paid, if any, within a period of two months from today.

17. No order as to costs.

18. Office is directed to remit the lower court record to the concerned Tribunal forthwith within a period of four weeks.

(2019)10ILR A 1033

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2019

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Matter Under Article - 227 No. 5239 of 2019

Kedar ...Petitioner
Versus
Radha Krishna Mahavidyalaya Sunderpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Pandey

Counsel for the Respondents:
Sri Jai Prakash Rai

A. Family Courts Act- Section 7(1) – Specific Relief Act- Section 34 - Code of Civil Procedure - Section 9- The issue as to whether defendant No.3 is son of Bhairam or Vishwanath would not fall within the realm of the jurisdiction of Family Courts, which are courts of limited jurisdiction. The relief sought would fall under the ambit of Section 34 of the Specific Relief Act, well within the domain of ordinary civil courts. The impugned judgment passed by the appellate court is accordingly set aside. The matter is remitted to the appellate court for deciding the appeal afresh based on its merits in light of the observations made above. (Para 7,8, 10 & 11)

Writ Petition allowed in part (E-8)

List of Cases Cited: -

1. Samar Kumar Roy vs. Jharna Bera, (2017) 9 SCC 591

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

1. Heard counsel for the parties.

2. The instant petition is directed against the order dated 4.4.2019 passed by District Judge, Ghazipur in Misc. Civil Appeal No. 17 of 2018 disposing of the appeal filed by the petitioner with a direction to the trial court to decide issue relating to jurisdiction in the light of the observations made in the order, before proceeding further in the matter. The appeal was directed against the order dated 9.3.2018 passed in Original Suit No. 722 of 2017, whereby the application for temporary injunction filed by the plaintiff-petitioner was rejected. The relief claimed in the suit is for cancellation of sale deed dated 13.10.2016 executed by defendant No.3, Mangala in favour of defendants no. 1 and 2; for permanent injunction restraining the defendants from interfering in the possession of the plaintiff in respect of the suit property or raising constructions over the same without getting the property partitioned; and for declaration that defendant No.3 Mangala is son of late Vishwanath and not Bhairam. The appellate court, while deciding the appeal, has held that the main issue involved in the suit is whether defendant No.3 is son of Bhairam or Vishwanath. It has observed that the said issue would fall within the jurisdiction of Family Court in view of Clause (e) of the Explanation of sub-section (1) of Section 7. In the aforesaid backdrop, the above direction had been issued by the appellate court.

3. Counsel for the petitioner submitted that the issue relating to parentage of defendant No.3 cropped up in relation to title to the suit property. The suit does not involve adjudication of any dispute between spouses nor any dispute arising out of any matrimonial relationship. It also does not involve any declaration as to legitimacy of the defendants. The submission is that the Family Courts are constituted with the object of settlement of family disputes and not of the nature, as has been raised in the suit.

4. On the other hand, learned counsel for the respondents submitted that since the main issue involved is whether defendant No.3 is son of Bhairam or not, therefore, the said issue would fall squarely under Clause (e) of *Explanation* of sub-section (1) of Section 7 of the Family Courts Act. He further placed reliance upon clause (d) which provides for a suit or proceeding for an order or injunction in circumstances arising out of a matrimonial relationship to be decided by a Family Court.

5. Before proceeding to consider the submissions, it would be apposite to take note of the plaint case. The suit was instituted by the plaintiff-petitioner with the allegation that the suit property belonged to his ancestor Khelawan. He was survived by his son Sundar. Sundar had three sons; Mukhram, Bhairam and Rajdev. Mukhram died issueless. Bhairam had two sons, namely the plaintiff-petitioner and defendant No.2, Subedar. It is alleged that Mangala, defendant No.3 is son of Vishwanath. According to the plaint assertions, father of defendant No.3, Vishwanath was resident of a different village. He had no connection with the family of the plaintiff and his ancestors. Defendant No.3 fraudulently succeeded in getting his name entered in the municipal records showing himself as son of Bhairam and on basis thereof, he

illegally transferred the suit property in favour of defendant-respondent 1st set alleging himself to be a co-sharer in the properties left behind by Khelawan and Sundar. In essence, the plaint case was that the defendant No.3 wrongly claimed himself to be co-sharer of the suit property as he is in no manner connected with the family of Sundar and Bhairam.

6. The defendants, on the other hand, have denied the plaint assertions and claim that defendant No.3 is son of Bhairam.

7. No doubt, having regard to the pleadings of the parties and the relief sought, one of the main issues to be decided by the trial court is whether defendant No.3 is son of Bhairam or not. In case it is held that he is son of Bhairam, the plaint case would stand demolished. On the other hand, if it is established that he is son of Vishwanath, then definitely the sale deed executed by him, asserting himself to be a co-sharer in the properties kept behind by Bhairam, would be void.

8. Section 9 of the Civil Procedure Code provides that all suits of civil nature except suits of which cognizance is either expressly or impliedly barred, shall be tried by the civil courts. The first Explanation provides that a suit in which right to property is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. The jurisdiction of the civil court to try a suits involving right to property is thus expressly recognised. It is also well settled that in dealing with the question whether a civil court has or has not jurisdiction to entertain a suit, every presumption has to be made in favour of jurisdiction of the civil court, unless there is express or implied bar. The Family Courts Act, 1984 (hereinafter referred to as 'the Act') was enacted by the Parliament to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. The statement of objects and reasons, interalia, provides that Family Courts are being setup for settlement of family disputes where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. One of the object of the legislation was to confer exclusive jurisdiction upon Family Courts in matters relating to:-

"(i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of a marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(ii) declaration as to the legitimacy of any person;

(iv) guardianship of a person or the custody of any minor;

*(v) main*tenance, including proceedings under Chapter IX of the Code of Criminal Procedure;"

9. Section 7 of the Act, lays down the jurisdiction of a Family Court and it provides as follows:-

"7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall-

(a)have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b)be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends. Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

10. The Explanation to sub-section (1) of Section 7 enumerates the disputes which are in the exclusive jurisdiction of Family Courts. It interalia provides that a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them or a suit or proceeding for an order or injunction in circumstances arising out of a matrimonial relationship or a suit or proceeding for a declaration as to the legitimacy of any person is in the exclusive domain of Family Court. There is no dispute as to whether defendant was born out of the wedlock between Bhairam and his wife and he is their legitimate son or not but rather the dispute is whether he is son of Bhairam or Vishwanath, who has no connection with the family of the plaintiff. Thus, the issue of legitimacy is not at all involved, nor Clause (e) of Explanation to sub-section I of section 7 gets attracted. The phrase 'matrimonial relationship' used in Clause (d) of the Explanation to sub-section 1 of section 7 would mean the relationship arising out of marriage between two persons. It is never intended that it would take within its sweep all disputes to property based on lineage of a person. A dispute as to whether A is son of 'X' or 'Y' so as to entitle

him to succession of property is definitely not a dispute arising out of a matrimonial relationship.

11. The Supreme in **Samar Kumar Roy vs. Jharna Bera, (2017) 9 SCC 591,** considered the issue as to whether declaration sought by plaintiff that defendant is not his legally wedded wife and that she has no right to his property could be given by civil court or the suit has to be instituted before the Family Court, in view of the Sections 7 and 8 of the Act. After considering the reports of Law Commission, scheme of the Act, and Section 34 of the Specific Relief Act, the Supreme Court held that:-

"16. On a reading of the aforesaid propositions, it is clear that the examination of the remedies provided and the scheme of the Hindu Marriage Act and of the Special Marriage Act show that the statute creates special rights or liabilities and provides for determination of rights relating to marriage. The Acts do not lay down that all questions relating to the said rights and liabilities shall be determined only by the Tribunals which are constituted under the said Act. Section 8(a) of the Family Courts Act excludes the Civil Court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage. Also as was pointed out, an exclusion of the jurisdiction of the civil courts is not readily inferred. Given the line of judgments referred to by the High Courts, and given the fact that a suit for declaration as to legal character which includes the matrimonial status of parties to a marriage when it comes to a marriage which allegedly has never taken place either de jure or de facto, it is clear that the civil court's jurisdiction to determine the aforesaid legal character is not barred either expressly or impliedly by any law."

12. Applying the principles laid down by the Supreme Court and having regard to the scheme of the Act, the irresistible conclusion is that the view taken by the Appellate Court is not sustainable in law.

13. The issue as to whether defendant No.3 is son of Bhairam or Vishwanath would not fall within the realm of the jurisdiction of Family Courts, which are courts of limited jurisdiction. The relief sought would fall under the ambit of Section 34 of the Specific Relief Act, well within the domain of ordinary civil courts. The impugned judgment passed by the appellate court is accordingly set aside. The matter is remitted to the appellate court for deciding the appeal afresh based on its merits in light of the observations made above.

14. As a result, the petition succeeds in part. No order as to costs

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(2019)10ILR A 1037

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Appeal (Against Acquittal) (u/s 378(4) of Cr.P.C.) No. 116 of 2019

Ashok Kumar Pandey
...Appellant/Complainant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Viresh Misra, Sri Amit Misra, Sri Sandeep Kumar Dubey

Counsel for the Opposite Party:
G.A.

A. Indian Penal Code, 1860 - Sections147, 148, 323/149, 325/149, 504, 506(2), 307, 452 -Application-grant of leave to file Criminal Appeal-rejection- In cross-case, there occurred conviction against which Criminal Appeal, has been instituted and is pending- Therein, Ashok Kumar Pandey side was held aggressor, who had committed above offences and Shitla Prasad Pandey side was held to be victim of that aggression -There is no perversity or illegality in passing of the present impugned judgment of acquittal-Moreso, the conduct of Ashok Kumar Pandey regarding having an X-ray and plaster, without there being any fracture over his person, reveals the way in which this case was concocted. (Para 4, 6 & 7)

Criminal Appeal Rejected (E-6)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

Order on Application to Grant Leave for Filing Criminal Appeal

1. This Criminal Appeal, under Section 378 (4) of Criminal Procedure Code , read with Section 372 of Cr.P.C., alongwith Application to Grant Leave for Filing appeal, has been filed by Ashok Kumar Pandey against State of U.P. and six others, challenging the judgment of acquittal, passed by the Additional Sessions judge, Court No.14, Varanasi, in Sessions Trial No. 363 of 2017, Ashok Kumar Pandey vs. Shitla Prasad Pandey and 5 others, under Section 147, 148, 323/149, 325/149, 504, and 506(2) of Indian Penal Code (in short IPC), Police Station-Rohaniya, District Varanasi.

2. Learned counsel for the applicant argued that the trial court passed the impugned judgment of acquittal, on the basis of incorrect appreciation of facts and evidence placed on record. Testimony of informant PW-1 was fully intact and supported with medical evidence in which medico legal report as well as X-ray report was in full tune with injury of fracture over phalanges, reported, proved by the medical evidence, which stood corroborated by two independent witness, who have proved case of prosecution, but trial court passed judgment of conviction in cross case in which present applicant side has been convicted; against which Criminal Appeal, being Criminal Appeal No.4930 of 2019, Ashok Kumar Pandey vs. State of U.P., has been admitted and record of the case has been summoned, vide order, dated 30.07.2019, wherein judgment of conviction, in Sessions Trial No. 392 of 2003, for offence, punishable, under Sections 307 and 452 of IPC, Case Crime No. 224 of 2002, of Police Station Rohaniya, District Varanasi, has been passed. Hence, leave to file this Criminal Appeal be granted and this Criminal Appeal be also connected with above Criminal Appeal for its disposal.

3. From very perusal of the impugned judgment and contentions made in this Application as well as affidavit, filed in support of the Application, it is apparent that the pendency of the cross case for occurrence of same date, time and place, in between the same parties, was undisputed fact and both of the Sessions Trial were held as cross cases in which one case ended in conviction wherein present applicant and others were

held aggressor and convicted against which Criminal Appeal was admitted and is pending. In this case, judgment of acquittal is there.

4. Occurrence, injuries of complainant side, cause of those injuries, were given by accused persons in their statement recorded, under Section 313 of Cr.P.C. and it was the same contention, which was a case of prosecution in cross-case. Meaning thereby, injury over the person of Ashok Kumar Pandey was not disputed, but it was said to be caused by exercise of right of private defence by accused persons, when this assault was made by Ashok Kumar Pandey and his family members, at the time of dispute, which occurred, while depositing sand over the pathway, which was protested by Shitla Prasad Pandey and his family members, but was resisted by Ashok Kumar Pandey and his family members, which resulted in this occurrence, in which a fire arm shot, with intention to kill, was extended, and a case crime number, for offence of attempt to culpable homicide, amounting to murder, punishable under Section 307, coupled with Section 452 of IPC was got registered against Ashok Kumar Pandey and his family members. Those case crime numbers were investigated, which resulted in submission of chargesheet, over which cognizance was taken and cross-cases were held in trial.

5. In cross-case, there occurred conviction against which Criminal Appeal, as above, has been instituted and is pending. Therein, Ashok Kumar Pandey side was held aggressor, who had committed above offences and Shitla Prasad Pandey side was held to be victim of that aggression.

6. One very important fact, which needs to be mentioned, is the testimony of Medical Officer of Jail where Ashok Kumar Pandey was admitted. Wherein this has specifically been mentioned that there was no fracture over the body part, which was put under plaster by the Medical officer of Government Hospital at Varanasi. This was suspected by the Medical officer and, ultimately, he made a report and got the same examined by a team of specialist and it was found that it was a false injury, i.e., Ashok Kumar Pandey, who got this criminal case initiated, by way of an application moved, under Section 156 (3) of Cr.P.C., which, subsequently, stood converted to be a complaint case, was with no injury of fracture over his person at the place, which was put under plaster and it was found by the team of Specialists that there was no such injury and it was proved on record. This was a fact of present case and under all above perspective of law and fact as well as evidences, proved before trial court, this judgment of acquittal was passed. There was a judgment of conviction against Ashok Kumar Pandey and his allies.

7. There is no perversity or illegality in passing of the present impugned judgment. Moreso, this conduct of Ashok Kumar Pandey regarding having an X-ray and plaster, without there being any fracture over his person, reveals the way in which this case was concocted. Hence, there remains no ground for grant of leave to file proposed Criminal Appeal against the judgment impugned.

8. In view of what has been discussed above, Application for Grant of Leave to File Criminal Appeal lacks merit and, therefore, stands rejected accordingly.

(2019)10ILR A 1040

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE

THE HON'BLE MOHD. NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR-IX, J.

Crl. Misc. Application (Leave To Appeal) (Defective) No. 58 of 2018

Salil Kumar Verma
...First Informant/Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Jai Nath Patel

Counsel for the Opposite Parties:
G.A., Sri Apul Misra, Sri Nrapendra Kumar Chaturvedi, Sri Upendra Kumar Pandey

A. Code of Criminal Procedure, 1973:- Section 372 - Appeal against acquittal - complainant has preferred the instant appeal after lapse of more than 14 years - When the judgment of acquittal was pronounced, the proviso of Section 372 Cr.P.C. was not in existence. It was incorporated by the legislature only on 31.12.2009 giving right to victim to prefer an appeal against the acquittal of the accused or conviction for a lesser offence or imposing inadequate punishment - Since the amendment has come into force on 31.12.2009, it cannot have any retrospective effect to allow the victim to prefer the appeal against acquittal which was passed by learned trial court against the accused respondents by order dated 21.10.2004. (Para 6, 9, 11, 12 & 13)

Crl. Misc. Application (Leave to Appeal) dismissed (E-6)

Precedent followed: -

1. Mallikarjun Kodagali (Dead) through L.R. Vs St. of Kar. & ors. (2018) 2 S.C.Cr.R. 1310.

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Anil Kumar-IX, J.)

1. No one is present on behalf of appellant to address the Court, however, Shri Nripendra Kumar Chaturvedi and Shri Apul Misra learned counsel for complainant are present on behalf of the opposite parties.

2. On the last occasion this Court has passed the following order which is being reproduced hereunder:-

"No one is present on behalf of the appellant, even case is called out in the revised list.

Sri Nrapendra Kumar Chaturvedi as well as Sri Apul Misra are present on behalf of the opposite parties.

Pursuant to the order dated 31.05.2018 the notice was issued to the opposite party to file objection to the delay condonation application.

Learned counsel appearing for the accused/respondents submits that he has prepared the counter affidavit to the delay condonation application filed on behalf of the appellant in respect of inordinate delay of about 14 years in filing the appeal. The appellant's counsel is seeking adjournment on one pretext or the other as such he has not been able to contact him to serve the copy of the objection.

Considering the submission advanced by learned counsel for the opposite party and perused the order sheet, it transpires that learned counsel for the appellant is seeking adjournment on one round or the other as such we are taking on record the counter affidavit filed by learned counsel appearing on behalf of opposite party.

Let the case be listed in the next cause list.

On the next date of listing if the learned counsel for the appellant fails to appear the court shall proceed to decide application itself."

3. The instant Criminal Appeal U/S 372 Cr.P.C. along with an application for Leave to Appeal has been preferred by the appellant against the judgment and order dated 21.10.2004 passed in Sessions Trial No. 03/2003 (State Vs. Deepak Kumar Verma and others) arising out of Case Crime No. 473/2001 under Sections 498A, 304B I.P.C. and 3/4 D.P. Act, Police Station Uttar, District- Firozabad whereby the accused respondents have been acquitted by the learned Additional Sessions Judge, Court No. 1 Firozabad.

4. As there is a report of stamp reporter that the appeal has been filed beyond time by 4868 days, hence notice was issued to the respondents vide order dated 31.05.2018 to the delay condonation application filed by the appellant to condone the delay in filing the appeal.

5. Learned counsel appearing on behalf of accused respondents has made serious objections with regard to the maintainability of the appeal itself.

6. The submission of learned counsel is that against the order of acquittal passed by learned trial court by judgment and order dated 21.10.2004, complainant has preferred the instant appeal on 31.05.2018 after lapse of more than 14 years. When the judgment of acquittal was pronounced, the proviso of Section 372 Cr.P.C. was not in existence which was incorporated by the legislature only on 31.12.2009 giving right to victim to prefer an appeal against the acquittal of the accused or conviction for a lessor offence or imposing inadequate compensation. Since the amendment has came into force on 31.12.2009, it cannot have any retrospective effect to allow the victim to prefer the appeal against acquittal which was passed by learned trial court against the accused respondents by order dated 21.10.2004. The present appeal itself is not maintainable and deserves to be dismissed with cost on this count alone.

7. It is further submitted by the learned counsel that the filing of this appeal with inordinate delay which is not at all maintainable has caused immense mental harassment to the accused respondents who have already been acquitted by the trial court.

8. We have considered the arguments advanced by the learned counsel for the accused respondents. The provision of Section 372 Cr.P.C. has been amended by adding the proviso by virtue of the amendment which has came into force w.e.f. 31.12.2009 Act No. 5 of 2009 which reads thus:-

9. Section 372 Cr.P.C.:-

No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal

ordinarily lies against the order of conviction of such Court."

10. The above proviso is prospective not retrospective as held by the Hon'ble Apex Court recently in the judgment of ***Mallikarjun Kodagali (Dead) represented through Legal Representatives Vs. State of Karnataka & Ors.*** reported in ***2018 (2) S.C.Cr.R. 1310.***

11. In paragraph 74 of the aforesaid citation, Hon'ble Apex Court has held as follows:-

"74. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of appeal under the proviso to Section 372 of the Cr.P.C. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has no relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the Trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31st December, 2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso."

12. The right to appeal is a substantive right. The right to appeal given to victim would be prospective and enforceable with effect from 31st December 2009 only (Act No. 5 of 2009). The proviso under Section 372 Cr.P.C. has not conferred right to the victim retrospectively as such no right accrue to the complainant to derive any benefit.

13. Since the issue is not res integra as such we have not find any merit to entertain this appeal which is not maintainable as the judgement of acquittal has been pronounced prior to the amendment came into force under Section 372 Cr.P.C. giving right to the victim to prefer an appeal against the acquittal. The delay condonation application as well as the appeal sans any merit are hereby **dismissed.**

(2019)10ILR A 1042

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2019

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

U/S 407 of Cr.P.C. No. 5 of 2019

Ved Prakash ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Nadeem Murtaza, Sri Shubham Tripathi

Counsel for the Opposite Parties:
Govt. Advocate, Sri Vijay Kumar Tripathi

A. Indian Penal Code, 1860 - Sections 364/511, 504, 506 & Code of Criminal Procedure, 1973 - Section 407-Transfer application has been moved by the applicant- application - rejection - the principles governing the transfer of criminal cases from one District to another District -

it is implicit under Section 407 of the Cr.P.C. that a criminal case can be transferred if it is made to appear that a fair and impartial inquiry or trial could not be had - apprehension of not getting a fair trial should be substantial and not cosmetic - The transfer of a case from one territorial jurisdiction to another territorial jurisdiction is a serious business and the same should not be ordered at the drop of a hat unless substantial compelling facts and circumstances are present. (Para 14 & 15)

Transfer Petition dismissed (E-6)

Precedent followed: -

1. Sarasamma @ Saraswathiyamma Vs St. rep. by Dy. D.S.P.& ors. (2018) 7 SCC 339

2. Abdul Nazar Madni Vs St. of T.N. & anr. (2000) 6 SCC 204

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

1. Heard learned counsel for the applicant and learned AGA for the State as well as Shri Vijay Kumar Tripathi for opposite party no.2 as well as perused the record.

2. This transfer application has been moved by the applicant -Ved Prakash with a prayer to transfer Sessions Trial No. 370 of 2015 (State Vs. Shesh Narayan), arising out of case crime no. 2333 of 2008, under Sections 364/511, 504, 506 IPC relating to Police Station Kotwali, District Sultanpur, pending in the court of Additional Sessions Judge, Court No.1, Sultanpur to any other court of competent jurisdiction within State of U.P.

3. Learned counsel for the applicant while referring to the affidavit filed in support of the transfer application submits that the applicant is a practicing lawyer of this Court since 2003 and is a permanent resident of District Sultanpur but after enrollment with the Bar Council of U.P. in the year 2003, he is continuously residing and practicing at Lucknow. He regularly visits his paternal home at village Raniganj, District Sultanpur for purpose of doing pairvi and giving evidence in the cases.

4. It is further submitted that pertaining to the murder of the father of the applicant a case Crime No. 403 of 1986 under Sections 147,1 48, 149, 302 IPC was registered at Police Station Kotwali Nagar, District Sultanpur. All accused persons of this case after trial by the trial court had been convicted by judgment and order dated 28.11.1987. In Appeal also the High Court sustained the conviction of all the accused persons except Ram Naresh, vide order dated 27.4,2006 passed in Criminal Appeal No. 724 of 1987.

5. It is further submitted that in year 2001 the nephew of the applicant, namely, Ravindra Pratap @ Rinku aged about 10 years was kidnapped and murdered, a criminal case was registered against the accused persons on an application given by the brother of the applicant at Police Station Kotwali Nagar, District Sultanpur.

6. It is next submitted that pertaining to a property dispute he filed a Writ Petition No. 863 of 1993 on behalf of his client, namely, Kalu Ram and an order for maintaining status-quo was passed by the Court, however, opposite party no.2, namely, Shesh Narayan Mishra after purchasing the land in dispute started selling the land by carving plots and on

being informed about existence of stay order on 6.9.2008, he (opposite party no.2) by entering into the house of the applicant threatened and assaulted him along with his companions regarding which an FIR was lodged by the applicant at Police Station Kotwali Nagar, District Sultanpur as Case Crime No. 2333 of 2008, under Sections 147, 148, 149, 504, 506, 364 and 511 IPC and the same case is now pending before the Additional Sessions Judge, Court No.1, Sultanpur. It is further alleged that on 14.8.2014 the elder brother of the applicant, who was an Advocate, was murdered by assailants while he was going to Court for pairvi of a case, pertaining to which Case Crime No. 1231 of 2014, under Section 302 IPC was registered at Police Station Kotwali Nagar, District Sultanpur. It is further submitted that vide order dated 9.10.2015 passed in Misc. Bench No. 8636 of 2015, he was provided security for his visits to Sultanpur and the same is being provided to the applicant without charging any costs.

7. It is next submitted that on 23.7.2016 when he (applicant) was returning from the Court after attending the above mentioned matter he was followed by opposite party no.2 and his other companions, he made a complaint to D.G. P. (Prosecution) asking for security and the D.G.P. (Prosecution) directed the Joint Director (Prosecution) to take appropriate action, who entered issued an order dated 3.8.2016 directing the I.G. Zone, Lucknow to provide appropriate security to the applicant.

8. It is further alleged that opposite party no.2 is a history sheeter and he is indulged in criminal activities and is threatening the applicant as well as the witness Kallu to the extent that the witness Kallu has lost his mental balance and he is also trying to influence the applicant.

9. Highlighting the above factual matrix, learned counsel for the applicant submits that the above criminal case is at the stage of recording his evidence and he hds appeared before the court on various dates, however, his evidence could not been recorded. It is further alleged that allurement of some money is being also extended to him by opposite party no.2, therefore, there is no hope of getting fair trial and justice and the above mentioned case must be transferred to any other court of competent jurisdiction within the State of U.P.

10. Learned counsel for the applicant while substantiating his argument relied on ***Sarasamma @ Saraswathiyamma Vs. State represented by Deputy Superintendent of Police and others,*** reported in (2018) 7 Supreme Court Cases 339 and ***Abdul Nazar Madni Vs. State of T.N. and another*** reported in (2000)6 Supreme Court Cases 204.

11. Learned AGA while opposing the contention of learned counsel for the applicant submits that in pursuance of the order of this Court passed in Misc. Bench No. 8636 of 2015 dated 9.10.2015 admittedly security is being provided to the applicant and therefore there is no need to transfer the case.

12. Learned counsel for opposite party no.2 submits that so far as other criminal cases mentioned by learned counsel for the applicant is concerned the opposite party no.2 is not having any concern with them and only instant

criminal case is related to the opposite party no.2 which has been lodged on wrong and concocted facts. It is further submitted that nothing as claimed by the applicant has been done by the opposite party no.2 and all the allegations are false and baseless while referring to paragraph 25 of the affidavit filed in support of transfer application he mentioned that the facts given in this paragraph of attending the trial court by the applicant are wrong and false, as on these dates the case was not fixed for prosecution evidence. Therefore the application has been moved by quoting wrong facts.

13. Having heard learned counsel for the parties and having perused the record, I find that an application pertaining tot he incident mentioned in the transfer application, on the basis of which transfer of the above mentioned case is being sought, was given by the applicant to the Additional Sessions Judge- Ist, Sultanpur on 1.12.2018. A copy of that application has been placed as Annexure No.11 to the affidavit filed in support of the application and the incident described therein is alleged to have happened on 30.7.2016. It is only alleged therein that on that date opposite party no.2 followed the applicant to a Hotel at Trivedi Ganj and also that he was staring towards the applicant. No more overact with regard to the conduct of opposite party no.2 has been alleged in that application and a prayer of only fixing the case only on Saturday and to take the case at 3.00 P.M. in the after-noon session has been made. Another incident which has been mentioned in that application is pertaining to the fact that the opposite party no.2 also approached the brother of the applicant to settle the dispute. He is also stated therein that opposite party no.2 is a hardened criminal and seven criminal cases are pending against him. Record further reveals that the applicant earlier approached this Court and vide order dated 9.10.2015 passed in Misc. Bench No. 8636 of 2015 adequate security was directed to be provided to the applicant and vide order dated 30.10.2015 of District Level Committee, constituted to provide security, an order was passed by the S.P. Sultanpur to provide adequate security to the applicant on his coming to his home town. Apart from this, there is one more letter written by the Joint Director (Prosecution), Lucknow dated 3.8.2016 whereby the Inspector General of Police, Lucknow Zone, was requested to provide security to the applicant.

14. So far as the principles governing the transfer of criminal cases from one District to another District is concerned it is implicit under Section 407 of the Cr.P.C. that a criminal case can be transferred if it is made to appear that a fair and impartial inquiry or trial could not be had. It is further to be seen that the apprehension of not getting a fair trial should be substantial and not cosmetic. The transfer of a case from one territorial jurisdiction to another territorial jurisdiction is a serious business and the same should not be ordered at the drop of a hat unless substantial compelling facts and circumstances are present. The applicant in his application has mentioned various dates in paragraph 25 whereon he stated to have visited the district court, Sultanpur for the purpose of recording of his evidence and nothing as apprehended by him has happened. There is already an order passed by a Division Bench of this Court to provide an adequate security to the applicant and admittedly in one of such criminal case, which has been tried

by a court at Sultanpur, accused persons have been convicted. So at this juncture, keeping in view all the facts and circumstances of the case, I do not find it a fit case any order pertaining to transfer of above mentioned criminal case be passed and therefore the prayer of the applicant pertaining to the transfer of the criminal case i.e. Sessions Trial No. 370 of 2015 (State Vs. Shesh Narayan), arising out of case crime no. 2333 of 2008, under Sections 364/511, 504, 506 IPC relating to Police Station Kotwali, District Sultanpur, pending in the court of Additional Sessions Judge, Court No.1, Sultanpur to any other court of competent jurisdiction within State of U.P., is refused and thereby transfer petition is ***dismissed.***

15. However, so far as the apprehension of the applicant with regard to any incident which may be caused by opposite party no.2 is concerned Senior Superintendent of Police, Lucknow and Superintendent of Police, Sultanpur are directed to provide adequate security to the applicant on such dates which have been fixed for his evidence in Sessions Trial No. 370 of 2015, arising out of case crime no. 2333 of 2008, under Sections 364/511, 504, 506 IPC relating to Police Station Kotwali, District Sultanpur.

(2019)10ILR A 1046

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl Misc. Ist Anticipatory Bail Application No. 38121 of 2019

Deepak Chugh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Kumar Pandey, Sri Satish Trivedi.

Counsel for the Opposite Parties:
A.G.A.

A. Indian Penal Code, 1860 - Sections 323, 506, 498-A and 354(a) and Protection of children from sexual offence (POCSO) Act, 2012-Section7/8-application-grant of anticipatory bail-rejection- accusation of sexual assault against father with his own girl, aged about 13 years- Offence is very heinous-Hence, bail is rejected.

B. In instant case, accused applicant is the father. He may be having matrimonial dispute with his wife, but the victim of this offence is minor girl of 13 years of age. The alleged offence is committed by victim's own father, who is her guardian, and under the lap of whom, she is protected against all world, but he has sexually assaulted her. (Para 4,5 & 6)

Ist Anticipatory Bail Application rejected
(E-6)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This application for grant of anticipatory bail has been moved by Deepak Chugh in Case Crime No. 250 of 2019, under Sections 323, 506, 498-A, 354(a) I.P.C. read with Section 7/8 POCSO Act, Police Station Govind Nagar, District Kanpur Nagar.

2. Learned counsel for applicant argued that there is a family dispute in between accused and his wife, who were married in year 2001. She went with her

kids to her parental house and she was with her paramours, which was never complained by accused to anyone because of family prestige. On 28.06.2019, she along with her siblings went to her parental house and even after request on birthday of applicant on 29.06.2019, she did not turn up. On 04.07.2019 she sent some photographs over whats app. On 09.07.2019 applicant was at Mumbai regarding his business work and he came back on 14.07.2019. He found obscene messages with obscene selfie photos over mobile phone of his wife. This was protested, resulting abuse by her and she demanded Rs.3 crores in lieu of Talaq, otherwise to face dire consequences. She again went to her parental house. Those mobile numbers and name of holders were reported to police by way of application dated 05.08.2019. As a counter blast, this false case for offence punishable under under Sections 323, 506, 498-A, 354(a) I.P.C. read with Section 7/8 POCSO Act has been got registered on 19.08.2019 for alleged occurrence of 05.07.2019, which was much delayed and under concoction, owing to above family dispute. The maximum sentence for offence is five years and by putting applicant in jail her entire prestige will go away, for which his wife is adamant to snatch. Hence, this anticipatory bail application was moved before court of Sessions Judge, Kanpur Nagar, but it was rejected by Special Judge (POCSO Act) / Additional Sessions Judge vide order dated 03.09.2019. Hence, this application.

3. Learned A.G.A. has vehemently opposed bail with this contention that there is accusation of sexual assault against father with his own girl, aged about 13 years. Offence is very heinous. Hence, bail be rejected.

4. Having heard learned counsel for both sides and gone through first information report, it is apparent that this case was got registered by way of presenting an application before Senior Superintendent of Police, whereby case has been registered against applicant for offence punishable under Sections 323, 506, 498-A, 354(a) I.P.C. read with Section 7/8 POCSO Act, for an occurrence of 05.07.2019 and it was registered on 19.08.2019. There is specific accusation of sexual assault by accused applicant with her daughter victim, aged about 13 years and when protested complainant informant was beaten and ousted from her house. She went with her children. There is allegation of persistent occurrence of such type of offence, since last two years and this was occurrence of 05.07.2019, at about 3 A.M., which was complained and this was reported. The statement of victim recorded under Sections 161 and 164 Cr.P.C. is fully intact. In application, moved by accused applicant before Senior Superintendent of Police, Kanpur Nagar, the fact that victim is of 13 years was admitted by accused himself. The application by accused applicant was moved after above occurrence of 05.07.2019, when this protest was there.

5. No doubt, offence punishable under Section 7/8 POCSO Act is punishable with five years of sentence, but the legislation legislated this special Act with a view to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for matters connected therewith or incidental thereto. This Act was legislated in furtherance of Article 15 of the Constitution, which, inter alia, confers upon the State powers to make special provisions for children.

Article 39 provides that the State shall in particular directive policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. This was in furtherance of treaty and covenant adopted under the United Nations Convention on the Rights of Children, which are ratified by India on 11th December, 1992 and data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the "Study on Child Abuse: India 2007" conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. Hence, it was felt for such legislation.

6. In present case, accused applicant is the father. He may be having matrimonial dispute with his wife, but the victim of this offence is minor girl of 13 years of age. The alleged offence is committed by victim's own father, who is her guardian, and under the lap of whom, she is protected against all world, but he has sexually assaulted her. It does not require any indulgence by this Court.

7. The anticipatory bail application is accordingly **rejected.**

(2019)10ILR A 1048

REVISIONAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 25.01.2019

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Revision No. 2 of 2004

M/s Kanoria Chemicals and Industries Ltd. ...Plaintiff/Revisionist/Applicant
Versus
M/s Global Drugs (P) Ltd.
...Defendant/Opposite Party

Counsel for the Revisionist:
Sri Surendra Tiwari

Counsel for the Opposite Party:

A. Returning the plaint on the ground that no cause of action arose - breach of a contract for supply of aluminium chloride - payment for supply has not been made - The plaintiff needs to prove the contract - the place from where the aluminium chloride was dispatched to the defendant is not relevant - The place from where the goods were supplied therefore is not a fact which is within the bundle of facts comprising the cause of action of the suit itself.

B. Cause of action are those bundle of facts which need to be traversed in the suit before any relief can be granted to the plaintiff. Any fact which is not relevant for deciding the suit does not constitute the cause of action. In the case at hand all that is required to be established is that goods under the purchase order, placed by the defendant, were supplied but not paid for. The place from where the goods were supplied is not material and for the same reason it is not a relevant fact, constituting the cause of action. (Para 7,8,15,16,17,18,21,22 & 23)

Civil Revision dismissed (E-6)

Precedent followed: -

1. Laxman Prasad Vs Prodigy Electronics Ltd. & anr. (2008) 1 SCC 618

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard counsel for the revisionist.

2. The instant revision is directed against the order dated 12.09.2003 passed by the Civil Judge (Senior Division) Sonbhadra.

3. By this order, the Civil Judge (Senior Division), Sonbhadra has returned the plaint of the suit filed by the revisionist for presentation before the appropriate forum on the ground that it did not have jurisdiction to entertain the suit.

4. The plaintiff-revisionist filed a suit for recovery of money on the ground that certain goods had been supplied by it to the defendant.The bills raised in regard to this remained, unpaid. A copy of the plaint of the suit has been filed as Annexure-2 to the affidavit filed in support of the stay application.

5. Counsel for the revisionist has laid emphasis on the averment contained in paragraph 6 of the plaint, wherein it has been averred that the plaintiff on numerous occasions called upon the defendants for payment of the unpaid bills and that, letters were sent demanding the balance payments. In response, the defendant, by letters dated 11.05.2000 and 28.08.2001, assured that the outstanding two bills would be paid within a month.

6. It is also averred that apart from the above, the defendant informed the plaintiff revisionist, vide letter dated 22.09.2001, that the defendant had been registered as a sick Industrial Company before the BIFR and the payment due, would be made soon.

7. The main contention of learned counsel for the revisionist is that the suit has rightly been filed before the Court at Sonbhadra. The contract between the parties was for supply of aluminium chloride which was supplied from the unit of the plaintiff situated at Sonbhadra. Aluminium Chloride being manufactured at the said unit and at no other place.

8. On the basis of the above, the case of the revisionist is that part of cause of action arose at Sonbhadra and in ignoring this aspect of the matter, the trial Court has erred materially.

9. It is also submitted that the various bills, which have been submitted for supply of aluminium chloride under the contract, have not been disputed by the defendants.

10. I have considered the submissions made by the counsel for the revisionist and perused the impugned order.

11. The following facts, which are relevant to decide the controversy raised in this revision are to find illegality and irregularity in the impugned order dated 12.09.2003.

12. The plaintiff M/S Kanoria Chemicals And Industries Ltd. is a company having registered office at Calcutta. An order was placed by the defendant M/s Global Drugs Private Limited for supply of aluminium chloride. The registered office of M/s Global Drugs Private Limited is admittedly situated at Hyderabad while its factory is situated at Medak in Andhra Pradesh. It is also admitted that the purchase order was placed at the plaintiff's Chennai Office.

The aluminium chloride was required to be supplied at Medak in Andhra Pradesh and it was duly supplied there.

13. Apart from the above, the impugned order also refers to the various communication, between the parties. The letters that had been written by the plaintiff were addressed to M/s Global Drugs Private Limited, Chennai Branch. However, it is not clear as to from which place, these letters were dispatched by the plaintiff. However, since these letters/communications were signed by one Sri Mukim, who on the basis of Paper No. 14 Ga, was found to be employed in the Chennai branch of M/s Kanoria Chemicals and Industrial Limited, the plaintiff.

14. In the aforesaid, factual background, the Court below came to the conclusion that with regard to the provisions contained in Section 20 of the Civil Procedure Code, no cause of action arose at Sonbhadra.

15. Counsel for the petitioner has placed reliance upon decision of the Apex Court in ***Laxman Prasad Vs.Prodigy Electronics Ltd and another, (2008) 1 Supreme Court Cases 618,*** primarily upon paragraph 46 of the said judgement, which is extracted herein below-

"46. Territorial jurisdiction of a court, when the plaintiff intends to invoke jurisdiction of any court in India, has to be ascertained on the basis of the principles laid down in the Code of Civil Procedure. Since a part of "cause of action' has arisen within the local limits of Delhi as averred in the plaint by the plaintiff Company, the question has to be considered on the basis of such averment. Since it is alleged that the appellant-defendant had committed breach of agreement by using trade mark/trade name in Trade Fair, 2005 in Delhi, a part of cause of action has arisen in Delhi. The plaintiff Company, in the circumstances, could have filed a suit in Delhi. So far as applicability of law is concerned, obviously as and when the suit will come up for hearing, the Court will interpret the cause and take an appropriate decision in accordance with law. It has, however, nothing to do with the local limits of the jurisdiction of the Court."

16. In my considered opinion, the judgement cited is not relevant for the controversy involved in the instant revision. This Court while deciding the instant revision, is required to a rule, as to whether, in the facts and circumstances narrated above, any cause of action or part thereof arose at Sonbhadra only then would the suit lie at Sonbhadra.

17. In the judgement cited above, it has been held that although there existed a contract between the parties, specifying the terms of that contract would be interpreted in terms of law prevalent in Hong Kong, however, since part of the cause of action arose in India, the matter would necessarily have to be decided in accordance with the Indian law and not according to the law of Hong kong.

18. I do not find any illegality in the order passed by the trial court, returning the plaint on the ground that no cause of action arose at Sonbhadra.

19. The contract for supply of the materials was entered into Chennai. The materials were supplied at the factory of the defendant at Medak, Andhra Pradesh.

The registered offices of the plaintiff and the defendant are admittedly situated in Calcutta and Hyderabad, respectively. The jurisdiction of the courts at Sonbhadra is being invoked only on the ground that material was produced and supplied from the unit of the plaintiff situated at Sonbhadra on the plea that part of the cause of action arose at Sonbhadra.

20. The place from where these goods were supplied would not materially altered nor would be necessarily require to be look into the suit.

21. The suit in essence is a money suit, filed claiming breach of a contract for supply of aluminium chloride, which was duly supplied but payment for suit supply has not been made or has been made in part only. The plaintiff therefore, needs to allege and prove the contract; that the material has been supplied but payment has not been made. In this context, the place from where the aluminium chloride was dispatched to the defendant is not relevant. It is neither required to be alleged or proved, nor will the said fact materially effect the outcome of the suit. The place from where the goods were supplied therefore is not a fact which is required within the bundle of facts. Comprising the cause of action of the suit itself.

22. Cause of action are those bundle of facts which need to be traversed in the suit before any relief can be granted to the plaintiff. Any fact which is not relevant for deciding the suit does not constitute the cause of action. In the case at hand all that is required to be established is that goods under the purchase order, placed by the defendant, were supplied but not paid for. The place from where the goods were supplied is not material and for the same reason it is not a relevant fact, constituting the cause of action. Therefore, the same cannot be made a ground to claim that part of the cause of action arose at Sonbhadra.

23. In view of the foregoing discussion and since the judgement cited by counsel for the revisionist is not applicable in the facts and circumstances of this case, the impugned order is not found to suffer from any illegality or any manifest or jurisdictional error, warranting interference.

24. The revision is accordingly, dismissed.

(2019)10ILR A 1051

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE ALOK MATHUR, J.

Misc. Bench No. 6804 of 2018

Dr. Ashish Mahendra ...Petitioner
Versus
Vice Chancellor, R.M.L.A. University, Faizabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Srivastava, Sri Abhay Kumar Khare, Sri Abhishek Dwivedi, Sri Arun Kumar Yadav, Sri Kshitij Mishra, Sri Ramendra Kumar Yadav, Sri Sanjay Bhasin

Counsel for the Respondents:

C.S.C., A.S.G., Sri Abhinav N. Trivedi, Sri Amit Jaisawal-Ojus Law, Dr. V.K. Singh, Sri Manu Kumar Srivastava

A. Dentist Act, 1948 - Sections -3(d) & 5 - No dispute regarding eligibility of the candidate- raised during process of election or till the declaration of result-If no dispute is raised till then, University was under obligation to declare the result-declaration of election result withheld illegally-order of cancellation of election of the representative of the University in the Dental Council of India passed by Registrar of University-which is under challenge-had no authority to cancel-should have refered the matter to the Central Government.

Held: - It is when dispute pertaining to election was not during the course of election or immediately after counting of votes. It is more so when dispute is about the eligibility of the candidates thus should have been raised during process of election. If no dispute is raised till then, University was under obligation to declare the result. Accordingly, while quashing the order dated 08.02.2018, we allow the writ petition with a direction to the respondent to declare the result of the election. However, it would not preclude the respondent no. 6 or any other candidate to challenge the election by taking appropriate measures, as provided under the law. A reference of dispute to the Central Government can be made in that case.

Writ Petition allowed. (E-8)

(Delivered by Hon'ble Munishwar Nath Bhandari, J. & Hon'ble Alok Mathur, J.)

1. By this writ petition, a challenge has been made to the order dated 08.02.2018 passed by the Registrar of respondent-University cancelling the election of the representative of the University in the Dental Council of India.

2. Learned counsel for the petitioner submits that as per Section 5 of the Dentist Act, 1948 *(hereinafter referred to as 'the Act of 1948')*, the Registrar of University has no competence to cancel the election. In case of dispute, the matter needs to be referred to the Central Government for its decision and in that case, the decision of the Government would be final. In view of above, the impugned order has been passed by the incompetent authority thus, on that ground itself, it deserves to be set aside.

3. Referring to the facts of this case, learned counsel for the petitioner submits a schedule of election was announced by the respondent-University. The date of submission of nomination, its withdrawal and finally the date of declaration of result was given. The notification issued for it makes specific reference of Section 3(d) of the Act of 1948 regarding election of the representative of the University in the Dental Council of India. As per the schedule of election, the result was to be declared on 23.09.2017 at 05.00 pm. The respondent-University adhered to the schedule of election and accordingly after completion of process of the election, the votes were counted on 23.09.2017. The petitioner could get 27 votes out of 49 and the other candidates could get 22 votes. In view of above, even the counting took place but the respondent-University, for reasons best known to them, did not declare formal result. It was withheld going contrary to the programme of election, which was conducted under the University Code. Accordingly, it is not only that cancellation of election is illegal, as the order for it has been passed by the Incompetent Officer but even withholding the result by the University is also illegal. The University should be commanded with a direction to declare the result as the counting took place on 23.09.2017 itself.

4. Learned counsel for the petitioner has made a reference of Annexure 14 dated 04.12.2017 to show that there was no complaint in regard to the election till 23.09.2017, as such, there was no occasion for the University to refer the dispute to the Central Government, as envisaged under Section 5 of the Act of 1948. The document at Annexure 14 shows date of complaint to be dated 12.10.2017 on which a Committee was constituted on 25.10.2017. On the day of declaration of result i.e. 23.09.2017, there was no dispute before the University thus even for the aforesaid reason, Section 5 of the Act of 1948 could not have been invoked by the respondents. The prayer is to allow the writ petition with the grant of relief.

5. Learned counsel appearing for the University has contested the writ petition. He submits that after passing of the impugned order, much water has flown. The University has referred the dispute to the Dental Council of India for its reference to the Central Government. In the light of the aforesaid, the interference in the order impugned herein may not be made or if at all it is set aside, the subsequent proceedings may not be effected as the final decision would now be taken by the Central Government, as provided under Section 5 of the Act of 1948, as a reference of a dispute has been sent to Central Government also.

6. Learned counsel appearing for the University has given brief facts of the case to show that a dispute over the election came before it. It was regarding the eligibility of the petitioner to contest the election. Two Members' Committee was constituted to look into the matter and submit report. After a report, the matter was referred to the Dental Council of India and also to the Central Government. The prayer is accordingly to dismiss the petition.

7. Learned counsel appearing for the respondent no. 4 i.e. Dental Council of India submits that they have not received any complaint/dispute and otherwise whenever dispute over the election is raised, it has to be referred to the Central Government and not to the Dental Council of India.

8. Learned counsel appearing for respondent no. 6 has supported the argument raised by learned counsel for the respondent-University. In addition to the argument of respondent-University, it is stated that a complaint about the eligibility of the petitioner was raised during the course of election itself and on the aforesaid, the impugned order was passed. The prayer is accordingly not to cause interference in the order impugned herein or if at all it is set aside, not in reference of dispute to the Central Government. It is further submitted that even if the prayer made in the writ petition is granted, he may be given liberty to challenge the election.

9. Learned standing counsel as well as counsel for the Union of India have jointly stated that they are not concerned with the issue.

10. We have pondered upon the arguments raised by the representative of the parties and scrutinized the matter carefully.

11. The order dated 08.02.2018 has been challenged on many grounds. The first ground is about the competence of

the Registrar of the University to cancel the elections, which were conducted to seek representation of the University in Dental Council of India, as envisaged under Section 3(d) of the Act of 1948. It has not been disputed the Registrar of the University is not competent to cancel the election. Section 5 of the Act of 1948 gives power to the University to refer the dispute to the Central Government but they cannot cancel it. For ready reference, Section 5 of the Act of 1948 is quoted hereinbelow:-

"5. Elections under this Chapter shall be conducted in the prescribed manner, and where any dispute arises regarding any such election, it shall be referred to the Central Government whose decision shall be final."

12. The provision quoted above shows that if a dispute pertaining to the election arises, it shall be referred to the Central Government. In view of the aforesaid provision, the Registrar of the University was not competent to cancel the election and accordingly the impugned order can be quashed on the aforesaid ground itself.

13. We are, however, required to look into the other aspect of the matter.

14. Learned counsel for the petitioner has made reference of the election programme given at Annexure 11 to the writ petition. The perusal of the election programme shows date of declaration of result. For ready reference, the election programme is quoted hereunder:

चुनाव सम्बंधी विवरण निम्नवत् है:–

क्रमांक	*विवरण*	*दिनांक*	*समय*
1.	*चुनाव हेतु नामांकन तिथि*	*21.09.2017*	*पूर्वान्ह 11.00 बजे से अपरान्ह 4.00 बजे तक*
2.	*नामांकन वापसी की तिथि*	*22.09.2017*	*पूर्वान्ह 11.00 बजे से अपरान्ह 4.00 बजे तक*
3.	*चुनाव (मतदान)*	*23.09.2017*	*पूर्वान्ह 12.00 बजे से अपरान्ह 4.00 बजे तक*
4.	*मतगणना एवं चुनाव परिणाम*	*23.09.2017*	*सांय 5.00 बजे*

(संजय कुमार)
कुल सचिव/चुनाव अधिकारी

15. It is not in dispute that election programme was undertaken by the University on the scheduled dates. It is also not in dispute that on 23.09.2017, the result was to be declared. It is however a fact that the result was not formally declared though counting took place where the petitioner is said to have remain successful.

16. The aforesaid issue is relevant for the reason that till the date of declaration of result i.e. 23.09.2017, no complaint about the election was received by the University. Perusal of Annexure 14 reveals a complaint dated 12.10.2017, which is much subsequent to the date of declaration of result.

17. Learned counsel appearing for the University could not explain as to why the result was withheld till receipt of the complaint when it was to be declared on 23.09.2017. They could not show any

provision empowering them to withheld the result, once the election commenced, as per the schedule given by them. In view of the above, an inference can be drawn against the University for undue advantage to other party by going against the statutory provisions or send a representation of their choice. The adverse remarks against the Officer who has passed the impugned order could have been made but he is not party in person to the litigation. Thus, we are refraining ourselves to make adverse remark against the Registrar or the Vice-chancellor. The facts on record shows that till the date of declaration of result i.e. 23.09.2017, no complaint was received by the respondent-University.

18. At this stage, we may refer the argument of learned counsel for the respondent no. 6, who stated that complaint was given on the date of declaration of result itself. The argument aforesaid has been raised orally. It is not supported by any of the document and otherwise goes against the document at Annexure 14, where the only complaint received by the University was on 12.10.2017 and not prior to that.

19. Accordingly, we cannot accept the oral statement of learned counsel for respondent no. 6 going contrary to the document. In view of the facts given above, what we find is that non-declaration of the result of the election is wholly illegal. It should have been declared on 23.09.2017 and in case of a dispute thereupon, could have referred to the Central Government but not in the manner it is done in this case.

20. In view of above, while causing interference in the order impugned herein, the respondent-University is directed to declare the result of the election.

21. It is when dispute pertaining to election was not during the course of election or immediate after counting of votes. It is more so when dispute is about the eligibility of the candidates thus should have been raised during process of election. If no dispute is raised till then, University was under obligation to declare the result. Accordingly, while quashing the order dated 08.02.2018, we allow the writ petition with a direction to the respondent to declare the result of the election. However, it would not preclude the respondent no. 6 or any other candidate to challenge the election by taking appropriate measures, as provided under the law. A reference of dispute to the Central Government can be made in that case.

22. In view of the acceptance of the prayer, subsequent schedule given in Annexure 2 for the election is set aside.

(2019)10ILR A 1055

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.02.2018

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Consolidation No. 4196 of 2018

Dev Bux Singh ...Petitioner
Versus
Deputy Director Consolidation Faizabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Onkar Pandey

Counsel for the Respondents:
C.S.C., Sri Badrish Tripathi

A. U.P. Consolidation of Holdings Act, 1953 - Section 9(A)2 - Revision under section 48(1) of the Act - Rule 111 of the Uttar Pradesh Consolidation of Holdings Rules, 1954 - limitation for filing a revision before the Deputy Director of Consolidation under section 48 of the Act - 30 days from the date of the order against which the application is directed .

Held:- The revision was barred by limitation by more than five years - the revision preferred by the private respondent no. 2 has been admitted by the Deputy Director of Consolidation without condoning the delay - It is settled that where a suit, appeal, revision or application is barred by limitation the court has no jurisdiction to pass any order unless the delay is condoned -In case of delay in filing an appeal, revision or application, the court is obliged to consider the explanation for the delay offered by the appellant/revisionist, as the case maybe - It is only after condoning the delay that the court gets jurisdiction to proceed with the matter. (Para 10,11,12)

Impugned order set aside (E-7)

List of Cases Cited: -

1. Noharlal Verma Vs Distt. Coop. Central Bank Ltd. (2008) 14 SCC 445

2. St. of W.B. Vs Somdeb Bandyopadhayay (2009) 2 SCC 694

3. Sant Lal Gupta Vs Modern Cooperative Group Housing Society Ltd. & ors. (2010) 13 SCC 336

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

1. Sri Madan Chandra Dubey, the Deputy Director of Consolidation, District Faizabad has appeared in person. Supplementary affidavit filed on his behalf is taken on record.

2. The officer has stated that he suspected some fraud and as such he admitted the appeal and stayed the operation of the order dated 2.4.2012 passed by the Consolidation Officer. This fact is not borne out from the order under challenge. However, the apology tendered by the officer is accepted. The officer is let off with a warning to be very careful in future.

3. Heard Sri Onkar Pandey, learned counsel for the petitioner, the learned Standing Counsel representing the State-respondents and Sri Badrish Tripathi, learned counsel appearing on behalf of respondent no. 2. In view of the order proposed to be passed, notice to respondent nos. 3 and 4 is dispensed with. With the consent of the counsels present the matter has been heard and is being disposed of at the admission stage itself.

4. It appears that against the order dated 2.5.2012 passed by the Consolidation Officer in Case No. 1752, under section 9(A)2 of the U.P. Consolidation of Holdings Act, 1953 (for short "the Act'), the respondent no. 2 preferred a Revision No. 1194 under section 48(1) of the Act before the Deputy Director of Consolidation, Faizabad.

5. On 10.1.2018, the revision was admitted, the record of the court below was summoned and 26.2.2018 was fixed as the next date and by a non-speaking order the operation of the order dated 2.5.2012 was also stayed. The order dated 10.1.2018 is extracted below:

"आज पत्रावली पेश हुई । निगरानी दर्ज रजिस्टर हो । निगरानीकर्ता को स्थगन के बिंदु पर सुना एवं पत्रावली पर उपलब्ध साक्ष्यों का विधिवत अवलोकन एवं अध्ययन किया । न्यायहित में चकबंदी अधिकारी द्वारा वाद संख्या&171152 में पारित आदेश दिनांक 02-05-2012 का क्रियान्वयन

एवं आगामी प्रभाव अग्रिम आदेश तक स्थगित किया जाता है। अवर न्यायालय की पत्रावली मंगाई जाए। विपक्षीगण को सुनवाई हेतु सम्मन तामील कराकर दिनांक 26-02-2018 को पत्रावली वास्ते तर्क प्रस्तुत हो।"

6. It is this order which is under challenge in this petition.

7. Learned counsel for the petitioner has submitted that there was a delay of more than five years in filing the revision. The counsel submits that without condoning the delay, the revision could not have been admitted and an interim order could not have been passed in favour of the respondent no.2. Even otherwise, the counsel submits the interim order, being a non-speaking order, cannot be sustained.

8. The learned counsel appearing on behalf of respondent no. 2 has supported the order.

9. Under Rule 111 of the Uttar Pradesh Consolidation of Holdings Rules, 1954 the limitation for filing a revision before the Deputy Director of Consolidation under section 48 of the Act is 30 days from the date of the order against which the application is directed. Admittedly, the revision was barred by limitation by more than five years.

10. It is settled that where a suit, appeal, revision or application is barred by limitation the court has no jurisdiction to pass any order unless the delay is condoned. In *Noharlal Verma v. Distt. Coop. Central Bank Ltd., (2008) 14 SCC 445* the Apex Court has held as under:

"32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits."

11. In case of delay in filing an appeal, revision or application, the court is obliged to consider the explanation for the delay offered by the appellant/revisionist, as the case maybe. It is only after condoning the delay that the court gets jurisdiction to proceed with the matter.

12. In the case at hand, the revision preferred by the private respondent no. 2 has been admitted by the Deputy Director of Consolidation without condoning the delay. The order impugned is liable to be set aside on this ground alone.

13. That apart the Apex Court has strongly deprecated the practice of granting an interim order without condoning the delay in *State of W.B. v. Somdeb Bandyopadhayay, (2009) 2 SCC 694* the Apex Court has held as under:

7. It is to be noticed that *even without condoning the delay and entertaining the writ appeal the High Court has passed a series of interim orders. Such a course is impermissible as the appeal was non est in the eye of the law without it being entertained.* Admittedly, the delay in preferring the writ appeal was not condoned at the time when the interim orders were passed."

(emphasis supplied)

14. Furthermore, the interim order passed by the Revisional Court would show that the interim order which has

been passed in favour of respondent no. 2 is a cryptic one. The impugned order merely states that the operation of the order under challenge is being stayed in the interest of justice. There is absolutely no reason or ground mentioned in support of this order. It is no more res integra that every judicial order must contain reasons. In *Sant Lal Gupta v. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336* the Apex Court in paragraph 27 has opined as under:

"27. It is a settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice."

15. For the aforesaid reasons, impugned order dated 10.12018 cannot be sustained and is accordingly set aside.

16. The Deputy Director of Consolidation, Faizabad is directed to pass a fresh order in accordance with law in the light of the observations made above expeditiously and without granting unnecessary adjournments to either of the parties.

17. Till the time a fresh order is passed by the Deputy Director of Consolidation, the parties shall maintain status quo and shall not alienate the property in dispute.

(2019)10ILR A 1058

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Government Appeal No. 334 of 2019

State of U.P. ...Appellant
Versus
Shree Krishna Chandra
...Accused-Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:

A. Code of Criminal Procedure, 1973 :- Section 378(3) - application-grant of leave to appeal- if the value of property held is not 10% in excess than the known source of income then that will not be deemed to be inappropriate or disproportionate property.-After analyzing this aspect, the judgment of acquittal has been passed, which is based on the basis of evidence on record. (Para 3 & 4)

Government Appeal rejected (E-6)

Case Law discussed:

1. Krishnand Rao Vs St. of M. P. AIR 1977 SC 796

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal u/s 378(3) Cr.P.C. has been proposed by State of U.P. with a prayer for grant of leave to appeal against judgment of acquittal passed by Court of Additional Sessions Judge/ Special Judge (Prevention of Corruption Act), Court No. 2, Varanasi, in S.S.T. No. 7 of 2001, State Vs. Sri Krishna Chandra, under section 13(2) read with 13(1) (E) of Prevention of Corruption Act, 1988 by U.P. Vigilance Organization, District Allahabad.

2. Learned AGA argued that the learned Trial Judge failed to appreciate facts and law placed before it. On the application of Pradeep Srivastava, Vice Chairman, U.P. Youth Congress (I) to Governor of U.P. an order for enquiry about disproportionate wealth of Sri Krishna Chandra, Dy. Excise Commissioner, Kanpur, was passed and after enquiry accusation was held to be substantiated, which resulted registration of above case under above sections and filing of charge sheet. Cognizance over it was taken and trial was held, wherein evidence was produced on record, but the trial court failed to appreciate facts and law placed before it, thereby passed impugned judgment of acquittal. Hence this application with above prayer.

3. Perusal of judgment reveals that statement of Krishna Chandra was recorded u/s 313 Cr.P.C. in which specific contention was that owing to enmity, this false complaint was filed and it was enquired. But the enquiry was not a correct one. The earning by salary was not properly calculated. Many heads of earning by him was not taken into consideration. Whereas earning of family having independent business was not assessed properly. Earnings of Smt. Manju Chandra, as were given in exhibit Kha 1 to Kha 10, were not properly appreciated. Accused was of no concern with Subhash Chandra. His wife Manju Chandra had purchased properties, detailed in para 92 of the judgment, by her own independent earnings, which included purchase of Rifle etc. These were of her own separate business and earnings. Those documents were submitted before the enquiry officer, but the same were not taken into consideration. Manju Chandra Gas Service, Allahabad, was under proprietorship of Manju Chandra. This earning is in the names of Prateek Chandra and Nisha Chandra. Accounts of that Gas Agency was not taken into consideration, though details of same were submitted before the Government. Accused had examined Manju Chandra as DW1 and himself as DW2. Documentary evidence including Income Tax Return of Smt. Manju Chandra right from 1982 to 1996 as well as of Manju Chandra Gas Service Exhibits Kha 1 to Kha 10 were submitted. Trial court has appreciated those facts. Upon enquiry got conducted under direction of State of U.P. and report filed thereby, which was of State itself and was proved before the Court, were of those fact that earning of Manju Chandra was Rs. 12,59,008/- and expenses were Rs.10,83,936/- i.e. property held within the earning. Moreso, as per law laid down by Apex Court in ***Krishnand Rao Vs. State of M. P., AIR 1977 SC 796,*** if the value of property held is not 10% in excess than the known source of income then that will not be deemed to be inappropriate or disproportionate property. After analyzing this aspect, the judgment of acquittal has been passed, which is based on the basis of evidence on record.

4. Under all above facts there remain no ground for grant of leave to appeal.

5. According the application is rejected.

(2019)10ILR A 1060

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Government Appeal No. 338 of 2019

State of U.P. ...Appellant
Versus
Dr. Nishant Gupta & Ors.
...Accused- Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

A. Indian Penal Code, 1860 - Sections 376(2)(E), 376(D), 166B, 201, 202, 506(2) & Code of Criminal Procedure, 1973 - Section 378(3) - application - grant of leave to appeal-rejection - delay in F.I.R - accusation of commission of rape was against two employees of hospital concerned-No allegation against remaining accused persons - it was not said in the report that it was threat of dire consequences and threat of not treating or providing medical help-the statement of victim u/s 164 Cr.P.C. in which specific accusation of rape is against the two attendants not against doctors who were giving threat-Victim has said that she informed her parent on telephone and her father came there and she was treated by Doctors of the same hospital were very affectionate to the victim- charges levelled against them were not proved by the prosecution- Hence they were acquitted - Overall appreciation of facts and circumstances and reasoning given by the trial court, there appears no illegality or irregularity in the impugned judgment.

B. Informant's daughter was serving as attendant of Dr. Shalini Maheshwari at Ganga Sheel Hospital, D.D. Puram, Bareily. she was on her duty when she was summoned by Shivraj attendant of Dr. Nishant Gupta at first floor and when she reached there, she was bolted inside by Nar Singh and Shivraj, they committed rape. She narrated the occurrence to Dr. Shalini Maheshwari through telephone. There was persistent threat by Dr. Shalini Maheshwari and Dr. Nishant Gupta. Meaning thereby accusation of commission of rape was against two employees of hospital concerned. No allegation against remaining accused persons was there till registration of F.I.R. except extension of persistent threat and it was not said in the report that it was threat of dire consequences and threat of not treating or providing medical help. Rather the same is the statement of victim u/s 164 Cr.P.C. in which specific accusation of rape is against Shivraj and attempt to commit rape is against Narsingh. But there is variance. Victim has said that she informed her parent on telephone and her father came there and she was treated by Dr. Nishant. Dr. Shalini was very affectionate to the victim. Hence after appreciating all facts, the essential ingredients for the charges levelled against them were not proved. (Para 2 & 3)

Government Appeal rejected (E-6)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This appeal has been proposed by State of U.P. under section 378(3) of Cr.P.C. against judgment of acquittal passed by court of Additional Sessions Judge, fifth, Bareilly, on 9.4.2019 in S.T. No. 1051 of 2013, State Vs. Shivraj and others, u/s 376(2)(E), 376(D), 166B, 201, 202, 506(2) I.P.C., P.S. Prem Nagar,

District Bareilly, arising out of Case Crime No. 1066 of 2013.

2. Learned AGA argued that the court has convicted Shivraj and Nar Singh and sentenced them for offence punishable u/s 376(2)(E) I.P.C. with ten years R.I. and Rs. 5000/- each and in case of default, one month's additional imprisonment, they have been further sentenced with twenty years imprisonment and fine of Rs. 20,000/- each and in default six months' additional imprisonment for offence punishable u/s 376D I.P.C. with direction for concurrent running of sentences and adjustment of previous imprisonment. But Dr. Nishant, Dr. Shalini, Dr. Dushyant, Manish Vaishnav and Sanket Bali have been acquitted of the charges levelled against them, whereas there was evidence on record with regard to charges framed against them. The trial court failed to appreciate the facts and law brought on record, which resulted this judgment of acquittal of those accused persons. Hence this application with above prayer for grant of leave to appeal.

3. From the very perusal of material on record, it is apparent that F.I.R. (Ext Ka1) was got lodged by informant at P.S. Prem Nagar on 16.7.2013 at 19.00 hours and it was with accusation that informant's daughter, aged about 18 years, was serving as attendant of Dr. Shalini Maheshwari at Ganga Sheel Hospital, D.D. Puram, Bareily. On 14.7.2013 (Sunday) she was on her duty when she was summoned by Shivraj attendant of Dr. Nishant Gupta at first floor and when she reached there, she was bolted inside by Nar Singh and Shivraj, they committed rape with her and while being under injury, she was sent back to her home. She narrated the occurrence then matter was communicated to Dr. Shalini Maheshwari through telephone, the injured was taken to hospital and she was put under treatment. Then after threat for opening leap and making complaint to police was extended. He tried to get case lodged on 15.7.2013, but owing to pressure exercised by accused, it could not be lodged and ultimately it was lodged on 16.7.2013. There was persistent threat by Dr. Shalini Maheshwari and Dr. Nishant Gupta. Meaning thereby accusation of commission of rape was against two employees of hospital concerned. No allegation against remaining accused persons was there till registration of F.I.R. except extension of persistent threat and it was not said in the report that it was threat of dire consequences and threat of not treating or providing medical help. Rather the same is the statement of victim u/s 164 Cr.P.C. in which specific accusation of rape is against Shivraj and attempt to commit rape is against Narsingh. But there is variance. Victim has said that she informed her parent on telephone and her father came there and she was treated by Dr. Nishant. Dr. Shalini was very affectionate to the victim. Hence after appreciating all facts, the essential ingredients for the charges levelled against them were not proved by the prosecution and the trial court came to the conclusion that essential ingredients for the aforesaid charges levelled against them were not made out. Hence they were acquitted of the charges levelled against them vide impugned judgment. Overall appreciation of facts and circumstances and reasoning given by the trial court, there appears no illegality or irregularity in the impugned judgment. Hence this application lacks merit.

4. Accordingly rejected.

(2019)10ILR A 1062

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.09.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Government Appeal (u/s 378 of Cr.P.C.) No. 170 of 2019

State of U.P. ...Appellant
Versus
Noor Mohammad & Anr. ...Accused-Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Code of Criminal Procedure, 1973 - Section 407-application-rejection-trial delayed, by getting it transferred – adjournment was sought-non-appearance of counsel and accused on the date given-issue of warrant against accused by court was the ground for transfer.

B. It has been specifically mentioned by the Trial Judge that newly engaged Senior Counsel for defence, has sought an adjournment of the case and given an assurance that he will argue the case on the only date requested by him. This date was given to him. On that particular date, none of the accused appeared nor the counsel appeared, which compelled the court for issuing warrants against the accused persons and this was made a ground for Transfer Application, moved before the court of Sessions Judge, but nowhere it was mentioned in the said Transfer Application that there had been a direction by this Court for expeditious disposal of above Sessions Trial, that too, in a time bound frame. This has neither been mentioned before the court of Sessions Judge, Agra, nor before this Court, in this Transfer Application, which itself goes to show modus and intention of the accused-applicants, who have filed this Transfer Application, to get the trial delayed, by getting it transferred from the court where it is likely to be decided in near future. (Para 7, 8 ,10, 11 & 12)

Transfer Application (Crl.) rejected (E-6)

List of Cases Cited: -

1. St. of Bihar Vs Hemlal Sah 2014 Crl. L.J. 1767

2. St. of Mah. Vs Ramdas Shrinivas Nayak AIR 1982 SC 1249 at page 1251

(Per Lord Atinkson in Somasundaram Chetty Vs Subramanian Chetty AIR 1926 PC 136)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Government Appeal has been proposed, under Section 378(3) of Code of Criminal Procedure, with an application for grant of leave to appeal against judgment of acquittal passed by Court of Special-Judge, EC Act/ Additional District and Sessions Judge, Bareilly, in Criminal Appeal No. 67 of 2001 ***Noor Mohammad vs. State of U.P.*** **,** wherein the judgment of conviction and sentence, passed by Court of Judicial Magistrate, North Eastern Railway, Bareilly, has been altered and convicted persons have been acquitted of charge of offence punishable, under Section 3 of Railway Property Unauthorized Occupation Act, with this contention that the Appellate Court failed to appreciate facts and law placed before it, thereby,

judgment of acquittal is a result of perversity whereas, learned Trial Magistrate has appreciated facts and law and has passed impugned judgment of conviction and order of sentence made therein.

2. An appeal under Section 374 Cr.P.C. was filed by convict appellants against judgment of conviction and sentence, dated 17.7.2001, passed by the Additional Chief Judicial Magistrate (N.E.R.), Bareilly and it was transferred to above Court of Special-Judge, EC Act/Additional District and Sessions Judge, Bareilly as Criminal Appeal No. 67 of 2001 ***Noor Mohammad and others vs. State of U.P.*** wherein, learned First Appellate Judge passed impugned judgment of acquittal against it.

3. Learned AGA has argued that there was a case of recovery of Railway property from place of occurrence kept under 4 gunny bags and it was seen to be thrown by two persons who were consistently identified by the employee of Railway Protection Force. They were Noor Mohammad, Jawahar and one other accused person had also thrown bag having railway property in it and he was subsequently identified in identification parade, hence, there was a huge recovery of property of Railway and witnesses have identified the same during trial whereupon, learned Magistrate had passed judgment of conviction with order of sentence. But First Appellate Judge failed to appreciate facts and law placed before it and on the basis of perversity, passed impugned judgment of acquittal, hence, this appeal with above prayer for grant of leave for filing this appeal.

4. A perusal of impugned judgment reveals that there was no instant arrest of any accused persons nor there was any recovery of stolen article from their possession. Three persons were seen carrying gunny bag over their shoulder and on being enquired by RPF, they had thrown those bags and fled from spot. They could not be apprehended.

5. The RPF personnel recovered those gunny bags in which broken pieces of copper wire with broken and a railway brackets were kept which were said to be railway property but the two witnesses PW-1 and PW-2 who were witness for proving this fact that recovered articles were property of railway have said in their cross-examination that this electric wire was not manufactured by railway, rather it was purchased from private concern and it was available with private concern. Meaning thereby, the same being exclusively of railway and in no circumstance available with any other person, could not be proved beyond doubt.

6. The identification parade was conducted after a considerable delay; that too with no protection that the chance for identifying in between may never exist, was there. Hence, on the basis of above testimony, the First Appellate Judge passed impugned judgment, which was based on evidence on record. The conviction and sentence of Additional Chief Judicial Magistrate was result of perversity, which was corrected by First Appellate Court. The impugned judgment does not suffer from any illegality or irregularity.

7. Hence, no ground for grant of leave to file proposed appeal is there.

8. Accordingly, Application to grant leave for filing appeal, being devoid of merits, stand rejected.

(2019)10ILR A 1064

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Commercial Tax Revision No. 162 of 2009
&
Sales/Trade Tax Revision No. 163 of 2009

M/s Fabrico India (P) Ltd. ...Revisionist
Versus
Commissioner of Commercial Tax, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Rakesh Ranjan Agrawal, Sri Suyash Agarwal, Ms. Pooja Srivastava

Counsel for the Opposite Party:
C.S.C.

A. U.P. Trade Tax Act, 1948-Section 4-BB, 8-A(2)(b), 29- A(2)-Timing of the claim raised is inconsequential – Assessee must fulfill the conditions to claim set off - The assessing authority rejected the claim of the revisionist-assessee, made in the course of assessment proceedings, for set off of the tax paid on purchase of raw material. The first appeal of the revisionist was allowed.-Tribunal reversed the order - Dismissing both the revisions, the High Court held- It was permissible for the assessee to raise the claim at the stage of the assessment proceedings, however, for such claim to arise and be allowed, assessee must be shown to have fulfilled the conditions for the set off being claimed. (Para 9 & 14)

B. Notwithstanding full compliance made by the assessee, in payment of tax on purchase of raw material and charge of tax on sale of tubular pipes, it lost the right to claim the set off u/s 4-BB, upon opting to charge full tax on the sale of tubular pipes, instead of deducting the tax paid on purchase of raw material from the tax payable on the sale of tubular pipes. (Para 11, 12, 13 & 14)

Revisions filed against order dated 07.01.2009, passed by the Trade Tax Tribunal, Meerut.

Tax Revision dismissed (E-4)

Precedent distinguished: -

1. M/s Sohan Lal Babu Ram Vs Commissioner of Sales Tax, U.P., Lucknow & ors., (1981) STD 121 (Para 7)

2. M/s Indian Oil Corpn., Agra Vs St. of U.P. & anr., (1981) UPTC 1248 (Para 7)

3. Commissioner of Sales Tax, U.P., Lucknow Vs M/s G.R. Tibrewal & Co., Kanpur, 1982 UPTC 241 (Para 7)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. These revisions have been filed by the applicant-assessee against the common order passed by the Trade Tax Tribunal, Meerut, dated 7.1.2009, passed in second appeal nos. 273/2003 for A.Y. 1999-2000 (U.P.) and 274/2003 for A.Y. 1999-2000 (Central). By that order, the Tribunal has allowed the appeals filed by the revenue and held the assesssee not entitled to benefit of set off under Section 4-BB of the U.P. Trade Tax Act, 1948 (hereinafter referred to as 'the Act').

2. During assessment years in question, the assessee had manufactured tubular poles claiming benefit of notification no. 2339 dated 22.10.1996, read with notification no. 1223 dated 22.5.1998. In the course of the assessment proceedings, the assessee claimed set off of tax paid on purchase of raw materials

used in the manufacture of tubular poles. The assessing officer rejected the claim on the reasoning that the assessee had not raised any such claim in its return and, therefore, it was not permissible to grant the same at the stage of assessment. The first appeal filed by the assessee was allowed by the Joint Commissioner (Appeal), by his order dated 19.2.2003, on the reasoning that under the aforesaid notifications, there was no restraint place in law that such set off may be claimed at the stage of filing of return and not later. Insofar as the assessee had not violated the law in charging the tax on the sale of tubular poles, it was held entitled to the set off, as claimed. Upon revenue's appeal, the Tribunal has allowed the same on the reasoning that the scheme of set off cannot be permitted to be used as a handle to retain an amount by the selling dealer, for his personal gain. Insofar as the assessee had made excess realization of 2%, the State was held entitled to retain the same as trustee.

3. Heard Sri Rakesh Ranjan Agrawal, Senior Advocate, assisted by Ms. Pooja Srivastava, learned counsel for the applicant-assesee and Sri B.K. Pandey, learned Standing Counsel for the revenue.

4. The revisions have been pressed on the following questions of law:

"(i) Whether the facts and circumstances of the case, the Tribunal was correct to hold that the assessing authority was justified in forfeiting the amount of the tax under Section 29-A(2) of the Act despite the applicant was entitled to adjustment of tax paid on the purchase of raw material u/s 4-BB of the Act.

(ii) Whether the Tribunal having not reversed the finding of the appellate authority that the provisions of Section 8-A(2)(b) of the Act having not violated, the amount refund can not be forfeited under Section 29-A(2) of the Act.

(iii) Whether the Tribunal having not considered that with raw material purchased after paying the purchase tax was consumed in the manufacture of tubular poles that is notified goods being Iron & Steel as per notification No. 1223 dated 22.05.1998, the assessing was right in denying the set off under Section 4-BB of the Act since it was not claimed in the return but was claimed at the time of the assessment."

5. Learned Senior Counsel would submit, the reasoning of the assessing authority was completely erroneous, inasmuch as, there is no stipulation either under the Act, or under the relevant notifications, whereby the claim for set off must necessarily be made at the stage of filing the return. On the other hand, the first appellate authority had correctly allowed the same as the assessee had not flouted, either the provisions of the Act, or the scheme in either paying 2% tax on purchase of raw materials, or in charging 4% tax on the sale of tubular poles. According to him, since the law stipulated that the amount of tax paid on raw material be set off against the tax paid on sale of tubular poles, the set off ought to have been granted in the course of assessment proceedings.

6. Further, it has been submitted, the Tribunal has completely misdirected itself i reaching the conclusion that, in the garb of claiming set off, the assessee could not be allowed to retain any tax charged for its personal gain. In fact, the Tribunal has

not given any reason to reverse the finding recorded by the first appellate authority.

7. Reliance has been placed on the division bench decisions of this Court in **M/s Sohan Lal Babu Ram Vs. Commissioner of Sales Tax, U.P., Lucknow & Ors., (1981 STD 121); M/s Indian Oil Corporation, Agra Vs. State of Uttar Pradesh & Anr., (1981 UPTC 1248)** and; decision of a learned single judge of this Court in **Commissioner of Sales Tax, U.P., Lucknow Vs. M/s G.R. Tibrewal and Co., Kanpur, (1982 UPTC 241),** to submit that mere admission of tax liability may not disentitle the assessee from raising a claim of set off.

8. Opposing the revision, learned Standing Counsel would submit, at the relevant time, the assessee did not claim set off and instead he paid full tax on the purchase of raw materials and charged full tax on sale of tubular poles. Having done that, the assessee clearly opted out of the set off scheme, which in any case, did not have mandatory force. Alternatively, it has been submitted that the dispute being canvassed by the assessee is purely academic, inasmuch as, there is no provision for the refund of the tax paid on purchase of raw materials. Having charged full tax on the sale of tubular poles, the assessee cannot claim any refund or adjustment of that amount against any other liability that may be standing against it.

9. Having heard learned counsel for the parties and having perused the record, in the first place, though it is true that the claim for set off may not have been rejected only because the same had not been raised in the return filed by the assessee and theoretically, it was permissible for the assessee to raise that claim at the stage of assessment proceedings, however, for such claim to arise and be allowed, the assessee must be shown to have fulfilled the conditions for the set off being claimed.

10. The set off of tax paid on raw material and packing material used in the manufacture of notified goods is provided under Section 4-BB of the Act. It reads as below:

"4-BB. Set off of tax paid on raw material and packing material in certain cases.

Where tax has been paid on the purchase or sale of raw material or packing material inside the State and such raw material or packing material has been used in manufacture or packing of such goods as are notified by the State Government in this behalf and such goods are sold in the State or in the course of inter State trade or commerce, the amount of tax paid on the purchase or sale or the raw material or packing material shall, subject to such conditions and restrictions as may be specified in the said notification, be deducted from the tax payable on the sale of such goods-

(a) inside the State, to the extent the tax has been paid on the purchase or sale of raw material or packing material from which the goods sold inside the State were manufactured or packed;

(b) in the course of inter State trade or commerce, to the extent the tax has been paid on the purchase or sale of raw material or packing material, from which the goods sold in the course of inter State trade or commerce were manufactured or packed:

Provided that the amount of tax to be deducted under clause (a) or clause (b) shall not exceed the amount of tax payable separately under this Act or the Central Sales Tax Act, 1956."

11. Thus, in the first place, the set off is available with respect to the tax paid on purchase of raw materials used in the manufacture of notified goods. Second, such set off is to be availed by making deduction of that amount from the tax payable on the sale of notified goods. The tax on sale of tubular poles would have become payable at the time of sale of those goods by the assessee and, in any case, at the stage of filing of the monthly/quarterly return, as the case may have been. Therefore, to take the benefit of Section 4-BB of the Act, plainly, the assessee was required to make that deduction, at that stage, and not later. Then, looking at the notification no. 2339 dated 22.10.1996, read with notification no. 1223 dated 22.5.1998, under the conditions for grant of benefit of set off, it was clearly stipulated by way of condition no. 3 that it was permissible to the manufacture (of notified goods) to claim such deduction, by way of an option to the payment of full tax on sale of such goods. It was not compulsary for that manufacturer to necessarily avail set off.

12. Thus, a co-joint reading of the provisions of Section 4-BB of the Act and the notifications leaves no doubt, for the set off to be claimed by the assesee, the deduction of tax paid or purchase of raw material had to be made at it's end at the time of making sale of notified goods i.e. tubular poles. Once the assessee failed to make such deductions, at that stage, no subsequent claim in that regard may have been raised, either at the stage of filing annual return or during the course of the assessment proceedings. Only other situation in which such a claim may have then arisen, could have been if the assessee had always claimed that it had not charged tax on the sale of tubular poles but paid that amount from its own pocket. Clearly, that case does not exist in the present case.

13. Therefore, the reasoning given by the Tribunal apart, it does not appear possible to contemplate a situation where a claim of set off may have been raised by the assessee after it had failed to make a deduction of tax payable on the sale of tubular poles and it had charged full tax @ 4% on sale of tubular poles.

14. In view of the above, the question of law no. 1 is answered thus - notwithstanding full compliance made by the assessee, in payment of tax on purchase of raw material and charge of tax on sale of tubular pipes, it lost the right to claim the set off under Section 4-BB of the Act upon opting to charge full tax on sale of tubular pipes, instead of deducting the tax paid on purchase of raw material from the tax payable on the sale of tubular pipes. The subsequent events of the timing of the claim raised during assessment proceedings remained inconsequential as the scheme of set off was optional and the assessee must be held to have necessarily opted out of it by choosing to charge full tax on sale of tubular pipes.

15. Both the revisions lack merit and are accordingly **dismissed,** for reasons different from those recorded by the Tribunal.

(2019)10ILR A 1068

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2019

BEFORE

THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ Tax No. 336 of 2019

M/s Notional Chemical & Dyes Co. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aloke Kumar

Counsel for the Respondents:
C.S.C.

A. U.P. Value Added Tax Act, 2008- Section 29(7) - Schedule 2, Part-C - Order authorizing reassessment, only on the basis of audit objection cannot be sustained - Notice for reassessment issued - Original assessment order was passed after scrutiny of the records and no turnover was assessed to tax at lower rate - Allowing the petition, the High Court held - Reassessment cannot be made on the same material by the same authority, if there is any change of opinion, only on the basis of audit objection. (Para 10)

Writ petition challenges orders dated 07.03.2019, passed by Additional Commissioner, Grade-I, Commercial Tax, Varanasi Zone – I, Varanasi, for assessment year 2010- 11.

Writ Petition allowed (E-4)

Precedent followed: -

1. M/s Vikrant Tyres Ltd. Vs St. of U.P. & ors., (2005) UPTC 501 (Para 5)

2. St. of U.P. Vs M/s Aryawart Chawal Udyog & ors., (2017) UPTC 262 (Para 6)

3. Varun Beverages Ltd. Vs St. of U.P. & 2 ors., (2016) 62 NTN DX 324 (Para 7)

4. M/s Sterling India Vs St. of U.P. & 3 ors. (2017) UPTC 379 (Para 7)

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

1. Heard Sri Aloke Kumar, learned counsel for the petitioner and Sri C. B. Tripathi, learned Special counsel for the respondents-State.

2. Present petition has been filed assailing the order dated 07.03.2019 passed by Additional Commissioner, Grade-I, Commercial Tax, Varanasi Zone-I, Varanasi under Section 29(7) for reassessment for assessment year 2010-11 and notice dated 07.03.2019 issued by Joint Commissioner, (Corporate Circle), Commercial Tax, Varanasi Zone-I, Varanasi which had been issued in consequence of the order of authorisation.

3. According to petitioner the dispute relates to reassessment of assessment year 2010-11. Petitioner is registered proprietorship firm, and is involved in manufacture and sale of chemicals. According to petitioner the chemicals manufactured are commonly known as prepared driers and the same find place at Serial No. 134 of Part-C of Schedule 2 of Value Added Tax (in short 'VAT Act'). The said prepared driers are taxable at the rate of 4% from 01.01.2008. According to petitioner, the petitioner firm was assessed for assessment year 2008-09 and assessment order was passed on 22.10.2011, accepting the sale and tax at 4%. It was on 24.07.2013 that respondent no. 3 had issued a notice to

petitioner firm regarding the taxability of prepared driers, which was replied on 25.08.2013 and the proceedings were, thereafter, dropped. According to petitioner assessment was made for the year 2010-11 and assessment order was passed on 13.01.2014 granting benefit to the firm that commodity sold by firm was prepared driers and was taxable under Item No. 134 of Schedule 2, Part-C. In the assessment year of 2011-12, the contention of the petitioner was also accepted as regards prepared driers manufactured and sold by petitioner firm and assessment order was passed on 23.07.2014.

4. According to petitioner, on 07.02.2019, respondent no. 2 exercising power under Sub-section 7 of Section 29 issued notice stating that the goods sold by the petitioner firm are liable to be taxed at the rate of 12.5% and stated that HSN Code 05000039 is for paints and varnishes of all kinds and all materials used in painting and varnishes, and prepared driers manufactured by petitioner was used only in manufacture of paint and varnishes, thus, it falls under the said HSN Code and accordingly 8.5% tax had been left to be imposed on the turnover of prepared driers and permission has been sought for reassessment. Petitioner appeared on the date fixed and filed his reply and submitted that original assessment order was passed after scrutiny of the records and no turnover was assessed to tax at lower rate and as such there was no occasion to grant permission for reassessment on basis of change of opinion. Respondent no. 2 exercising power under Section 29(7) passed the order of authorisation on 07.03.2019.

5. Counsel for the petitioner submitted that the order authorising for reassessment amounts to change of opinion as the question of taxability was never in dispute and the same has been accepted even after recording finding on the same by taking note of HSN Code specially prescribed for prepared driers. He submitted that reassessment cannot be made on the same material which was subject-matter of the original assessment. He relied upon judgment of this Court in case of ***M/s Vikrant Tyres Ltd. vs. State of U.P. and others, 2005 UPTC 501*** that no reassessment can be made by same authority on the same material and if the same was permitted will open flood gate for arbitrary action exposing one to unending process, permitting uncertainty, reopening of closed chapters without assigning good reason, depending upon whims of individuals.

6. He further relied upon a judgment of the Apex Court in case of ***State of U.P. vs. M/s Aryawart Chawal Udyog and others, (2017) UPTC 262*** which is on the question of change of opinion. Relevant Para 30 is extracted hereasunder:-

"30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion and the material present before the Assessing Authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra Hon'ble Supreme Court Shah, (1972) 2 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360)."

7. He also relied upon the Division Bench judgment of this Court in ***Varun***

Beverages Ltd. Vs. State of U.P. and 2 others, (2016) 62 NTN DX 324 and case of M/s Sterling India vs. State of U.P. and 3 others, (2017) UPTC 379.

8. Per contra, learned Special counsel for the Department submitted that the case of the petitioner was not covered under Article 134, Schedule 2, Part-C but was covered under HSN Code 05000039. He further submitted that it was not change of opinion but was on the basis of an audit held in the Department in which the said fact was pointed out and pursuant to the audit objection, review pertaining to the assessment year 2010-11 was taken. The said fact has been stated in Para Nos. 7 and 14 of the counter affidavit which is extracted hereasunder:-

*"**7.** That there was an audit held in the department in which the aforesaid inadvertence was pointed out and pursuant to the audit objection, review pertaining to the assessment year 2010-11 in respect of petitioner was made and during review of the matter it was found that 13.5% tax ought to have been charged instead of 5% tax inasmuch as Paint Drier comes under the purview of non-clasified category. Hence it has been decided to rectify the aforesaid inadvertence as per provision laid under under Section 29(7) of the Act which provides;*

"Where the Commissioner, on his own or on the basis of reason recorded by the assessing authority, is satisfied that it is just and expedient so to do authorize the assessing authority in that behalf, such assessment or re-assessment may be made within a period of eight years after expiry of assessment year to which such assessment or re-assessment relates notwithstanding such assessment or re-assessment may involve a change of opinion.

Provided that it shall not be necessary for the Commissioner to hear the dealer before authorising the assessing authority."

***14.** That, the contents of paragraph nos. 7,8,9 and 10 of the writ petition are not admitted as stated hence denied, in reply it is submitted that there was an audit held in the department in which the aforesaid inadvertence was pointed out and pursuant to the audit objection, review pertaining to the assessment year 2010-11 in respect of petitioner and during review of the matter it was found that 13.5% tax ought to have been charged instead of 5% tax inasmuch as the Paint Drier comes under the purview of non-classified category. Thereafter, after examining entire facts of the matter, impugned order dated 07.03.2019 has been passed by respondent no. 1 and consequently as show-cause notice dated 07.03.2019 was issued to the petitioner for initiating re-assessment process."*

9. Having heard learned counsel for the parties and perusing the records of the case, we find that in previous as well as in subsequent years the petitioner had been constantly assessed under the heading prepared driers for which he has been taxed at the rate of 5% under the relevant Code by the assessing authority. Earlier in 2013 the notice was also issued to the petitioner which was replied by him and it seems that further proceedings were dropped and no orders were passed. For the relevant assessment year, the averment made in Para Nos. 7 and 14 of the counter affidavit clearly states that the reassessment is being made on the basis of audit objection thus, it is not the case of

the Department that any part of the turnover of a dealer for any assessment year or part thereof has escaped assessment to tax, it is only on the basis of the audit objection that the proceedings for reassessment has been initiated by passing orders of authorisation by respondent no. 2 against the petitioner firm.

10. It is well settled that reassessment cannot be made on the same material by the same authority nor if there is any change of opinion, as in the present case there was no fresh material on record on which the authorities proceeded for reassessment, thus the order authorising for reassessment only on the basis of audit objection cannot be sustained. Thus we are of the considered view that the order dated 07.03.2019 passed by respondent no. 2 under Section 29(7) for reassessment of assessment year 2010-11 and notice dated 07.03.2019 issued by respondent no. 3 are unsustainable and are hereby quashed.

11. Writ Petition stands **allowed.**

(2019)10ILR A 1071

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Matter Under Article. 227 No. 5718 of 2019 (Civil)

Rakesh Kumar & Anr.
...Petitioners/Defendants (Tenants)
Versus

The Addl. District Judge Court No. 2, Bulanshahar & Ors.
...Respondents/Plaintiffs

Counsel for the Petitioners:
Sri Some Narayan Mishra

Counsel for the Respondents:
Sri Nitin Kumar Agarwal

A. Transfer of Property Act, 1882 - Section 106 - Determination of tenancy and demand for arrears of rent- to answer the following questions: (a) Under the facts and circumstances of the case what would be the minimum period of notice under Section 106 of the Transfer of Property Act, 1882 as substituted by the Central Act No.3 of 2003?

B. Whether the amendment made by the Transfer of Property (Amendment) Act (Central Act No.3 of 2003), would prevail over the U.P. Amendment by U.P. Act No.24 of 1954 and consequently, the minimum period of notice would be 15 days? (Paras 10, 13, 19, 20 & 24).

Matter is referred to a larger bench (E-8)

List of Cases Cited: -

1. Mohd. Afzal Vs. Smt. Ramesh Kumari, 2014(3) ARC 864

2. Hardoi Zila Sahkari Bank Limited, Hardoi Vs. Smt. Sarla Gupta and another, 2010(2) A.R.C. 144

3. Dharam Pal Vs. Harbans Singh, 2006 (9) SCC 216

4. Parwati Bai Vs. Radhika, (2003) 12 SCC 551

5. Food Corporation of India and another Vs. Smt. Nisha Agnihotri, 2016 (9) ADJ 452

6. Sri Janki Devi Bhagat Trust, Agra Vs. Ram Swarup Jain (Dead) by LRs., (1995) 5 SCC 314

7. Bradley vs. Atkinson, ILR (1885) 7 All 596: 1885 SCC OnLine All 89

8. Pt. Rishikesh and another vs. Salma Begum (Smt.), (1995) 4 SCC 718

9. Engineering Kamgar Union vs. Electro Steel Castings Ltd. and another (2004) 6 SCC 36

10. Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109

11. Animal Welfare Board of India vs. A Nagaraja and others, (2014) 7 SCC 547

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Some Narayan Mishra, learned counsel for the defendant-tenants/petitioners and Sri Nitin Kumar Agrawal, learned counsel for the plaintiff-landlady/respondent no.3.

Facts:-

2. Briefly stated facts of the present case are that undisputedly, the plaintiff-respondent no.3 is the owner and landlady of a shop bearing Municipal No.185/1, Railway Road, Dibai, Pargana and Tehsil Dibai, District Bulandshahr, which she had purchased by a registered sale-deed dated 5.12.1991. She built three shops in it. First assessment of the disputed property was made in the year 1993. By a registered sale-deed dated 25.2.1997, the plaintiff-landlady/respondent no.3 had sold one shop to one Sri Suresh Chand Gupta, son of Sri Nand Kishore Gupta. She had let out the second shop to Sri Yogendra. **The third shop was let out by her to the defendant-tenant/petitioners nos.1 and 2.**

3. According to the plaintiff-landlady/respondent no.3, the defendant-tenants/petitioners defaulted in payment of rent from 01.01.2010. Therefore, the plaintiff-landlady/respondent no.3 issued a notice dated 31.3.2010 to the defendant-tenants/petitioners, under Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act 1882') whereby she determined the tenancy and demanded arrears of rent. The defendants-tenants/petitioners did not comply with notice. Therefore, she filed S.C.C. Suit No.15 of 2010 (Smt. Maya Devi v. Rakesh Kumar and others) in the court of Judge Small Cause, Bulandshahr. In the aforesaid suit five issues were framed as under:

''1. क्या विवादित दुकान पर उत्तर प्रदेश अधिनियम संख्या 13 सन 1972 के प्राविधान लागू नहीं होते है?

2. क्या दावा वादी मे आवश्यक पक्षकार न बनाये जाने का असंयोजन का दोष है?

3. क्या प्रतिवादी के उपर दिनांक 01.01.2010 से किराया बाकी व बाजिब है और प्रतिवादी द्वारा किराया अदा करने में चूक की है?

4. क्या प्रतिवादी धारा 20(4) उत्तर प्रदेश अधिनियम संख्या 13 सन 1972 का लाभ पाने का अधिकारी है?

5. अनुतोष?''

4. Issue nos. 1,2 and 4 were decided by the Judge Small Cause Court, Bulandshahr by judgment dated 14.1.2016 in favour of the plaintiff-landlady/respondent no.3, while Issue No.3 was decided against her and accordingly the relief was declined.

5. Aggrieved with this judgment, the plaintiff-landlady/respondent no.3 filed S.C.C. Revision No.10 of 2016 (Smt. Maya Devi alias Radha Devi v. Suresh Kumar and another), which was allowed by the District Judge, Bulandshahr by judgment dated 31.10.2017 and the matter was remanded to the court below to decide Issue no.3 afresh and also to decide issue No.6 framed by the revisional court as under:

''क्या वादिनी द्वारा निर्गत नोटिस दिनांकित 31.03.2010 वैध व प्रभावी है?''

6. On remand, the aforesaid S.C.C. Suit No.10 of 2010 was decreed by the Judge Small Causes Court, Bulandshahr by the impugned judgment dated 24.9.2018.

7. Aggrieved with that judgment the defendant-tenants/petitioners filed S.C.C. Revision No.17 of 2018 (Rakesh Kumar and another v. Smt. Maya Devi alias Radha Devi), which has been dismissed by the Additional District Judge (Court No.2), Bulandshahr by the impugned judgment and order dated 23.05.2019.

8. Aggrieved with these two judgments, the defendant-petitioners have filed the present petition under Article 227 of the Constitution of India.

Submissions:-

9. **Learned counsel for the defendant-petitioners submits** as under:

(i) After giving notice dated 31.3.2010, the S.C.C. suit was filed on 20.4.2010. Section 106 of the Transfer of Property Act, as applicable in the State of Uttar Pradesh, provides for 30 days notice for filing a suit. Since, the S.C.C. Suit was filed by the plaintiff-landlady/respondent no.3 prior to expiry of 30 days, therefore, the suit itself was not maintainable. Reliance is placed upon the Single Judge judgment of this Court in **Mohd. Afzal v. Smt. Ramesh Kumari, 2014(3) ARC 864** (Paragraph-10).

(ii) The findings recorded by the courts below on Issue No.2 regarding non-payment of rent is incorrect, inasmuch as, the rent was being regularly paid by the defendant-tenants/petitioners to the plaintiff-landlady/respondent no.3 and on refusal by her the rent was sent by money-order.

(iii) Since there is conflict between two Single Judge judgments of this Court in **Mohd. Afzal Vs. Smt. Ramesh Kumari, 2014(3) ARC 864 (Paragraph-10) and in Hardoi Zila Sahkari Bank Limited, Hardoi Vs. Smt. Sarla Gupta and another, 2010(2) A.R.C. 144 (Paragraph Nos. 25 to 29)** on the point of period of notice under Section 106 of the Transfer of Property Act, 1882, therefore, the matter deserves to be referred to a larger Bench.

10. Sri Nitin Kumar Agrawal, learned counsel for the plaintiff-respondent no.3 submits as under:

(i) Section 106 of the Transfer of Property Act, 1882, was amended by Parliament by Transfer of Property (Amendment) (Act No.3 of 2003), providing for period of notice of 15 days. Thus, the period of notice provided by U.P. Act No.24 of 1954 for 30 days is not relevant. Since, **15 days notice was given on 31.3.2010 and the suit was filed on 20.4.2010,** therefore, the suit was filed well after expiry of the statutory period of notice. Reliance is placed upon a judgment of learned Single Judge in **Hardoi Zila Sahkari Bank Limited, Hardoi v. Smt. Sarla Gupta and another, 2010(2) A.R.C. 144.**

(ii) The judgment in the case of Mohd. Afzal (supra) relied by the learned counsel for the plaintiff-landlord/respondent no.3 has no reference to the case of Hardoi Zila Sahkari Bank Limited (supra) in which the issue of the period of notice was settled after detail discussion.

(iii) Besides above, the case of the plaintiff-landlady/respondent no.3 is

protected by the provisions of Section 106(3) of the Transfer of Property Act.

(iv) In his written submission the defendant-petitioner no.1 Rakesh Kumar, had admitted non payment of rent after 31.12.2009 whereas in his written statement the defendant-petitioner no.2 Suresh Kumar, had alleged the rent was paid for the period from 1.1.2010 to 31.3.2010. Thus, conflicting stand was taken by the defendant-petitioners.

(v) An objection to the period of notice under Section 106 of the Transfer of Property Act, 1882 must be specifically raised in the written statement by a tenant and since the petitioners have not raised this point either in the reply to the notice or in the written statement, therefore, this plea can not be entertained at this stage. Reliance is placed upon the judgments of Hon'ble Supreme Court in **Dharam Pal Vs. Harbans Singh, 2006 (9) SCC 216 (para 7) and Parwati Bai Vs. Radhika, (2003) 12 SCC 551 (Para 5).**

(vi) The tenancy was on month to month basis in view of the provisions of Section 106 of the Transfer of Property Act, 1882 and also in view of the law laid down by a Division Bench of this Court in **Food Corporation of India and another Vs. Smt. Nisha Agnihotri, 2016 (9) ADJ 452 (paras 30 and 33),** therefore, the period of notice would be 15 days as provided by the amended provisions of Section 106 of the Act, 1882. Reliance is placed upon the judgments of Hon'ble Supreme Court in **Sri Janki Devi Bhagat Trust, Agra Vs. Ram Swarup Jain (Dead) by LRs., (1995) 5 SCC 314 (para 6), Dharam Pal Vs. Harbans Singh (2006) 9 SCC 216 (paras 5 & 6)** and the single Judge judgment of this Court in **Rakesh Kumar Vs. Rakesh Gupta, (2018) 2 ARC 393 (paras 37 and 39).**

(vii) The Central Amendment would prevail as to the period of notice to be 15 days under Section 106 of the Transfer of Property Act. Reliance is placed upon the Single Judge Judgment of this Court in **Hardoi Zila Sahkari Bank Limited, Hardoi Vs. Smt. Sarla Gupta and another, 2010 (2) A.R.C. 144 (Paragraph Nos. 19 to 25),** wherein the period of notice with reference to the amendment made by Transfer of Property (Amendment) Act, (Act No.3 of 2003) as well as the U.P. Amendment made by U.P. Act No.24 of 1954, were specifically considered and it was held that in case of conflict between the Central Act and the U.P. Amendment, the Central Act would prevail in view of the provisions of Article 254 of the Constitution of India. The subsequent amendment made by the Transfer of Property (Amendment) Act (Act No.3 of 2003) would prevail.

Questions:-

11. With the consent of learned counsels for the parties, the following questions are framed for determination in this petition:-

(a) Under the facts and circumstances of the case what would be the period of notice under Section 106 of the Transfer of Property Act, 1882 ?

(b) Whether the amendment made by Transfer of Property (Amendment) Act (Act No.3 of 2003), would prevail over the U.P. Amendment by U.P. Act No.24 of 1954 and consequently, the minimum period of notice would be 15 days after the amendment in Section 106 of the Act, 1882 by Central Act No.3 of 2003?

(c) Whether under the facts and circumstances of the case and in view of Section 21 of the Civil Procedure Code, the defendant-tenant/petitioners can be

allowed to raise the question of period of notice when this objection was not taken by them either in their reply to the notice of the landlady or in the written statement filed in SCC Suit No.15 of 2010?

DISCUSSION AND FINDINGS

12. Before I proceed to examine the questions as framed above, it would be appropriate to reproduce the provision of Section 106 of the Transfer of Property Act, 1882 as existed prior to the substitution of a new Section 106 by Act No.3 of 2003, the amendment made by U.P. Act XXIV of 1954 in Section 106 of the Transfer of Property Act, 1882 and newly substituted Section 106 by Parliament in the Transfer of Property Act, 1882 by Act No.3 of 2003:-

Originally enacted Section 106 of the Transfer of Property Act, 1882

*"**106. Duration of certain leases in absence of written contract or local usage:-** In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, **by six months' notice expiring with the end of a year of the tenancy;** and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, **by fifteen days' notice expiring with the end of a month of the tenancy.***

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the part who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

The amendment made by Section 2 of the U.P. Act No.XXIV of 1954 in Section 106 of the Transfer of Property Act, 1882

1. The words "expiring with the end of a year of the tenancy" and "expiring with the end of a month of the tenancy", shall be omitted.

2. For the words "fifteen days' notice" the words "thirty days' notice" shall be substituted.

Section 106 of the Transfer of Property Act, 1882 as substituted by Central Act No.3 of 2003

106. Duration of certain leases in absence of written contract or local usage:-** (1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and **a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the part who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

13. In the case of **Hardoi Zila Sahkari Bank Ltd., Hardoi vs. Smt. Sarla Gupta, 2010 (80) ALR 799,** an Hon'ble Single Judge referred to the provision of Section 106 of the Act, 1882 as originally enacted, the amendment by U.P. Act No.XXIV of 1954 and the newly substituted Section 106 by Central Act No.3 of 2003 and held that after amendment by the Central Act, the minimum period of notice under Section 106 of the Act, 1882, is fifteen days. The relevant portion of the judgment of **Hardoi Zila Sahkari Bank Ltd.** (supra) (Paras-20, 21, 22 and 26), are reproduced below:

"20. Presumably, the Parliament with a view to introduce a uniform law throughout the country avoiding defect found in practice passed the Transfer of Property (Amendment) Act, 2002. This object would be frustrated if the argument that both the U.P. Act No. No.24 of 1954 and the Amending Act, 2002 should co-exist as the U.P. Act No. of 1954 has not been omitted. By State Amendment i.e. U.P. Act No. 24 of 1954 the period of notice of "fifteen days" as prescribed in Section 106 of the Transfer of the Property Act was substituted by the words "thirty days" but by the Transfer of Property (Amendment) Act, 2002 the entire 106 Section occurring in the Transfer of Property Act, 1882 has been substituted by a new Section prescribing therein the period of notice as fifteen days. ***Therefore, in view of the settled law, the Central Amendment Act would prevail over the U.P. Act No. 24 of 1954.***

21. It may also be noted that though the notice to quit was sent by the respondents to the revisionist on 4.11.2004 providing 15 days time to vacate the premises but, admittedly, the suit was instituted by the revisionists in the year 2005, which is admittedly, much after 15 days time, provided in the notice.

22. Even otherwise as sub-Section 3 of Section 106 has been brought on the statute book by means of Amendment Act, 2002, it specifically provides that the notice under sub-Section 3 of Section 106 of the Act shall not deem to be not valid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section. Thus by fixation of law, proceedings cannot be vitiated on the ground of defective notice.

26. ***In view of the above discussions, the provisions of the U. P. Act No. 24 of 1954 cannot be allowed to operate only because it has received the Presidential assent when the entire provision of Section 106 of the Transfer of Property Act has been substituted in question is directly in conflict with the Central Act."***

(Emphasis supplied by me)

14. A contrary view has been taken by a coordinate bench of this court in **Mohammad Afzal vs. Smt. Ramesh Kumari, 2014 (3) ARC 864 (Paras-9, 10 and 11),** as under:

"9. The revised section 106 of the TP Act still provides for 15 days notice for determination of monthly tenancy. Therefore, the notice period for determining the tenancy under Section 106 of the T.P. Act remains the same/unchanged despite the amendment of 2002.

10. The said notice period as provided under Section 106 of the TP Act was amended to 30 days in its application to the State of U.P. Since there is no change in the notice period by the Transfer of Property Amendment Act of 2002, the notice period as it stood originally and amended in its applicability to the State of U.P. would continue to hold the field. ***In other words, in the State of U.P. 30 days notice is mandatory for determining the month to month tenancy.***

11. In the instant case, the notice gives only 15 days time for determining the tenancy of the petitioner. Therefore, the notice ex-facie appears to be invalid."

(Emphasis supplied by me)

15. Thus, in the aforesaid two judgments, conflicting views have been taken on the point of minimum period of notice under Section 106 of the Act, 1882. **Therefore, the matter deserves to be referred to a larger bench, on the following questions:**

(a) Under the facts and circumstances of the case what would be the minimum period of notice under Section 106 of the Transfer of Property Act, 1882 as substituted by the Central Act No.3 of 2003?

(b) Whether the amendment made by Transfer of Property (Amendment) Act (Act No.3 of 2003), would prevail over the U.P. Amendment by U.P. Act No.24 of 1954 and consequently, the minimum period of notice would be 15 days?

16. While referring the above noted two questions to a larger bench, it would be appropriate to mention some judgments of this Court and of Hon'ble Supreme Court.

17. Section 106 of the Act, 1882 as originally enacted, is in two parts. The first part is not relevant for the purposes of the present case. The second part provides for notice of fifteen days **"expiring with the end of a month of the tenancy"** in respect of lease of immovable property for any purpose other than agricultural or manufacturing purposes. The words "by fifteen days' notice" is qualified by the words "expiring with the end of a month of the tenancy". This provision was considered by a Division Bench of this Court in **Bradley vs. Atkinson, ILR (1885) 7 All 596 : 1885 SCC OnLine All 89** in which His Lordship Hon'ble Mr. Justice Mahmood, interpreted the words "fifteen days" to imply a fixation of the shortest period allowed by the Section; and the word "expiring" to mean the terms of notice must be such as to make it capable of expiring according to law at the right time, so as to render it safe for the tenant to quit co-incidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period. **The Division Bench found that as per Section 106 of the Act 1882, the notice to quit dated 11th December, 1882 was expiring on 10th January, 1883.**

18. It appears that because of two phrases as afore-noted used in Section 106 of the Act, 1882, there was confusion

with respect to the minimum period of notice, therefore, Section 106 of the Act, 1882 was amended by U.P. Act No.XXIV of 1954 whereby the words "fifteen days' notice" were substituted by the words "thirty days' notice" and the phrase "expiring with the end of a month of the tenancy" was omitted. Section 106 of the Act, 1882 as then existing, was substituted by a new Section 106 by Central Act No.3 of 2003 enacted by Parliament, which received assent of the President on 31.12.2002 and published in the Gazette of India Extra., Part-II, Section 1, dated 1st January, 2003. **Thus, this amended provision uniformly provides for minimum fifteen days' notice in the matter of month to month tenancy of an immovable property for the purposes other than agricultural or manufacturing purposes. After substitution of new Section 106 of the Act, 1882, no amendment has been brought by Uttar Pradesh legislature as was brought to amend the originally enacted Section 106 of the Act, 1882 by U.P. Act No.XXIV of 1954.**

19. In **Pt. Rishikesh and another vs. Salma Begum (Smt.), (1995) 4 SCC 718 (Paras-15, 18 and 21),** Hon'ble Supreme Court considered provisions of Article 254 of the Constitution of India, amendment of Order XV Rule 5, C.P.C. by U.P. Civil Laws (Reforms and Amendment) Act, 1976, U.P. Civil Laws (Amendment) Act 37 of 1972 and U.P. Civil Laws (Amendment) President's Act 19 of 1973 and the amendment made by Parliament in C.P.C. by Central (Amendment) Act 104 of 1976 and held, as under:

"15. Clause (2) of Article 254 is an exception to Clause (1). If law made by the State Legislature is reserved for consideration and received assent of the President though the State law is inconsistent with the Central Act, the law made by the Legislature of the State prevails over the Central Law and operates in that State as valid law. ***If Parliament amends the law, after the amendment made by the State Legislature has received the assent of the President, the earlier amendment made by the State Legislature, if found inconsistent with the Central amended Law, both Central law and the State Law cannot co-exist without colliding with each other. Repugnancy thereby arises and to the extent of the repugnancy the State Law becomes void under Article 254(1) unless the State Legislature again makes law reserved for the consideration of the President and received the assent of the President.*** *Full Bench of the High Court held that since U.P. Act 57 of 1976 received the assent of the President on 30.12.1976, while the Central Act was assented to on 09.09.1976, the U.P. Act made by the State Legislature, later in point of time it is a valid law.*

18. It is true that CPC, the principal Act No. 5 of 1908 as amended by the Central Act and the pre-existing State amendment or a provision made by a High Court was intended to be consistent so that the procedure would uniformly be efficacious and expeditious in adjudicating the substantive civil rights of the parties. It, thereby manifested its intention that there should be amendment to the Principal Act by the Central Act to a particular Section or a Rule or sub-rule or a provision in an Order in the Schedule. ***If the Principal Act, as so amended, and the pre-existing State amendment or a provision made by the High Court is found to be inconsistent***

with the amendment brought under the Central Act, then to the extent of inconsistent pre-existing amendments made by State Legislature or a provision made by the High Court becomes void by operation of clause (1) of Art. 254. *By operation of sub-section (1) of section 97 of the Central Act, it stands repealed unless State Act is passed, reserved for consideration and received the assent of the President under clause (2) of Article 254. Section 1(2) of the Central Act visualises that the Central Government may bring into operation different provisions in the Central Act at different dates by a notification published in a Gazette. As a matter of fact, three different notifications were published in the official gazette bringing diverse provisions of the Amendment Act into operation from three different dates. All the provisions except amended Sections 28, 34 and 148A were brought into force on 01.02.1977. Sections 28 and 148A were brought into force with effect from 01.02.1977 and Section 34 was brought into force with effect from 01.07.1977. The legislative business done by the appropriate State Legislature cannot be reduced to redundance by the executive inaction or choice by the Central Government by issuing different dates for the commencement of different provisions of the Central Act. The Constitution, therefore, made a clear demarcation between making the law and commencement of the law which, therefore, bears relevance for giving effect to Article 254.*

21. ***The condition precedent to bring about repugnancy should be that there must be an amendment made to the Principal Act under the Central Act and the previous amendment made by a State legislature or a provision made by a High Court must occupy the same field and operate in a collision course.*** *Since the State Act as incorporated by Act 37 of 1972 and the Explanations to Rule 5 by the Act 57 of 1976, Rule 5 was not occupied by the Central Act in relation to the State of U.P., they remain to be a valid law.* ***We may clarify at once that if the Central Law and the State Law or a provision made by the High Court occupy the same field and operate in collision course, the State Act or the provision made in the Order by a High Court being inconsistent with or in other words being incompatible with the Central Act, it becomes void unless it is re-enacted, reserved for consideration and receives the assent of the President after the Central Act was made by the Parliament i.e. 10.09.1976."***

(Emphasis supplied by me)

20. The aforesaid judgment in the case of Pt. Rishikesh (supra) has been affirmed by a Constitution Bench of Hon'ble Supreme Court in **State of Kerla and others vs. Mar Appraem Kuri Comapny Limited, (2012) 7 SCC 106 (paras-5, 78, 79 and 97.1),** as under:

"5. ***The statement of law laid down in Pt. Rishikesh (supra) was as under*** *(SCC P.729. para-17):*

"17... As soon as assent is given by the President to the law passed by the Parliament it becomes law. Commencement of the Act may be expressed in the Act itself, namely, from the moment the assent was given by the President and published in the Gazette, it becomes operative. The operation may be postponed giving power to the executive or delegated legislation to bring the Act into force at a particular time unless

otherwise provided. The Central Act came into operation on the date it received the assent of the president and shall be published in the Gazette and immediately on the expiration of the day preceding its commencement it became operative. Therefore, from the mid-night on the day on which the Central Act was published in the Gazette of India, it became the law. Admittedly, the Central Act was assented to by the President on 9-9-1976 and was published in the Gazette of India on 10-9-1976. This would be clear when we see the legislative procedure envisaged in Articles 107 to 109 and assent of the President under Article 111 which says that when a Bill has been passed by the House of the People, it shall be presented to the President and the President shall either give his assent to the Bill or withhold his assent therefrom. The proviso is not material for the purpose of this case. Once the President gives assent it becomes law and becomes effective when it is published in the Gazette. The making of the law is thus complete unless it is amended in accordance with the procedure prescribed in Articles 107 to 109 of the Constitution. Equally is the procedure of the State Legislature. Inconsistency or incompatibility in the law on concurrent subject, by operation of Article 254, clauses (1) and (2) does not depend upon the commencement of the respective Acts made by the Parliament and the State Legislature. Therefore, the emphasis on commencement of the Act and inconsistency in the operation thereafter does not become relevant when its voidness is required to be decided on the anvil of Article 254(1). Moreover the legislative business of making law entailing with valuable public time and enormous expenditure would not be made to depend on the volition of the executive to notify the commencement of the Act. Incompatibility or repugnancy would be apparent when the effect of the operation is visualised by comparative study."

78. To sum up, Articles 246(1), (2) and 254(1) provide that to the extent to which a State law is in conflict with or repugnant to the Central law, which Parliament is competent to make, the Central law shall prevail and the State law shall be void to the extent of its repugnancy. This general rule of repugnancy is subject to Article 254(2) which inter alia provides that if a law made by a State legislature in respect of matters in the Concurrent List is reserved for consideration by the President and receives his/ her assent, then the State law shall prevail in that State over an existing law or a law made by the Parliament, notwithstanding its repugnancy.

79. The proviso to Article 254(2) provides that a law made by the State Legislature with the President's assent shall not prevent Parliament from making at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by a State Legislature. Thus, Parliament need not wait for the law made by the State Legislature with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any State Legislation, which has received the President's assent, overriding within the State's territory, an earlier Parliamentary enactment in the concurrent sphere, before it is brought into force. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented to State law is brought into force. This view finds support in the judgment of this Court in State of Orissa v. M.A. Tulloch and Co. reported in (1964) 4 SCR 461.

97.1. On timing, ***we hold that, repugnancy arises on the making and not commencement of the law, as***

correctly held in the judgment of this Court in Pt. Rishikesh and Another v. Salma Begum (Smt) [(1995) 4 SCC 718]."

(Emphasis supplied by me)

21. In **Engineering Kamgar Union vs. Electro Steel Castings Ltd. and another, (2004) 6 SCC 36 (Paras-15 to 24),** Hon'ble Supreme Court considered the question of repugnancy and the provisions of Section 254 of the Constitution of India and held that two different Acts produce two different legal results, a conflict will arise.

22. In **Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109 (Para-12),** Hon'ble Supreme Court held that repugnancy is said to arise when : (i) there is clear and direct inconsistency between the Central and the State Act; (ii) such inconsistency is irreconcilable, or brings the State Act in direct collision with the Central Act or brings about a situation where obeying one would lead to disobeying the other.

23. In **Animal Welfare Board of India vs. A Nagaraja and others, (2014) 7 SCC 547 (Paras-75 to 79),** Hon'ble Supreme Court held that in order to decide the question of repugnancy, it must be shown that the two enactments contain inconsistent and irreconcilable provisions, therefore, they cannot stand together or operate in the same field.

24. For all the reasons afore-stated, particularly in view of afore-noted conflicting views taken by two Benches of this Court in two decisions namely **Mohd. Afzal** (supra) and **Hardoi Zila Sahkari Bank Limited** (supra), the matter is referred to a larger bench to answer the following questions:

(a) Under the facts and circumstances of the case what would be the minimum period of notice under Section 106 of the Transfer of Property Act, 1882 as substituted by the Central Act No.3 of 2003?

(b) Whether the amendment made by the Transfer of Property (Amendment) Act (Central Act No.3 of 2003), would prevail over the U.P. Amendment by U.P. Act No.24 of 1954 and consequently, the minimum period of notice would be 15 days?

25. Let the papers be placed before Hon'ble the Chief Justice to constitute a larger bench to decide the afore-noted questions.

(2019)10ILR A 1081

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2019

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Crl. Misc. Bail Application (IIND) No. 32155 of 2019

Arvind Rajak @ Vasu ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Qazi Vakil Ahmad

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 :- Sections 457, 380 and 411 - second bail application-rejection- The recognized considerations germane on the point to decide whether an accused ought to be released on bail or not also includes the probability of the accused absconding or fleeing from the course of justice, if released on bail-His character, behaviour, means, position and standing in the society are also relevant-The likelihood of the offence being repeated has also been recognized by the Hon'ble Apex Court as a relevant consideration-The enormous recoveries of gold and silver articles and also that of cash at the instance of applicant cannot be said to be either frivolous or planted at least at this stage. (Para 4, 5 & 6)

Bail Application dismissed (E-6)

Precedent followed:

1. Neeru Yadav Vs St. of U.P. in Criminal Appeal No.1272 of 2015

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This is the second bail application filed on behalf of applicant Arvind Rajak @ Vasu seeking his release on bail in Case Crime No.68 of 2018, u/ss 457, 380, 411 I.P.C., Police Station-Kakadev, District-Kanpur Nagar. First bail application of the applicant was rejected by this Court vide order dated 21.12.2018.

2. Heard learned counsel for the applicant and learned A.G.A. and also perused the record.

3. Counsel for the applicant has not raised any fresh argument but has insisted that a second look should be given to the facts of the case. The period of detention has also been pointed out.

4. Perusal of the earlier bail order shows that primarily the bail application was rejected because of a very long criminal history showing the involvement of applicant in not less than 33 cases which were registered against him. Merits of the case cannot be looked into again and again just because some further time has lapsed. There is therefore no reason to take a different view in the matter. While dealing with an accused of such kind this Court cannot loose perspective of the likelihood of the witnesses or evidence being tampered with and being adversely influenced under the coercive clout of criminality of the accused. The involvement of the applicant in three dozen criminal cases is not an ordinary circumstance and cannot be lightly ignored. It is not a usual feature to find people getting involved or being charged for criminal offences in such large number. When an accused with such kind of chequered criminal history is let loose, he finds unrestricted opportunities to wield his coercive powers and tamper with the evidence. The prospect of a fair trial naturally may get prejudicially affected and the possibility of prosecution evidence remaining intact comes under high peril. It is not needed but to make the factual situation clear the relevant portion of the order passed by this Court while rejecting the first bail application may be extracted herein below :

"Learned A.G.A. has opposed the prayer for bail and has submitted that the applicant is having criminal history of not less than 33 criminal cases and the applicant has been found to have been involved multiple cases of theft and robbery. The details of which have been given as follows :

1. Case Crime No.1175/2017, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

2. Case Crime No.1176/2017, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

3. Case Crime No.347/2018, u/s 394, 411 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

4. Case Crime No.190/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

5. Case Crime No.277/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

6. Case Crime No.281/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

7. Case Crime No.241/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District- Kanpur Nagar.

8. Case Crime No.330/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

9. Case Crime No.322/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

10. Case Crime No.154/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

11. Case Crime No.270/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

12. Case Crime No.137/2018, u/s 394, 411 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

13. Case Crime No.436/2018, u/s 392, 411 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

14. Case Crime No.362/2018, u/s 3/25 of Arms Act, P.S.-Naubasta, District-Kanpur Nagar.

15. Case Crime No.363/2018, u/s 4/25 of Arms Act, P.S.-Naubasta, District-Kanpur Nagar.

16. Case Crime No.365/2018, u/s 41, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

17. Case Crime No.366/2018, u/s 41, 411, 413, 414 I.P.C., P.S.-Naubasta, District-Kanpur Nagar.

18. Case Crime No.476/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

19. Case Crime No.515/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

20. Case Crime No.283/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

21. Case Crime No.525/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

22. Case Crime No.567/2018, u/s 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

23. Case Crime No.552/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

24. Case Crime No.375/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

25. Case Crime No.316/2018, u/s 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

26. Case Crime No.517/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

27. Case Crime No.502/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

28. Case Crime No.604/2018, u/s 380, 411, 413, 414 I.P.C., P.S.-Chakeri, District-Kanpur Nagar.

29. Case Crime No.21/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Kidwai Nagar, District-Kanpur Nagar.

30. Case Crime No.85/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Kidwai Nagar, District-Kanpur Nagar.

31. Case Crime No.41/2018, u/s 380, 411, 413, 414 I.P.C., P.S.-Kidwai Nagar, District-Kanpur Nagar.

32. Case Crime No.171/2018, u/s 457, 380, 411, 413, 414 I.P.C., P.S.-Vidhnu, District-Kanpur Nagar.

33. Case Crime No.378/2018, u/s 379, 411 I.P.C., P.S.-Barra, District-Kanpur Nagar.

Further submission is that the chequered history or the criminal antecedents of accused are sufficient to indicate that the accused is a habitual offender and in case he is released on bail, under the coercive influence of his criminality it will be difficult for the witnesses to depose independently without fear. It is further submitted that in all likelihood the release of the accused shall impair the prospects of a fair trial. It is next submitted that it is also very obvious that a person of this criminal background is also very likely to indulge himself in the activities which shall be detrimental to the society at large. Further submission is that the delinquents of such nature wield enormous criminal clout which in consequence very obviously affects a free trial. Therefore, in the facts and circumstances of the case, the accused should not be released on bail. Learned A.G.A. also relied upon the Apex Court decision Neeru Yadav vs. State of U.P. in Criminal Appeal No.1272 of 2015 decided on 29.9.2015 to emphasis upon the relevance of criminal history in matters of bail."

5. In the case of **Neeru Yadav vs. State of U.P.** in Criminal Appeal No.1272 of 2015 decided on 29.9.2015 the Apex Court had the occasion to reflect upon the criminal history of a particular accused and the observations made by the Apex Court in that regard may be apt to recall in this context. The relevant extracts of the aforesaid case may be quoted herein below :

"1. The present appeal, by special leave, on a summary glance may appear that a victim who might have an axe to grind against the accused, the respondent no.2 herein, and further to wreck his vengeance has approached this Court seeking cancellation of his bail, possibly being emboldened by the inaction of the State authorities who have chosen to maintain sphinx like silence or decided to assume the stagnated posture of a splendid sculpture of Rome, and invigorated by the thought that he can singularly carry the crusade, without any support, for he has a cause to vindicate by valiantly exposing the legal infirmities in the order passed by the High Court admitting the 2nd respondent to bail and also unconceal the lackadaisical attitude of the State, but on a keener scrutiny the initial impression melts away and the perversity of the order impugned gets unrolled. Be it stated, at a narrow level it may look like a combat between two individuals, but when analytical scrutiny is done and the State is compelled to wake up from its slumber, the unveiling of facts reveal the contestation between the accord and the discord, the scuffle betwixt the sacrosanctity and the majesty of law on one hand and the maladroit ingenious efforts to get the benefit by the abuse of process of the Court on the other. The analysis has to be made, that being an imperative command, between the honest nidification and the surreptitious edifice.

2. Mr. Pradeep Kumar Yadav, learned counsel for the appellant, with all the distress and the intellectual agony at his command, has submitted that the High Court without appropriate analysis and even without being fully apprised of the fact situation, solely on the basis of parity, as if it is the only foundation or for that matter, the comet that has come off to

shine, has enlarged the respondent no.2 on bail totally being oblivious that no accused, however influential he may be or clever he thinks to be, cannot be allowed to nullify the sanctity and purity of law and jettison the age old values "truth in action" and "the firm and continuous desire to render to every one which is due", the two fundamental pillars of justice. The plea, submits Mr. Yadav, apart from cleverness also shows an attempt of the nonchalant mind of the respondent No 2 to engage in fertile imagination possibly thinking that the ground of parity is the real structure of palladium to bring the nemesis of the prosecution and put the Court in a situation to choose between Scylla and Charybdis. And, at this juncture, we must state that both the appellant and the State (though at a later stage) have become Argus-eyed and destroyed the ingenious foundation so astutely built by the accused.

3. ..... It was contended before the High Court that an omnibus role had been ascribed to him and the other accused persons that they had indulged in general firing as a consequence of which one person had died, for he had received three gun shot injuries. It was also contended that there was no credible evidence against the accused persons. The real plank of submission before the High Court, as is perceptible, was that prayer for bail in respect of 11 accused persons including Mitthan Yadav had already been allowed, and there was no justification to deny him the said benefit as he was similarly placed.

4. The prayer for bail was resisted by the Public Prosecutor contending, inter alia, that there was indiscriminate firing by the accused person causing fatal injuries. The High Court, after hearing both the parties, has passed following order:-

"In view of above facts, considering the nature of allegation, severity of punishment and period of detention, without expressing any opinion on merit, it is a fit case for bail.

Let the applicant Budhpal @ Buddhu be enlarged on bail on his furnishing a personal bond with two heavy sureties each in the like amount to the satisfaction of court concerned in case crime no. 237 of 2013 under Section 147, 148, 149, 302, 307, 394, 411, 454, 506, 120-B, 34 I.P.C. Police Station Kavi Nagar, District Ghaziabad with the following conditions:

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurize/intimidate the prosecution witness.

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

In case of breach of any of the above conditions, the court below shall be at liberty to cancel the bail." The said order is the subject matter of assail in the present appeal by special leave.

5. At the outset we are obliged to clarify that it is not an appeal seeking cancellation of bail in the strictest sense. It actually calls in question the legal pregnability of the order passed by the High Court. The prayer for cancellation of bail is not sought on the foundation of any kind of supervening circumstances or breach of any condition imposed by the High Court. The basic assail is to the manner in which the High Court has exercised its jurisdiction under Section 439 CrPC while admitting the accused to bail. To clarify, if it has failed to take into

consideration the relevant material factors, it would make the order absolutely perverse and totally indefensible. That is why there is a difference between cancellation of an order of bail and legal sustainability of an order granting bail. [See State of U.P. v. Marmani Tripathi[1], Puran v. Rambilas[2], Narendra K. Amin v. State of Gujrat[3], and Prakash Kadam v. Ramprasad Vishwanah Gupta[4].]

6. .....

7. .....

8. It is interesting to note that learned counsel for the appellant and the learned counsel for the State submitted that the respondent no.2 is still in jail despite the order of bail as he is involved in so many cases. We will take up the said issue at a later stage. It is submitted by Mr. Yadav, learned counsel for the appellant that despite the factum of criminal history pointed out before the High Court, it has given it a glorious ignore which the law does not countenance. The solitary and the singular grievance which is propounded with solidity that the High Court should have dwelt upon the same and thereafter decided the matter. Mr. Dash, learned senior counsel (though the State has not moved any application for setting aside the order of bail granted by the High Court for the reasons which are unfathomable) unhesitatingly accepted the said submission. In the additional affidavit, an independent chart has been filed by the State and we find that apart from the present case, there are seven cases pending against the respondent no.2. ....."

9. .....

10. .....

11. .....

12. In Prasanta Kumar Sarkar v. Ashis Chatterjee [8], while dealing with the court's role to interfere with the power of the High Court to grant bail to the accused, the Court observed that it is to be seen that the High Court has exercised this discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in catena of judgments on that point. The Court proceeded to enumerate the factors:-

"9. ... among other circumstances, the factors [which are] to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

13. *We will be failing in our duty if we do not take note of the concept of liberty and its curtailment by law. It is an established fact that a crime though committed against an individual, in all cases it does not retain an individual character. It, on occasions and in certain offences, accentuates and causes harm to the society.* ***The victim may be an***

individual, but in the ultimate eventuate, it is the society which is the victim. *A crime, as is understood, creates a dent in the law and order situation. In a civilised society, a crime disturbs orderliness. It affects the peaceful life of the society. An individual can enjoy his liberty which is definitely of paramount value but he cannot be a law unto himself. He cannot cause harm to others. He cannot be a nuisance to the collective. He cannot be a terror to the society; and that is why Edmund Burke, the great English thinker, almost two centuries and a decade back eloquently spoke thus:-*

"Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters[9].

14. *E. Barrett Prettyman, a retired Chief Judge of US Court of Appeals had to state thus:-*

"In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematised restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect realisation, of each separate human mind, soul and body; not in mute, motionless meditation but in flashing, thrashing activity.[10]"

15. This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history- sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.

16. .....

17. .....

18. ..... we may repeat with profit that it is not an appeal for cancellation of bail as the cancellation is not sought because of supervening circumstances. The annulment of the order passed by the High Court is sought

as many relevant factors have not been taken into consideration which includes the criminal antecedents of the accused and that makes the order a deviant one. Therefore, the inevitable result is the lancination of the impugned order.

19. Resultantly, the appeal is allowed and the order passed by the High Court is set aside. ....."

6. The perusal of aforesaid case law reveals that a very strict view against the accused on the point of bail has been adopted by the Hon'ble Supreme Court for the reason of the accused having a shady past blemished with criminal antecedents. The Apex Court therefore, had proceeded to cancel the bail that had already been granted by the High court on the ground of parity with co-accused without giving due consideration to the criminal history of the accused. It may not be out of place to mention here that in the case of Neeru Yadav (supra) the accused was said to have a criminal history of only seven cases out of which ofcourse two cases were that of murder. But even a fleeting glance on the criminal history of the present accused would show that he appears to have been involved in almost similar kind of offences of committing lurking trespass, of committing theft and possessing theft property in such large number that he may be termed to be an incorrigible offender beyond all possibilities of reformation or corrective redemption. Even the present case at hand, in which the applicant seeks his bail relates to the offence under Sections 457 and 380 I.P.C. and the contents of the F.I.R. would show that at the time of incident the informant's family had gone to attend the marriage and the informant had also gone to Lucknow in connection with some matter and after having returned from there, he found his gate closed from inside which aroused suspicion. Somehow he managed his entry in his house from the roof of his neighbour and then he found that the window had been broken and the articles were thrown hither and thither, safe was found opened and it was discovered that the licensee pistol and a lot of gold jewellery and cash had been stolen away. During the course of investigation the accused was arrested and on being questioned by the police, he spilled the beans and made shocking disclosures about the enormous number of crimes of almost similar nature committed by him. Huge amount of recoveries were effected at his instance, the details of which have been narrated in Annexure No.3 which is memo of recovery and which relate to large number of thefts committed by him. Shocking number of thefts committed by the applicant and the huge number of consequential recoveries of highly valuable jewellery of gold and silver and cash does not leave any doubt at least at this stage that there is no dearth of incriminating evidence available against him pointing towards his guilt and guilty mind. Prima facie at this stage, unless the conclusion of the trial shows otherwise later on, the accused appears to be a menace to the society and a peril overhanging all the citizens who ceaselessly toil to earn an honest living. The recognized considerations germane on the point to decide whether an accused ought to be released on bail or not also includes the probability of the accused absconding or fleeing from the course of justice, if released on bail. His character, behaviour, means, position and standing in the society are also relevant. The likelihood of the offence being repeated has also been recognized by the Hon'ble

Apex Court as a relevant consideration. The enormous recoveries of gold and silver articles and also that of cash at the instance of applicant cannot be said to be either frivolous or planted at least at this stage. It is not difficult to see that the involvement of applicant in different criminal offences over a period of time speaks about the delinquency and depraved nature of the offender and in the considered opinion of this Court with such long criminal history in the background, it does not appear judicially prudent to release the applicant on bail.

7. For all these reasons therefore, this Court does not see any good fresh ground to take a different view in the matter than the one that has already been taken by this Court earlier.

8. Second bail application thus stands dismissed.

(2019)10ILR A 1089

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ Petition (Tax) No. 760 of 2017

M/S Flipkart India Pvt. Ltd. ...Petitioner
Versus
Sate of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Tarun Gulati, Sri Ravi Kant

Counsel for the Respondents:
C.S.C.

A. U.P. Value Added Tax Act, 2008 - Section 29(6) - U.P. Value Added Tax Rules - Rule 72 - Central Sales Tax Act, 1956 (hereinafter referred to as 'CST Act').-An order passed in gross violation of the provision of the Act and without proper service of notice upon the petitioner is liable to be set aside-The petitioner prayed for quashing of the assessment orders dated 31.03.2017 for Assessment Years 2012 - 13 and 2013-14 under the U.P. VAT Act as also CST Act, on the ground that one was passed after the limitation prescribed and the other, ex-parte without any opportunity of hearing - Allowing this petition, the High Court held - The assessment orders dated 31.03.2017 for the Assessment Year 2012-13 were beyond the extended period of limitation prescribed u/s 29(6). (Para 13, 14 & 15)

B. U.P. Value Added Tax Rules - Rule 72(h) mandates that in addition to sending a personal notice through process server, sending of notice by registered post is mandatory. Where notices were not sent by registered post, presumption of service of notice through the process server cannot arise. (Para 24)

C. The respondents were aware of the change in address of the assessee on account of two prior rounds of litigation with the petitioner, yet notice by a fixation was served at the earlier address. The assessment orders were passed without proper service of notice upon the assessee and were set-aside. (Para 20, 21, 23, 27 & 29)

Writ petition challenges orders dated 31.03.2017, for the assessment years 2012-13 and 2013-14.

Writ Petition allowed (E-4)

Precedent followed: -

1. Writ Tax No. 80 of 2016, Writ Tax No. 168 of 2016 (Para 20)

2. Writ Tax No. 546 of 2016 (Para 21)

3. Shri Balaji Enterprises Vs. C.C.T. U.P. Lucknow, Sales/Trade Tax Revision No. 496 of 2015, decided on 23.11.2015 (Para 24)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of present writ petition the petitioner has prayed for quashing of the orders dated 31st March, 2017 for the assessment year 2012-13 and 2013-2014 both under U.P. Vat Act as well as under Central VAT Act.

2. Heard Mr. Ravi Kant, Senior Advocate assisted by Mr. Nishant Mishra and Mr. C.B. Tripathi, special counsel for the State of U.P.

3. The petitioner is a company incorporated under the provision of Indian Companies Act, 1956. Petitioner an online Agency engaged in marketing and selling of consumer goods is registered under U.P. Value Added Tax, Act 2008 (hereinafter referred to as 'Act 2008') and Central Sales Tax Act, 1956 (hereinafter referred to as 'CST Act'). The business of petitioner is that it buys goods from various dealers across the country and sells the same to other dealers in the State of U.P. as alleged throughout India. Apart from business and trading of goods petitioner is also engaged in providing warehousing and various other services to sellers registered on the portal www. flipkart. com wherein, petitioner manages inventory, packaging and invoicing for said sellers.

4. Under the registration documents of petitioner under Act 2008 and CST Act his address was mentioned as Cabin No. 2 First Floor, G-50 Sector-3, Noida,.

5. The petitioner have changed its address from the present address to D-510-513, Buffer Godown Compound, Devi Mandir Road, Dasna, Ghaziabad.

6. Thereafter, the petitioner intimated the respondent for change/amendment of the address in the registration certificate instead of the amending and passing order on the said application and ex-parti provincial assessment orders were passed for the assessment year 2012-13 (4) U.P. under Act 2008 and CST Act.

7. On the basis of an ex-parte assessment order certain amounts were also withdrawn from the Bank amount of the petitioner.

8. The petitioner had preferred a writ petition No. 80 and 168 of 2016 and the same was allowed and the ex-parte assessment orders were quashed with heavy cost of two lac.

9. Thereafter, on 31st March, 2017 again an ex-parte assessment orders were passed for assessment year 2012-13 and 2013- 14 both under Act 2008 and CST Act and the said assessment order have been passed ex-parte without any service of notice upon the petitioner or opportunity of being heard provided therein.

10. Learned senior counsel of the petitioner submits that this is a 3rd round of litigation forcing the petitioner to approach this Hon'ble Court as the respondents are bent upon to serve the notice not on the new address intimated to them but on the old/earlier address that too notice by affixation in gross violation of the provision of Rule 72 of the U.P. VAT Rules.

11. It is submitted that the impugned orders have been passed by the

respondents are wholly without jurisdiction and gross violation of principle of natural justice.

12. It is further argued that the assessment orders for the assessment year 2012-13 both under Act 2008 and CST Act are being passed after the expiry of period of limitation prescribed under Section 29 (6) of the Act and therefore the orders are liable to be set aside.

13. Learned counsel further submits that the normal limitation starts from 31st March, 2013 which ends on 31st March, 2016 but as per limitation prescribed under Section 29(6) of the Act ends on 30th September, 2016. Since, the impugned orders have been passed on 31st March, 2017 and the assessment orders were received on 12.10.2017, therefore, the assessment orders are vitiated and are liable to be set aside as barred by limitation.

14. Learned counsel for the respondent could not justify the action of the respondent passing the orders for the assessment year 2012-13 both under Act 2008 and CST Act in question after the expiry of period of limitation as provided under Section 29(6) of the Act.

15. In view of above mentioned facts that the limitation as prescribed under Section 29(6) of Act 2008 for the assessment year 2012-13 has expired. On 13th September, 2016 and the impugned orders both under Act 2008 and CST Act for assessment year 2012-13 have been passed on 31st March, 2017 which are apparently much beyond the period of limitation prescribed therein. Therefore, the impugned orders for the assessment year 2012-13 both under Act 2008 and CST Act are hereby quashed.

16. The learned Senior Counsel now raised an objection for the order passed for the assessment year 2013-14 both under the Act 2008 and CST Act.

17. It is submitted that in spite of the fact that the petitioner's address have been changed and the respondent were duly intimated about the said change of address, the respondents neither serve the copy of notice upon the petitioner on its new address nor any intimation was given before passing of the impugned order dated 31st March, 2017 for the disputed assessment year.

18. It is further argued that even though the complete procedure have been prescribed under Rule 72 of U.P. VAT Rules about the service of notice before taking any action against the petitioner but the same has not been complied with and in gross violation of the said Rule the notice of assessment in question have been served by affixation which is not permissible under the Act 2008 and Rules.

19. Learned counsel for the respondents have supported the impugned order and tried to justify the action of the respondent in passing the assessment order.

20. We have perused the record of the case before proceeding further it may be pointed out that in earlier two round of litigation the similar question arose about the service of notice on the earlier address and not on the new address from where the petitioner is doing its business and this Hon'ble Court has deprecated the method adopted by the respondent by not only quashed the orders but also imposed heavy cost upon the respondent. The

Hon'ble Court in the case of petitioner while allowing the Writ Nos. 80 and 168 of 2016 have observed as under:

"22. The respondents have tried to justify the assessment orders contending that proper service was made by refusal as well as by affixation and there was no illegality in the service of the summons. It was also urged that the petitioner has a remedy of filing an appeal against the assessment orders and that it was not necessary to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

23. Having heard the learned counsel for the parties, we are of the opinion that the rule of alternative remedy is not a bar for entertaining the writ petition. No doubt it is a rule of discretion but in the instant case, we are of the opinion that there would be a travesty of justice if we relegate the petitioner to the alternative remedy of an appeal. We are of the opinion that justice is required to be done at the earliest. We find that there is a total abdication by the respondents in adhering to the process of service of summons under Rule 72 of the Rules. Rule 72 of the Rules has been ignored and a procedure which is not known to law has been adopted. For facility, the Rule 72 of the Rules is extracted hereunder:-

24. Rule 72(a) of the Rules provides that the service of summons is required to be made on a dealer or a person concerned in person or his agent. In the instant case, the report of process server indicates that there was no Firm at the Noida address. At the Ghaziabad address, the process server met one person, who refused to divulge his name but clearly indicated as to which person would receive the notice. The process server, however, indicates service by refusal. In our opinion, the report of the process server is wholly illegal. There is no finding that the person who refused to accept the notice was a dealer or a person concerned in person or an agent empowered to accept the notice. In the absence of any report to this effect we are of the opinion that there is no valid service by refusal.

29. The recall application for recall of the assessment order was rejected by the assessing authority on the ground that the application was filed beyond the stipulated period of 30 days since service of the assessment order by affixation was made on 17.12.2015 at Noida. The Assessing Authority had also rejected the recall application on the ground that the admitted tax of Rs. 3.3 crore was not deposited which is a mandatory requirement as per Section 32 of the Act. On this issue, we are of the opinion that Assessing Authority committed a manifest error in rejecting the recall application. For facility, section 32 is extracted hereunder:-

35. Before parting, we must observe the manner in which the respondents have proceeded with the assessment and recovered the amount from the petitioner's Bank account in haste is deplorable and in gross violation of the provisions of the Act. We find that for the assessment years 2011-12, 2013-14 and 2014-15 ex-parte assessment orders were made without adequate service of notices upon the petitioner. These assessment proceedings were set aside in appeal on the short ground that the service of the summons were sent at the address where the petitioner was no longer carrying on its business. Inspite of this knowledge, the respondents chose deliberately to serve the notice for

provisional assessment for the period April to October, 2015 upon the petitioner at the Noida address knowing fully well that the petitioner was not carrying any business from the Noida address. The respondents knew very well that the petitioner had shifted its place of business from Noida to Ghaziabad as they made a futile attempt to serve the notice at Ghaziabad but later for the reasons best known to them, chose deliberately to serve the notice by affixation at the Noida address. Such tactics adopted by the assessing authority in getting the service effected upon the petitioner was in gross violation of Rule 72 of the Rules.

36. We also find that the entire exercise of service was done within four days without taking recourse to the other mode of service, namely simultaneously service by registered post with acknowledgement due. The assessment order indicates that the first and last date of hearing of the assessment proceedings was 10.12.2015 and that the assessment order was passed on 15.12.2015. The counter affidavit reveals that the assessment order was served by attachment at the Noida address. This was done deliberately by the respondents so that the respondents could withdraw the amount through garnishee notices by exerting pressure upon the bank authorities. The Court gets an uncanny feeling that a deliberate attempt was made by the respondents to withdraw the money from the petitioner's bank account through dubious mean by passing ex-parte assessment orders and not allowing it to be served validly upon the petitioner. If in this cavalier fashion the Commercial Tax Department functions and withdraws huge sums of money without valid service, it would be difficult for big business houses to carry on their business. Such business houses would be forced to shift their business outside the State of Uttar Pradesh.

37. Consequently, the petitioners are entitled for cost. The writ petitions are allowed with cost amounting to Rs. 2,00,000/- (Rupees two lakhs only), which will be paid by the Commercial Tax Department to the petitioner within two weeks from the date of filing of a certified copy of this order. If the amount is not paid, it would be open to the petitioner to move an appropriate application in this petition."

21. Thereafter, again a writ Petition No. 546 of 2016 was allowed with a cost being imposed on respondent of Rs. 50,000/. The Hon'ble Court has observed us under:

"16. We however required him to tell us as to how respondent 1 could dare to pass further assessment orders, when earlier orders passed by him were declared without jurisdiction by this Court by referring to the similar application of petitioner for change of business address. In reply thereto a very bulky counter affidavit has been filed separately by respondent 1. Despite he could not explain as to what was the occasion for any confusion when the needs were very clearly disclosed and decided in Courts' judgment dated 29.02.2016 and why respondent 1 was in so such a hurry so as to pass the impugned assessment orders on 04.05.2016.

18. In these facts and circumstances we are satisfied that here is a forced litigation by unmindful illegal act on the part of respondent 1 and realizing the same he has also withdrawn the impugned orders and also considered the

fact he is an authority which was already adversely commenced by this Court in its order dated 29.02.2016 still he did not care to such observations. It is again a fit case where respondent 1 himself would be saddled with cost by this litigation. Since the impugned order of assessment have already been recalled by order dated 23.07.2016 in this regard no further order is required but we hold that respondent 1 being guilty of compelling and forcing second round of litigation upon petitioner must be saddled with cost which we quantify to Rs. 50,000/-.

19. We also direct Principal Secretary, Trade Tax, U.P. Government to look into the manner in which respondent 1 has functioned in this case and despite strictures and penal cost imposed by this Court in earlier judgment dated 29.02.2016 and also directing Commissioner Trade Tax to get an inquiry conducted against erring officials, respondent 1 has not cared to mend his ways to conduct but has proceeded to harass a dealer like petitioner and appropriate disciplinary action be taken at the earliest and finalise the same. It may also be considered by Principal Secretary, Trade Tax, U.P. Government as to whether, respondent 1 is a person fit to be assigned such important quasi-judicial functions."

22. Admittedly, the two judgments shows the working of the departmental authorities and the manner in which they are working is not in the interest of either parties.

23. The case in hand also service of notice has been made by affixation on the earlier address of the petitioner in spite of the fact being within their knowledge that the petitioner have changed the place of business to the new address but still with a mind set of passing the order hurriedly passed an ex-parte order under Act 2008 and CST Act creating huge demand against the petitioner.

24. This Hon'ble Court in the case of Sri. Balaji Enterprises vs. Commissioner Commertial Tax U.P. Lucknow Sales/Trade Tax Revision No. 496 of 2015 decided on 23rd November, 2015 to interpret as to how under Rule 72 the notice is to be served and held as under:

"The record reveals that a notice through process server was sent to the assessee revisionist but the same was not accepted and the service was deemed to be sufficient by refusal. However, there is nothing on record to show that any notice of the proceedings was sent to the assessee revisionist by registered post.

Rule 72 of the Rules framed under the Act provides for the mode of service of notice of the proceedings under the Act.

In addition to the service of notice of the proceedings through process server Sub-Rule (h) of Rule 72 provides that the authorities shall simultaneously issue notice, order or summon for service by post.

The aforesaid Sub-Rule (h) of Rule 72 of the Rules clearly envisages that in addition to the personal service through process server, sending of notice by registered post is mandatory.

This mandatory provision has not been followed in the present case as is evident from the record produced.

In view of the aforesaid facts and circumstances, the contention of assessee revisionist that he was not served with any notice of the proceedings has force. Accordingly, as the service of

notice by post is mandatory and in addition to service by process server, the above question is answered in favour of the assessee revisionist and against the revenue holding that the authority was not competent to cancel the registration of the assessee/revisionist without issuing notice to him by registered post simply on the basis of service of process server by refusal."

25. The Division Bench judgement in the case of petitioner itself and Sri Balaji Enterprises (supra) a clear procedure for service on notice has been prescribed which has not been followed by the respondent in the case in hand.

26. The record further reveals that the notice by affixation has been made on the earlier address of the petitioner even without satisfying the conditions as mentioned in the Rule. Even after service of notice by affixation, no such report has been brought on record as provided under the Rules.

27. In spite of the fact being within the knowledge of the respondent that the petitioner has changed the place of business to the new address still notice by affixation has been made in the earlier address. This fact is also came to the notice of this Court in earlier two rounds of litigation filed by the petitioner in Writ Nos. 80 and 168 of 2016 and Writ No. 546 of 2016 which has been allowed with the cost of Rs. 2 lac and Rs. 50,000/-.

28. The record further reveals that the impugned order has been passed in gross violation of the provision of the Act and without proper service of notice upon the petitioner. The said fact could not also be disputed by the learned counsel for the respondent.

29. In view of the facts and circumstances of the case as stated above, the impugned order dated 31.3.2017 for the assessment year 2013-14 under the U.P. Act 2008 and CST Act are hereby set aside.

30. It is made clear that respondents are permitted to initiate the proceeding by issuing notice at the current address of the petitioner, if any, in accordance with law.

31. The writ petition is accordingly allowed.

(2019)10ILR A 1095

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2015

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Contempt No. 37 of 2006

Smt. Maya Niranjan ...Appellant
Versus
Phuleashwar & Anr. ...Respondents

Counsel for the Appellant:
Sri B.P. Singh, Sri Ram Babu Yadav, Sri Shashi Nandan

Counsel for the Respondents:
Sri R.B. Tripathi, A.G.A., Sri Krishan Ji Khare

A. Contempt of Courts Act, 1971- Section 19 - Delay in payments by appellant - wilfully and deliberately disobeying the orders of the High Court - the subsequent payments clearly establish that the said

payments were wilfully and deliberately delayed for more than four and a half years - the appellant has substantially contributed obstructions for more than four and a half years - subsequent payments, therefore, do not absolve the appellant of the contempt that was earlier committed - the officers who succeeded the appellant were also punished. Hence, the non-compliance of the judgment is clearly established and therefore the conviction and punishment have to be upheld. (Para 4, 5, 7, 16, 22, 24 to 36)

Contempt Appeal Disposed of (E-6)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J. & Hon'ble Pramod Kumar Srivastava, J.)

1. Heard Sri Shashi Nandan, learned Senior Counsel for the appellant and Sri R.B. Tripathi, learned counsel for the respondent no. 2.

2. This contempt appeal under Section 19 of the Contempt of Courts Act, 1971 assails the conviction and punishment awarded by the learned Single Judge in Contempt Petition No. 1487 of 2001 whereby the appellant was sentenced to two months simple imprisonment with a fine of Rs. 2000/- and in case of default to further undergo one month imprisonment. A direction was given to send the copy of the order to the Chief Secretary, Government of Uttar Pradesh, Secondary Education, U.P. Lucknow with the hope that the matter would also be dealt with administratively against the appellant.

3. The conviction was brought home on account of the charge that was framed against the appellant for showing cause as to the wilful and deliberate violation, and defiance, of the judgment and order of a learned Single Judge of this Court dated 21st February, 2000 in Writ Petition No. 2022 of 1995 as confirmed by a division bench in Special Appeal No. 295 of 2000 vide judgment dated 19th April, 2000. While proceeding to frame charges, the learned Single Judge took notice of a communication dispatched by the appellant under her signatures dated 9th May, 2000 which is extracted hereinunder:-

''अ0शा0 पत्रांक/ /2000–2001
श्रीमती माया निरंजन जिला विद्यालय निरीक्षक (द्वितीय) इलाहाबाद।

दिनांक : 09–05–2000
स्पेशल अपील संख्या–295/2000 प्रधानाचार्या, जगत तारन गर्ल्स इं0का0, इलाहाबाद बनाम मण्डलीय उप शिक्षा निदेशक (माध्यमिक) एवं अन्य में माननीय उच्च न्यायालय द्वारा आदेश दि0: 19–4–2000 पारित किया गया है जिसमें याचिका संख्या–2022/1995 प्रधानाचार्या, जगत तारन गर्ल्स इण्टर कालेज, इलाहाबाद बनाम उप शिक्षा निदेशक (माध्यमिक) में पारित निर्णय दि0 21–2–2000 को सही मानते हुये **माननीय जजों** ने स्पेशल अपील खारिज कर दी है। **स्पेशल अपील खारिज हो जाने से श्री फुलेश्वर परिचारक को बिना काम के दि0 01–08–94 से शासन/विभाग को वेतन देना पड़ेगा जिससे शासकीय धन का दुरूपयोग होगा।** सुलभ संदर्भ हेतु स्पेशल अपील की छाया प्रति, तथा उसमें पारित आदेश दिनांक 19–4–2000 की छाया प्रति, याचिका संख्या–2022/1995 में माननीय न्यायालय द्वारा पारित आदेश दिनांक 21–2–2000 की छाया प्रति तथा प्रकरण के सम्बन्ध में संक्षिप्त इतिहास आदि अभिलेख इस निवेदन के साथ प्रेषित है कि मामले का अध्ययन कर अग्रिम कार्यवाही हेतु निर्देश देने का कष्ट करें।

चूँकि प्रकरण 10 वर्ष तक फर्जी जन्मतिथि बढ़ा लेने से सम्बन्धित है जिससे शासन पर अनावश्यक व्यय भार बढ़ेगा। ऐसी स्थिति में प्रकरण के सम्बन्ध में आवश्यक निर्णय लेकर आवश्यक कार्यवाही के लिये इस कार्यालय को निर्देश देने का कष्ट करें ताकि **आपके निर्देश के अनुपालन में** आवश्यक कार्यवाही की जा सके।
संलग्नकः यथोक्त्।
ह0 –
श्री अमृत प्रकाश
श्रीमती (माया निरंजन)

शिक्षा निदेशक (माध्यमिक)
उत्तर प्रदेश लखनऊ
अ0शा0 पृ0सं0 / / 2000–2001 तददिनॉकः
उक्त की प्रतिलिपि निम्न को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।
श्रीमती सरिता यादव
ह0 –
अपर शिक्षा निदेशक (माध्यमिक)
श्रीमती (माया निरंजन)
अ0शा0 पृ0सं0 / –– / 2000–2001
तददिनॉकः
उक्त की प्रतिलिपि निम्न को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।
श्रीमती प्रेमलता सिंह
ह0 –
उप शिक्षा निदेशक (माध्यमिक)
श्रीमती (माया निरंजन)
शिक्षा निदेशालय, उत्तर प्रदेश
इलाहाबाद।''

4. The learned Single Judge found not only the said letter to be contemptuous but also found the affidavits that were filed in the proceedings to be further fortifying the charge of wilful and deliberate disobedience and an attitude of the appellant not to comply with the directions of the Court. The learned Single Judge came to the conclusion that it was the appellant who while acting as District Inspector of Schools, being the drawing and disbursing officer, had created hurdles in the execution of the order with a reprehensive defiance and it was her action to resist payments that were due as is evident from the letter dated 9th May, 2000 which clearly indicated her intention to "set the cat among the pigeons" which resulted in wilful defiance and non-compliance of the order of the learned Single Judge for four and a half years.

5. The learned Single Judge thereafter also appears to have taken notice of the career of the appellant and described her as a veteran of contempt matters with about 60 contempt petitions pending against her.

6. Sri Shashi Nandan has then invited the attention of the Court to the facts of the case which in a nutshell as under.

7. Phuleshwar who was a Class IV employee of an Intermediate College raised a claim in relation to his reinstatement and payment of salary. Writ Petition No. 2022 of 1995 was filed by the Principal of the Institution contending that salary was being claimed by Phuleshwar on the strength of an alteration in the date of birth as a result whereof Phuleshwar would receive the same for a period of extra 10 years. This challenge raised in the writ petition by the Principal of the College, who is the appointing authority of a Class IV employee under the U.P. Intermediate Education Act, 1921 was rejected and the writ petition was dismissed on 21st February, 2000 with a further direction to the Principal and the District Inspector of Schools - II, the respondent no. 3 therein to reinstate Phuleshwar, the respondent no. 4 in the writ petition, in service and pay his entire arrears of salary within a period of two months from the date of production of a certified copy of the order.

8. The Principal of the Institution aggrieved by the said judgment of the learned Single Judge preferred Special Appeal No. 295 of 2000 and the same was also dismissed on 19th April, 2000. Copies of the said judgments are on record.

9. The said judgment was pressed into service for compliance by the

recipient of the salary upon which the appellant Smt. Maya Niranjan wrote the letter dated 9th May, 2000 that has been extracted hereinabove.

10. The said letter taking notice of the judgment of the High Court categorically states that the Hon'ble Judges hearing the special appeal have dismissed the same and as a consequence thereof Sri Phuleshwar would be entitled for salary without doing work w.e.f. 1.8.1994 and the department would have to compulsorily pay the same which would amount to a misutilization of government funds. The letter further recites that the matter is being forwarded for further examination and action for which appropriate instructions may be issued by the Director of Education to whom the letter was addressed.

11. Thereafter the letter recites that since the matter relates to a fake and a forged date of birth having been manipulated increasing the period to 10 years, the same would also amount to an unnecessary burden on the State Exchequer. In such a situation, decision be taken for appropriate action and instructions be issued to her office so that further action be taken in compliance thereof.

12. It is admitted that the appellant was also holding charge of the post of District Inspector of Schools - I as well as District Inspector of Schools - II dealing with all institutions in the district of Allahabad both Boys and Girls. The institution where Phuleshwar was working was admittedly a Girls Institution, namely Jagat Taran Girls Intermediate College and was under a direct control of the District Inspector of Schools - II. The powers for disbursement of salary are conferred on the District Inspector of Schools in relation to employees of aided Secondary institutions under the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. The appellant was thus under a statutory obligation to ensure payments to the employee.

13. Learned counsel for the appellant pointed out that the appellant was holding charge of these two posts even though she was working as a Deputy Director of Education, and she handed over charge of District Inspector of Schools - I on 4th August, 2000 and District Inspector of Schools - II on 3rd October, 2000. Thus on the date when the judgment was delivered and even thereafter when the letter dated 9th May, 2000 was written, the appellant continued to hold charge as the District Inspector of Schools - II as well. It may be reiterated that District Inspector of Schools - II was the respondent no. 3 in the writ petition. Thus the responsibility of obedience to the orders of the High Court was clearly on the appellant on the delivery of the judgment and which fact is also evident from the letter dated 9th May, 2000 written by the appellant herself seeking instructions in the matter.

14. Since the payment was not released for a fairly long time, the employee was left with no option but to file a contempt application no. 522 of 2001 arraying therein four officials. It may be remembered that the contempt was filed much after the appellant had handed over charge to the new incumbents of the office of District Inspector of Schools - I and District

Inspector of Schools - II, namely Smt. Santwana Tiwari and Smt. Farhana Siddiqui. Sri Satyanarain Srivastava was the Finance and Accounts Officer in the year 2001 when the said contempt application was filed arraying these persons.

15. It appears that thereafter another contempt application was filed being Contempt Application No. 1487 of 2011 where the appellant Smt. Maya Niranjan was arrayed as opposite party. Thus the appellant was also sought to be proceeded against and after notices were issued both contempt matters proceeded together but later on the contempt petition of the appellant appears to have been not taken up when the earlier contempt application no. 522 of 2001 came to be heard against the officials referred to hereinabove.

16. It may be also noticed that the contempt petitions in both matters were heard by the same learned Single Judge and decided by him. Contempt Petition No. 522 of 2001 was ultimately decided on 20th September, 2004 holding Smt. Farhana Siddiqui and Sri Satyanarain Srivastava of having wilfully and deliberately disobeyed the judgment referred to hereinabove and they were sentenced with two months imprisonment coupled with fine and further compensation was awarded keeping in view the alleged non-payments to Sri Phuleshwar.

17. It may be however noticed that before the delivery of the said judgment, in the contempt filed against the appellant namely Contempt Petition No. 1487 of 2001, charges were framed against her on 11th August, 2004. This contempt was taken up thereafter and the judgment was delivered giving rise to this appeal on 5th November, 2004 whereby the appellant has been convicted and sentenced as referred to hereinabove.

18. Contempt Appeal No. 16 and Contempt Appeal No. 17 of 2004 were filed by Smt. Farhana Siddiqui and Satyanarain Srivastava arising out of the judgment dated 20th September, 2004.

19. In the matter of the appellant the present appeal was filed as a defective appeal no. 11 of 2004 now given a regular number as Appeal No. 37 of 2006 in which an interim order was passed staying the operation of the judgment on 5.11.2004. Against the said interim order passed in this appeal Phuleshwar filed Special Leave to Appeal No. 819 of 2005 before the Apex Court that was dismissed on 24th January, 2005.

20. This appeal remained pending, but the two appeals which were filed by Farhana Siddiqui and Satyanarain Srivastava against their convictions and sentence, were taken up and were decided by a division bench of this Court on 15th September, 2005.

21. This appeal has remained pending for 10 years thereafter.

22. The judgment of conviction and sentence against Farhana Siddiqui and Satyanarain Srivastava was upheld in the above mentioned appeals with a modification to the effect that the conviction was founded on valid grounds but the extreme punishment of imprisonment of two months was held not to be desirable on the facts as brought before the Court. Accordingly, while upholding the conviction, the division

bench suitably modified the sentence by reducing the sentence of imprisonment. Rest of the sentence was maintained. A copy of the said judgment has been placed by Sri Shashi Nandan before us.

23. Sri Shashi Nandan has then advanced his submissions in this appeal contending that firstly the letter dated 9th May, 2000 is an interdepartmental letter written by the appellant in terms of the instructions contained in the circular of the Director dated 21st April, 1993. He has invited the attention of the Court, particularly to Paragraph 1 of the said circular which is extracted hereinunder:-

"1– न्यायालयों द्वारा वादों/रिट याचिकाओं के प्रसंग में यदि भुगतान के एक पक्षीय आदेश जारी किये गये हों तो तत्काल पूरी तथ्यात्मक स्थिति से सम्बन्धित न्यायालयों में प्रार्थना–पत्र देकर शासकीय अधिवक्ता के माध्यम से आदेश संशोधित कराने की कार्यवाही तत्परता से की जाय। यदि विभागीय अधिकारी द्वारा न्यायालय द्वारा दिये गये अवसर का लाभ नहीं उठाया जाता है और शासन का पक्ष न्यायालय में समय से प्रस्तुत न करने के कारण एक पक्षीय निर्णय होता है तो उसके लिए सम्बन्धित अधिकारी/कर्मचारी दोषी माने जायेंगे तथा उनके विरूद्ध कठोर कार्यवाही की जायगी। यदि न्यायालय के आदेश का अनुपालन तत्काल किया जाना अपेक्षित हो तो न्यायालीय आदेश की सत्यापित प्रति भेजते हुए सम्पूर्ण स्थिति को दर्शाते हुए धनावंटन की मांग निर्धारित प्रक्रिया से की जानी चाहिए। यदि मामले में पुनर्विचारार्थ प्रत्यावेदन/अपील करने की अवाश्यकता समझी जायगी तो उसके लिए समस्त अभिलेख/पत्रावलियॉ विशेष वाहक के माध्यम से प्रेषित करके आवश्यक आदेश/निर्देश निदेशालय से समय से प्राप्त करेंगे। ऐसे मामलों में विलम्ब के लिये कोई कारण अथवा आधार मान्य नहीं होगा।"

24. He submits that it is in view of such interdepartmental instructions that the appellant in good faith sought instructions from the Director of Education for making payments to Phuleshwar. He submits that the said letter was only seeking instructions and was in no way intended or designed to wilfully and deliberately flout the directions of the judgment of the learned Single Judge or the Division Bench. He therefore submits that this letter does not in any way convey any perception of a wilful and deliberate disobedience so as to constitute a civil contempt making it punishable under the Contempt of Courts Act, 1971. In addition to this, he also urges that the entire judgment of the learned Single Judge does not record any specific finding or reason so as to bring the act of the appellant within the fold of deliberate and wilful disobedience.

25. The second contention of Sri Shashi Nandan is that the entire judgment of the learned Single Judge is also overwhelmingly capped with certain perceptions about the officer and her functioning as well as her involvement in other contempt matters which was neither the basis of the charge nor could it had been taken into account for having punished the appellant. He submits that it appears that the said perception also has probably weighed with the learned Single Judge heavily to bring about the punishment of imprisonment.

26. The third argument of Sri Shashi Nandan is that even assuming though not admitting that disobedience was allegedly committed by the appellant and there was some default in payment to Sri Phuleshwar then in that event the judgment of the division bench in contempt appeal no. 16 and contempt appeal no. 17 of 2004 dated 15.9.2005 should be taken into account at least to reduce the punishment, particularly with regard to the sentence of imprisonment. He therefore submits that the incident of the alleged disobedience being at par with

that of Farhana Siddiqui and Satyanarain Srivastava, this Court may not be justified in upholding the sentence of imprisonment, as a coordinate bench has deleted the said sentence after taking into account the circular dated 21.4.1993 of the Director, and the interdepartmental procedure. He contends that the validity of such actions on the basis of the circular has been upheld in that case and to that extent the same reasoning should be adopted for the purpose of setting aside the imposition of sentence on the appellant.

27. The fourth argument of Sri Shashi Nandan is that the presumption drawn by the learned Single Judge of deliberately and wilfully forestalling any attempt of payment by the appellant is also not justified, inasmuch as, unless the funds were released by the Directorate, the payment was not possible and which actually took place during the pendency of these proceedings under the order of the Director of Education dated 31st July, 2004 whereafter the entire dues to the employee were paid on 2nd August, 2004.

28. The submission of Sri Shashi Nandan, therefore, is that when the learned Single Judge proceeded to frame the charges on 11th August, 2004 against the appellant the judgment had already been complied with, with payment to Sri Phuleshwar on 2nd August, 2004 prior to that. He therefore submits that this mitigating circumstance does not appear to have been taken into account while imposing the punishment on the appellant.

29. Having heard Sri Shashi Nandan and having considered the submissions raised, the first question is as to whether the learned Single Judge has arrived at any conclusion of wilful and deliberate disobedience or not. To this extent, we clearly find a clear recital contained in the judgment after discussion of the entire material on record that the act of the appellant including the contents of the letter dated 9th May, 2000 and her affidavits filed on record before the learned Single Judge clearly resulted in wilful defiance and non compliance of the order for four and a half years, though it was to be complied within one month. This satisfaction has been categorically recorded by the learned Single Judge at internal page 16 of the impugned judgment. The contention therefore of Sri Shashi Nandan that the learned Single Judge has not recorded any such finding or satisfaction does not appear to be correct.

30. The second question is about the argument advanced as to whether the letter dated 9th May, 2000 and its contents are a mere communication seeking instructions or they do convey any wilful or deliberate disobedience. We have hereinabove appropriately to the best of our ability translated the contents of the letter highlighted above and we find in no unequivocal terms that the appellant has time and again asserted in the letter that the payment as a result of the judgment of the High Court would amount to misutilization of government funds on account of the alleged manipulation in the date of birth of the employee Phuleshwar which would result ultimately in an unnecessary burden on the State Exchequer. We are amazed at this expression of the officer who was clearly trying to sit in appeal and give an opinion as if she was under some authority to reverse what had been directed to be delivered under the judgments of this

Court in the writ jurisdiction. The expressions used in the letter clearly establish that the appellant was not seeking instructions for compliance but was suggesting a loss that was to be caused on account of the judgment. The appellant, who was the drawing and disbursing officer obliged to make payments, instead of compliance was resisting payment and proceeding not as per the judgment but was seeking a direction from the Director without even referring to the circular of 1993, as if the Director could have exercised his authority contrary to the judgment of the High Court.

31. The recitals contained in the said letter were therefore clearly designed to obviate the execution of the judgment of the High Court and which fact has been correctly construed by the learned Single Judge in the impugned judgment. We, therefore, find that the letter dated 9th May, 2000 is not only unhappily worded but is also a clear indication of the intent of the appellant to wilfully and deliberately forestall the execution of the judgment which is a clear defiance and therefore constitutes a civil contempt as defined under Section 2(c) read with Section 12 of the Contempt of Courts Act, 1971. The learned Single Judge was, therefore, absolutely justified in framing the charge and arriving at the conclusion that the act of the appellant amounted to wilful and deliberate disobedience, inasmuch as, this is admitted on record that she on the said date was already holding charge of District Inspector of Schools - II.

32. The contention next raised by Sri Shashi Nandan is about the perceptions of the learned Single Judge in relation to the conduct and service and career of the appellant. It is correct that the same was not a matter of charge that was to be tried but that was a matter of record and that was also indicated in the judgment of the learned Single Judge which facts have not been explicitly denied. The institution of contempt petitions against the appellant does reflect on her attitude in either not understanding the orders of the High Court or her being incapable of trying to understand the judicial orders which in our opinion cannot be said to be an irrelevant consideration for the purpose punishing her for wilful and deliberate disobedience. Her bold and open expressions, therefore, amount to an obstinate act in trying to create obstructions in the implementation of judicial orders wilfully and deliberately. It is a different matter that the officer may have been exonerated in any other matter but this reflects on the career of an officer who is enjoined with the duty to comply with the judgment of the High Court especially where the officer has been arrayed as a party respondent and directions have been issued. The said perceptions of the learned Single Judge therefore may not have been necessary to prove the charge but they were absolutely necessary for the consideration of the imposition of punishment.

33. Coming to the argument of subsequent compliance of the directions of the High Court and the payments made prior to the framing of the charge against the appellant, suffice it to say that a delay in the framing of the charge cannot be a ground or an excuse to absolve the appellant of her act of having committed the contempt in the year 2000 itself. The delay in the framing of the charge or the payments having been made is not a

relevant factor for judging the commission of an act by the appellant of wilfully and deliberately disobeying the orders of the High Court. To the contrary, the subsequent payments clearly establish that the said payments were wilfully and deliberately delayed to the recipient who was entitled to receive the same under a valid judgment of this Court towards which the appellant has substantially contributed obstructions. The same was delayed for more than four and a half years for which the appellant was also responsible in the circumstances indicated above. It is for this reason that the officers who succeeded the appellant namely Farhana Siddiqui and Satyanarain Srivastava were also punished and their punishment has been upheld by the division bench. This factor also therefore clearly traverses against the appellant and not in her favour. The subsequent payments, therefore, do not absolve her of the contempt that was earlier committed.

34. We now come to the submission raised by Sri Shashi Nandan regarding the sentence of imprisonment and compared with that in the case of Farhana Siddiqui and Satyanarain Srivastava. We have carefully perused the judgment of the division bench dated 15.9.2005 and we find that the division bench while deleting the sentence of imprisonment of the aforesaid two officers has taken notice of the communication sent by them pleading justification on the strength of the circular dated 21st April, 1993. We have not been able to find any adverse observation by the division bench in relation to the language utilised by the aforesaid two officers in the letters sent by them to the Director to be offensive or contemptuous. The finding recorded is that the said officers had sent letters only for guidance and financial release and disbursement of payments under the circular dated 21st April, 1993 which was justified. There is no finding recorded by the division bench that the said contemnors had used any such language which can be compared with that of the appellant as expressed in her letter dated 9th of May, 2000. No such material has been placed before us. Consequently, the contention of Sri Shashi Nandan that the said factors should be taken into account keeping in view the judgment of the division bench does not on parity appeal to us at all. The reason being that the contents of the letter dated 9th May, 2000 has been found by us to be clearly contemptuous and intended to disobey the orders of this Court which does not appear to be in the case of Farhana Siddiqui and Satyanarain Srivastava.

35. Now coming independently to the issue as to whether the sentence should be reduced or not, for the reasons indicated not only hereinabove but also in the judgment of the division bench dated 15th September, 2005 the non compliance of the judgment is clearly established and therefore the conviction and punishment has to be upheld. However, on the facts and circumstances of the present case we while upholding the conviction of the appellant reduce the sentence of imprisonment only to a period of one month. For this the reasons, apart from the contents of the letter dated 9.5.2000, are also that this officer was found by the learned Single Judge to have returned back after a couple of months managing her stay at Allahabad that has been narrated in the judgment. Her conduct cannot be compared with that of the other officers who have been punished. The appellant therefore deserves the extreme

punishment of imprisonment as well. The appeal stands disposed of with the said modification.

36. Learned counsel for the appellant prayed that sometime may be granted as the appellant may seek her remedy against our judgment before a higher forum. We, therefore, provide that the our judgment delivered today, resulting in the coming into effect of the punishment order shall remain suspended for a period of fifteen days. In the event the appellant does not succeed in getting any further redressal within fifteen days, she shall surrender to serve out the sentence thereafter.

(2019)10ILR A 1104

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

S.C.C. Revision No. 86 of 2019

Munnu Yadav ...Defendant/Revisionist
Versus
Ram Kumar Yadav & Anr.
...Plaintiff/Respondent

Counsel for the Revisionist:
Sri Ayush Khanna, Sri Atul Dayal

Counsel for the Respondent:
Sri Manish Tandon

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - U.P. Act 13 of 1972 - Section 3(i) - A small roofless portion of house and surrounded by boundary wall let out by the landlord to the tenant - is a building within the meaning of Section 3(i) of U.P. Act 13 of 1972 - Roof is not necessary and indispensable adjunct for a building.

Held:-A structure or edifice enclosing a space within its walls, and usually, but *not necessarily, covered with a roof* is a building - Roof *is not necessary and indispensable* adjunct for a building because there can be roofless buildings - An open land including any garden, garages and out-houses, appurtenant to a roofed structure for its beneficial engagement shall be a building within the meaning of Section 3(i) of U.P. Act 13 of 1972. (Para 15)

B. Provincial Small Cause Courts Act, 1887 - Section 25 - Practice and procedure - Objection to jurisdiction/competence of the court - for the first time in revision - cannot be allowed to be raised in view of the provisions of Section 21 of Civil Procedure Code.

Held: -An objection to the competence of the court below to decide the SCC Suit cannot be raised in Revision under Section 25 of the Act, 1887, inasmuch as such an objection could have been taken by the tenant in the Court of first instance at the earliest possible opportunity. (Para 17)

Revision dismissed (E-5)

List of cases cited: -

1.Krishna Bhagwan Vs D.J. Bareilly & ors. 1999(2) ARC 248 (Para Nos.6 to 11)

2.Raj Kishore Tandon & ors. Vs D.J. Etawah & ors. (2006) 1 ARC 880 (Para 4)

3.Surya Kumar Govindjee Vs Krishnammal 7 ors. (1990) 4 SCC 343 (Para 17).

4.Harshad Chiman Lal Modi Vs DLF Universal Ltd. & anr. (2005) 7 SCC 791 (Para Nos. 30 to 33)

5.Hasham Abbas Sayyad Vs Usman Abbas Sayyad & ors. (2007) 2 SCC 355 (Paragraph Nos. 22 and 23)

6.Om Prakash Agarawal Vs Vishan Dayal & anr. 2018 (3) ARC 652 (Paragraph Nos. 56, 59, 61 and 62)

7.Madhyamik Shiksha Parishad Vs IInd A.D.J. Allahabad (2010) 2 ARC 396 (Paragraph Nos. 10,11 and 12).

8.Harish Chandra & anr. Vs Mohd. Ismail & ors. (1990) 4 SCC 493 (para 4)

9.Sube Deen 7 ors. Vs Satyawati Devi & anr. (1996) 28 ALR 415

10.Ashok Kapil Vs Sana Ullah (Dead) & ors. (1996) 6 SCC 342 (paras 6,10 & 11)

11.Ichchapur Industrial Co-operative Society Ltd. Vs the Competent Authority Oil & Natural Gas Commission & anr. (1997) 2 SCC 42 (para 27)

12.K.V. Muttu Vs Angamuthu Ammal (1997) 2 SCC 53 (paras 10 to 13)

13.Damadi Lal Vs Parashram (1976) 4 SCC 855 (para 12)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Atul Dayal, learned Senior Advocate assisted by Sri Ayush Khanna, learned counsel for the defendant-revisionist and Sri Manish Tandon, learned counsel for the plaintiff-respondent.

Facts:-

2. Briefly admitted facts of the present case are that the plaintiff-respondent is the owner and landlord of House No.76/184, Sabji Mandi, Kanpur Nagar, which is bounded by east, west and south side by public lane and on the northern side by House No.76/183. **An open portion of the said house measuring 9 feet x 9 feet with four *pucca* tanks (nad) for feeding of cattles and enclosed by boundary wall was let out by the landlord-respondent to the tenant-revisionist on a monthly rent of Rs.1000/-.** The tenant-revisionist defaulted in payment of rent. Therefore, the landlord-respondent issued a notice dated 18.06.2016 by registered post, whereby he determined the tenancy and demanded arrears of rent from the tenant-revisionist. The notice was served and yet neither the rent was paid nor the tenanted portion was vacated by the tenant-revisionist. Therefore, the landlord-respondent filed SCC Suit No.67 of 2016 (Ram Kumar Yadav and another Vs. Munnu Yadav) which was decreed by the Additional District Judge/Judge Small Cause, Court No.13, Kanpur Nagar, by the impugned judgment and decree dated 27.03.2019. In the aforesaid SCC Suit, six issues were framed. The **issue no.1** regarding landlord-tenant relationship was decided by the court below holding that the respondent is the landlord of the disputed accommodation of which the revisionist is the tenant. The **issue no. 2** was framed on the point as to whether provisions of U.P. Act 13 of 1972 are applicable? The averments made by the landlord that the provisions of U.P. Act 13 of 1972 are applicable was not specifically denied by the tenant-revisionist. Therefore, it was held that provisions of U.P. Act 13 of 1972 are applicable. The **issue No.3** was framed on the point of default in payment of rent. The court below held that the tenant-revisionist defaulted in payment of rent. The **issue no.4** was framed as to whether the tenant-revisionist is entitled for the benefit of the provisions of Section 20(4) of U.P. Act 13 of 1972 ? The court below held that since arrears of rent was not paid

by the tenant-revisionist on the first date of hearing, therefore, the benefit of Section 20(4) of the Act is not available to the tenant-revisionist. The **issue no.5** was framed as to whether the notice determining the tenancy was validly given. The court below recorded the finding that the tenancy was determined by a valid notice. The **issue no.6** was framed as to grant of relief. On the basis of findings of fact recorded on issue nos. 1 to 5 the court below found that the SCC Suit deserves to be decreed.

3. Aggrieved with the impugned judgment and decree dated 27.03.2019, the tenant-revisionist has filed the present revision under Section 25 of the Provincial Small Cause Courts Act,1887 (hereinafter referred to as "the Act, 1887).

Submission on behalf of tenant-revisionist

4. Sri Atul Dayal, learned counsel for the tenant-revisionist submits as under:-

(i) The impugned judgment dated 27.03.2019, passed by the Additional District Judge/Judge Small Cause Court No.13, Kanpur Nagar, is without jurisdiction inasmuch as the portion let out by the landlord-respondent to the tenant-revisionist is an open accommodation which is not a building within the meaning of Section 3(i) of U.P. Act 13 of 1972 and, therefore, the Judge Small Cause Court had no jurisdiction under Section 15 of the Act, 1887, to take cognizance of such a suit for eviction of tenant of an open land which stand ousted by Clause 4 of the 2nd Schedule to Section 15 of the Act, 1887. Reliance is placed upon judgments of this Court in **Krishna Bhagwan Vs. District Judge, Bareilly and others, 1999(2) ARC 248 (Para Nos.6 to 11), Raj Kishore Tandon and others Vs. District Judge, Etawah and others, 2006(1) ARC 880 (Para 4**) and the judgment of Hon'ble Supreme Court in **Surya Kumar Govindjee Vs. Krishnammal and others, (1990) 4 SCC 343 (Para 17).**

(ii) Since, the disputed property is not a building, therefore, under Section 15 of the Provincial Small Cause Courts Act, 1887, the Judge Small Cause Court, lacked inherent jurisdiction to entertain the S.C.C. Suit No.67 of 2016. When a court lacks inherent jurisdiction, Section 21 C.P.C. shall have no application. Reliance is placed upon judgments of Hon'ble Supreme Court in **Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and Another, (2005) 7 SCC 791 (Para Nos. 30 to 33) and in Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others, (2007) 2 SCC 355 (Paragraph Nos. 22 and 23).**

Submission on behalf of landlord-respondent

5. Sri Manish Tandon, learned counsel for the landlord-respondents submits as under:-

(i) The accommodation let out by the landlord-respondent to the tenant-revisionist is part and parcel of House No.76/184, Sabji Mandi, Kanpur Nagar, which is a building within the meaning of Section 3(i) of of U.P. Act 13 of 1972.

(ii) Without prejudice to the above, the tenant-revisionist has not taken any objection as has now been taken in the submissions aforenoted, either in his written statement or at any stage before the court below. Therefore, such an

objection can not be allowed to be taken before this Court in revision under Section 25 of the Act, 1887. Reliance is placed upon the judgment of Hon'ble Supreme Court in **Om Prakash Agarawal Vs. Vishan Dayal and another, 2018 (3) ARC 652 (Paragraph Nos. 56, 59, 61 and 62)** and a judgment of this Court in **Madhyamik Shiksha Parishad Vs. IInd Additional District Judge, Allahabad, (2010) 2 ARC 396 (Paragraph Nos. 10,11 and 12).**

6. The learned counsel for the tenant-revisionist has not made any other submissions before me except those aforenoted.

Discussion and findings

7. The submission made by learned counsels for the parties give rise to the following questions for determination in this revision:-

(a) Whether a small roofless portion of House No.76/184, Sabji Mandi, Kanpur Nagar, with four *pucca* tanks for feeding cattle and surrounded by boundary wall let out by the landlord-respondent to the tenant-revisionist, is a building within the meaning of Section 3(i) of U.P. Act 13 of 1972 ?

(b) Whether the objection on the point of jurisdiction raised by the tenant-revisionist for the first time in the present revision can not be allowed to be raised in view of the provisions of Section 21 of Civil Procedure Code ?

Question No.(a)

8. The word "building" has been defined in Section 3(i) of U.P. Act 13 of 1972, as under:-

*"**In this Act, unless the context otherwise requires**-*

i) "Building", means a residential or non-residential roofed structure and includes-

(i) any land (including any garden), garages and out-houses, appurtenant to such building ;

(ii) any furniture supplied by the landlord for use in such building ;

(iii) any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof ;"

9. Section 15 of the Act, 1887, provides for jurisdiction of Courts of Small Causes. Second Schedule to Section 15 (1) of the Act 1887, provides for suits excepted for the cognizance of a Court of Small Causes. Clause 4 of the 2nd Schedule to Section 15(1) of the Act, 1887, is relevant for the purposes of present case which is reproduced below:-

*"Section 15(4)- a suit for the possession of immovable property or for the recovery of an interest in such property, **but not including** a suit by a lessor for the eviction of a lessee from a building after the determination of his lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease.*

***Explanation**- For the purposes of this Article, the expression '**building**' **means a residential or non-residential roofed structure, and includes any land (including any garden), garages, out-houses, appurtenant to such building,** and also includes any fittings and fixtures affixed to the building for the more beneficial enjoyment thereof."*

10. In the case of **Harish Chandra and another Vs. Mohd. Ismail and**

others, (1990)4 SCC 493 (para 4), Hon'ble Supreme Court observed that open land would not be a building within the meaning of expression "building" under Section 3(i) of the U.P. Act 1972. In **Sube Deen and others Vs. Satyawati Devi and another 1996 (28) ALR 415,** a learned Single Judge of this Court held that "Adda" land used for sale of animals would not be a building within the meaning of Section 3(i) of U.P. Act 13 of 1972. In **Ashok Kapil Vs. Sana Ullah (Dead) and others (1996) 6 SCC 342 (paras 6,10 & 11)** Hon'ble Supreme Court held that a structure without roof cannot fall within the ambit of the definition of building under Section 3(i) of U.P. Act 13 of 1972, **but where a structure remained a roofed building when it became vacant and the roof was later dismantled by the owner, so on the date of allotment order it remained roofless, would constitute a building.** In paras 10 & 11 of the judgment in **Ashok Kapil (supra),** Hon'ble Supreme Court held as under:-

"10. Jurisdiction of the District Magistrate, therefore, is in respect of a building which is either vacant or which "has fallen vacant" or is about to fall vacant. If a structure was a building as per the definition at the time when it fell vacant, the District Magistrate, no doubt, gets jurisdiction to initiate proceedings for passing allotment order. But would he lose jurisdiction merely because the structure became roofless subsequently? No doubt, if we go by the definition in Section 3(i) stricto sensu, the structure without roof will cease to be building. But a roofless structure can still continue to be building outside the fixed borders of the definition. It is now necessary to notice that Section 3 of the Act, which contains all the definition clauses, prefaces with the words "unless the context otherwise requires". Thus the legislature which fixed contours for different expressions through the definition clauses has also provided sufficient play at the joints for contextual adaptations. In other words, contextual variations are not impermissible under the Act if such variations are necessary to achieve the object of the enactment. Outside the definition in Section 3 of the Act the word 'building' need not necessarily be a roofed structure for even roofless structures are, sometimes, used as buildings in certain circumstances.

*11. Stroud's Judicial Dictionary (Vol.I of the 5th edn.) states that "what is a building must always be a question of degree and circumstances". Quoting from Victoria City Corpn. V. Bishop of Vancouver Island (1921)2 AC 384, (AC at p. 390), the celebrated lexicographer commented that " the ordinary and natural meaning of the word building includes the fabric and the ground on which it stands". In black's Law dictionary (5th Edn) the meaning of the building is given as "**A structure or edifice enclosing a space within its walls, and usually, but not necessarily, covered with a roof" (emphasis supplied) The said description is recognition of the fact that roof is not necessary and indispensable adjunct for a building because there can be roofless buildings. So a building, even after losing the roof, can continue to be a building in its general meaning. Taking recourse to such general meaning in the present context would help to prevent a mischief."***

(Emphasis supplied by me)

11. In **Krishna Bhagwan's case (supra)** Hon'ble Single judge held that a

suit for eviction of a tenant of an open land is beyond the jurisdiction of Small Cause Courts. **In the said case an open land was let out.** In **Raj Kishore Tandon (supra)**, Hon'ble Single Judge explained the words "appurtenant" as used in Section 3(i) of U.P. Act 13 of 1972, and held as under:-

"3. Under Section 3(i) of the Act building is defined to mean a residential or non-residential roofed structure and includes-

(i) any land (including any garden) garages and out houses, appurtenant to such building;

4. Land appurtenant means so much land, which is necessary for proper enjoyment of the constructed portion. If in any land of several acres a small accommodation is constructed, the said constructed accommodation cannot be allotted alongwith the entire land of several acres.

6. According to the allegations in the writ petition ***the portion, which has been allotted, contains the construction over an area of about 200 square yards and the open land, which is shown to have been allotted and mentioned in the map, annexed alongwith Form B is about 20 bighas.*** *Inspector had reported that servant quarters were in possession of other persons. Even those servant quarters have also been included in Form B. Inspector further found that Chaukidar employed by landlord was in possession of the portion in dispute.*

7. In my opinion firstly the land, which has been allotted could never be allotted as ***the entire land can not be said to be the land appurtenant. It was virtually allotment of open land, which is not permissible.*** *Secondly the allotment order is utterly illegal as no notice to the landlord was given after declaration of vacancy and before allotment as required by Rule 9 (3) of the Rules framed under the Act. Vacancy declaration and allotment was made by one and the same order. Rule 9(3) of the Rules framed under the Act is mandatory. The purpose of the said rule is to provide opportunity to the landlord to file release application if he so desires. The allotment order was therefore utterly illegal (vide R.L.Poddar Vs. A.D.J 2003 (2) ARC 629, C.K.Nagarkar Vs. A.D.J 2004 (2) ARC 349 and Kusum Lata Yadav Vs. A.D.J 2004 (2) ARC 789)."*

(Emphasis supplied by me)

12. In **Govardhan Goyal and others Vs. Rishi Raj Singhal, 2013 (96) ALR 806 (Paras 23 to 28),** a Bench of this Court held as under:-

"23. It is settled in law that the ***jurisdiction of a court has to be determined on the basis of the plaint allegations alone and on the defence taken in written statement. In Abdulla Bin Ali Vs. Galappa AIR 1985 SC 577 it has been clearly laid down that allegations in the plaint alone are relevant for deciding about the jurisdiction of the court.*** *Thus, in view of the plaint allegations, the suit is for eviction from a building and for damages for its use and occupation. Accordingly, it is not excluded from the jurisdiction of the Small Causes Court.*

24. It is but natural that when the landlord allowed a building to be put up on the open plot of land the character of the premises let out would automatically change with the raising of the constructions over it and the plot of land would not remain an open piece of land.

25. A learned Single Judge of this Court in M/s. Kedar Nath Baij Nath and others Vs. Shri Ram Chandraji, Shri Jankiji, Shri Lakshmanji, Virajman Mandir and others 1991(1) ARC 420 has clearly laid down that a suit for eviction of a tenant in respect of the property where initially land alone was leased out but over which a building was constructed with the permission of the landlord, would be cognizable by a court of small causes.

26. In Sardar Gurcharan Singh Vs. Ist Additional District Judge, Kanpur and others 1994(1) ARC 546 His Lordship of this Court held that where a suit is filed treating the property as a building seeking eviction of the tenant, the suit would lie before the Court of Small Causes.

27. In simple terms, the nature of the property from which the eviction is claimed in the suit is material and not the nature of the property that may have been let out for the purposes of determining the jurisdiction of the Small Causes Court.

28. In view of the above, the revisionists can not escape from the jurisdiction of the Small Causes Court as the suit is essentially one for their eviction from the 'building' and not simplicitor from the land leased out."
(Emphasis supplied by me)

13. In I**chchapur Industrial Co-operative Society Ltd. Vs. the Competent Authority, Oil & Natural Gas Commission & Anr. , (1997)2 SCC 42 (para 27),** Hon'ble Supreme Court observed that where the definition clause is preceded by the words "unless the context otherwise requires", the definition has to be interpreted in the light of the context in which it is used. The aforesaid phrase has been similarly interpreted by Hon'ble Supreme Court in cases arising from rent matters. In **K.V. Muttu Vs. Angamuthu Ammal (1997) 2 SCC 53 (paras 10 to 13), Damadi Lal Vs. Parashram (1976) 4 SCC 855 (para 12) and Ashok Kapil (supra).**

14. **The word "means" and "includes" used in Section 3(i) of the Act implies that the definition is exhaustive with respect to "residential or non residential roofed structure" unless the context otherwise requires but it is illustrative with respect to the inclusion part given in sub clauses i, ii and iii. The phrase "unless the context otherwise requires" indicates that while construing, interpreting and applying the definition clause, the Court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise. Where the definition is preceded with the phrase "unless the context otherwise requires" the connotation is that normally the definition as given in Section should be applied and given effect to but it may be departed from if the context otherwise requires.**

15. From bare perusal of the definition of "building" in Section 3(i) of the U.P. Act 13 of 1972, it is clear that unless the context otherwise requires, "building" means a residential or non residential roofed structure and includes any land (including any garden), garages and out-houses, appurtenant to such building; any furniture supplied by the landlord for use in such building and any fittings and fixtures affixed to such building for the more beneficial enjoyment thereof. As held by Hon'ble Supreme Court in **Ashok Kapil (supra)** a structure or edifice enclosing a space

within its walls, and usually, but not necessarily, covered with a roof is a building. Roof is not necessary and indispensable adjunct for a building because there can be roofless buildings. **The "Building" as defined in Section 3 (i) is a residential or non-residential roofed structure and includes any land (including any garden), garages and out-houses, appurtenant to such building. Therefore, an open land including any garden, garages and out-houses, appurtenant to a roofed structure for its beneficial engagement shall be a building within the meaning of Section 3(i) of U.P. Act 13 of 1972.**

16. In the present set of facts **the small accommodation let out by the landlord-respondent to the defendant-revisionist is an integral part of the building bearing municipal No.76/184, Sabji Mandi, Kanpur Nagar. Therefore, the disputed accommodation, even though is roofless; is part of the house in question. Consequently, the disputed accommodation let out by landlord-respondent to the tenant-revisionist is "building" as defined** under Section 3(i) of the U.P. Act 13 of 1972. **Question no. (a) is answered accordingly.**

17. In view of my answer to the question (a) there is no need to decide **question (b)** yet it would be suffice to observe that admittedly the competence of the court below to decide the SCC Suit in question was not raised by the tenant-revisionist before the court below. Therefore, in view of the provisions of Section 21 of the Civil Procedure Code and the law settled by Hon'ble Supreme Court in the case of **Om Prakash Agarawal (supra),** such an objection can not be raised at this stage in Revision under Section 25 of the Act, 1887, inasmuch as such an objection could have been taken by the tenant-revisionist in the Court of first instance at the earliest possible opportunity.

18. For all the reasons aforestated, it is held that the disputed accommodation is a building within the meaning of Section 3(i) of the U.P. Act 13 of 1972 which was let out by the landlord-respondent to the tenant-revisionist and the tenant-revisionist defaulted in payment of rent resulting in determination of tenancy. Therefore, the SCC Suit for eviction has been lawfully decreed by the impugned judgment. The findings recorded by the court below on the issues before it are the findings of fact which do not suffer from any perversity. Therefore, these findings of fact can not be interfered with.

19. For all the reasons aforestated, I do not find any merit in this revision. Therefore, the revision is **dismissed.** However, there shall be no order as to costs.

(2019)10ILR A 1111

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

FAFO No. 3730 of 2008

National Insurance Company ...Appellant
Versus
Smt. Pushpa Devi & Ors.
...Claimants/Opposite Parties

Counsel for the Appellant:
Sri Radhey Shyam

Counsel for the Opposite Parties:
Sri Pradyumn Kumar

A. Motor Vehicles Act, 1988 - Section 163-A – Murder - when claim maintainable - 'murder simpliciter', claim not maintainable - but if the death was a result of an act to ensure commission of another act of felony, while the vehicle was in use, then claim would be maintainable.

Held:-If the Court comes to a conclusion that it was a case of *'murder simpliciter'* that is, where the perpetrators of the crime had the intention of committing murder only, then, the claim under Section 163-A of the Motor Vehicles Act would not be maintainable – But, if the Court comes to a conclusion that it was a case of an accidental murder that is where the perpetrators of the act did not have any motive against victim but the *death was a result of an act to ensure commission of another act of felony, while the vehicle was in use*, then, the claim under Section 163A of the Motor Vehicles Act would be maintainable. (Para 14)

Just because the truck was not looted, it cannot be said that the claim petition was not maintainable. It is proved that the vehicle was involved and just because he was murdered, it cannot be a ground for rejection of the claim petition -- incident occurred due to use of Motor Vehicle -- The deceased was a driver on the said vehicle and was on duty and during the course of employment, this incident occurred. (Para 13 & 15)

First Appeal from Order partly allowed (E-5)

Cases relied upon: -

1.Rita Devi 7 ors. Vs New India Assurance Co. Ltd. & anr. (2000) 5 SCC 113,

2.Oriental Insurance Co. Ltd. Vs Smt. Mainaz & ors. (2014) 3 T.A.C. 408 (All.)

3.Kalim Khan & ors. Vs Fimidabee & ors. (2018) 3 T.A.C. 337 (SC)

4.National Insurance Company Ltd. Vs Smt. Kusuma Devi 2007 T.A.C. 729 (All.

5.Oriental Insurance Company Ltd. Vs Poonam Kesarwani & ors. 2008 LawSuit (All) 1557

6.Ram Chandra Singh Vs Rajaram & ors. AIR 2018 SC 3789

6.Sunita & ors. Vs Raj. St. Road Transport Corporation & anr. 2019 LawSuit (SC) 190

7.Mangla Ram Vs Oriental Insurance Company Ltd. & anr. (2018) 5 SCC 656

8.Vimla Devi & ors. Vs National Insurance Company Ltd. & anr. (2019) 2 SCC 186

9. National Insurance Co. Ltd. Vs Smt. Vidyawati Devi & 2 ors. F.A.F.O. No.2389 of 2016

10.National Insurance Company Ltd. Vs Pranay Sethi & ors. 2017 0 Supreme (SC) 1050

11.Sarla Verma Vs Delhi Transport Corporation (2009) 6 SCC 121

12.National Insurance Co. Ltd. Vs Mannat Johal & anr. (2019) 2 T.A.C. 705 (S.C.)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri Radhey Shyam, learned counsel for the appellant and Sri Pradyumn Kumar, learned counsel for the respondent-claimants. None appeared on behalf of owner.

2. This appeal, at the behest of the National Insurance Co. Ltd., challenges the judgment and award dated 4.9.2008 passed by Motor Accident Claims Tribunal/Special Judge, Mainpuri (hereinafter referred to as 'Tribunal') in

M.A.C.P. No. 268 of 2002 awarding a sum of Rs.1,77,000/- with interest at the rate of 8% as compensation in favour of the respondent-claimants.

3. Factual scenario as it emerges for the purpose of this Court is that the deceased and one another person was found dead in Truck No. UP-84 2403 when they were going to load iron rods from Kanpur to Mainpuri. At about 12.45 p.m. on 7.6.2002, the owner was informed about this fact and he lodged a First Information Report. The claimants preferred claim petition claiming that the deceased was 35 years of age and was earning Rs. 4500/- per month and they had become destitute and, therefore, claimed Rs.17,50,000/- with 18% rate of interest.

4. The respondent-owner appeared before the Tribunal, accepted the age of the deceased, that the deceased was employed at his place, his vehicle was insured with Insurance Company and that his driver had proper driving license. The Insurance Company appeared before the Tribunal and filed its reply of negation contending that no cause of action arose against them that the deceased was not 35 years of age as his age certificate was not filed, that there was breach of policy condition.

5. The Tribunal on 31.1.2006 framed four issues and returned the findings in favour of the claimants and against the Insurance Company holding that the claim petition was maintainable and allowed the same on the basis of evidence of P.W.1 and P.W.2 and held that the deceased was in employment. The witness withstood the cross-examination by Insurance Company. The Tribunal placed reliance on the decision of the Apex Court in Case of **Rita Devi (Infra)** and held in favour of the claimants. As far issue No. 2 is concerned, there is no dispute that the vehicle was insured, it had proper permit and that the documents were in order and, therefore, the said contention has not been raised. As for as issue No. 3 relating to license of the deceased-driver is concerned. the Insurance Company has disputed its liability contending that the driving license was fake as proved in M.A.C.P. No. 280 of 2002 and they should be exonerated. In view of this, the appeal requires to be decided.

6. The learned counsel for the appellant has contended that the murder cannot be said to be giving cause of action to file a claim under the Motor Vehicles Act, 1988 (hereinafter referred to as 'Act, 1988'). It is further contended that the compensation of Rs. 1,77,000/- is on the higher side. The truck was neither looted and despite that the Tribunal wrongly decided in favour of the claimants. It is further submitted that the license of the deceased-driver was not produced. It is further submitted that in Motor Accident Claims No. 280 of 2002 arising out of the same accident, the Tribunal held that the license was fake. This aspect should have been considered by the Tribunal.

7. Sri Pradyumn Kumar, learned counsel for the claimants has relied on the decisions in **Rita Devi and others Vs. New India Assurance Co. Ltd. and another, (2000) 5 SCC 113, Oriental Insurance Co. Ltd. Vs. Smt. Mainaz and Others, 2014 (3) T.A.C. 408 (All.) and Kalim Khan and others Vs. Fimidabee and others, 2018 (3) T.A.C. 337 (SC)** to contend that as per the

provisions of Section 166 of the Act, 1988, the involvement of the vehicle is proved. There is no breach of policy conditions and as contended that the compensation awarded requires to be re-evaluated as no amount under the head of future loss of income has been granted and that the amount under the head of non pecuniary damages is on the lower side.

8. So as to appreciate the contentions raised by the counsels for the parties, this Court feels that the provision of Sections 147 and 166 of the Act, 1988 be reproduced here which are as follows:

"147 Requirements of policies and limits of liability. --

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:
Provided that a policy shall not be required--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee--

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. --For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date

of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons"

166. Application for compensation.--

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed: Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.[***] 3(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

9. The decision in **National Insurance Company Limited Vs. Smt. Kusuma Devi, 2007 T.A.C. 729 (All.)** relied on by the counsel for the claimant before the Tribunal and nothing in the rebuttal has been proved by the Insurance Company. The owner in his written

statement contended that the vehicle was being driven by a qualified driver and, therefore, the said ground that the driver did not have proper driving license cannot be accepted. The Tribunal has held that it was the duty of the Insurance Company to prove the negative. The Tribunal has rightly relied on the judgment in **Smt. Kusuma Devi (Supra)** as the deceased had died. The widow submitted that she did not have the duplicate copy of the driving license.

10. It is further contended that the owner in his reply has seen the license of the deceased and the judgment in M.A.C.P. No. 280 of 2002 was never placed before the Tribunal nor any rebuttal evidence was laid before the Tribunal. The submission here about M.A.C. P. No. 280 of 2002 cannot be found from the record of the Tribunal and just because in that matter some adverse inference was drawn, in this matter, the said cannot be made applicable unless it is proved that the driver did not have proper driving license or that the findings of M.A.C.P. No. 280 of 2002 were pressed into service. I do not think that the finding of the Tribunal required to be interfered with. The Insurance Company could have very well proved the negative. As far as the policy is concerned, the driver was covered in the said policy. There was proper permit. Just because the license was not produced by the claimants and a so called verification report of one Vineet Jain was produced without examining him on oath, a copy of the verification report and the appended photocopy of license of Chhavi Singh goes to show the license was issued by R.T.O., Mainpuri and the report of licensing authority of Agra was produced which shows that licensing authority from Agra had not issued license in name of Chhavi Singh. The Judgment of this Court in the Case of **Smt. Kusma Devi (Supra)** has been rightly relied by the Tribunal.

11. I am supported in my view by the decision in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557** wherein the Court has held as under:

"9. The question is whether the letter/certificate issued by Regional Transport Officer, Raipur (Chhatisgarh) can be considered to be a public document as defined in section 74 of the Indian Evidence Act, 1872, which required no proof or it was required to be proved by the person producing it before the tribunal by examining witnesses? A public document is a document that is made for the purpose of the public making use of it. When a public officer is under a duty to make some entries in the official book or register, the entries made therein are admissible in evidence to prove the truth of the facts entered in the official book or register. The entries are evidence of the particular facts which was the duty of the officer to record. The law reposes confidence in the public officer entrusted with public duties and the law presumes that public officers will discharge their duties with responsibility. A driving licence is issued under Chapter II of the Act. Section 26 of the Act makes it mandatory for the State Government to maintain a register known as State Register of Driving Licence. The entries with regard to issuance or renewal of driving licence by the licensing authorities which contains particulars of licence and the licence holder are entered by the Regional Transport Officer/the

licensing authority in discharge of their official duty enjoined by law. The State Register of Driving Licence is record of the acts of public officers. The State Register of Driving Licence is a public record. It can be inspected by any person. We are of the considered opinion that the State Register of Driving Licence is a public document as defined by Section 74 of the Evidence Act.

10. Section 76 of the Evidence Act gives the right to obtain a certified copy of a public document which any person has a right to inspect on payment of fee. A certified copy of the entries made in the public record is required to be issued on payment of fee in Form-54 as laid down by Rule 150(2). Form-54 being a certified copy of a public document, namely, the State Register of Driving Licence, need not be proved by examining a witness. Once a certified copy of the entries made in the register maintained under section 26(1) read with Rule 23 is issued in Form-54 it is admissible in evidence under 77 of the Evidence Act, and no further proof of Form-54 by oral evidence by examining witnesses is required.

11. In the case in hand the information has not been furnished by the registering authority in Form-54. It had been provided in the following manner which is extracted below:-

"(Hindi matter omitted)

Sri M. Ibrahim

12. The aforesaid information is in the form of a letter written to the investigator appointed by the insurance company. It cannot be deemed to be a certificate or certified copy in Form-54 of the Rules. Deposit of fee would not convert the letter into a certificate under Rule 150. Therefore, the aforesaid letter issued by Regional Transport Officer, Raipur (Chhatisgarh) was required to be proved by the insurance company before the tribunal by oral evidence by examining witnesses. The insurance company had failed to lead any evidence to prove the aforesaid letter by examining witnesses before the tribunal. The tribunal rightly refused to place reliance on the letter dated 20.4.2005.

13. The learned counsel for the appellant has urged that the application filed by the insurance company before the tribunal on 19.7.2008 was illegally rejected. The application filed by the appellant under Order 12 Rule 2 of the Code of Civil Procedure to the effect that the claimant and the owner of the vehicle may be directed to either admit or deny the letter dated 20.4.2005 was rightly rejected by the tribunal on 19.7.2008 as the burden of proof was on the insurance company to prove that the driving licence of the driver of the offending truck was fake but the insurance company failed to discharge its burden. There is yet another to uphold the order of the tribunal dated 19.7.2008. Under Rule 221 of The Uttar Pradesh Motor Vehicle Rules, 1998 only some of the provisions of the Code of Civil Procedure had been applied to the summary proceedings before the Motor Accident Claims Tribunal. The provisions of Order 12 Rule 2 having not been made applicable to the proceedings before the tribunal, the application filed by the insurance company was not maintainable.

14. The learned counsel for the appellant has lastly urged that the application filed by the appellant under Section 170 of the Act had illegally been rejected on 2.9.2006 by the tribunal and the appellant is also challenging this order in the appeal. We have examined the relief claimed in this appeal but we do not find that order dated 2.9.2006 had

been challenged by the appellant. After the application under Section 170 was rejected it was open to the appellant to challenge the order under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. But the order dated 2.9.2006 cannot be challenged in an appeal, as an appeal under Section 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal and the order under Section 170 not being an award, no appeal would be maintainable against such an order.

15. For the aforesaid reasons, we do not find any merit in this appeal. The appeal fails and is accordingly dismissed."

12. I am even supported in my view by the decision in **Ram Chandra Singh Vs. Rajaram and Others, AIR 2018 SC 3789** wherein it has been held that the Insurance Company did not examine any witness and did not come out with a case that the owner of the vehicle was aware that the license of the driver was a doubtful license and, therefore, it cannot be said that there was any breach of policy condition as envisaged in Section 147 of the Motor Vehicles Act, 1988.

13. Just because the truck was not looted, it cannot be said that the claim petition was not maintainable. It is proved that the vehicle was involved and just because he was murdered, it cannot be a ground for rejection of the claim petition.

14. This Court in **Smt. Mainaz and Others (Supra) has held as under:**

9. To answer the aforesaid question it would be useful to examine the decision of the apex court in Rita Devi's case (supra) which has been relied by the Tribunal. In Rita Devi's case, the facts of the case were that an auto rickshaw driver was murdered in the process of stealing the auto-rickshaw. The question before the apex court was as to whether the death of auto rickshaw driver was on account of an accident arising out of the use of motor vehicle and, if so, whether a claim under section 163-A of the Motor Vehicle Act was maintainable. While deciding the said case, the apex court observed that from a reading of the provisions of section 163-A, a victim or his heirs are entitled to claim from the owner / Insurance Company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle, without having to prove wrongful act or neglect or default of any one. It was observed that if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle then they will be entitled for payment of compensation. As to whether murder, in a given situation, could be said to be caused due to an accident arising out of the use of motor vehicle, the apex court observed as follows:-

"10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such

murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder."

Thereafter, the apex court proceeded to hold as follows:-

"14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was dutybound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw.

18. In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving the use of motor vehicle."

10. In the light of the law laid down by the apex court, in the instant case, what is, therefore, to be seen is whether from the evidence brought on record, it is proved that the death of Naseem Khan was as an incident of loot/ robbery/ dacoity, that is an "accidental murder", or "murder simpliciter". If this Court comes to a conclusion that it was a case of murder simpliciter that is, where the perpetrators of the crime had the intention of committing murder only, then, the claim under Section 163-A of the Motor Vehicles Act would not be maintainable. But, if this Court comes to a conclusion that it was a case of an accidental murder that is where the perpetrators of the act did not have any motive against victim but the death was a result of an act to ensure commission of another act of felony, while the vehicle was in use, then, the claim under Section 163A of the Motor Vehicles Act would be maintainable.

15. In that view of the aforesaid factual data, the contention that the petition was not maintainable cannot be accepted because there is an involvement of vehicle. The incident occurred due to use of Motor Vehicle. The deceased was a driver on the said vehicle and was on duty and during the course of employment, this incident occurred. Hence, the said ground fails and the findings of the Tribunal are upheld.

16. The Motor Vehicles Act is a beneficial piece of legislation. It has been

time and again held that trappings of civil and criminal proceedings cannot be applied in a very strict manner. I am fortified in my view by the decisions in **Sunita and others Vs. Rajasthan State Road Transport Corporation and Another, 2019 LawSuit (SC) 190, Mangla Ram Vs. Oriental Insurance Company Limited and Others, 2018 (5) SCC 656 and Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186**

17. The compensation is ordered to be reassessed in view of the submission of Sri Pradyumn Kumar and in view of the decision in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016.**

18. The deceased was 35 years of age at the time of accident and was survived by 6 dependants. The Tribunal has granted a sum of Rs.1,77,000/- with 8% rate of interest. The Tribunal considered the income of the deceased to be Rs.15,000/- per year and deducted 1/3rd holding that he would be spending that much amount on himself and granted multiplier of 17 and added Rs. 7,000/- for non-pecuniary damages. This amount requires to be re-evaluated. A driver in the year 2002 when the accident occurred can be safely held to be earning Rs.3,000/- per month. The owner did not give any certificate about his income, hence, Rs.3000/- per month would be proper amount. The submission counsel for the appellant that his age should be considered to be 50 years cannot be accepted as the Tribunal has relied on the post-mortem report at Exhibit 19/G. Hence his as considered by the Tribunal to be 35 years requires to be accepted and no fault can be found on this finding of fact by the Tribunal.

19. Hence, the income of the deceased is held to be Rs.3,000/- per month namely Rs.36,000/- per year, to which as the deceased was below 40 years of age, 40 % of the income i.e. Rs. 14,400/- requires to be added as future income of the deceased in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** which would come to Rs.36,000+ 14,400 = 50,400/-. Deduction towards his personal expenses would be 1/3rd as he was survived by six dependants out of which three were minor. Hence, after deduction of 1/3rd, the annual datum figure available to the family would be Rs.33,600/-. As the deceased was in the age bracket of 31-35, the applicable multiplier would be 16 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.** In addition to that, Rs.70,000/- is granted under the head of non-pecuniary damages in view of the decision in **Pranay Sethi (Supra).** Hence, the claimants are entitled to a total compensation of Rs.33,600 x 16 + 70,000 = 6,07,600/-.

20. However, the rate of interest which is 8% would be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters.

The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

21. In view of the above, the appeal is partly allowed qua interest. The cross objection is allowed. The amount be deposited within 12 weeks from today with interest at the rate of 7.5% from the date of filing the of claim petition till the amount is deposited.

22. Record and proceedings be sent back to the Tribunal forthwith.

(2019)10ILR A 1121

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

FAFO No. 851 of 1989

New India Assurance Company Ltd.
... Appellant
Versus
Smt. Murti Devi & Anr. ...Respondents

Counsel for the Appellant:
Sri Brijesh Chandra Naik

Counsel for the Respondents:

A. Motor Vehicles Act, 1939 - Section 95 read with Section 92 (A) & Motor Vehicles Act, 1988 - Section 147 of is pari materia to Section 95.

Held: - Learned Tribunal has threadbare discussed the difference in a contract of minimum liability contract as well as of statutory liability and in this case it is proved that where liability is not limited by cogent evidence from the policy itself that for 29 passengers, extra premium of Rs. 348/- was charged. Third party insurance of Rs. 75/- was also charged, and therefore, in light of the decision of those days, the submission that policy was for limited purpose and liability was only Rs.15,000/- cannot be accepted. (Para 5)

Appeal Fails (E-5)

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri B. C. Naik, learned counsel for the appellant.

2. By way of this appeal the Insurance Company has felt aggrieved by the judgment and decree dated 10th May, 1989 in Motor Accident Claim Petition No. 92 of 1984 passed by Motor Accident Claims Tribunal/Additional District Judge, Allahabad granting a sum of Rs.33,000/-.

3. Brief facts available from the record are that on 02.07.1984 accident occurred when the deceased was going on his bicycle at that point of time a Truck came rashly and negligently and dashed him and caused his death. Accident is not in dispute, and therefore, the claim petition was filed by the claimant against the driver and owner as well as Insurance Company of offending vehicle. Tribunal after hearing the parties and after taking into account the evidence on record allowed the claim petition and awarded a sum of Rs. 33,000/- in favor of the claimant.

4. The main plank of submission is that under Section 95 (2) Motor Vehicles Act, 1939, the liability of the Insurance

Company was limited to Rs. 15,000/- only and the Tribunal has misread the cover-note and therefore, it is submitted that Tribunal committed an error in holding that as extra premium of Rs. 348/- was charged, the liability was unlimited, and as separate charge for the passengers was taken, therefore, it is submitted that this finding is bad as no extra premium was charged for passengers and liability was only to Rs. 15,000/-.

5. The learned Tribunal has threadbare discussed the difference in a contract of minimum liability contract as well as of statutory liability and in this case it is proved that where liability is not limited by cogent evidence from the policy itself that for 29 passengers, extra premium of Rs. 348/- was charged. Third party insurance of Rs. 75/- was also charged, and therefore, in light of the decision of those days, the submission that policy was for limited purpose and liability was only Rs.15,000/- cannot be accepted.

6. Section 95 reads with Section 92 (A) of Motor Vehicles Act, 1939 reads as follows:-

"SECTION 95: Requirements of policies and limits of liability

(1) In order to comply with the requirements of this Chapter, a policy of insurance may be a policy which,-

(a) is issued by a person who is an authorised insurer391[or by a cooperative society allowed under section 108 to transact the business of an insurer], and

[(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;]

Provided that a policy shall not393[* * *] be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employees of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment Mother than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods vehicle, being carried in the vehicle]; or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of contract of. employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon -or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability.

[Explanation.- For the removal of doubts, it is hereby declared that the

death of or bodily injury to any person, or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.]

(2) Subject to the proviso to sub-section (1) a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:-

[(a) where the vehicle is a goods vehicle, a limit of396[one lakh and fifty thousand rupees] in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923-, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;]

[(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,-

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees' in all;

[(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;]

(c) save as provided in clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees [six thousand] in all in respect of damage to any property of a third party].

(4) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance j[* * *] in the precribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

[(4A) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time. the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.]

(5) Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

SECTION 92A: Liability to pay compensation in certain cases on the principle of no fault

(1) Where the death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under subsection (1) in respect of the

death of any person shall be a fixed sum of fifteen thousand rupees and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of seven thousand five hundred rupees.

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement."

7. Section 147 of Motor Vehicles Act, 1988 which is pari materia to Section 95 reads as follows:-

"147 Requirements of policies and limits of liability. --

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--

(i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required--

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee--

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. --For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance

referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:--

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of section 147 (being a liability covered by the terms of the policy) 1[or under the provisions of section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of

any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:--

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India: Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart

from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be. Explanation.--For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168."

8. Section 166 of Motor Vehicles Act reads as under:-

"166. ***Application for compensation.--*** *(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made--*

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

*(3) [* * *]*

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under subsection (6) of section 158 as an application for compensation under this Act."

9. I am fortified in my view by the judgment, and therefore, this appeal fails and is dismissed. There is no question of depositing further amount as while

entertaining this appeal, the appellant was directed to deposit the entire amount. The interim relief shall stand vacated.

(2019)10ILR A 1128

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE

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

Habeas Corpus Writ Petition No. 731 of 2019
&
Habeas Corpus Writ Petition Cases No. 732 of 2019 & 734 of 2019

Jai Pal ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Upendra Upadhyay

Counsel for the Respondents:
A.S.G.I., Sri S.K. Srivastava, Sri Deepak Mishra (A.G.A.)

A. National Security Act, 1980 – Preventive Detention - Grounds of detention do not indicate that the mob was organized by the petitioners or that there was anything done by the petitioners - Solitary incident- Satisfaction to be recorded on the basis of cogent material that the detenu on being released on bail is likely to indulge in activity prejudicial to the maintenance of public order- Absence of such material- Preventive detention of the petitioners is not justified and is liable to be set aside.
(Para 12 & 13)

The incident reflected a mob activity triggered by a road accident in which a person had died. It is not the case in the grounds of detention that the petitioners had with a view to embarrass the administration planned or organized the mob action. The grounds though reflect petitioners' participation in the mob but do not indicate that the mob was organized by the petitioners or that there was anything distinguishable done by the petitioners in that mob action than what was done by other participants.

There is no cogent material on the basis of which, based on a solitary incident of the nature cited in the grounds of detention, satisfaction could be drawn that the petitioners on being released on bail would indulge in activity that would be prejudicial to the maintenance of public order. As it is well settled that to preventively detain a person, who is already in judicial custody, satisfaction, amongst others, is also to be recorded on the basis of cogent material that the detenu on being released on bail is likely to indulge in activity prejudicial to the maintenance of public order, in absence of existence of such material, the preventive detention of the petitioners is not justified and is liable to be set aside.

Consequently, all the three habeas corpus petitions are allowed. The detention orders, dated 16th April, 2019, passed by District Magistrate, Etah against the aforesaid three petitioners are hereby quashed. The petitioners shall be set at liberty forthwith unless wanted in any other case.

Habeas Corpus Petitions allowed (E-3)

Case law relied upon/discussed: -

1. Attorney General for India Vs Amratlal Prajivandas & ors. reported in 1994 (5) SCC 54

2. Surya Prakash Sharma Vs St. of U.P. & ors. 1994 (Supp.) (3) SCC 195

3. Yogendra Murari Vs St. of U.P.& ors. (1988) 4 SCC 559

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Mrs. Manju Rani Mishra, J.)

1. These three habeas corpus petitions question detention orders, dated

16th April, 2019, separately passed against the petitioners by the District Magistrate, Etah in exercise of powers under Section 3(2) read with Section 3(3) of the National Security Act, 1980 (for short the Act, 1980).

2. Today, counter affidavit of respondents 2 and 4 have been filed by the learned AGA in each of the three petitions, which have been taken on record. The learned counsel for the petitioners stated that he does not wish to file reply to those affidavits and has prayed that the petitions be heard finally.

3. As the petitioners are co-accused and the detention order separately passed against them are based on identical grounds, with the consent of learned counsel for the parties, these petitions are being decided by a common judgment and order.

4. We have heard Sri Upendra Upadhyay for all three petitioners; Sri Deepak Mishra, learned A.G.A. for the State as well as the other state-officers including the detaining authority; Sri S.K. Srivastava for the Union of India in Habeas Corpus Petition No. 731 of 2019; Sri Surendra Nath Chauhan for the Union of India in Habeas Corpus Petition No. 732 of 2019; and Sri Kameshwar Singh for the Union of India in Habeas Corpus Petition No. 734 of 2019; and have perused the record.

5. A perusal of the record would reveal that detention orders dated 16th April, 2019 were separately passed against the petitioners by the District Magistrate, Etah (the Detaining Authority) in exercise of power under Section 3(2) read with Section 3(3) of the Act, 1980 with a view to prevent the petitioners from indulging in activity that might be prejudicial to the public order. The grounds of detention, which are common to all the petitioners, reflect that the detention order has been passed with reference to the activity of the petitioners in the company of several other accused persons in an incident dated 22nd March, 2019 which gave rise to case crime No.0056 of 2019 at police station Awagarh, district Etah, under Sections 147, 148, 149, 341, 307, 332, 353, 427, 336, 436 and 188 IPC and Section 7 Criminal Law Amendment Act. The record reflects that prior to that incident, in a road accident, a person had died. This resulted in mass protest by the public including road blockade. To remove the road blockade, police force was deployed. The allegation is that a large gathering of persons comprising 12 named accused including the petitioners with 100 odd other persons attacked the police force and damaged / burnt police vehicle. It is stated that the petitioners were duly identified along with twenty-thirty others and their participation in the incident was substantiated from statement of the witnesses. It is alleged that the said road blockade and mob activity disturbed the public order. By citing that the petitioners have applied for bail in the said case and are likely to be released on bail, with a view to prevent the petitioners from acting in a manner prejudicial to the public order, the detention order was passed.

6. The contention of learned counsel for the petitioners is that the petitioners have no previous criminal history; that from a solitary incident of the nature which has given rise to Case Crime No.0056 of 2019 it cannot be presumed

that the petitioners on being released on bail would repeat such activity that would be prejudicial to the public order therefore the order of preventive detention is not legally sustainable. It has been submitted that the purpose of preventive detention is to prevent the detenu from indulging in activity that is prejudicial to the maintenance of public order or security of the State or maintenance of essential services and civil supplies. It has been urged that since it is to prevent a person from repeating such activity, the past activity has to be considered for the purpose of ascertaining the propensity of that person whether he would repeat such activity. It has been submitted that admittedly there were 12 named accused including the petitioners in the first information report. The list of names, after investigation, expanded to twenty-thirty persons. Otherwise, more than 100 persons were there, who allegedly participated in the incident of road-block and arson, but the detention order has been passed only against three persons, namely, the petitioners, whereas no detention order was passed against the rest of the accused, which clearly suggests that from the nature of the incident it could not have been logically inferred that the persons involved were likely to repeat such act. It was urged that the incident, as narrated in the first information report, did not disclose an organized criminal activity, rather, it appeared to be a mob reaction to an accident. Hence, from such an incident it could not have been inferred that the petitioners had mental pre-disposition to repeat such acts. It has been submitted that mob psychology is spontaneous and such incidents are not planned and there is nothing on record that the incident was planned or orchestrated by the petitioners. More over, the first information report and the other material attributes common role to all. In the alternative it has been contended that even if the detention was justified for a limited period in view of the forthcoming elections, its extension is not justified, post the elections. It has been submitted that the detention order after confirmation was initially for three months only but, unnecessarily, it has been extended up to six months.

7. Learned AGA submitted that the first information report as also the grounds of detention sufficiently demonstrate that on account of mob action the public order was disturbed as police personnel were also injured and police vehicle was burnt. He has submitted that such mob activity needs to be dealt with an iron hand and therefore the detention order is justified even though the petitioners may not have previous criminal history.

8. Having considered the rival submissions, before we address the issues raised, it would be apposite for us to notice the legal position as to when an order of preventive detention can lawfully be passed on a solitary act of the detenu. In this regard, it would be useful for us to notice the decision of nine-judges Bench of the Apex Court in **Attorney General For India vs Amratlal Prajivandas and others reported in 1994 (5) SCC 54.** In paragraph 48 of the judgment, as reported, the apex court has held as follows:-

"48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for

detaining the person. In Debu Mahato v. State of W.B. it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W. B. It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur. and Dharua Kanu v. State of W.B. single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswati Seshagiri v. State of Kerala , a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish- plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention.

(Emphasis Supplied)

9. In **Surya Prakash Sharma v. State of U.P and others : 1994 (Supp.) (3) SCC 195,** the petitioner was already in jail in connection with a murder case. The petitioner had no criminal history though there was a solitary case of broad day light murder registered against him. The argument raised before the apex court was that on the basis of that solitary case against the detenu, there could be no apprehension in the mind of the detaining authority that the detenu on being released would indulge in any such activity that would be prejudicial to the maintenance of public order. The apex court found that there was no cogent material placed before the court or before the detaining authority to enable an inference that the

detenu on being released on bail would indulge in such offence that would be a threat to public order. The apex court, accordingly, quashed the order of detention and, while doing so, in paragraphs 5 and 6, as reported, observed as follows:

"5.The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan, [1964] 4 SCR 921. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat v. Union of India, AIR (1990) SC 1196 wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw (supra) answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment: made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail 'he may again indulge in serious offences causing threat to public order", (emphasis supplied), To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified."

10. In **Yogendra Murari v. State of U.P. and others : (1988) 4 SCC 559,** the apex court had the occasion to deal with a submission whether the detention order could be considered discriminatory on the ground of non-detention of co-accused in the same incident. Rejecting the claim of discrimination, raised on behalf of the petitioner, in paragraph 9 of the judgment, the apex court observed as follows:-

"9. There is no merit whatsoever in the petitioners grievance of discrimination on the ground that the other co- accused persons have not been

detained. The role of the petitioner and that of the others are not identical and the reasonable apprehension as to their future conduct must depend on the relevant facts, and circumstances which differ from individual to individual. It would have been wrong on the part of the detaining authority to take a uniform decision in this regard only on the ground that the persons concerned are all joined together as accused in a criminal case."

11. From the decisions noticed above, what is clear is that though ordinarily a solitary act may not be sufficient to sustain an order of preventive detention but where that act is of such a nature that it is reflective of, or has manifestation of, an organized criminal activity, or is so grave that it reflects the propensity of that person to repeat such an act, then even a solitary act could well be made basis for passing an order of preventive detention.

12. In the instant case, we find that the incident reflected a mob activity triggered by a road accident in which a person had died. In this mob action hundreds of persons had participated but no one died. It is not the case in the grounds of detention that the petitioners had with a view to embarrass the administration planned or organized the mob action. The grounds though reflect petitioners' participation in the mob but do not indicate that the mob was organized by the petitioners or that there was anything distinguishable done by the petitioners in that mob action than what was done by other participants. When a mob reacts, the action is triggered by sudden surge of emotions which become uncontrollable. Largely, mob actions are unorganized and therefore by mere participation in a mob the propensity of its participant that he would repeat such act cannot ordinarily be inferred. Had it been a case in the grounds of detention that the petitioners had organized the mob action with a view to disrupt public order or had committed some such act which distinguishes their case from the rest and is suggestive of their mental make up or propensity to repeat such act, things would have been different. But here the petitioners were mere participants who, by chance, were identified along with twenty to thirty more persons though hundreds of persons had participated. Moreover, it is not a case of communal violence. Communal violence stand on a different footing inasmuch as it reflects upon the mental predisposition of its participant. Thus, looking to the facts of the case as also that the petitioners have no previous criminal history, we are of the considered view that there is no cogent material on the basis of which, based on a solitary incident of the nature cited in the grounds of detention, satisfaction could be drawn that the petitioners on being released on bail would indulge in activity that would be prejudicial to the maintenance of public order. As it is well settled that to preventively detain a person, who is already in judicial custody, satisfaction, amongst others, is also to be recorded on the basis of cogent material that the detenu on being released on bail is likely to indulge in activity prejudicial to the maintenance of public order, in absence of existence of such material, the preventive detention of the petitioners is not justified and is liable to be set aside.

13. Consequently, all the three habeas corpus petitions are **allowed.** The detention orders, dated 16th April, 2019, passed by District Magistrate, Etah

against the aforesaid three petitioners are hereby quashed. The petitioners shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

(2019)10ILR A 1134

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE

THE HON'BLE IRSHAD ALI, J.

Rent Control No. 123 of 2004

Lalji Keshwarwani ...Petitioner
Versus
IV Addl. Distt. Judge, Pratapgarh & Ors. ...Respondents

Counsel for the Petitioner:
Sri G.C. Sinha, Sri A.K. Pandey Bistaul, Sri Ashok Kumar Dwivedi, Sri Atul Kumar Dwivedi, Sri Manish Kumar, Sri S.A. Khan

Counsel for the Respondents:
C.S.C., Sri Niranjan Singh

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- Notice under section 106 of Transfer of Properties Act-Section 21(1)A. of U.P. Urban Buildings Act, 1972- application for release of the disputed shop – `*The Tenant cannot suggest to the landlord to run his business from some other place*'. (Para 3 &18)

The landlord offered to the tenant that after construction of the shop, he will be provided one shop to run his business of dentist and the tenant refused the same and suggested to the landlord to run his business at some other place, which was accepted by the appellate Court.

Held:- The tenant cannot dictate to the landlord as to how the property belonging to the landlord should be utilized by him for the purpose of his business. It was further recorded that the landlord is doing business from various other premises cannot for close his right to seek eviction from the tenanted premises so long as he intends to use the tenanted premises for his own business – `*The tenant cannot suggest to the landlord to run his business from some other place*'. (Para 16 ,17,18)

Writ petition allowed (E-7)

List of Cases Cited: -

1. Anil Bajaj & anr. Vs Vinod Ahuja (2014) 15 SCC 610

2. Radhey Shayam Agarwal Vs Addl. Distt. and Sessions Judge Court No.13 Lko. Anr. 2006 (24) LCD 1141

3. Zareena Haider & anr. Vs Special Judge E.C. Act/ADJ, LKO. & anr. 2013 (31) LCD 2396

4. Dr. Iqbal Ahmad Vs 2nd Additional Distt. Judge, Ballia & anr. 2005 (23) LCD 221

5. Krishna Kumar Rastogi Vs Sumitra Devi (2014) 9 SCC 309

6. B.C. Bhutada Vs G.R. Mundada and Salim Khan Vs IVth Addl. Distt. Judge Jhansi (2006) 1 ARC 588

7. Badrinarayan Chunilal Bhutada Vs Gonindram Ramgopal Mundad AIR 2003 SC 2713 (2003) 2 SCC 320

(Delivered by Hon'ble Irshad Ali, J.)

1) Heard Sri Manish Kumar, learned Senior Counsel assisted by Sri Atul Kumar Dwivedi, learned counsel for the petitioner and to the learned Additional Chief Standing Counsel on behalf of State respondent.

2) In spite of service of notice, no one has appeared on behalf of respondent Nos.2 and 3.

3) Factual matrix of the case is that the petitioner purchased a portion of the

building including the disputed shop in occupation of respondent No.2 on 16.08.1988. A notice was issued to the respondent No.2 on 28.10.1991 under Section 106 of the Transfer of Properties Act and thereafter, an application under Section 21(1)(a) of U.P. Act No.13 of 1972 was filed for release of the disputed shop on 03.09.1994. The respondent No.2 filed written statement on 13.09.1995. The prescribed authority after hearing the parties and taking into consideration the contents of the release application as well as the written statement filed by the respondents by taking notice of the ingredients required to be considered, passed an order for release of the shop on 18.05.1996. The respondent No.2 preferred an appeal against the order passed by the prescribed authority, which was allowed dismissing the application for release filed under Section 21(1)(a) of U.P. Act No.13 of 1972.

4) Assailing the order passed by the appellate authority, submission of learned Senior Counsel for the petitioner is that the appellate Court while passing the impugned order has ignored the finding returned by the prescribed authority on the bonafide requirement and comparative hardship of the petitioner. In support of submission advanced on the point of bonafide requirement and comparative hardship, learned Senior Counsel for the petitioner has placed reliance upon certain judgments, which are as under:

i) Anil Bajaj and another Vs. Vinod Ahuja; 2014 (15) SCC 610, paragraph Nos.6 to 8.

ii) Radhey Shayam Agarwal Vs. Addl. District and Sessions Judge, Court No.13 Lucknow and another; 2006 (24) LCD 1141, paragraph Nos.16 to 18.

iii) Zareena Haider and others Vs. Special Judge E.C. Act/ADJ, Lucknow and others; 2013 (31) LCD 2396, paragraph Nos.12, 16 to 18.

iv) Dr. Iqbal Ahmad Vs. 2nd Additional District Judge, Ballia and another; 2005 (23) LCD 221, paragraph No.10, 12, 13 and 14.

v) Krishna Kumar Rastogi Vs. Sumitra Devi; (2014) 9 SCC 309, paragraph No.9.

5) He further submitted that the appellate court has misread the provisions contained under Rule 17 framed under the Act of 1972. He submitted that Rule 17 of the Act applies in the case, wherein application has been moved under Section 21(1)(b) of the Act of 1972. Thus, his submission is that the provisions referred while passing the impugned order is not attracted to the present facts and circumstances of the case.

6) He next submitted that the respondent No.2 was offered that after construction of the shop, he will be provided one shop to run his business of Dentist and the same was refused by him, thus, the appellate court on wrong premises has proceeded to allow the appeal and dismissed the release application.

7) He further submitted that the appellate court cannot suggest to the landlord to run his business at other place taking into consideration the suggestion of the tenant to run his business.

8) Learned Senior Counsel for the petitioner further invited attention of this Court on the written statement filed by the respondent No.2; annexure No.3 to the writ petition and pointed out that it is admitted case of the respondent No.2 that the petitioner and his two sons are

running the business at Gallamandi, thus, his submission is that the appellate court while passing the impugned order has ignored the admission of the tenant in the written statement.

9) In view of the above, his submission is that, the appellate court has committed gross illegality in passing the impugned order, therefore, the same is not sustainable in law.

10) I have considered the submission advanced by learned counsel for the petitioner and perused the material on record as well as the law reports relied upon by learned Senior Counsel for the petitioner and the counter affidavit filed by learned counsel for respondent Nos.2 and 3.

11) To resolve the controversy involved in the present writ petition, the provisions contained under Section 21(1)(a) of U.P. Act No.13 of 1972 is being quoted below:

"21. Proceeding for release of building under occupation of tenant. *- (1)(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust."*

12) On its perusal, it is evident that while considering the release application, the prescribed authority has to consider the bonafide requirement, comparative hardship and irreparable loss and injury.

13) The prescribed authority while dealing with the matter of release application, on perusal of the evidence and material on record, passed the order holding that the petitioner has made out a case for release of shop and in comparison of the tenant, the bonafide requirement and comparative hardship are in favour of the landlord.

14) In support of submission advanced, learned Senior Counsel for the petitioner relied upon certain judgments, which are as under:

i) Anil Bajaj and another Vs. Vinod Ahuja (Supra):

"6. In the present case it is clear that while the landlord (appellant No. 1) is carrying on his business from a shop premise located in a narrow lane, the tenant is in occupation of the premises located on the main road which the landlord considers to be more suitable for his own business. The materials on record, in fact, disclose that the landlord had offered to the tenant the premises located in the narrow lane in exchange for the tenanted premises which offer was declined by the tenant. It is not the tenant's case that the landlord-appellant No. 1 does not propose to utilize the tenanted premises from which eviction is sought for the purposes of his business. It is also not the tenant's case that the landlord proposes to rent out/keep vacant the tenanted premises after obtaining possession thereof or to use the same is any way inconsistent with the need of the landlord. What the tenant contends is that the landlord has several other shop houses from which he is carrying on different business and further that the landlord has other premises from where the business proposed from the tenanted

premises can be effectively carried out. It would hardly require any reiteration of the settled principle of law that it is not for the tenant to dictate to the landlord as to how the property belonging to the landlord should be utilized by him for the purpose of his business. Also, the fact that the landlord is doing business from various other premises cannot foreclose his right to seek eviction from the tenanted premises so long as he intends to use the said tenanted premises for his own business.

7. The grounds on which leave to defend was sought by the tenant and has been granted by the High Court runs counter to the fundamental principles governing the right of a tenant to contest the claim of bonafide requirement of the suit premises by the landlord under the Delhi Rent Control Act, 1958. Even assuming the assertions made by the tenant to be correct, the same do not disclose any triable issue so as to entitle the tenant to grant of leave to defend.

8. We are, therefore, of the view that the impugned order dated 20.09.2012 of the High Court of Delhi is not legally sustainable. We, accordingly, set aside the same and allow this appeal and restore the order dated 02.09.2011 passed by the learned Additional Rent Controller, Delhi."

ii) Radhey Shayam Agarwal Vs. Addl. District and Sessions Judge, Court No.13 Lucknow and another (Supra):

"16. The tenant Puttan Lal was required to demonstrate before this Court by passing a specific order as to what efforts he had made to find out alternative accommodation for his residential or commercial purpose since November, 1988 when the release application was filed. He has filed an affidavit dated 5.4.2006 indicating that he cannot afford to pay more than Rs. 100 as against Rs. 20 per month presently being paid as rent for any other shop in the nearby locality and that he failed to get a shop at this rent. He has reiterated in the affidavit that the landlord is having sufficient residential accommodation and shops in the city of Lucknow, which fact has been denied by the petitioner. As per Sri S.M.K. Chaudhary, learned Counsel for the petitioner, several shopping and residential complexes have come up in New Hyderabad. Nishatganj and adjoining areas. Besides, several residential colonies of U.P. Housing and Development Board, Lucknow Development Authority and other cooperative societies have come up in the nearby areas. Land for housing and commercial use is available to the public and can be purchased through loans on lower rate of interest offered by the nationalized and co-operative banks. These facilities ought to have been availed by the tenant, opposite party No. 2. There is no force in the submission of Sri M.S. Kotwal, learned Counsel for opposite party No. 2 that no accommodation was available to the tenant and that he cannot afford to pay more than Rs. 20 per month. The Hon'ble Supreme Court of India and this Court in recent decisions, as in B.C. Bhutada v. G.R. Mundada and Salim Khan v. IVth Additional District Judge. Jhansi 2006 (1) ARC 588, have held that where the tenants did not show what efforts they made to search alternative premises, it is sufficient to tilt the balance of hardship against them. Even under Rule 10(3) of the Rules the tenant has failed to demonstrate whether he had filed any application to the appropriate authority for allotment of another accommodation.

Thus, despite an opportunity being given by this Court, the respondent No. 2 has failed to demonstrate his serious efforts, if any, made for finding out alternative accommodation or submission of any such allotment application as provided under Rule 10(3) of the Rules. Thus, the question of comparative hardship ought to have been decided by the appellate authority against the tenant. The judgment and order passed by the appellate court Is, therefore, wholly erroneous and unsustainable in law. I find support in my view from the Judgments of the Hon'ble Supreme Court of India as in 2005 (2) ARC 793.

17. The appellate authority has also ignored the finding of the learned prescribed authority that the landlord has a right to use the premises for expanding his business and augment his income vide Gaya Prasad v. Pradeep Srivastava (2001) 2 SCC 604. The Hon'ble Supreme Court in another Judgment in Ragavendra Kumar v. Firm Prem Machinery and Co. , has held that it is a settled position of law that the landlord is the best Judge of his requirement for residential or business purpose and he has got complete freedom in the matter. In the said case, the plaintiff landlord wanted the eviction of the tenant from the suit premises for starting his business as it was suitable and it cannot be faulted. Similar views have been expressed in G.C. Kapoor v. Nand Kumar Bhasin and Ors. This Court in Smt. Nirmala Tandon and Ors. v. Xth Additional District Judge, Kanpur Nagar and Ors. 1996 (2) ARC 409 : 1997 (1) AWC 2.59 (NOC) and Shree Chand Gupta v. XVIIIth Additional District Judge, Meerut and Ors. , has also dealt with the issue that a finding of fact may be interfered with when it is based on account of wrong application of principle of law relevant thereto or relevant material has not been taken into consideration, or a finding is otherwise arbitrary or perverse. These elements are present in this case. I find force in the submissions made by Sri S.M.K. Chaudhary, learned Counsel for the petitioner which are squarely covered by the case-laws cited by him. as referred to above. On the other hand, the decisions cited by Sri M. Section Kotwal, learned Counsel for the opposite party No. 2, as referred to above, cannot be applied in the present set of circumstances.

18. In the opinion of this Court, the view taken by the appellate authority is highly erroneous in law. The tenant is already having in his possession a portion of the building for residential purpose. It is an uncontroverted fact that he has purchased a double-storyed House No. 9. Gopi Nath Building, R.B.L. Road, Lucknow where he and his family are residing or if not residing, he can continue in the portion of the building which is still under his occupation. He has not searched alternative accommodation. These facts by itself are sufficient to decide the question of comparative hardships against the tenant. The Hon'ble Supreme Court of India in the case of Siddalingama v. M. Shenoy 2002 (46) ALR 18 (SC), has held that the entire Rent Control Act is basically meant for the benefit of the tenant and provision of release on the ground of bona Jlde need is the only provision which treats the landlords with some sympathy."

iii) Zareena Haider and others Vs. Special Judge E.C. Act/ADJ, Lucknow and others (Supra):

"12. This finding of the lower appellate court is utterly erroneous in law. Bona fide need does not mean dire need vide Dattatraya Laxman Kamble v.

Abdul Rasul Moulali Kotkunde & Anr., AIR 1999 SC 2226. Landlords cannot be compelled to use verandas as rooms to fulfil their need so that tenant may continue to enjoy possession of the tenanted accommodation. Verandahs are not built to be used as rooms etc. Supreme Court in Sarla Ahuja v. United India Insurance Company Limited, AIR 1999 SC 100 has held that tenant cannot dictate the landlord as to how he should satisfy his need without disturbing the tenant. Same view has been taken in the following authorities:

(i) Prativa Devi v. T.V. Krishnan, 1996 (5) SCC 353

(ii)Ragavendra Kumar v. Firm Prem Machinary & Co., AIR 2000 SC 534

(iii) R.C. Tamrakar and anr. v. Nidi Lekha, AIR 2001 SC 3806 (para-10)

(iiv) Dinesh Kumar Vs. Yusuf Ali, AIR 2010 SC 2679 (para-8).

16. Regarding comparative hardship, the lower appellate court held that the tenants were using their residential house at Pan Dariba for running printing and publishing business hence they had no alternative accommodation and as their family consisted of 16 members, hence they would be thrown on street in case of eviction. Prescribed Authority had held that tenants were quite wealthy and were paying very good income tax. All these aspects were not touched by the lower appellate court.

17. There cannot be any doubt, looking to the number of family members and their professions, that the landlords required additional accommodation. Tenants were having a residential house but they were using the same for commercial purposes. The house in dispute is situate at a famous busy road, hence the area where it is situate is more beneficial for advocates chamber. As held by the Supreme Court in "Chandrika Prasad v. Umesh Kumar Verma" AIR 2002 SC 108 a less advantageous accommodation available to the landlord is no ground to reject the release application for a more advantageous accommodation in occupation of tenant. In the said case, accommodation was required for establishing clinic for doctor son-in-law of the landlord. The Supreme Court held that the fact that the father of the son-in-law of the landlord possessed a house in a less important area was immaterial.

18. Supreme Court in Badrinarayan Chunilal Bhutada v. Gonindram Ramgopal Mundada, AIR 2003 SC 2713 : 2003 (2) SCC 320 (para-8) has held that bona fide requirement of landlord implies an element of necessity. The necessity is a necessity without regard to the degree of which it may be. Degree of urgency or the intensity of felt need assumes significance for the purpose of comparative hardship."

iv) Dr. Iqbal Ahmad Vs. 2nd Additional District Judge, Ballia and another (Supra):

"10. The main emphasis of the lower appellate court was on the fact that landlord could not show that his medical practice was of such scale which required more accommodation. Even a Doctor having small number of patients per day is entitled to have reasonable accommodation for his clinic. Judicial notice may be taken of the fact that often allopathic medicines, which are prescribed by doctors, may be purchased from any shop. However, Homeopathic doctors invariably give medicines to the patients by themselves. No such shop may be found in any city where Homeopathic medicines are sold to the patients on the

prescription. The tenant suggested that shop A could be partitioned and in one portion landlord, doctor could check the patients and writ prescriptions and from the other portion his compounder could give medicines to patients. This suggestion was self serving. Tenant has got no business to dictate the landlord as to how he can squeeze his need in smaller portion.

12. Regarding the shop taken on rent by the tenant, the lower appellate court accepted the version of the tenant that he was using the said shop as godown. If the tenant is using a shop as godown, it is his look (out). In such situation it can not be said that the said shop is not available to the tenant. As the tenant has already got another shop on rent, hence question of comparative hardship has to be decided against him. Rule 16(2) (b) which is quoted below is squarely attracted to the fact of the case.

*"**Rule 16(2)(b):-** Where the tenant has available with him suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the application."*

13. Even otherwise tenant did not bring on record any evidence to show that he made any efforts to purchase or take on rent any alternative accommodation after filing of release application. It was also very relevant for deciding the question of comparative hardship against the tenant (vide AIR 2003 SC 2713).

14. Alongwith written arguments filed by learned counsel for tenant respondent No.2, copy of an affidavit of landlord petitioner sworn on 17.1.2001 filed by him before Assistant Registrar, Funds (sic-Firms), Societies and Chits, Varanasi Division, Varanasi in file No.B-3064 has been filed. In para 9 of the said affidavit it was stated that Javed Iqbal Ansari (son of petitioner) is head master of Hazrat Aasi Junior High School. No notice can be taken of the copy of a document, which is filed alongwith written written arguments. The said copy has not been filed alongwith any affidavit. Even if for the sake of arguments it is accepted that the son of landlord is head master in some school still the fact remains that tenant has categorically admitted that in the shop shown by letter C in the map landlord has installed Photostat and lamination machines. If the statement of the tenant that son of the landlord is head master in school is taken to be correct then it would mean that landlord himself is carrying on the business of making copies from Photostat machine and laminating the documents from lamination machine. If the landlord in addition to his medical practice in Homeopathy has started the said business also, then he can not be put to disadvantage due to that. Tenant himself repeatedly asserted that landlord was not having good medical practice. In view of this no fault can be found with the landlord if he starts additional business for augmenting his income. Learned counsel for tenant respodent also argued that during the pendency of writ petition landlord petitioner got vacated some of his shops from his previous tenant and let out the same to other tenants. For this argument no foundation has been laid in the form of any affidavit hence it cannot be considered."

v) Krishna Kumar Rastogi Vs. Sumitra Devi (Supra):

11. In Mohd. Ayub v. Mukesh Chand, while interpreting the above provisions of law, this Court has observed in para 15 as under: (SCC p. 159)

" 15. It is well settled the landlord's requirement need not be a dire necessity. The court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It was wrong on the part of the District Court to hold that the appellants' case that their sons want to start the general merchant business is a pretence because they are dealing in eggs ?????Similarly, length of tenancy of the respondent in the circumstances of the case ought not to have weighed with the courts below."

15) In the case of **Anil Bajaj and another Vs. Vinod Ahuja (Supra)** relied upon by learned counsel for the petitioner, the landlord was carrying on business from a shop premises located in a narrow lane, whereas the tenant was in occupation of the premises located on the main road, which the landlord considers to be more suitable for his own business. The landlord offered to the tenant the premises located in the narrow lane in exchange of the tenant's premises, which was declined by the tenant. The tenant contended that the landlord has several other shops and houses, from where he is carrying out his business and suggested that he can run his shop in other available shops to him.

16) After considering the material evidence on record, the court held that the tenant cannot dictate to the landlord as to how the property belonging to the landlord should be utilized by him for the purpose of his business. It was further recorded that the landlord is doing business from various other premises cannot forclose his right to seek eviction from the tenanted premises so long as he intends to use the tenanted premises for his own business.

17) In the case in hand, the landlord offered to the tenant that after construction of the shop, he will be provided one shop to run his business of dentist and the tenant refused the same and suggested to the landlord to run his business at some other place, which was accepted by the appellate Court.

18) In view of the above, the ratio of the judgments referred herein above, is fully applicable to the present facts and circumstances of the case, therefore, this Court is of the opinion that the tenant cannot suggest to the landlord to run his business from some other place.

19) In the case of **Radhey Shayam Agarwal Vs. Addl. District and Sessions Judge, Court No.13 Lucknow and another (Supra),** the question was that since the application for release was filed, what effort had been made to find out alternative accommodation for residential or commercial purposes since the date the release application was filed. The claim was setup by the tenant that the landlord is having sufficient residential accommodation and shops in the city of Lucknow, which was denied by the petitioner-landlord. Considering the judgment of Hon'ble Supreme Court in the case of **B.C. Bhutada v. G.R. Mundada and Salim Khan v. IVth Additional District Judge. Jhansi 2006 (1) ARC 588,** it was held that where the tenant did not show the effort made to search alternative premises, it is sufficient to tilt the balance of hardship against him. The tenant failed to establish that he filed any application to the appropriate authority for allotment of another accommodation.

20) In the present case, the appellate authority has failed to appreciate that the tenant has ever tried to search out any other alternative accommodation during pendency of the release application. Thus, in the opinion of the Court, the appellate authority is highly erroneous in law in proceeding to pass the impugned order.

21) In other two judgments in the cases of **Zareena Haider and others Vs. Special Judge E.C. Act/ADJ, Lucknow and others (Supra) and Dr. Iqbal Ahmad Vs. 2nd Additional District Judge, Ballia and another (Supra),** the court has proceeded to hold that the landlord cannot be compelled by the tenant to run his shop in an accommodation, which is not feasible to run the shop/business. Hon'ble Supreme Court in the case of **Badrinarayan Chunilal Bhutada v. Gonindram Ramgopal Mundada, AIR 2003 SC 2713 : 2003 (2) SCC 320** has held that the bona fide requirement of landlord implies an element of necessity. The necessity is a necessity without regard to the degree of which it may be. Degree of urgency or the intensity of felt need assumes significance for the purpose of comparative hardship.

22) The appellate court in the present case, in spite of considering the hardship of the landlord, has proceeded to suggest on otherwise considerations to fulfill the need of the landlord. The counter affidavit filed by learned counsel for respondent Nos.2 and 3 supports the contents made in the written statement filed before the prescribed authority as well as before the appellate court, which denies the offer made by the landlord to provide one shop after construction of the shop to run business to the tenant of dentist, which was refused by the respondent Nos.2 and 3. This act of the tenant cannot be justified in law.

23) On over all consideration and on perusal of the material on record as well as the judgments referred herein above, it is well established that the appellate court has committed manifest error of law in dismissing the release application and allowing the appeal. The appellate court has not considered the finding recorded by the prescribed authority in allowing the application for release of the shop and by ignoring the same has proceeded to pass the impugned order. The appellate court has mis-read the applicability of the provisions of Rule 17 framed under U.P. Act No.13 of 1972 and has wrongly applied to the facts and circumstances of the present case. Rule 17 of the Act of 1972 applies, in case the application has been moved on the ground that the building is in dilapidated condition and after its demolition fresh construction shall be made.

24) The judgment and order passed by the appellate court suffers from apparent illegality and cannot be sustained. In view of the observation made above, the impugned order dated 12.08.2004 being not sustainable in law is hereby set aside.

25) The writ petition succeeds and is allowed. It is, however, directed that the opposite parties shall vacate the disputed premises/shop within the period specified by the prescribed authority under the order dated 18.05.1996.

(2019)10ILR A 1143

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

FAFO No. 3189 of 2003
&
FAFO No. 3188 of 2003

Smt. Bitti & Ors. ...Appellants
Versus
Abdul Farookh @ Kallu & Anr. ...Respondents

Counsel for the Appellants:
Sri R.K. Porwal

Counsel for the Respondents:
Sri Nripendra Misra

A. Motor Accident Claim -Composite Negligence-Apportionment of compensation-Apportionment of compensation between two tort feasors vis a vis the claimant is not permissible - Claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation - as liability of joint tort feasors is joint and several. (Para 13)

B. Motor Accident Claim - Extent of composite negligence - Not appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles - Joint tort feasor, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award. (Para 13)

C. Motor Accident Claim – Negligence - Negligent act must contribute to the accident having taken place - Insurance company failed to prove that accident occurred due to carrying of person as pillion rider, cannot be benefited. (Para 11)

Appeal Partly allowed (E-5)

List of cases cited: -

1.Pawan Kumar & anr. Vs M/S Harkishan Dass Mohan Lal & ors. (SC) decided on 29 January, 2014

2.Archit Saini & anr. Vs Oriental Insurance Company Ltd. AIR 2018 SC 1143

3.Khenyei Vs New India Assurance Company Ltd. & ors. 2015 Law Suit (SC) 469

4.National Insurance Co. Ltd. Vs Challa Bharathamma & ors. reported in [2004 (8) SCC 517]

5.Bithika Mazumdar Vs Sagar Pal (2017) 2 SCC 748

6. Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. F.A.F.O No. 1818 of 2012 decided on 19.7.2016

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri R.K. Porwal, learned counsel for the appellants for the appeals and Sri Nripendra Misra, learned counsel for the respondents in both the appeals.

2. Both these appeals, at the behest of the claimants, challenges the judgment and award dated 30.09.2003 passed by Motor Accident Claims Tribunal/Special Judge (E.C.) Act, Etawah (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 45 of 2000 and M.A.C.P. No.44 of 2000.

3. Brief facts of the litigation are that on 28.11.1999 at about 05 p.m. on Mathura Agra road near village Mahuaa the deceased was plying his scooter bearing No. D.L. 8 C 3277 and Prem Singh and his minor son were going at that time a Tata Sumo Bearing No. M.P. 7 H 4155 coming from Agra driven rashly and negligently drag with the scooter. Jagmohan and his son met with serious

injuries and during the treatment they summoned to the death. F.I.R. was lodged charge sheet was led against the driver of Tata Sumo. The owner of the driver of Tara sumo did not appear and qua them the litigation proceeded ex-parte. The insurance company took its defence contending that on the scooter there were three persons plying the scooter. The vehicle though was insured with them there was breach of policy condition.

4. The Tribunal framed four issues in both the matters and rejected both the claim petitions holding the driver of the scooter solely responsible for the accident. It is this finding of fact which is assailed by the appellants.

5. It would be necessary for us to decide the question of negligence as for the pillion rider it was a case of composite negligence and that it is submitted that the scooter driver was driving the scooter on its correct side as he had to cross the divider and as he had to go in the same lane as the side which was his correct side the site map shows that it was Tata Sumo which came on its extreme right and the accident was so grave that the driver and the pillion driver met with serious injuries and therefore it cannot be said that the driver of the scooter was negligent. It is further submitted that the driver of the sumo did not step into the witness box.

6. The principle of negligence enunciated here in below will have to be looked into as the Insurance company in memo of appeal has come with the stand that there was a head on collision and it was a case of contributory negligence and, therefore, there is error apparent on the face of record and erred in not framing any issue on that count.

7. The concept of contributory negligence has been time and again evolved, decided and discussed by the courts.

8. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of *"res ipsa loquitur"* meaning thereby "the things speak for itself" would apply.

9. The term contributory negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. The Apex Court in **Pawan Kumar & Anr vs M/S Harkishan Dass Mohan Lal & Ors** decided on 29 January, 2014 has held as follows:

7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7

of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:

"6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

10. The Division Bench of this Court in **F.A.F.O No. 1818 of 2012 (Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 which has held as under:

"17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also

provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).***

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."

11. The insurance company has failed to prove that accident occurred due to carrying of person as pillion rider. In absence of such a finding, the insurance company having not proved factum of negligence on the part of the scooterist, cannot be benefited. The negligent act must contribute to the accident having taken place. The Apex Court recently has considered the principles of negligence in case of **Archit Saini and Another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143.**

12. The Apex Court in **Khenyei Vs. New India Assurance Company**

Limited & Others, 2015 Law Suit (SC) 469 has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

13. The Apex Court in **National Insurance Co. Ltd. Vs Challa Bharathamma & Ors** reported in **[2004 (8) SCC 517]** has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent

of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

emphasis added

14. While going through the record it is clear that the Tribunal has materially erred in coming to the conclusion that the driver of the scooter was driving the scooter in rash and negligent manner. The reasoning given are not germane and are not proved by the driver of the Tata Sumo while seeing the site plan it is clear that the correct side of the scooter was the one where he was driving, though the road is divided by divider the side which was the correct side was not open to public and the scooter driver and other vehicles had to ply the vehicles on the side where the deceased was driving the said scooter. In this case the driver of the Tata Sumo has been charge sheeted. He has not stepped into the witness box and the impact shows that the scooterist was 10 per cent negligent. The Tata Sumo was trying to overtake another vehicle which is clear from evidence. The Sumo tried to overtake came on the right side which was not meant for it and that is how the accident occurred. There is no rebuttal evidence and therefore also this court while relying on the site plan and the judgment in **Archit Saini and Another (supra)** holds that the driver of the Tata Sumo who caused the fatal accident was the main author of the accident having taken place whereby two persons died which shows the impact with which Tata Sumo must have dashed the scooter hence the driver of Tata Sumo is held to be 90 percent negligent.

15. In view of the judgment in the case of F.A.F.O. No.534 of 1995 **(Brahma Dutta Sharma Vs. Umesh Sharma and Others)** decided on 30.01.2019 wherein para 14 , it has been held as follows:

"14. The finding of the Tribunal are perverse. The tempo being a bigger vehicle as no legal evidence has been produced to show that the claimant had contributed to the accident. Tribunal has not given proper reasons for holding him negligent whether he had taken permission to come Jhansi or not is of no relevance and it has not been brought on record that because he has left place of service, he was negligent. The conclusive proof negligence is of against the tempo driver, therefore, the tribunal committed manifest error in holding the appellant first contributory negligent and coupling with no proper reply for leaving the head quarter. There is no evidence about the motorcycle being driven negligently by the appellant at the time of accident. The Respondent did not produce any such evidence and there is a charge sheet against the tempo driver which prima-facie pointed towards the negligence of the appellant. Thus the finding of contributory negligence cannot be sustained. I am supported in my view in Mangla Ram Versus Oriental Insurance Company Limited, (2018) 5 SCC 656. "

16. Holding that the claim petitions were wrongly dismissed. The question is should this court remand the matter to the tribunal or decide the same here as the record is before this court while going though the judgment it is clear that the tribunal had calculated what would be the compensation available in M.A.C.P. No.44 of 2000 and 45 of 2000 but as the petitions being rejected no amount of compensation was ordered to be paid by any of the respondents holding that the claimants could file claim petitions for recovery against the owner and driver of the scooter though for the pillion rider it was a case of composite negligence.

17. In view of **Bithika Mazumdar Vs. Sagar Pal (2017) 2 SCC 748** wherein it has been held that compensation claim petition which remained undecided for nine years and the record was before the Apex Court, the Apex Court decided the quantum.

Similarly, this court feels that as sixteen years have elapsed from filing of claim appeal and that the record is before this court instead of directing the parties to go before the tribunal only for the **re-assessmen**t of compensation which could cause further delay and will also cause further loss to the destitute family. This court in **Brahma Dutta Sharma Vs. Umesh Sharma and Others (supra)** has taken similar view and therefore I without remanding the matter as the principles for determination of compensation are well settled venture to recalculate the amount of compensation to be paid to the appellants in both these appeals decide the compensation here."

18. It is submitted by learned counsel for the appellant that the Tribunal has though wanted to reject the claim petition has considered and decided on quantum the income in Claim Petition No.44 of 2000 and 45 of 2000 of the deceased to be Rs. 2,000/- per month and has held that sum of Rs.4,08,000/- for loss of income in case of Bitti and has added another Rs.5,000/- in case of deceased Prem Singh. Law as it held that deceased driver of scooter negligent rejected both the claim petitions.

19. In case of Jagmohan his income has been considered to Rs.3,000/- as the deceased had a shop of preparing sweet in Delhi and has deducted 1/3 and granted a sum of Rs.4,32,000/- as the deceased was 25 years of age.

20. The amount is being re-evaluated in both the matters. The accident occurred in the year 2000. The income of the deceased in both the matters can be safely considered to be Rs.3,000/- as considered by the Tribunal however a sum of Rs.12,000/- will have to be added. Hence, the amount would be Rs.4,200/- per month. 1/3 will have to be deducted hence the amount available to the family would be Rs.3,000/- per month meaning thereby Rs.36,000 x 17 +40,000= 6,52,000/- in case of F.A.F.O No. 3189 of 2003 and in F.A.F.O. No. 3188 of 2003 Rs.36,000X18=40,000=6,88,000/-.

21. However, the rate of interest which is 6% would be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate

of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

22. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be calculated and deposited with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount be deposited within a period of 12 weeks from today.

23. As far as the claimants of F.A.F,O No.3189 of 2003 who are the heirs of Prem Singh and who had preferred M.A.C.P. No. 45 of 2000 can recover the amount from any of the tort-fessor as Prem Singh was a pillion rider and the insurance company may recover 10 per cent from the insurance company and owner of the scooter. F.A.F. No. 3188 of 2003 the owner and the insurance company of the Tatasumo to deposit 90 per cent of the awarded amount as driver Jagmohan is held to be 10 per cent negligent and that amount will have to be deducted.

24. The record and proceedings be send back to the Tribunal forthwith.

(2019)10ILR A 1151

APPELLATE JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 26.09.2019

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE MANISH MATHUR, J.

Income Tax Appeal No. 37 of 2017

Commissioner of Income Tax Exemption U.P. State Cons. & Infra. ...Appellant
Versus
M/s Reham Foundation Kandhari Lane Lal Bagh Lucknow ...Respondent

Counsel for the Appellant:
Sri Manish Mishra

Counsel for the Respondent:
Sri Sidharth Dhaon

A. Income Tax Act, 1961- Sections 11, 12, 12 AA, 254, 260 (A) - Tribunal can pass order directing Commissioner to grant registration, if satisfied with the material already on record - To decide contradictory views of regarding the issue - whether Income Tax Appellate Tribunal while hearing Appeal in a matter where registration U/S 12 AA has been denied by Commissioner, can itself pass an order directing Commissioner to grant registration or should leave the matter to be considered afresh by Commissioner, giving rise to further litigation - matter has been referred to Full Bench- Answering the reference, the High Court held-An appeal before the Tribunal is a continuation of original proceedings-The words "as it thinks fit" used in relation to the power of the Income Tax Appellate Tribunal in Section 254(1) are of widest amplitude and confer very wide jurisdiction on the appellate authority- Where the words of Statute are clear without any ambiguity, there is no scope for the courts to

innovate or alter statutory provisions by breathing into the provision words which have not been incorporated by the legislature. (Para 12, 13, 17, 18, 19 & 20)

B. Income Tax Act, 1961-Section 254 and Section 12(AA) - Power of Appellate Tribunal are co-extensive with the power of the Commissioner u/s 12 (AA) - Powers given under S. 254 have to be read along with other provisions of the Income Tax Act - Section 12AA requires satisfaction about the genuineness of the activities and the object of the Trust to be recorded before its registration. (Para 23 & 31)

C. Remand would be necessary when Tribunal records satisfaction on the basis of material not available before the Commissioner and where the application has been rejected on technical ground. (Para 31)

Reference before Full Bench vide order dated 18.01.2019, passed by Division Bench in the case of Commissioner of Income Tax Exemption U.P. State Construction and Infrastructure Vs. M/s Reham Foundation Kandhari Lane, Lal Bagh, Lucknow.

Income tax disposed of (E-4)

Precedent followed: -

1. Shiv Shakti Coopve. Housing Society Vs Swaraj Developers & ors., (2003) 6 SCC 59 (Paras 12, 16)

2. Bharat Aluminium Co. Vs Kaiser Aluminium Technical Services Ltd. Inc., (2012) 9 SCC 552 (Para 14)

3. Commissioner of Customs (Import) Vs Dileep Kumar & Co. & ors., (2018) 9 SCC 1 (Para 15)

4. Babu Lal Nagar Vs Shri Synthetics Ltd. & ors., (1984) Supp. SCC 128 (Para 19)

5. Clariant International Ltd. & anr. Vs Securities & Exchange Board of India, (2004) 8 SCC 524 (Para 21)

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

1. This Full Bench has been constituted in terms of the reference order dated 18.01.2019 passed by Division Bench in the case of ***Commissioner of Income Tax Exemption U.P. State Construction and Infrastructure vs. M/s. Reham Foundation Kandhari Lane, Behind Islamia College, Lal Bagh, Lucknow*** vide order dated 18.01.2019. The questions referred are as folllows:-

"(i) Whether Income Tax Appellate Tribunal while hearing Appeal in a matter where registration under Section 12AA has been denied by Commissioner Income Tax can itself pass an order directing Commissioner to grant registration or should leave the matter to be considered by Commissioner Income Tax to consider matter afresh giving rise to further litigation in the matter;

(ii) Whether co-extensive Appellate jurisdiction conferred upon Income Tax Appellate Tribunal being a last court of fact can be read to confer upon it similar powers as been exercised by authorities below whose orders are considered in Appeals by Tribunal."

2. It was on an Appeal preferred by the Revenue under Section 260 (A) of Income Tax Act, 1961 *(hereinafter referred to as "the Act of 1961')*. The Appeal was preferred to challenge the order of the Income Tax Appellate Tribunal, which directed registration of the Trust under Section 12AA (1)(b) of the Act of 1961 within a period of sixty days, failing which it would deemed to have been registered. The challenge to said direction was made by the Revenue in reference to the judgment of the Division Bench in Income Tax Appeal No. 112 of 2013: Commissioner of

Income Tax, Meerut vs. M/S. A.R. Trust Meerut decided on 04.09.2017 wherein it was held that the Income Tax Appellate Tribunal itself cannot direct for registration of a Trust, without recording satisfaction, as contemplated under Section 12AA of the Act of 1961.

3. Learned counsel for the Revenue submits that power for registration of a Trust or an Institution under Section 12AA of the Act of 1961 has been given to the Commissioner. Those powers cannot be exercised by the Tribunal. If at all on the scrutiny of the case in Appeal, a case is made out for registration of a Trust, it needs to be remanded back to the Commissioner. The direction for registration of the Trust under Section 12AA of the Act of 1961 cannot be given by the Tribunal itself. It is for the reason that registration of the Trust under Section 12AA of the Act of 1961 is subject to the satisfaction of the Commissioner about the genuineness of activities of the Trust. In absence of recording of satisfaction of the Commissioner about the object and activities of a Trust, a direction for registration would be illegal. It is for that reason alone, the Division Bench of this Court in the case of M/s. A.R. Trust Meerut (supra) caused interference in the order of the Tribunal, where direction was given for registration of the Trust within a period of sixty days.

4. In the subsequent judgment in the case of M/s. Yamuna Expressway Industrial Development Autority (supra), a divergent view was taken by the Court. If a direction for registration of a Trust is given without recording satisfaction, it would be opposed to Section 12AA of the Act of 1961. The prayer is accordingly to answer the Reference against the assessee and in favour of the Revenue. It is after holding that the Appellate Tribunal is not competent to direct for registration of a Trust under Section 12AA of the Act of 1961, rather it should remand the case to the Commissioner for the aforesaid.

5. The argument raised by learned counsel for the Revenue has been opposed by learned counsel appearing for the assessee. It is submitted that after the rejection of an application for registration of a Trust under Section 12AA of the Act of 1961, if refusal is without considering any material, then on Appeal, after considering the issue and recording satisfaction, the Tribunal can direct for registration of the Trust. It is not only for the reason that such power exists with the Tribunal pursuant to Section 254 of the Act of 1961 but even to take the order of the Tribunal to its logical conclusions.

6. It is stated that if application for registration is rejected by the Commissioner after recording a perverse finding then on an Appeal, it can be corrected after taking a proper view and recording satisfaction, as required under Section 12AA of the Act of 1961, to direct for registration of the Trust. If the required satisfaction is recorded by the Appellate Tribunal, then remand of the matter would be nothing but an empty formality, as the Commissioner cannot take a view different then taken by the Appellate Tribunal. The registration of the Trust needs to be granted if the Appeal is allowed by the Tribunal after recording its satisfaction, as required under Section 12AA of the Act of 1961. In view of above, the Tribunal can itself issue a direction for registration of the Trust. The

Tribunal can even remand the case in given circumstance when the Commissioner has rejected the application on hyper technical grounds and interference therein is made. The matter can be remanded back to the Commissioner to record its satisfaction, as required under Section 12AA of the Act of 1961. In view of above, the adjudication of the issue before the Tribunal can be with a direction to register the Trust under Section 12AA of the Act of 1961 or remand of the case. The prayer is to answer the Reference holding that Tribunal is having powers to direct for registration of a Trust under Section 12AA of the Act of 1961 or to remand the case to the Commissioner to record its satisfaction, as required under the Act. The direction of the Tribunal for registration of the Trust would however to be on recording such satisfaction and not otherwise. The prayer is accordingly to answer the Reference by holding that Appellate Tribunal is having the power to direct for registration of the Trust or alternatively to remand the case to the commissioner.

7. In counter, the counsel for the assessee has relied upon the judgment of Division Bench in the case of Income Tax Appeal No. 107 of 2016: Commissioner of Income Tax (Exemption), Lucknow vs. M/s. Yamuna Expressway Industrial Development Authority, decided on 21.04.2017. In the said case, the Division Bench held that powers of the Tribunal are co-extensive to that of the Commissioner under Section 12AA of the Act of 1961. Thus, it can direct for registration of a Trust/Institution. A reference of Section 254 of the Act of 1961 was given to show power of the Tribunal. The Division Bench therein found the Tribunal to be competent to direct for registration of a Trust. Taking into consideration the conflicting view, now we need to decide the questions raised before us and otherwise quoted herein above.

8. We have considered the rival submission of the parties and perused the record.

9. The issue before the larger Bench is in reference to Section 12AA of the Act of 1961, thus, it would be gainful to refer the provisions aforesaid. It is quoted hereunder for ready reference:-

"Procedure for registration.

12AA. *(1) The Principal Commissioner or Commissioner, on receipt of an application for registration of a Trust or institution made under clause (a) or clause (aa) or clause (ab) of sub-section (1) of Section 12A, shall--*

(a) call for such documents or information from the Trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the Trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) after satisfying himself about the objects of the Trust or institution and the genuineness of its activities, he--

(i) shall pass an order in writing registering the Trust or institution;

(ii) shall, if he is not so satisfied, pass an order in writing refusing to register the Trust or institution,

and a copy of such order shall be sent to the applicant:

Provided *that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.*

(1A) All applications, pending before the Principal Chief Commissioner or Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Principal Commissioner or Commissioner and the Principal Commissioner or Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six months from the end of the month in which the application was received under clause (a) or clause (aa) or clause (ab) of sub-section (1) of section 12A.

(3) Where a Trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)] and subsequently the Principal Commissioner or Commissioner is satisfied that the activities of such Trust or institution are not genuine or are not being carried out in accordance with the objects of the Trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such Trust or institution:

***Provided** that no order under this sub-section shall be passed unless such Trust or institution has been given a reasonable opportunity of being heard.*

(4) Without prejudice to the provisions of sub-section (3), where a Trust or an institution has been granted registration under clause (b) of sub-section (1) or has obtained registration at any time under section 12A [as it stood before its amendment by the Finance (No. 2) Act, 1996 (33 of 1996)] and subsequently it is noticed that the activities of the Trust or the institution are being carried out in a manner that the provisions of sections 11 and and 12 do not apply to exclude either whole or any part of the income of such Trust or institution due to operation of sub-section (1) of section 13; then the Principal Commissioner or the Commissioner may, by an order in writing, cancel the registration of such Trust or institution:

***Provided** that the registration shall not be cancelled under this sub-section, if the Trust or institution proves that there was a reasonable cause for the activities to be carried out in the said manner."*

10. A perusal of Section 12AA of the Income Tax Act shows that the Principal Commissioner or the Commissioner, on receipt of an application for registration of a Trust or an institution, may call for such document or information as he thinks necessary to satisfy himself about the genuineness of the activities of the Trust or the Institution, as it deems necessary. After calling for such an information and satisfying himself about the object and genuineness of the activities of the Trust, he shall pass an order for registering the Trust or the Institution or in the alternate, refuse such registration. In view of the aforesaid provision, the registration of the Trust is subject to satisfaction of the Commissioner, not only over the genuineness of the activities of the Trust, but also about the objects of the Trust or the Institution. In view of above, the registration of the Trust requires

satisfaction of the Commissioner. In case the Commissioner is satisfied with the genuineness of the activities and even the objects, he can register the Trust under Section 12AA of the Act of 1961 and in case the Commissioner is not satisfied or refuses registration, then the Appeal lies to the Tribunal to challenge such order under Section 254 of the Act, 1961.

11. In such case, the Appellate Tribunal needs to adjudicate the issue raised before it because it is the last court of facts. The exemption under Sections 11 & 12 of the Act of 1961 can be sought only after registration of the Trust, thus satisfaction of the Commissioner before registration has been given importance. In view of above, the argument of the learned counsel for the Revenue is that unless such a satisfaction, as envisaged under Section 12AA of the Act of 1961 is recorded by the Commissioner, a direction for its registration should not be given by the Tribunal. As against the aforesaid, the argument of learned counsel for the assessee is that if Tribunal is satisfied about the genuineness of the activities and the object then it can direct for registration.

12. Hon'ble the Supreme Court in case of **Shiv Shakti Cooperative Housing Society versus Swaraj Developers and others** reported in (2003) 6 SCC 659 has considered the scope of an Appeal although in terms of Sections 96 and 100 of the Code of Civil Procedure, 1908 but the basic premise culled out from the pronouncement of Hon'ble the Supreme Court is that an Appeal is essentially continuation of original proceedings which is provided for only by statute and is not a necessary part of procedure in an action. The relevant paragraphs of the judgment is as follows:-

16. *An Appeal is essentially continuation of the original proceedings and the provisions applied at the time of institution of the suit are to be operative even in respect of the Appeals. That is because there is a vested right in the litigant to avail the remedy of an Appeal. As was observed in K. Kapen Chako v. Provident Investment Co. (P) Ltd. [(1977) 1 SCC 593 : AIR 1976 SC 2610] only in cases where vested rights are involved, a legislation has to be interpreted to mean as one affecting such right to be prospectively operative. The right of Appeal is only by statute. It is (sic not a) necessary part of the procedure in an action, but "the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. It seems absurd to denominate this paramount right part of the practice of the inferior Tribunal". (Per Lord Westbury, See: Attorney General v. Sillem [33 LJ Ex 209 : 10 LT 434 : 10 HLC 704, 724 : 11 ER 1200] , ER p. 1209.) The Appeal, strictly so called, is "one in which the question is, whether the order of the court from which the Appeal is brought was right on the materials which that court had before it" (Per Lord Devuil Ponnammal v. Arumogam [1905 AC 383, 390] . The right of Appeal, where it exists, is a matter of substance and not of procedure (Colonial Sugar Refining Co. v. Irving [1905 AC 369 : (1904-07) All ER Rep Ext 1620 : 92 LT 738 (PC)])."*

*"**17.** Right of Appeal is statutory. Right of Appeal inhered in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of*

Appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, Appeal requires so. As was observed in State of Kerala v. K.M. Charia Abdulla and Co. [AIR 1965 SC 1585] the distinction between right of Appeal and revision is based on differences implicit in the two expressions. An Appeal is continuation of the proceedings; in effect the entire proceedings are before the Appellate Authority and it has the power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four Judge Bench in Hari Shankar v. Rao Girdhari Lal Chowdhury [AIR 1963 SC 698] that the distinction between an Appeal and a revision is a real one. A right of Appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of Appeal limits the rehearing in some way, as has been done in second Appeals arising under the Code. The power of hearing revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone."

13. With regard to interpretation of statute, it is settled law that statute is an edict of the legislature and where the words of statute are clear without any ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of altering the statutory provisions by breathing into the provisions, words which have not been expressly incorporated by the legislature.

14. It is only in case where the words of statute are ambiguous or a reading of which clearly indicates that it is a case of 'casus omissus' that the court can interpret the provisions incorporated in statute. Hon'ble the Supreme court referring to various pronouncements in the case of **Bharat Aluminium Company versus Kaiser Aluminium Technical Services Inc.** reported in (2012) 9 SCC 552 has held that the court must proceed on the footing that the legislature intended what it has said. Even where there is a 'casus omissus' it is for the others than the courts to remedy the defect. The relevant paragraph in the case of Bharat Aluminium Company (supra) is as follows:-

*"**65.** Mr Sorabjee has also rightly pointed out the observations made by Lord Diplock in Duport Steels Ltd. [(1980) 1 WLR 142 : (1980) 1 All ER 529 (HL)] In the aforesaid judgment, the House of Lords disapproved the approach adopted by the Court of Appeal in discerning the intention of the legislature; it is observed that: (WLR p. 157 C-D)*

"... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an

excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our Constitution it is Parliament's opinion on these matters that is paramount."

(emphasis supplied)

In the same judgment, it is further observed: (WLR p. 157 F)

"... But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts...."

(emphasis supplied)"

15. With regard to taxing statute, it has been held that the courts have to apply strict rule of interpretation. When the competent legislature mandates taxing certain person/certain objects in certain circumstances, it can not be expanded/interpreted to include those, which were not intended by the legislature. The aforesaid has been held by Hon'ble the Supreme Court in the case of **Commissioner of Customs (Import) Mumbai versus Dilip Kumar and Company and others** reported in (2018) 9 SCC 1. The relevant paragraphs in the aforesaid judgment of Dilip Kumar and Company and others(supra) is as follows:-

*"**21.** The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the legislature."*

*"**24.** In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [**"265. Taxes not to be imposed save by authority of law.--** No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature."*

*"**25.** At the outset, we must clarify the position of "plain meaning rule or clear and unambiguous rule" with respect to tax law. "The plain meaning rule" suggests that when the language in the statute is plain and unambiguous, the court has to read and understand the plain language as such, and there is no scope for any interpretation. This salutary maxim flows from the phrase "cum inverbis nulla ambiguitas est, non debet admitti voluntatis quaestio". Following such maxim, the courts sometimes have made strict interpretation subordinate to the plain meaning rule [Mangalore Chemicals and Fertilisers Ltd. v. CCT, 1992 Supp (1) SCC 21] , though strict*

interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilise strict interpretation in the event of ambiguity is self-contradictory."

16. The principles with regard to 'casus omissus' and its implementation have also been dealt with by Hon'ble the Supreme Court in the case of Shiv Shakti Cooperative Housing Society (supra) in which the relevant paragraphs are as follows:-

*"**19.** It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse [(1997) 6 SCC 312 : AIR 1998 SC 74] .) The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner [(1846) 6 Moo PCC 1 : 4 MIA 179] courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai Nathjibhai Patel [(1998) 3 SCC 234 : 1998 SCC (Cri) 737 : JT (1998) 2 SC 253] .) It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See Stock v. Frank Jones (Tipton) Ltd. [(1978) 1 All ER 948 : (1978) 1 WLR 231 (HL)]] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. v. Evans [1910 AC 444 : 1910 WN 161 (HL)] , quoted in Jumma Masjid v. Kodimaniandra Deviah [AIR 1962 SC 847] .)"*

*"**23.** Two principles of construction -- one relating to casus omissus and the other in regard to reading the statute as a whole -- appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J. in Artemiou v.*

Procopiou [(1966) 1 QB 878 : (1965) 3 All ER 539 : (1965) 3 WLR 1011 (CA)] (All ER p. 544 I), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. Per Lord Reid in Luke v. IRC [1963 AC 557 : (1963) 1 All ER 655 : (1963) 2 WLR 559 (HL)] where at AC p. 577 (All ER p. 664 I) he also observed: "This is not a new problem, though our standard of drafting is such that it rarely emerges."

17. A conspectus of the aforesaid judgments make it amply clear that statutory interpretation particularly with regard to taxing statutes has to be strict and only in accordance with the unambiguous words used in the statute. The intention of the legislature in incorporating or leaving out certain words is necessarily required to be seen.

18. The words 'as it thinks fit' used in relation to the powers of the Appellate Tribunal exercisable under Section 254(1) of the Act, 1961 is of the widest amplitude. The said expression confers a very wide jurisdiction enabling the Appellate authority to take an entirely different view on the same set of facts.

19. The terminology ' as it thinks fit' in relation to the powers of the Appellate authority have been considered by Hon'ble the Supreme Court in the case of **Babu Lal Nagar versus Shree Synthetics Limited and others** reported in 1984 (supp) SCC 128. The relevant paragraph of the judgment is as follows:

*"**16.** Section 66(1) of the Act provides that the Industrial Court omitting the portion not relevant for the present purpose, may call for and examine the record of such case and pass order in reference thereto as it thinks fit. If the Industrial Court has the jurisdiction to pass any order in reference to a case called for by it as it thinks fit, obviously it can come to a conclusion on the same set of facts different from the one to which the Labour Court had arrived. It was however urged that this jurisdiction of wide amplitude has been cut down by the proviso which provides that the Industrial Court shall not vary or reverse any order of the Labour Court under Section 66(1) unless -- (i) it is satisfied that the Labour Court has -- (a) exercised jurisdiction not vested in it by law; or (b) failed to exercise a jurisdiction so vested; or (c) acted in exercise of its jurisdiction illegally or with material irregularity. It was urged that these clauses so circumscribe and cut down the jurisdiction of the Industrial Court under Section 66 as to be on par with Section 115 of the Code of Civil Procedure. The main part of Section 61 (sic 66) clearly spells out the jurisdiction of the Industrial Court to pass any order in reference to the case brought before it as it thinks fit. The expression "as it thinks fit" confers a very wide jurisdiction enabling it to take an entirely different view on the same set of facts. The expression "as it thinks fit" has the same connotation, unless context otherwise indicates, "as he deems fit" and the latter expression was interpreted by this Court in Raja Ram Mahadev Paranjype v. Aba Maruti Mali [AIR 1962 SC 753 : 1962 Supp (1) SCR 739] to mean to make an order in terms of the statute, an order which would give effect to a right which the Act has elsewhere*

conferred. Is this jurisdiction so circumscribed as to bring it on par with Section 115 of the Code of Civil Procedure? Proviso does cut down the ambit of the main provision but it cannot be interpreted to denude the main provision of any efficacy and reduce it to a paper provision. Both must be so interpreted as to permit interference which if not undertaken there would be miscarriage of justice. Sub-clause (c) of the first proviso to Section 66(1) will permit the Industrial Court to interfere with the order made by the Labour Court, if the Labour Court has acted with material irregularity in disposal of the dispute before it. If the finding recorded by the Labour Court is such to which no reasonable man can arrive, obviously, the Industrial Court in exercise of its revisional jurisdiction would be entitled to interfere with the same even if patent jurisdictional error is not pointed out."

20. Upon a perusal of the powers of the Appellate authority as indicated in section 254(1) of the Act, 1961, it can be seen that the widest jurisdiction has been conferred upon the Appellate authority in the wisdom of the legislature. The said power has not been proscribed in any manner whatsoever.

21. Hon'ble the Supreme Court in the case of **Clariant International Limited and another versus Securities and Exchange Board of India** reported in (2004) 8 SCC 524 has held that once the jurisdiction of the Appellate authority is not fettered by statute, it exercises all the jurisdiction. It has also been held that the limits to jurisdiction of the Appellate authority would have been stated explicitly in the statute had that been the intention of legislature.

The relevant paragraphs of the judgment in the case of Clariant International Limited (supra) are as follows;-

*"**73.** Had the intention of Parliament been to limit the jurisdiction of the Tribunal, it could say so explicitly as it has been done in terms of Section 15-Z of the Act whereby the jurisdiction of this Court to hear the Appeal is limited to the question of law."*

*"**74.** The jurisdiction of the Appellate Authority under the Act is not in any way fettered by the statute and, thus, it exercises all the jurisdiction as that of the Board. It can exercise its discretionary jurisdiction in the same manner as the Board."*

22. In view of the aforesaid judgments of Hon'ble the Supreme Court, it is clearly evident that the provisions of the Act 1961 have to be interpreted strictly in accordance with what it explicitly states. Once the legislature in its wisdom has not fettered the jurisdiction of the Appellate Tribunal, it would not be appropriate for the courts to put fetters upon such jurisdiction since doing so would amount to doing violence to the specific provisions of statute.

23. A perusal of Section 254 of the Act of 1961 shows that the Appellate Tribunal is given power to pass such orders, as it thinks fit. The powers given under Section 254 of the Act of 1961 is to be read along with other provisions of the Act. Section 12AA of the Act of 1961 requires satisfaction about the genuineness of the activities and the objects of a Trust before its registration by the Commissioner. The arguments of learned counsel for Revenue in reference

to the requirement of satisfaction on the genuineness of activities of a Trust is to be exercised by the Commissioner and that the Tribunal should not direct registration of Trust unless satisfaction, as envisaged under Section 12 (AA) of the Act, 1961 is recorded, is only partly correct.

24. Upon consideration of the judgments referred to herein above, we are of the considered opinion that in case where the Commissioner has refused to accept the application for registration of Trust after recording its finding on the basis of material on record before him holding that the activities and object of the Trust are not genuine and the Appellate Tribunal on the basis of the same material on record comes to the conclusion that the order of the Commissioner is perverse since it has been passed ignoring, misconstruing or misinterpreting such evidence, then it can direct registration of the Trust without remanding the matter to the Commissioner.

25. Remand of the case to the Commissioner in the said circumstance after recording of satisfaction by the Appellate Tribunal about the genuineness of objects and activities of the Trust, on the basis of material on record, would be an empty formality because the Commissioner in such a case can not go against the specific finding recorded by the Appellate Tribunal.

26. In view of the unfettered power of the Appellate Tribunal in terms of section 254 (1) of the Act, 1961 the Tribunal can very well record its satisfaction on the genuineness of the activities and object of the Trust and can very well direct registration of the Trust without remand of case to the Commissioner in case such satisfaction is recorded on the basis of documents and material already available on record at the stage of examination by Commissioner.

27. However it would be a different matter where the Appellate Tribunal records such satisfaction on the basis of material or documentary evidence which was not available before the Commissioner while exercising his powers under Section 12 (AA) of the Act, 1961, which is our opinion would require remand.

28. Remand to the Commissioner can also be affected in a case where the Commissioner rejects the application on a technical ground without recording its opinion on facts or genuineness of the activities and object of the Trust but the Tribunal finds ground for rejection on such technical ground thereby reopening the issue of recording satisfaction in terms of Section 12 (AA) of the Act, 1961.

29. In view of the aforesaid discussion, it is clear that the power and jurisdiction of the Appellate Tribunal under Section 254(1) of the Act, 1961 is unfettered thereby enabling the Appellate Tribunal to direct registration of the Trust at its level itself but the same is not open as a matter of course and such power is to be exercised only in circumstances indicated herein above.

30. The said onus on the Appellate Tribunal to remand the matter in cases indicated herein above is also in view of the strict interpretation of the powers of the Commissioner under Section 12 (AA) of the Act, 1961 because if the Appellate

Tribunal is given such wide powers to direct registration of Trust in all or any circumstances, it would render the provisions of Section 12(AA) otiose, which again can not be the intention of legislature.

31. In view of the above the answer to questions referred are answered as under:-

(i) The income tax Appellate Tribunal while hearing an Appeal under Section 254(1) in a matter where registration under Section 12(AA) has been denied by Commissioner income tax can itself pass an order directing commissioner to grant registration in case the income tax Appellate Tribunal disagrees with the satisfaction of the Commissioner on the basis of material already on record before the Commissioner.

However the said power is not to be exercised as a matter of course and that remand to the Commissioner income tax is to be made where the income tax Appellate Tribunal records a divergent view on the basis of material which has been filed before the Appellate Tribunal for the first time.

Remand for determination of question regarding grant of registration to a Trust would also be necessitated in cases where the registration application has been rejected by the Commissioner income tax on technical grounds without recording his satisfaction as contemplated under Section 12 (AA) of the Act, 1961 and such decision is overturned by the income tax Appellate Tribunal.

(ii) The power of the Appellate Tribunal are co-extensive with the power of the Commissioner under Section 12 (AA) of the Act, 1961 subject to what has been indicated herein above. However order for registration can be issued only after recording satisfaction with regard to genuineness of activities of the Trust as provided under Section 12 (AA) of the Act, 1961.

32. In view of the aforesaid the reference is answered.

33. The Registry is directed to place Appeals before the appropriate court dealing with the matter.

(2019)10ILR A 1163

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2019

BEFORE

THE HON'BLE MANISH MATHUR, J.

Rent Control No. 3685 of 2019

Maseehamasi Farookhi ...Petitioner
Versus
Jainul Islaam @ Gop & Ors.
...Respondents

Counsel for the Petitioner:
Sri Ravi Nath Tilhari

Counsel for the Respondents:
Sri Ishwar Dutt Shukla, Sri Priyam Mehrotra, Sri Santosh Kumar Mehrotra

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972- SCC Suit for arrears of rent, damages and ejectment of tenant- SCC Revision under Section 25 of the Provincial Small Cause Courts Act, 1887 - application under Order 15 Rule 5 CPC - striking off defence on failure to deposit admitted rent etc. (Para 3,4 ,7 & 23)

Held:- The power to strike off defence is

discretionary at the instance of court concerned and that it is not mandatory for the court to automatically allow the application for striking off defence - mere failure to pay rent on part of tenant is not enough to justify an order striking off defence and it is only a wilful failure or deliberate default that can call for exercise of the extra ordinary power vested in court. The defence has been struck off - default in deposit of admitted amount of rent as contemplated under second part of Order 15 Rule 5 C.P.C. was continuous - explanation of illness given by tenant-opposite party without adequate evidence to corroborate the same would definitely fall within the meaning of wilful default. The revisional court without interfering with the findings of fact recorded by the trial court erred in law in setting aside the order of trial court for striking off defence. (Para 33 ,34, 35)

Writ Petition allowed (E-7)

List of Cases Cited: -

1. Bal Gopal Maheshwari & ors. Vs Sanjeev Kumar Gupta (2013) 8 SCC 719

2. Trilok Singh Chauhan Vs Ram Lal (Dead) through LRs & ors. (2018) 2 SCC 566

3. Bimal Chand Jain Vs Gopal Agarwa (1981) 3 SCC 486

4. Haider Abbas Vs Addl. Distt. Judge (Court No.3) Ald. & ors. (2006) 1 ARC 341

5. Shailendra Sharma & anr. Vs Amit Bansal (Dr.) (2017) 5 ADJ 239

6. Shailendra Sharma & Vs Dr.amit Bansal (2017) 35 LCD 1521

7. Rajendra Kumar Verma & anr. Vs Padma Jindal & anr. (2006) 1 ARC 764

8. Shiv Balak Singh Vs Addl. Distt. Judge XI Lko. 2014 (2) ARC 552

9. Dina Nath (D) by LRs & anr. Vs Subhash Chand Saini & ors. Civil Appeal No.4563 of 2014

10. Santosh Mehta Vs Om Prakash (1980) 3 SCC 610

11. Atma Ram Vs Shakuntala Rani (2005) 7 SCC 211

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

1. Heard Sri Ravi Nath Tilhari, learned counsel for the petitioner and Sri S.K.Mehrotra, learned counsel assisted by Ms.Priyam Mehrotra, learned counsel appearing on behalf of opposite party no.1. Opposite party no.2, Additional District Judge being merely a proforma opposite party is not represented.

2. Under challenge is the order dated 30.08.2018 passed by III Additional Sessions Judge, Unnao in SCC Revision No.04/2018 (Jainul Islaam @ Gop v. Maseehamasi Farookhi) whereby revision filed against order dated 17.05.2018 striking off defence of tenant-opposite party on application of petitioner-landlord has been allowed.

3. As per averments made in this petition filed under Article 227 of the Constitution of India, petitioner-landlord filed SCC Suit No.8/2009 for arrears of rent, damages and ejectment of tenant-opposite party with respect to three shops numbered 369, 370, 371 situate in Mohalla Taki Nagar, opposite Central Bank, Pargana, Tahsil and District Unnnao. It has been stated that tenancy of the shops in question was at the rate of Rs.700/- per month for each shop apart from water tax. The landlord was compelled to file suit when monthly rent with effect from June 2008 till April 2009 was not paid by tenant. The tenancy was determined by registered notice dated 27.04.2009 in which arrears of rent and water tax was also demanded along with vacation of the shops in question. However, despite aforesaid notice when arrears of rent were not paid, petitioner-landlord was compelled to file the suit.

4. Tenant-opposite party having put in appearance in suit proceedings, filed his written statement on 07.05.2010 admitting tenancy but denying the rate of rent at the rate of Rs.700/- per shop for any period prior to April 2007 although admitting aforesaid rate of rent with effect from April 2007. Liability for payment of water tax was also denied.

5. Subsequently, the SCC Suit was dismissed in default of appearance on 30.08.2011 and was restored to its original number only on 25.09.2014 whereafter tenant-opposite party filed application dated 23.01.2015 (Paper No.56-Ga) to deposit rent with effect from August 2011 till January 2015 amounting to Rs.88,200/-. Another application (Paper No.61-Ga) was filed to deposit rent for the months of February 2015 till April, 2015 including water tax and interest at the rate of 9% per annum amounting to Rs.5040/-.

6. Aforesaid applications were allowed by means of order dated 23.08.2017 permitting tenant to deposit rent/arrears of rent/water tax and interest at his own risk.

7. However, it has been stated that despite said order, tenant did not comply with the same and no such deposit as envisaged in the order was made by tenant. Owing to the said fact, petitioner-landlord filed application dated 1.5.2017(Paper No.C-70) under Order 15 Rule 5 CPC seeking the striking off defence of tenant-opposite party for failing to comply with the provisions. Petitioner-landlord filed another application on 30.10.2017 (Paper No.C-86) stating that tenant had not deposited rent with effect from April 2011 and that an amount of more than Rs.2,00,000/- towards rent and water tax was outstanding. A prayer for striking off defence as per the earlier application was also made.

8. Pursuant to aforesaid applications by petitioner-landlord, tenant opposite party filed another application dated 16.12.2017 (Paper No.91-Ga) stating that the due amount could not be deposited owing to ill-health of tenant and permission was sought to deposit Rs.50,000/- out of due amount, with assurance that rest amount would be deposited at the earliest. The application was thereafter allowed vide order dated 16.12.2017 permitting tenant-opposite party to deposit the amount at his own risk. It has been stated that even thereafter, deposit as permitted was not made.

9. Subsequently vide order dated 17.05.2018, application (no.C-70) was allowed striking off defence of tenant-opposite party against which SCC Revision No.4 of 2018 was filed and has been allowed vide impugned order dated 30.08.2018 resulting in the filing of the present petition under Article 227 of the Constitution of India.

10. Learned counsel appearing on behalf of petitioner-landlord has submitted that a bare perusal of order dated 17.05.2018 will make it clear that the circumstances indicated in said order left the court with no other option but to strike off defence of tenant-opposite party particularly in view of the fact that twice applications for deposit of rent were allowed by the SCC Court, firstly on 23.08.2017 and subsequently on 16.12.2017 but despite said permission

being granted by court, no deposit was made by tenant which would definitely come within the meaning of the term 'willful default'. It has been submitted that the learned revisional Court had no occasion to disturb the order dated 17.05.2018, particularly when no different opinion has been expressed by revisional court for differing with reasons indicated by the SCC Court. It has been submitted the finding recorded by revisional court that tenant/opposite party has deposited rent on various occasions is not based on any cogent evidence on record and is also completely against the finding recorded by the SCC Court to the effect that no deposit was made by tenant-opposite party despite orders thereto.

11. The learned counsel has relied upon the decision of Hon'ble the Supreme Court in **Bal Gopal Maheshwari and others v. Sanjeev Kumar Gupta** reported in (2013) 8 SCC 719 regarding the scope of powers of this Court under Article 227 of the Constitution of India. He has further relied on the judgment rendered by Hon'ble the Supreme Court in **Trilok Singh Chauhan v. Ram Lal (Dead) through LRs and others** reported in (2018) 2 SCC 566. Reliance has also been placed on the judgment in **Bimal Chand Jain v. Gopal Agarwal** reported in (1981) 3 SCC 486; **Haider Abbas v. Additional District Judge (Court No.3), Allahabad and ors** reported in 2006(1) ARC 341 as well as decision of this Court in **Shailendra Sharma and another v. Amit Bansal (Dr.)** reported in 2017 (5) ADJ 239 with regard to striking off defence and the provisions of Order 15 Rule 5 C.P.C. as applicable in the State of U.P.

12. Learned counsel appearing on behalf of tenant-opposite party has rebutted arguments advanced by learned counsel for the petitioner with the submission that arrears of rent along with interest etc. had been deposited by tenant-opposite party on the first date of hearing which was prior to its dismissal in default of appearance in the year 2011. It has been submitted that the suit itself was dismissed in default of appearance on 30.08.2011 and was subsequently restored only after three years on 25.09.2014. As such, there was no occasion for tenant-opposite party to make any deposit within aforesaid three years. It has been submitted that subsequently as soon as the suit was restored, tenant-opposite party himself filed application dated 23.1.2015 seeking to deposit rent for the period August 2011 till January 2015. Another application for deposit of rent for the period of February 2015 till April 2015 was also made by tenant-opposite party at his own instance. The said applications were allowed vide orders dated 23.08.2017 but could not be complied with owing to illness of tenant-opposite party. It was in such extenuating circumstance that deposit of rent could not be made which has, rightly been condoned by the revisional court. Learned counsel for the opposite parties has relied upon the judgments rendered in **Shailendra Sharma and another v. Dr. Amit Bansal,** reported in 2017(35) LCD 1521; **Rajendra Kumar Verma and another v. Padma Jindal and another,** reported in 2006 (1) ARC 764; **Shiv Balak Singh v. Additional District Judge XI, Lucknow** reported in 2014 (2) ARC 552, **Dina Nath (D) by LRs & another v. Subhash Chand Saini & others,** rendered by Hon'ble the Supreme Court in Civil Appeal No.4563 of 2014 as well as **Santosh Mehta v. Om Prakash** reported in (1980) 3 SCC 610 regarding striking off defence.

13. Heard learned counsel for the parties and perused the record.

14. It is admitted between the parties that the dispute in question pertains only to the second part of Order 15 Rule 5 C.P.C. pertaining to continuous regular deposits being made during pendency of suit proceedings and that deposits made on first date of hearing as provided in the first part under Order 15 Rule 5 C.P.C. are not in question.

15. Regarding the same, it is seen that the suit was filed in 2009 in which written statement was filed on 07.05.2010 but suit having been dismissed in default of appearance on 30.08.2011 was thereafter restored to its original number only on 25.09.2014 whereafter tenant-opposite party filed application dated 23.01.2015 for deposit of rent from August 2011 to January 2015 and by a separate application for deposit of rent from February 2015 till March 2015. Despite opposition by petitioner-landlord, said applications were allowed vide order dated 23.08.2017 permitting tenant-opposite party to make the deposit at his own risk. Subsequently another application for deposit of rent was filed after filing of application under Order 15 Rule 5 C.P.C. on 01.05.2017. The said application was also allowed vide order dated 16.12.2017. Thereafter defence had been struck off vide order dated 17.05.2018 specifically recording aforesaid facts and particularly indicating that despite permission granted for deposit of rent vide orders dated 23.08.2017 and 16.12.2017, no deposit as prayed for and directed was made by tenant-opposite party. The SCC Court on the basis of aforesaid facts came to the conclusion that default in deposit of rent by tenant-opposite party was willful, necessitating striking off defence under Order 15 Rule 5 of C.P.C.

16. The revisional court vide the impugned order has upset the order of SCC Court permitting tenant-opposite party to make deposits within a period of one month. It is to be seen that the order of revisional court is conditional and that in the event of tenant-opposite party not making deposit as indicated by the revisional court, the revision was directed to be considered dismissed.

17. It has been submitted by learned counsel for tenant-opposite party that in pursuance of directions of the revisional court, deposit was made as directed.

18. For proper appreciation of dispute in question, it would be necessary to refer to provisions of Order 15 Rule 5 C.P.C. as applicable in the State of Uttar Pradesh, which are quoted hereunder :

"Order XV : **Disposal of the Suit at the first hearing :**

1……....

2…….

3……....

4……....

5. Striking off defence on failure to deposit admitted rent etc.--

(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum per annum and whether or not he admits any amount to be due, he shall throughout the

continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the court may subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1.--

The expression 'first hearing' means the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2.--

The expression 'entire amount admitted by him to be due' means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any' paid to a local authority in respect of the building on lessor's account and the amount, if any, deposited in any court under section 30 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972.

Explanation 3.--

The expression 'monthly amount due' means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deductions except the taxes, if any, paid to a local authority in respect of the building on lessor's account.

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited :

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the court may require the plaintiff to furnish security for such sum before he is allowed to withdraw the same."

19. A perusal of order dated 17.05.2018 striking off defence indicates that the trial court exercised its discretion to do the same in view of the fact that deposit of rent etc. had been permitted to be made by tenant twice vide orders dated 23.08.2017 and 16.12.2017 on the applications preferred by tenant himself but when compliance of neither of the orders was made, defence was struck off holding that such default is willful on the part of tenant.

20. Perusal of impugned order dated 30.08.2018 passed by the revisional court however indicates that findings recorded by trial court pertaining to willful default on the part of tenant has not been interfered with. The only ground on which tenant opposite party was granted indulgence was after appreciating his submission with regard to illness and the fact that there was no occasion for tenant-opposite party to have made any deposit towards rent from August 2011 till September 2014 due to the suit having been dismissed in default of appearance.

It was in these circumstances that the order of trial court was interfered with and tenant-opposite party was granted an opportunity to deposit rent which admittedly has been done in pursuance of such directions.

21. The decision in **Bal Gopal Maheshwari**(supra) relied upon by learned counsel for the petitioner noticing the provisions of Order XV Rule 5 C.P.C. as applicable in the State of Uttar Pradesh and judgment of Hon'ble the Supreme Court in **Bimal Chand Jain**(supra) has held that the discretion exercisable by trial court with regard to striking off defence is not compulsory and is in the realm of discretion to be exercised by the trial court upon consideration of facts and circumstances of the case. It has been held that interference with regard to the power to strike off written statement can be exercised only in case it was perverse or the court below has exceeded or failed to exercise the jurisdiction. **Shailendra Sharma**(supra) also relies upon judgment of Hon'ble the Supreme Court rendered in **Bimal Chand Jain**(supra) which has held as follows:-

"6. It seems to us on a comprehensive understanding of Rule 5 of Order 15 that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vested power in the court to strike off the defence. It does not oblige it to do so in every case of default."

22. Thus it can be seen that power to strike off defence is not to be exercised by

treating it to be a statutory mandate. Since exercise of such power inflicts severe penal consequences, the court has discretion not to strike off defence if on facts it finds good reason for not doing so. Therefore, the power should be exercised after consideration of the facts and circumstances appearing on the record and, in the event of there being a representation, after considering the representation.

23. Once the court concerned has exercised its discretion regarding striking off defence, an aggrieved party has remedy of filing revision under Section 25 of the Provincial Small Cause Courts Act, 1887 but the revisional court has very limited power to interfere with the discretion so exercised by court concerned. Such limited grounds for interference have already been explained by Hon'ble the Supreme Court in Trilok Singh Chauhan(supra). In the said decision, it has been held that interference in exercise of jurisdiction under Section 25 of the said Act can be only when the findings are perverse, based on no material, upon taking into consideration the inadmissible evidences or without consideration of relevant evidence. The relevant paragraph of the said judgment is quoted as follows:

"25. There are very limited grounds on which there can be interference in exercise of jurisdiction Under Section 25; they are, when (i) Findings are perverse or (ii) based on no material or (iii) Findings have been arrived at upon taking into consideration the inadmissible evidences or (iv) Findings have been arrived at without consideration of relevant evidences."

24. Upon application of aforesaid judgments, it is clear that the trial court has absolute discretion to pass appropriate orders regarding striking off defence upon an application so made by the landlord. The discretion once exercised can be interfered with by the revisional authority only on limited grounds. In the present case, it can be seen that the revisional court has not at all interfered with the findings of fact recorded by the trial court. None of the grounds indicated by Hon'ble the Supreme Court in **Trilok Singh Chauhan**(supra) has been followed by revisional court while passing the impugned order. As such it can be said that the impugned order has been passed against the principles enunciated by Hon'ble the Supreme Court.

25. Another aspect to be considered is whether the discretion exercised by the trial court in striking off defence has been exercised judicially upon consideration of material facts or not. The trial court judgment clearly indicates that tenant-opposite party has committed wilful default in adhering to the second part of Order 15 Rule 5 C.P.C. particularly since tenant-opposite party was twice given opportunity to make deposit of the admitted amount of dues but the said benefit was not availed of and deposit as required to be made in terms of the order of trial court was not made. It was in these circumstances that the trial court held default on part of tenant-opposite party to be wilful, thereby striking off defence.

26. Hon'ble the Supreme Court in **Atma Ram v. Shakuntala Rani** reported in 2005 (7) SCC 211 has held that in Rent Control legislation, if tenant wishes to take advantage of beneficial provisions of the Act, he must strictly comply with the requirements indicated therein. The relevant paragraph of the said decision is as follows:

"19. It will thus appear that this Court has consistently taken the view that in the Rent Control legislations if the tenant wishes to take advantage of the beneficial provisions of the Act, he must strictly comply with the requirements of the Act. If any condition precedent is to be fulfilled before the benefit can be claimed, he must strictly comply with that condition. If he fails to do so he cannot take advantage of the benefit conferred by such a provision."

27. The aforementioned position was reiterated by a Division Bench of this Court in **Haider Abbas**(supra), which reads as follows:-

"23. The aforesaid decision of the Supreme Court in the case of Atma Ram, (supra)emphasizes that if the tenant wishes to take advantage of the beneficial provisions of the Rent Control Act, he must strictly comply with the requirements and if any condition precedent is required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the Act and if it is deposited somewhere else, it shall not be treated as a valid payment/tender of the rent and consequently the tenant must be held to be in default."

"24. In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram, (supra), it has to be held that the tenant must comply with the requirements of Order XV, Rule 5, C.P.C. and make the deposits strictly in accordance with the procedure contained therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and,therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5(1) of Order XV, C.P.C."

"25. It, therefore, follows that the amount due to be deposited by the tenant through out the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under section 30(1) of the Act after the first hearing of the suit cannot be taken into consideration."

28. The aforesaid view with regard to tenant being obliged to strictly comply with requirements of the Act in order to avail advantage of beneficial provisions has been reiterated by this Court in a number of judgments following the aforesaid judgments of Hon'ble the Supreme Court and this Court.

29. In the present case, it is quite clear that tenant opposite party failed to make compliance of provisions of Order 15 Rule 5 C.P.C. despite adequate opportunity being provided for the same by the trial court.

30. Upon application of the judgments indicated hereinabove, it is quite clear that tenant-opposite party was a wilful defaulter and deliberately failed to comply with the provisions of Order 15 Rule 5 C.P.C. due to which his defence was correctly struck off by the trial court and that the order passed by the revisional

court, being against the judgments rendered by Hon'ble the Supreme Court regarding powers and jurisdiction of interference, is also vitiated.

31. So far as judgments relied upon by learned counsel for tenant-opposite party are concerned, the case of **Shailendra Sharma and another v. Dr. Amit Bansal**(supra) has followed the dictum of Hon'ble the Supreme Court in **Bimal Chand Jain**(supra) in which it has been held that the power to strike off defence is not mandatory but discretionary at the instance of court concerned. To the same effect is another judgment relied upon by learned counsel for tenant-opposite party in **Santosh Mehta v. Om Prakash**(supra).

32. There is no dispute regarding proposition that power exercisable under Order 15 Rule 5 C.P.C. is not mandatory but discretionary at the instance of court concerned. In the instant case, the trial court has clearly recorded a finding that tenant-opposite party is a wilful defaulter since it failed to comply with provisions of Order 15 Rule 5 C.P.C. not once but twice upon applications filed by tenant opposite party itself. As such its discretion was exercised in the facts and circumstances of the case which would clearly be in accordance with the dictum of Hon'ble the Supreme Court.

33. Learned counsel appearing for tenant-opposite party has also relied upon the judgment of Hon'ble the Supreme Court in **Dina Nath (D) by LRs & another v. Subhash Chand Saini & others,** (supra) in which again it has been held that the power to strike off defence is discretionary at the instance of court concerned and that it is not mandatory for the court to automatically allow the application for striking off defence. It has also been held that mere failure to pay rent on part of tenant is not enough to justify an order striking off defence and it is only a wilful failure or deliberate default that can call for exercise of the extra ordinary power vested in court.

34. In the present case the trial court has clearly recorded a finding of fact that there was wilful and deliberate default on part of tenant-opposite party in complying with the provisions of Order 15 Rule 5 C.P.C. thereby requiring it to exercise its discretion of striking off defence. The aforesaid judgments also therefore would not be of any help to learned counsel for tenant-opposite party.

35. In the present case, it can be seen that tenant-opposite party was allowed to make deposit of admitted amount of rent firstly in August 2017 and thereafter in December 2017. The defence has been struck off subsequently in May, 2018. As such it can be seen that the default in deposit of admitted amount of rent as contemplated under second part of Order 15 Rule 5 C.P.C. was continuous and, therefore, the explanation of illness given by tenant-opposite party without adequate evidence to corroborate the same would definitely fall within the meaning of wilful default. The revisional court without interfering with the findings of fact recorded by the trial court erred in law in setting aside the order of trial court for striking off defence without adhering to the principles enunciated by Hon'ble the Supreme Court regarding exercise of revisional power.

36. In view of the aforesaid, the petition is allowed setting aside the

judgment and order dated 30.08.2018 passed in SCC Revision No.04/2018 (Jainul Islaam @ Gop v. Maseehamasi Farookhi).

(2019)10ILR A 1173

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2019

BEFORE

THE HON'BLE RAJAN ROY, J.

Misc. Single No. 18761 of 2016

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

Counsel for the Petitioner:
Sri Apoorva Tewari, Sri Prakhar Misra

Counsel for the Respondents:
C.S.C., Aprajita Bansal, Sri Prashant Kumar

A. U.P. Panchayat Raj Act, 1947 - Sections -11E, 95(1)(g), 5A & 6A- Constitution of India - Article 243 (O) - the case of petitioner is of disqualification u/s.11-E – barring him from contesting the election to the office of Gram Pradhan as- on the date of filing nomination he was functioning as an elected member of Kshetra Panchayat-this defect dis-entitled the petitioner to contest the election and to hold the office in question-renders the holding of office of Gram Pradhan by the petitioner void ab-initio.

Held : - any interference by this Court would restore and perpetuate an illegality and would encourage others to violate the law contained in Section 11-E in the belief that they would get away with it- For these reasons this Court declines to exercise its equitable, discretionary and extra ordinary jurisdiction under Article 226 of the Constitution of India in the facts and circumstances of the case and does not interfere with the impugned order, as, substantial justice has been done in the matter. Consequently, the petitioner shall not be entitled to continue as Gram Pradhan of Gram Panchayat Barauli. Interim order granted earlier stands vacated.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Smt. Ram Kanti vs. District Magistrate, Hamirpur and others (1995) 2 UPLBEC 771

2. Sunita Patel vs. State of U.P. & others 2006 (1) ALJ 417 (DB)

3. K. Venkatachalam vs. A. Swamickan and another (1999) 4 SCC 526

4. Karnek Singh vs. Charanjit Singh (2005) 8 SCC 383

5. Godde Venkateswara Rao vs Government Of Andhra Pradesh_AIR 1996 SC 828

6. M. C. Mehta v. Union of India and others (1999) 6 SCC 237

7. Mohd. Shwale vs. III ADJ (1988) 1 SCC 40

8. Om Prakash vs. U.P. Secondary Education Service Commission Allenganj Allahabad and others (1990) 2 UPLBEC 983

9. State of Maharashtra and others vs. Prabhu (1994) 2 SCC 481

10. A.M. Allison and another vs. B.L. Sen and others AIR 1957 SC 227

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri Apoorva Tewari learned counsel for the petitioner, Ms Aparita Bansal for the State Election Commission and Sri Anuj Garg learned standing counsel.

2. This writ petition has been filed under Article 226 of the Constitution of

India challenging an order passed by the District Magistrate/District Election Officer on 30.07.2016 under Section 11-E of the U.P. Panchat Raj Act, 1947 (hereinafter referred to as 'the Act, 1947') wherein he has held that the petitioner was not qualified for contesting the election to the office of Gram Pradhan Village Barauli, District Hardoi, as, on the date of filing nomination he was functioning as an elected member of Kshetra Panchayat Barauli. Accordingly he has held that the office of Gram Pradhan Barauli is deemed to be vacant requiring a fresh process of election.

3. The facts of the case are that the petitioner admittedly was a member of Kshetra Panchayat Barauli and his tenure was till 17.03.2016. He filed his nomination for contesting election to the office of Gram Pradhan while he was still continuing as a member of Gram Panchayat. On 13.12.2015 the result of the election to the office of Gram Pradhan was declared and he took oath of office on 19/20.12.2015. Even at the cost of repetition it needs to be stated that it is the admitted factual position that on both the dates i.e. on the date of filing of nomination and on the date of taking oath of office of Gran Pradhan, he continued to function as an elected member of of Kshetra Panchayat Barauli. A complaint was made by one Aneeta Mishra that on account of holding office of member, Kshetra Panchayat, petitioner was ineligible to contest the election to the office of Gram Pradhan, therefore, the election was bad and he should be restrained from functioning as Gram Pradhan. Prior to this complaint i.e. on 09.02.2016, the petitioner is stated to have resigned from office of MEMBER, Kshetra Panchayat. The contention of the counsel for the petitioner is that this resignation was not actuated by detection of any dis-qualification but was a voluntary act on the part of the petitioner. Ms. Aneeta Mishra then filed a writ petition before this Court bearing no. 12466 (MB) of 2016 seeking a writ of quo warranto. The said writ petition was disposed of on 30.03.2016 in the following terms:-

"Shri Manoj Kumar Mishra, Advocate has filed Vakalatnama on behalf of opposite party no.6. The same is taken on record.

This petition has been filed with the following prayers:-

(a) To issue a writ, order or direction in the nature of quo warranto for removal of Sri Rajendra Kumar Son of Sri Ram Kumar from Office of Village Pradhan of Village Panchayat-Barauli, Block-Kachauna, District-Hardoi.

(b) To issue a writ order or direction in the nature of Mandamus commanding the opposite party no.3 to pass an order for declaration of the post of Village Pradhan of Village Panchayat-Barauli, Block-Kachauna, District-Hardoi as Vacant in view of Section 11(E) of Uttar Pradesh Panchayat Raj Act, 1947.

chequered(c) To issue a writ, order or direction in the nature of Mandamus commanding the opposite party no.2 to issue a notification for holding a fresh election for Office of Village Pradhan of Village Panchayat-Barauli, Block-Kachauna, District Hardoi.

(d) To issue a writ, order or direction in the nature of Mandamus commanding the opposite party no.4 to declare the proceedings followed by decisions taken by the opposite party no.6

as void since he was elected for the post of Pradhan of Village Panchayat-Barauli, Block-Kachauna, District-Hardoi.

(e) To issue any other order or direction which this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

(f) Award cost of the writ petition in favour of the petitioner against the opposite party, forthwith to impart due justice.

The representation of other person contained in Annexure-4 was disposed of by the District Magistrate. Though it is stated by counsel for the petitioner that in the representation, the petitioner has taken grounds in respect of disqualification of opposite party no.6 from the office held by him.

Learned counsel for the petitioner further submits that it is incumbent upon District Magistrate to consider and dispose of the representation and decide the issue in accordance with law but the District Magistrate is not paying any attention to the representation.

In the aforesaid circumstances, the writ petition is disposed of with direction to the District Magistrate to consider and dispose of the representation preferred by the petitioner within a period of two months."

4. The aforesaid order was passed after hearing the parties including the petitioner herein, who had put in appearance. The petitioner who was the opposite party no.6 therein did not challenge the aforesaid order of the High Court.

5. In pursuance to the aforesaid complaint Ms. Aneeta Mishra moved a representation before the District Magistrate and it is this representation which has been decided by the said officer on 30.07.2016 which is impugned herein.

6. It is not out of place to mention that Ms. Aneeta Misra moved an application for being impleaded as an opposie party in this petition but it was rejected on the ground that a complainant was not a necessary party.

7. The contention of Sri Tewari learned counsel for the petitioner is firstly that the District Magistrate had no jurisdiction to pass such an order even in his capacity as District Election Officer or for that matter in pursuance to the direction issued by the High Court, as a District Election Officer becomes functus-officio once the election result is declared and in this regard, he has relied upon a Division Bench judgment reported in ***(1995) 2 UPLBEC 771 (Smt. Ram Kanti vs. District Magistrate, Hamirpur and others)*** and connected matters, wherein, the aforesaid preposition of law has been laid down. The same principle has been reiterated in a subsequent decision reported in ***2006 (1) ALJ 417 (DB) (Sunita Patel vs. State of U.P. & others)*** albeit in the context of Kheshtra Panchayat election.

8. Learned counsel for the petitioner further contends that if the legislature has not conferred jurisdiction on a particular authority in respect of a particular subject then such jurisdiction cannot be conferred by consent or even by the order of the Courts and the Court cannot issue direction to an incompetent authority to decide a dispute is well settled.

9. Contention of the learned counsel is that once the petitioner was elected as Gram Pradhan, in view of the provisions

contained in Article 243(o) of the Constitution to the effect "notwithstanding anything in the constitution, no election to any Panchayat shall be called in question except by Election Petition presented to such authority in such manner as is provided for under any law made by the legislation", as, the challenge in essence was to the election of the petitioner as Gram Pradhan, the only remedy available was in terms of an Election Petition under Section 12-C(1) of the Act, 1947 but no Election Petition was filed and the period of limitation prescribed for the same having expired, the writ petition for issuance of quo warranto filed by Aneeta Mishra also having been disposed of, in the absence of any challenge to petitioner's election by filing an Election Petition, there was no other remedy available to any aggrieved person, nor was there any provision in the Act, 1947 or in the Constitution of India under which any authority including the District Magistrate could divest the petitioner of the office of Gram Pradhan in the manner it had been done.

10. This apart, Sri Apoorva Tewari learned counsel for the petitioner contended that reference to Section 11-E(2) of the Act, 1947 in the impugned order is misconceived for the reason that the said provision is attracted only in an eventuality where after a person has been elected as Gram Pradhan, he, is elected subsequently to another office, which is not the case here. Furthermore, he says that in this view of the matter there is no question of 'deemed vacancy' of the office held by the petitioner.

11. According to him, even if an election petition had been filed the defence would be open to the petitioner that Section 12-C does not apply to the facts of the present case as it does not fall in any of the eventualities mentioned therein, including 'voidance' of election and that even such 'viodance' is required to be declared by the Courts, even if, in collateral proceedings, and the District Magistrate could not have done so. He also submitted that requirement of the Election being 'materially affected' would still not be satisfied. In this context he also invited the attention of the Court to Rule 4(3)(a) of the U.P. Pachayat Raj (Settlement of Election) Disputes Rules, 1997 to contend that casual vacancy can be declared by the Sub Divisional Officer i.e. the Prescribed authority that too only in a proceeding for setting aside the election, therefore, the District Magistrate had no power to do so and has exceeded his jurisdiction.

12. Ms. Aparajita Bansal learned counsel appearing for Election Commission has invited the attention of the Court to sub Section 3 of Section 11-E, however sub section 3 relates to the first election under the Act, 1947, therefore, the same does not apply in this case as it was not the first election under the Act. She also submitted that so far as Section 11-D of the Act, 1947 is concerned the Rules have been framed for vacancy of the office but in respect of Section 11-E no such Rules have been framed, therefore, once the disqualification is detected the office becomes automatically vacant and all that the District Magistrate has done is to declare it to be so. She also submitted that the remedy of an Election Petition under Section 12-C(1) was not available in this case as in fact there was no challenge to the election, what was pointed out by the

complainant was the ineligibility of the petitioner to hold two offices at the same time.

13. Sri Anuj Garg learned standing counsel submitted arguments on the same line as Ms Aparajita Bansal.

14. As per Section 11-E(1) of the Act, 1947 a person shall be disqualified for being elected to or holding the office of Pradhan or member of Gram Panchayat or a Panchayat or a Nyaya Panchayat, if he is (a) a member of parliament or of the State Legislature; or (b) member, Pramukh or Up-pramukh of a Kshettra Panchayat; or (c) member, Adhyaksha or Upadhyaksha of a Zila Panchayat; or Adhyaksha or Upadhyaksha of any co-operative society.

15. As regards the first contention of learned counsel for the petitioner, the legal position is well settled that once the result of the election has been declared the District Magistrate/District Election Officer becomes functus officio. The District Magistrate thereafter has power to take a decision for removal of Pradhan under Section 95(1)(g) of the Act, 1947. The Court does not find any ground mentioned in Section 95(1)(g) or under Section 5-A of the Act, 1947 as being available in this case for availing the remedy under Section 95(1)(g) of the Act, 1947 and Section 6-A of the Act, 1947. The disqualification mentioned in Section 11-E is not mentioned in Section 5-A nor as a ground for removal under Section 95(1)(g) of the Act, 1947. An Election petition assuming it would have been maintainable on the ground that the result of the election had been materially affected by improper acceptance or rejection of petitioner's nomination or by gross failure to comply with the provisions of the Act or the Rules framed thereunder, as, while holding the office of member of Kshetra Panchayat he could not have filed the nomination paper for Election to the office of Gram Pradhan, the fact of the matter is that no Election petition was filed by any aggrieved person instead a writ of quo warranto was filed which was disposed of as already stated. Now the question to be considered is whether merely because an Election Petition was not filed against the petitioner, who admittedly was disqualified from being elected or holding the office of Gram Pradhan in view of the provisions contained in Section 11-E(1) of the Act, 1947, should he be allowed to continue in office because the District Magistrate who has passed the impugned order did not have jurisdiction to do so and this Court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution should be a mute-spectator to a void and illegal act and should dismiss this petition on this ground thereby sustaining and perpetuating an apparent illegality.? While it is true that so far as elections are are concerned, in view of the provisions contained in Article 243(O), the remedy is by way of an Election Petition but there is a decision to the effect of the Supreme Court reported in ***(1999) 4 SCC 526 (K. Venkatachalam vs. A. Swamickan and another)*** wherein their Lordship at the Supreme Court have said that Article 243 (O) of the Constitution by itself may not per-se bar judicial review which is the basic structure of the Constitution but ordinarily such jurisdiction would not be exercised, there may be some cases where a writ petition would be entertained. Reference may also be made to another decision reported in ***(2005) 8 SCC 383***

(Karnek Singh vs. Charanjit Singh) wherein their Lordships of the Supreme Court held as under:-

"29. In view of the judgment of this Court in the case of ***Election Commission of India v. Saka Vankata Rao*** *it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?*

30. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly. The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like this Election Commission should invariably be made a party.

31. When leave to appeal was granted to the appellant by this Court operation of the impugned judgment was suspended. Respondent No. 2 shall intimate to the State Government as to for how many days the appellant sat as a member of the Legislative Assembly and it would be for the State Government to recover penalty from the appellant in terms of Article 193 of the Constitution.

32. This appeal is dismissed with costs."

16. In the present case the one fact which makes a difference is the admitted case of the petitioner himself about his disqualification under Section 11-E of the Act. i.e. the admission of the fact that on the date of filing nomination for election to the office of Gram Pradhan and taking oath he was a member of Kshetra Panchayat then under Section 11-E he was disqualified not only from being elected but also from holding the office of Pradhan as is evident from the language used in the provision. Based on this

indisputable factual scenario the irresistible conclusion is that he was disqualified to contest the election of Gram Pradhan under Section 11-E. Furthermore, as already stated, the Court finds that Section 11-E did not only disqualify him from being elected but also from holding the office of Pradhan. Even otherwise, in view of the aforesaid admitted factual scenario while it is true that the District Election Office had become functus-officio after declaration of the election result and the District Magistrate could not have declared the election of the petitioner to be void, this Court finds what the District Magistrate has done is only to reiterate the obvious based on the provisions contained in Section 11-E in view of the indisputable facts before him. The consequence of it is a vacancy on the office of Gram Pradhan. Merely because he has referred to Section 11-E(2) can not be a ground for interference by this Court under Article 226 of the Constitution. A hyper-technical approach in this regard is not warranted. Even assuming that the District Magistrate did not have power in this regard, if interference with his order revives an apparent illegality this Court would decline to do so if substantial justice has been done as is the case here. Reference may be made to the decision reported in ***AIR 1996 SC 828 (Godde Venkateswara Rao vs Government Of Andhra Pradesh)*** wherein their Lordships of the Supreme Court of India sustained the decision of the High Court exercising its discretion refusing to interfere with an order of Government, which it did have power and jurisdiction to pass, as it would have restored an illegal order. The Supreme Court held as under:-

"In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order--it would have given the Health Centre to a village contrary to the valid resolution passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extra ordinary discretionary power in the circumstances of the case.

In the result, the appeal is dismissed, but, in the circumstances of the case, without costs."

17. On the same line there is another decision of the Supreme Court reported in ***(1999) 6 SCC 237 (M. C. Mehta v. Union of India and others)*** wherein it was held that the Court can refuse to exercise its discretion of striking down an order, if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite parties in violation of principle of natural justice or it is otherwise not in accordance with law. A reference was also made therein to another decision of the Supreme Court on the same line reported in ***(1988) 1 SCC 40 (Mohd. Shwale vs. III ADJ).***

18. Reference may also be made to a Division Bench Judgment of this Court reported in ***(1990) 2 UPLBEC 983 (Om Prakash vs. U.P. Secondary Education Service Commission Allenganj Allahabad and others)*** wherein, this Court declined to interfere in a decision taken without jurisdiction, as, substantial justice had been done in the matter. Reference may also be made to a decision of the Supreme Court reported in ***(1994) 2 SCC 481 (State of Maharashtra and others vs. Prabhu)*** wherein, the Supreme Court disapproved interference by the High Court in exercise of its equity jurisdiction under Article 226 of the

Constitution where more harm is likely to be caused to a society by such interference than good as it would shake the confidence and faith of the society in the system and would be prone to encouraging even the honest and sincere to deviate from their path. It held that it was the responsibility of the High Court as custodian of the Constitution to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good. Their Lordships also observed as under:-

"Even assuming that the construction placed by the High Court and vehemently defended by the learned counsel for respondent is correct should the High Court have interfered with the order of Government in exercise of its equity jurisdiction. The distinction between writs issued as a matter of right such as habeas corpus and those issued in exercise of discretion such as certiorari and mandamus are well known and explained in countless decisions given by this Court and English Courts. It is not necessary to recount them. The High Court exercise control over Government functining and ensure obedience of rules and law by enforcing proper, fair and just performance of duty. Where the Government or any authority posses an order which is contrary to rules or law it becomes amenable to correction by the courts in exercise of writ jurisdiction. But one of the principle inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society then the court may restrain from exercising the power."

19. Reference may also be made to another decision of the Supreme Court reported in ***AIR 1957 SC 227 (A.M. Allison and another vs. B.L. Sen and others)*** wherein a plea of lack of jurisdiction was taken yet the Supreme Court upheld the decision of the High Court by observing that proceedings by way of certiorari are "not of Course" (vide Halsbury's Laws of England', Hailsham Edition, Vol.9 paras 1480 and 1481, pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice and that the Supreme Court could refused to interfere in appeals directed against such order of the High Court under Article 226 unless it was satisfied that the justice of the case required it. In the said case the Supreme Court held that it was not satisfied that it requires interference.

20. In the instant case any interference by this Court would restore and perpetuate an illegality and would encourage others to violate the law contained in Section 11-E in the belief that they would get away with it.

21. Sri Tewari in a desperate effort to protect the interest of his client attempted to argue that the defect was curable but on being confronted with the provisions contained in Section 11-E, he let go, as, the defect dis-entitled the petitioner to contest the election in the first place and also to hold the office in question and was too fundamental to be cured. It renders the holding of office of Gram Pradhan by the petitioner void ab-initio.

22. For these reasons this Court declines to exercise its equitable, discretionary and extra ordinary jurisdiction under Article 226 of the

Constitution of India in the facts and circumstances of the case and does not interfere with the impugned order, as, substantial justice has been done in the matter. Consequently the petitioner shall not be entitled to continue as Gram Pradhan of Gram Panchayat Barauli. Interim order granted earlier stands vacated.

23. This judgment shall not be treated as an affirmation of the powers of the District Magistrate/District Election Officer to pass such orders, but as a refusal by this Court to exercise its discretionary and equity jurisdiction for the above reasons.

24. Till elections to the office of Gram Pradhan of Gram Panchayat Barauli are held the District Magistrate shall make interim arrangement in terms of Section 12-J of the Act, 1947.

25. For these reasons the writ petition is dismissed.

(2019)10ILR A 1181

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.09.2019

BEFORE

THE HON'BLE IRSHAD ALI, J.

Rent Control No. 64 of 2015

Anil Mehrotra ...Petitioner
Versus
Addl. Session Judge Court No. 15 Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Krishna

Counsel for the Respondents:
Sri H.N. Tiwari, Sri Jagdish Prasad Vaish, Sri Nagendra Pratap Singh, Sri Shiwa Kant Tiwari

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1) A - Release application for vacating the premises - appeal under Section 22 - Application under Order 41 Rule 27(aa) CPC for taking copy of the sale deed as additional evidence. (Para 3, 4 & 5)

It is well established that the additional evidence can be placed at appellate stage; if the trial court has refused to take additional evidence which ought to have been admitted, the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. (Para 14)

Held:- The Additional District Judge has committed manifest error of law in passing the impugned order. The Additional District Judge has failed to appreciate the ingredients under Order 41 Rule 27 (aa) CPC and has proceeded to allow the application in a very cursory manner. (Para-17)

Writ petition allowed (E-7)

List of Cases Cited: -

1. Rajkali Vs St. of U.P. & ors. (2014) 1 JCLR 494

2. Kailash Chandra Vs A.D.J. Sitapur (2013) 2 ARC 797

3. Union of India Vs Ibrahim Uddin & anr. (2012) 8 SCC 148

(Delivered by Hon'ble Irshad Ali, J.)

1) Heard Sri N.K. Seth, learned Senior Counsel assisted by Sri Vijay

Krishna, learned counsel for the petitioner and to Sri Shiwa Kant Tiwari, learned counsel for respondent Nos.2 to 5.

2) By means of the present writ petition, the petitioner is challenging the order passed by respondent No.1 dated 27.05.2015 permitting the additional evidence to be adduced at appellate stage in the shape of sale deed.

3) Factual matrix of the case is that respondent Nos.2 to 5 filed release application under Section 21(1)(A) of U.P. Act No.13 of 1972 against the petitioner for vacating the premises of 308/55 Jauhari Mohalla, Chowk, Lucknow. The petitioner filed written statement denying the title of respondent Nos.2 to 5 and asserted that the premises is owned by Sri Radha Krishna Mandir (Lala Shyam Lal Girdhari Lal Agarwal) and the rent is being paid to the Manager of the Jankidas Puran Chand Trust and in support thereof, filed rent receipt issued by the trust.

4) The respondent Nos.2 to 5 filed affidavit and the petitioner also filed his affidavit. The prescribed authority after leading evidence and recording statement, allowed the release application against the petitioner vide order dated 31.07.2014.

5) Feeling aggrieved, the petitioner filed appeal under Section 22 of U.P. Act No.13 of 1972 before the District Judge, Lucknow, which has been admitted and transferred to the Court of Additional District Judge, Court No.15, Lucknow for disposal. The respondent Nos.2 to 5 filed an application for taking copy of the sale deed as additional evidence under Order 41 Rule 27 CPC. The Additional District Judge vide impugned order dated 27.05.2015 allowed the application, which has been impugned in the present writ petition.

6) Submission of learned Senior Counsel for the petitioner is that under the provisions of Order 41 Rule 27 CPC, there are exceptions, which have not been explained in the application that how the fact in regard to sale deed came into knowledge of respondent Nos.2 to 5 and due to non disclosure of this fact, the order passed on the application is illegal. The appellate court has also not recorded finding on the point of Order 41 Rule 27(aa) CPC and has proceeded to allow the application. Thus, the submission is that without explaining the due diligence in not bringing on record the additional evidence, the application would not have been allowed. In support of his submission, he placed reliance upon following judgments:

(i) **Rajkali Vs. State of U.P. and others; 2014 (1) JCLR 494,** paragraph Nos.4, 7, 8 and 9, (ii) **Kailash Chandra Vs. Additional District Judge, Sitapur; 2013 (2) ARC 797** and the last judgment has been produced, which was noticed by the Additional District Judge while passing the impugned order i.e. **Union of India Vs. Ibrahim Uddin and another; 2012 (8) SCC 148,** para 36, 39 to 46, 48, 52 and 53.

7) On the other hand, learned counsel for respondent Nos.2 to 5 submitted that in the application moved under Section 41 Rule 27 CPC, it has been disclosed that the respondents applied for certified copy of the sale deed and after obtaining it, they moved the application for taking as additional evidence.

8) He further submitted that the Additional District Judge has recorded finding in regard to due diligence in regard to non filing of sale deed at the trial stage, therefore, his submission is that there is no illegality or infirmity in the order under challenge by the petitioner.

9) He next submitted that Hon'ble Supreme Court in the case of **Union of India (Supra)** has considered the ingredients required permitting additional evidence to be adduced at appellate stage and taking notice of that, the judgment was passed by the Additional District Judge by recording cogent reasons, thus, the writ petition being misconceived is liable to be dismissed.

10) Having heard the rival contentions advanced by learned counsel for the parties, I perused the material on record as well as the impugned order under challenge in the writ petition and the judgments relied upon by learned counsel for the petitioner.

11) To resolve the controversy involved in the present writ petition, the provisions contained under Order 41 Rule 27 CPC is being quoted below:

"27. Production of additional evidence in Appellate Court - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due deligence, such evidence was not witin his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

12) On perusal of the provisions referred herein above, it is apparent on the face of it that there are three contingencies, which are required to be taken into consideration while accepting the additional evidence.

13) The judgments relied upon by learned Senior Counsel for the petitioner on the point involved in the matter are as under:

(i) **Rajkali Vs. State of U.P. and others (Supra) :**

"4. The second relief claimed in this writ petition is against the impugned order dated 10.07.2013, whereby the appellate court has dismissed the application 19Ga of the appellant petitioner filed under Order XLI Rule 27 of the Code of Civil Procedure. Learned counsel for the petitioner has submitted that although there is no mention of the sale deed dated 27.01.2006 in the plaint nor nay relief has been sought against the said sale deed, the additional document

which the petitioner appellant wanted to bring on record under order XLI Rule 27 of the Code of Civil Procedure has direct relation with the unregistered agreement of sale of 1999, which was assailed in the suit itself. He therefore, states that by rejection of the application Under Order XLI Rule 27 of the Code of Civil Procedure, the court below has committed an illegality. He does not dispute that the appeal is still pending.

7. The second ground for which the application under Order XLI Rule 27 of the Code of Civil procedure has been rejected is that the Khatauni which is sought to be brought on record relating to the sale deed of 2006 does not find mention in the plaint and there is no recitation about the sale deed of 2006 in the plaint as such the Khatauni based thereupon has no relevance in the present appeal, hence cannot be admitted in evidence. It has also been recorded that only such document can be taken as an additional evidence at the appellate stage which enable the court to effictively decide the real controversy between the parties. However, since there is no pleading relating to the sale deed of 2006 then the Khatauni relating thereto cannot be admitted in evidence.

8. No error can be found in the view taken by the appellate court in the impugned order dated 23.08.2008, whereby the application 19Ga of the appellant petitioner under Order XLI Rule 27 of the Code of Civil Procedure has been rejected. There is no merit in this writ petition. It is accordingly dismissed.

9. No order is passed as to costs."

(ii) **Kailash Chandra Vs. Additional District Judge, Sitapur (Supra):**

"The scrutiny of said provision indicates that the parties to appeal shall not be entitled to produce additional evidence whether oral or documentary in the appellate Court except under three circumstances; (i) when the Trial Court whose decree is under challenge in appeal has refused to admit evidence which ought to have been admitted, (ii) when the party seeking additional evidence, establishes before the appellate Court that in spite of exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him before the Trial Court and (iii) when the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial clause.

The case of petitioner at the most can be examined under exception no. (ii) as given above.

Learned counsel for petitioner has laid great stress on his argument that once he had pleaded before the Trial Court about the said evidence and the said evidence could not be produced, he should be allowed to produce the said evidence at the stage of appeal.

The scope of Order XLI Rule 27 of the Code has been examined in detail by the Apex Court in the case of Union of India Vs. Ibrahim Uddin and Another (supra) wherein the Apex Court has categorically held that in case there is inadvertence on the party of any party or there was inability to understand the legal issue involved or due to wrong advice of a pleader or negligence of a pleader or that a party did not realize the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain

evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

It is to be observed that the appellate Court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. It is the onus on the part of the party who wants to rely on evidence to prove it at the relevant time. In case a party has failed to discharge the onus, the Court cannot in such a case permit the said party to improve his case by producing additional evidence.

In the case of Vimal Chand Ghevarchan Jain and others (supra), reliance on which has been placed by learned counsel for petitioner, the Apex Court has no doubt observed that once the written statement was permitted to be amended the additional evidence pursuant thereto was also permitted to be adduced. The first appellate Court had a duty to properly appreciate the evidence in the light of the pleadings of the parties. It is true that when a pleading is amended, it takes effect from the date when the original one is filed.

The appellate Court in exercise of its discretionary jurisdiction and subject to fulfillment of the conditions under Order XLI Rule 27 of the Code may allow the parties to adduce additional evidence. However, it does not mean that the application under Order XLI Rule 27 of the Code can be allowed in routine manner. The Court has to be satisfied while allowing such application as to whether the ingredients of Order XLI Rule 27 of the Code are fulfilled or not.

As such, even if the petitioner had mentioned in his pleadings before the Trial Court about the said evidence but the same was not produced at the stage of evidence, the same could not be allowed to be brought on record at the appellate stage by moving application under Order XLI Rule 27 of the Code.

In the given facts and circumstances of the case in hand, I am of the view that the application moved under Order XLI Rule 27 could not have been allowed by the appellate Court, as such, I do not find any infirmity or illegality in the order impugned. "

(iii) Union of India Vs. Ibrahim Uddin and another (Supra) para 39 to 46, 48, 52 and 53:

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy, Municipal Corpn. Of Greater Bombay v. Lala Pancham, Soonda Ram v. Rameshwarlal and Syed Abdul Khader v. Rami Reddy.

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the

trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava and S. Rajagopal v. C.M. Armugam.

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

41. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with

objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, State of Uttaranchal v. Sunil Kumar Singh Negi, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd).

45. In City Improvement Trust Board v. H. Narayanaian, while dealing with the issue, a three judge Bench of this Court held as under: (SCC p. 20, para 28)

"28. We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."

(Emphasis added)

A similar view has been reiterated by this Court in Basayya I. Mathad v. Radrayya S. Mathad.

46. A Constitution Bench of this Court in K. Venkataramiah, while dealing with the same issue held: (AIR p. 1529, para 13)

"13. It is very much to be desired that the courts of appeal should not overlook the provisions of clause (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."

(Emphasis added)

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

52. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.

53. In the instant case, the application under Order XLI Rule 27 CPC was filed on 6.4.1998 and it was allowed on 28.4.1999 though the first appeal was heard and disposed of on 15.10.1999. In view of law referred to hereinabove, the order dated 28.4.1999 is just to be ignored."

14) On perusal of the aforesaid judgments, it is well established that the additional evidence can be placed at appellate stage; if the trial court has refused to take additional evidence which ought to have been admitted, the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed orthe Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

15) On perusal of the provisions contained under Order 41 Rule 27(aa) CPC and the judgments referred herein above, it is apparent that respondent Nos.2 to 5 have no-where disclosed the due diligence in as much as how they came to know about the sale deed and could not file the same before the trial court. No reasons whatsoever has been stated in the application, thus, the appellate court while considering the application has failed to appreciate the ingredients, which are required to be considered under Order 41 Rule 27 CPC.

16) On bare perusal of the order impugned, it is evident that the appellate court has not recorded satisfaction in allowing the application under Order 41 Rule 27 CPC.

17) After thoughtful consideration of the provisions contained under Order 41 Rule 27 CPC and the judgment placed before the Court, this Court is of the opinion that the Additional District Judge has committed manifest error of law in passing the impugned order. The Additional District Judge has failed to appreciate the ingredients under Order 41 Rule 27 (aa) CPC and has proceeded to allow the application in a very cursory manner.

18) In view of the above, the impugned order dated 27.05.2015 is hereby set aside.

19) The writ petition succeeds and is allowed.

20) The Additional District Judge, Lucknow is directed to reconsider the

application filed by respondent Nos.2 to 5 and to pass appropriate order in accordance with law as per observation made above and to decide the same within a period of six months from the date of production of a certified copy of this order.

21) The parties are, however, restrained to seek unnecessary adjournments in the matter.

22) No order as to costs.

(2019)10ILR A 1189

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

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

Matter Under Article. 227 No. 3276 of 2019 (Civil)

Balvindar Singh ...Petitioner/Plaintiff
Versus
IV Addl. Distt. & Sessions Judge/ Special Judge (E.C. Act), Bulandshahar & Ors. ...Respondents/Defendants

Counsel for the Petitioner:
Sri Rishu Mishra, Sri Uma Kant Mishra

Counsel for the Respondents:
Sri Anadi Krishna Narayana, Sri Sunil Kumar Mishra

A. Code of Civil Procedure, 1908 - O-XXI, Rules - 105 & 106 - petition-filed by a decree holder –whose application-rejected vide order impugned herein-by Executing Court-in his absence -though expressly not saying that the dismissal is in default.- the date was not fixed for hearing-the order is found to be manifestly illegal and liable to be set aside.

Held: - It was certainly not a date that was fixed for hearing the application within the meaning of sub-rule (2) of Rule 105 of Order XXI C.P.C. Thus, the order dismissing the Execution Application on 16.4.2010 cannot be said to be an order passed in exercise of jurisdiction under Order XXI Rule 106 of the Code. That being so, a restoration application, or an application to set aside the order 16.4.2010 is not at all one made under Rule 106 of Order XXI, so as to attract the bar of limitation, under Sub-rule (3). It is clearly an application under Section 151 CPC to which the rule of limitation, under Sub-rule (3) of Rule 106 of Order XXI, does not apply. Since, the impugned order dated 23.1.2019 proceeds entirely on the basis that the application is barred by limitation, which cannot be condoned treating it in manifest error to be an application under Order XXI Rule 106 of the Code, the impugned order aforesaid passed by the learned IVth Additional District Judge/Special Judge E.C. Act, Bulandshahar is manifestly illegal and liable to the set aside.

Writ Petition allowed (E-8)

List of Cases Cited: -

1. Khoobchand Jain and another vs. Kashi Prasad and other

2. Deo Narayan Goala (Deceased by L.R.) and others vs. Jagadish Pandit

3. Dambarudhar Mohanta vs. Mangulu Charan Naik and others

4. Damodaran Pillai and others vs. South Indian Bank Ltd

5. Arjun Prasad vs. Sameer Jahan Begum

6. State of U.P. vs. Saifi Abdul Hasan Nimachawala

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

1. This petition under Article 227 of the Constitution has been brought by a decree holder to set aside an order passed by the IVth Additional District and

Sessions Judge/Special Judge (E.C. Act), Bulandshahar dated 16.04.2010, in Execution Case No. 20 of 2004, dismissing the petitioner's Execution Application in his absence, though expressly not saying that the dismissal is in default. Further challenge is laid to an order dated 23.01.2019, passed by the Court aforesaid, rejecting an application under Section 5 of the Limitation Act, filed in aid of an application under Order IX Rule 4 read with Order XXI Rule 106 and Section 151 C.P.C. seeking to set aside the order dated 16.04.2010, dismissing the Execution Application in default of the decree holder.

2. Heard Sri Uma Kant Mishra, learned counsel for the petitioner and Sri Sunil Kumar Mishra, learned counsel appearing on behalf of respondent Nos. 2 and 3.

3. The question that falls for consideration in this petition is: whether an Execution Application dismissed in default on a day when it is not set down for hearing but for orders or some other proceeding, can be restored with aid of Section 5 of the Limitation Act, through an application made for the purpose, beyond the non condonable limitation of 30 days prescribed under Order XXI Rule 106(3) Code of Civil Procedure?

4. The issue has come up in the context of proceedings arising from two references made to the District Judge of Bulandshahar under Section 18 of the Land Acquisition Act, 1894 (for short, 'the Act'). The references aforesaid were a sequel to acquisition of certain land of the petitioner comprising *Khasra* No. 875/1 of *Khata* No. 206, admeasuring 2 *Bigha* and *Khasra* Nos. 874/2 and 875/3 both part of *Khata* No. 206, admeasuring a total of 7 *Bigha* 10 *Biswa*, located in the erstwhile village of Kasna, Pargana Dankaur, District Bulandshahar, and now falling in the district of Gautam Buddh Nagar. The aforesaid land is hereinafter referred to as the 'land in dispute'. The land in dispute was acquired by the State through a Notification under Section 4(1) of the Act, dated 03.03.1989, followed by a declaration under Section 6(1), dated 31.03.1989. Possession of this land appears to have been taken by the State on 03.07.1990 and an Award of compensation was made by the Special Land Acquisition Officer, Bulandshahar on 26.11.1990. The Special Land Acquisition Officer awarded compensation at four different rates per *Bhigha* of acquired land, according to four different classes of land, that comprised the land in dispute.

5. Aggrieved by the Award of the Special Land Acquisition Officer, the petitioner moved him to make a reference to the District Judge under Section 18 of the Act. Two separate references were made by the Special Land Acquisition Officer, one relating to *Khasra* No. 1875/1 and the other relating to *Khasra* No. 874/2 and 875/3; the first of the two references was numbered on the file of the learned District Judge as LAR No. 103/1992, and the second as LAR No. 511/1992. Both references were transferred and assigned to the Additional District Judge, Court No. 2, Bulandshahar before whom these came up for determination on 17.12.2003.

6. Both references were heard together and decided by a common judgment and award of the date last mentioned, whereby both references were

accepted. The references were accepted in terms that determining the land in dispute to be industrial in nature on the date of acquisition, compensation that was awarded by the Special Land Acquisition Officer @ of quantification per *Bigha*, the learned Judge determined it @ Rs. 65 per square yard. It was also awarded that the compensation payable shall carry interest from the date of Notification under Section 4(1) to the date of transfer of possession @ 12% per annum. It was also ordered that on the enhanced compensation worked out in terms of the award of the Reference Court, statutory entitlement of solatium @ 30% would be worked out. It was further ordered that on the entire enhanced amount of compensation, including solatium added to it from the date of taking over possession until one year afterwards, the decree holder would be entitled to 9% per annum in interest and, thereafter, on the entire sum of compensation interest would be payable @ 15 % per annum.

7. From the judgment and award of the Additional District Judge in LAR No. 103/1992 a First Appeal was carried to this Court by respondent no. 3, that is to say, the U.P.S.I.D.C. Ghaziabad, who are the beneficiaries of the acquisition. The aforesaid Appeal was a defective appeal and was numbered as First Appeal No. 580 (Defective) of 2004. The said Appeal was dismissed vide an order dated 24.07.2006.

8. It is the petitioner's case that during the aforesaid period of time, the petitioner filed for execution of the awards passed by the Additional District Judge under Section 18 of the Act, but those proceedings of execution remained in limbo because of the pendency of the defective First Appeal hereinbefore referred to by the petitioner that was until its decision on 26.07.2006, pending before this Court. It is the petitioner's case that the Execution Application aforesaid was dismissed in default on 16.04.2010, a fact of which the petitioner was never informed by his counsel at any point of time. It is specifically said in paragraph 9 of the petition that the petitioner came to know about the order dated 16.04.2010, relating to dismissal of his Execution Application from the office of respondent no. 3, for the first time, on 01.06.2017 when he demanded payment of compensation in terms of the award. It is asserted that immediately on the day following, that is, 02.06.2017, the petitioner went to his counsel's residence, that is to say, the residence of Sri Mahipal Singh, a resident of District Ghaziabad. After inquiry, he informed the petitioner that by some inadvertent error, he missed noting the date it in his diary, that fell on 16.04.2010. The petitioner was informed with regret that it was on that account the Execution Application came to be dismissed in default, in the petitioner's absence, on 16.04.2010. It was in this background that the petitioner was given to understand by his counsel that he could not inform the petitioner about the factum of dismissal of his Execution Application in default, or could he advise the petitioner to move for a recall of the said order. It is pointed out with much emphasis by the learned counsel for the petitioner that on the petitioner's request, the learned counsel appearing for him in Execution Application, Sri Mahipal Singh, Advocate initially agreed to file his own affidavit or an affidavit of his clerk in support of the application seeking recall of the order of dismissal in default, but lateron, for reasons best known to

him, filed a restoration application on 05.10.2017 supported by an affidavit of the petitioner. The recall application was accompanied by a delay condonation application, also supported by the said affidavit. It is asserted that the petitioner is almost an illiterate person. He was entirely dependent on the learned counsel whom he had instructed to pursue the matter on his behalf. Though, it is averred that his counsel could not explain the delay properly, and, on that account, the delay condonation application came to be rejected by means of the impugned order dated 23.01.2019, and resultantly, his application to set aside the order dated 16.04.2010, dismissing the Execution Application in default, learned counsel for the petitioner, at the hearing, has candidly pointed out that the application to set aside the order dated 16.04.2010 was rejected on ground that an application to set aside an order made *ex parte* or in default disposing of an execution application, is governed by the provisions of Order XXI Rule 106 CPC, where by virtue of provisions of Order XXI Rule 106 (3) CPC, there is an uncondonable limitation of 30 days to set aside such an order. It is also pointed out that the Court below held that the provisions of Section 5 of the Limitation Act have no application to an Execution Application decided *ex parte* or in default under Order XXI, where Order XXI Rule 106 CPC is a complete Code. It was also held by the Executing Court that the provisions of Section 151 CPC that were pressed into service on the petitioner's behalf, seeking to set aside the order dated 16.04.2010, passed in the execution case dismissing it in default, were inapplicable. This course of action, too, was based on the same reasoning that Order XXI Rule 106 CPC is a compete Code governing an application to set aside orders dismissing an Execution Application in default or proceeding *ex parte*, where Section 151 CPC has no application.

9. Learned counsel for the respondent, Sri Sunil Kumar Mishra has supported the order impugned passed by the Court below precisely adopting the reasoning subscribed to by the Court below in passing that order. In short, the submission is that once an Execution Application is dismissed in default, an application, to set such an order, has to be brought within the condonable limit of 30 days under Order XXI Rule 106 (3) of the Code. If it is brought beyond that date, the application to set aside an order made *ex parte* in execution proceedings, is not maintainable as the delay cannot be condoned. It is also argued that there being a special provision under the Code governing limitation in terms of the Rule 106(3) of Order XXI, Section 5 of the Limitation Act cannot be pressed into service nor can the provisions of Section 151 CPC called in aid.

10. Learned counsel for the petitioner, Sri Uma Kant Mishra has drawn the attention of the Court to a certain distinction in law, regarding the stage of proceedings in an execution, when an order, dismissing the Execution Application in default, is passed and its ramifications on the right of the decree holder to apply for a restoration of the Execution Application, *vis-a-vis* limitation prescribed under Order XXI Rule 106 (3) CPC. It is submitted by Sri Uma Kant Mishra, learned counsel for the petitioner that Order XXI Rule 106 (3) CPC comes into play, or so to speak, Rule 106 of Order XXI, as such, is applicable when the Execution Application

dismissed in default or proceeded *ex parte* is set down for hearing. It does not apply if the Execution Application is fixed before the Court for some other purpose, such as for some other steps being taken, or disposal of some office report regarding service, or disposal of some miscellaneous application. He has drawn the attention of the Court to the order dated 27.03.2010, which shows that a receipt bearing paper no. 24 BC has been filed on behalf of the decree holder. The order further shows that 16.04.2010 was the date fixed for disposal. He emphasized that 16.04.2010 was not a date fixed for hearing in the Execution Application. Learned counsel for the petitioner, therefore, submits that once the case was not set down for hearing, Order XXI Rule 106 CPC would not at all be attracted, and so also the non-condonable limitation prescribed under sub Rule (3) of Rule 106 of Order XXI. It is pointed out by the learned counsel for the petitioner that in the event of dismissal of an Execution Application, when it is not set down for hearing but some other purpose or step in proceedings, the power to recall or set aside, is to be drawn from Section 151 CPC and not Order XXI Rule 106 CPC. Once that is the case, as the one here, the Executing Court has gone utterly wrong in invoking Order XXI Rule 106 CPC to hold the petitioner's application to set aside, along with the delay condonation application to be not maintainable on ground that sub-Rule (3) of Rule 106 of Order XXI does not contemplate the power to condone delay.

11. This Court has considered the submissions advanced on both sides and carefully perused the record. A perusal of the order sheet indeed shows that going by the three orders preceding the one dated 16.04.2010, when the Execution Application was dismissed for non prosecution, the case was successively posted for disposal. The two orders passed on 31.10.2009 and 30.10.2010 show that the decree holder was not present when the case was called on, but was granted seven days' time to take steps. On each of the two days last mentioned, the Execution Application was posted for disposal. 'Disposal' would be referable to the service report. On 27.03.2010, that is to say, the date preceding the order dated 16.04.2010 dismissing the Execution Application, the following order was passed:

"आज पेश हुआ। D.H की ओर से रजि. रसीद २४ BC दाखिल हुई । वास्ते निस्तारण १६.०४.१० को पेश हो।"

12. It is thus evident that on 16.04.2010, when the case was dismissed in default, though those words are not expressly employed, the Execution Application was posted for disposal and not set down for hearing. There is no quarrel about the issue that on 16.04.2010, the case was dismissed in default and not on merits, though the words 'in default' have not been specifically used. The parties have not been at issue about the nature of the order dated 16.04.2010 being one in default, either before this Court or before the Court below. Even otherwise, a reading of the order made on 16.4.2010 does not spare as much as a hint showing it to be an order made on merits. It is clearly an order dismissing the execution proceedings in default or non prosecution. It would be profitable to refer to the provisions of Order XXI Rule 106 CPC, which are quoted in extenso:

106. Setting aside orders passed *ex parte*, etc-(1) The applicant,

against whom an order is made under sub-rule (2) of Rule 105 or the opposite party against whom an order is passed *ex parte* under sub-rule (3) of that rule or under sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it things fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an *ex parte* order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.

13. A perusal of sub-Rule (1) of Rule 106 of Order XXI shows that the first postulate that attracts the power under Rule 106 is that the order must be one made under Sub-rule (2) of Rule 105 of Order XXI, or under Sub-rule (3) of Rule 105 last mentioned, or under Sub-rule (1) of Rule 23 of Order XXI of the Code. The second postulate is that anyone, who invokes the provisions of Rule 106 of Order XXI, must satisfy the Court that there was sufficient cause for his non appearance when the Execution case was called on for hearing, almost to borrow the phraseology of the statute. It needs further exploration as to what pre-condition, the first postulate to invoke the provisions of Rule 106, envisages. A reference to the provisions of Rule 105 of Order XXI would be apposite. Rule 105 of Order XXI reads thus:

105. Hearing of application- (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex pare and pass such order as it things fit.

Explanation-An application referred to in sub-rule (1) includes a claim or objection made under Rule 58.

14. Sub-Rule (1) of Rule 23 of Order XXI has no relevance to the context of the facts in hand as that would be attracted, where a notice to show cause is issued to the judgment debtor and such judgment debtor, either does not appear, or appears but does not show cause to the satisfaction of the Court. What, therefore, comes into play in the facts of this case is sub-rule (2) of Rule 105 of Order XXI of the Code. A reading of the Rule 105 (*supra*) shows that it speaks about the Court fixing a date for hearing of the application; that is what Sub-Rule (1) of Rule 105 envisages. The dismissal of the application under Sub-Rule (2) of Rule 105 last mentioned is, therefore, a dismissal that comes about as a result of absence of the applicant on the date fixed for hearing, either originally fixed or the adjourned date, where the applicant fails to appear. But, there is little doubt on a plain construction of provisions of Sub-rule (2) of Rule 105 that the power to

dismiss in default for non prosecution, which is precisely the nature of the power conferred by the said sub-rule, must have been exercised on a day fixed for hearing of the Execution Application, that may be date fixed in the first instance or an adjourned date. It cannot be a date for any other purpose, such as taking steps, or for disposal of some report, or other application.

15. It would be gainful to refer to authority on the point where this question has arisen in the past. This question arose before the Gauhati High Court in **Deo Narayan Goala (Deceased by L.R.) and others vs. Jagadish Pandit**. It was a case where the Execution Application had been rejected on a date that was not fixed for hearing . The decree-holder applied to set aside the order rejecting the application in his absence, invoking the provisions of Section 151 CPC. In the said case, the Execution Application was dismissed on a date, which was fixed for disposal of an application by the Judgment Debtor, seeking stay of execution till harvesting was done. There were also objections by the decree-holder to that application up for orders. It was not a date fixed for hearing of the Execution Application but the Court had dismissed the Execution Application on ground that no steps were taken for proceedings with the execution. This, the Court did after dismissing the Judgment-debtor's application and the decree-holder's objections thereto as infructuous. The Executing Court on an application made to set aside the order dismissing the Execution Application, did so invoking its inherent powers under Section 151 CPC. That order was challenged before the Gauhati High Court. The Court holding that the provisions of Rule 106 of Order XXI do not apply, unless it is a date fixed for hearing of the Execution Application, said thus in paragraph 5 and 8 of the report:

"5. These two Rules were inserted by the Code of Civil Procedure Amendment Act, 1976 and were brought into force with effect from 1st February, 1977. R.105 deals with the hearing of an Execution Application. Sub-clause (1) of R.105 requires the court to fix a date for the hearing of an Execution Application. Sub-clause (2) of this Rule provides that if on the date fixed for hearing of the Execution Application or any application arising out of the Execution Application or on any other date to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the court may dismiss that application. Similarly if the other party to whom the notice has been served does not appear, the court may proceed to hear the application *ex parte* and pass such orders as it thinks fit and proper. Rule 106, empowers the executing court to recall the order of dismissal passed *ex parte* and it provides that the court may set aside the order passed either under sub-clause (1) of R.105 or of sub-clause (2) of R.105, if it is satisfied that there was sufficient cause for the non-appearance when the application is called on for hearing. R.105 also covers the Execution Application. The court may fix a date of hearing of an Execution Application if any objection is filed against the same and if on the date of hearing of the application, the decree-holder is not present, the application may be rejected. Similarly, if the judgment-debtor is not present at the time of hearing of the Execution Application, the hearing may be done *ex parte* and suitable orders may be passed in the case after hearing

the decree-holder. R.105 however does not deal with the situation when an Execution Application is rejected on account of not taking the requisite steps in the case. It is quite plain from sub-clause (1) of R.105 that the court may fix a date for the hearing of the application. But before an application is set down for hearing, it should have in fact, ripened for the hearing. In other words, the judgment-debtor should have the information that an application has been moved against him and he may show cause against the same. In order to serve notices on the judgment-debtor certain steps are to be taken. If the decree-holder does not take the requisite steps to serve notice on the judgment-debtor, the Execution Application may be rejected on account of non-prosecution. But that order of rejection will not be covered by R.105, Code of Civil Procedure; because, the date was not fixed for hearing the application but was fixed for taking requisite steps in the case. This distinction is also made out in the provisions of O.9 of the Code of Civil Procedure. I have referred to the provisions of O.9 not with a view to say that those provisions apply to the execution case but I have just mentioned them by way of an illustration. It cannot, therefore, be said that R.105 covers all the situations and if any application has to be made for setting aside the *ex parte* order, it should be only under R.106 of O.21. In fact R.106 comes into play when an application was fixed for hearing and the applicant was absent at the time of the hearing and the application was therefore rejected. In the case in hand, the learned Munsiff rejected the Execution Application on the ground that the decree-holder took no other steps for proceeding with the execution. Quite obviously, the Execution Application was not fixed on 11th July 1980 for its hearing. The petition No. 49/11 filed by the judgment-debtor was fixed for hearing and that petition was rejected on that day. After rejecting that application, the court below further passed an order dismissing the execution case for default on the ground that the decree-holder took no other steps. This order was obviously not covered by the provisions of R.105 of O.21, Code of Civil Procedure. Hence the provisions of R.106 could not be invoked. The decree was passed on 4th March, 1968. The period of 12 years had expired on 4th March, 1968. The Execution Application was dismissed on 11th July, 1980. In these circumstances, the decree-holder filed an application under S.151, Code of Civil Procedure for recalling the order of 11th July, 1980 instead of filing a second application for execution.

8. I have already pointed out above that the provisions of Rules 105 and 106 of O.21 could not be invoked on the facts and circumstances of the instant case. There is no other express provision in the Code of Civil Procedure dealing with the situation which had arisen in the present case. The trial court had not fixed the Execution Application for hearing on 11th July, 1980. It had fixed that date for hearing of the petition of the judgment-debtor whereby he wanted the stay of the execution proceedings till the harvesting was done. That application was rejected by the court below as it had become infructuous. The parties were present before the court. If any steps were required to be taken by the decree-holder for proceeding with the execution, the court should have granted time for doing so. Instead, the court below rejected the application in default. The decree-holder therefore applied for setting aside that order. Such an order not being covered by

R.105 of O.21, Code of Civil Procedure, the application for setting it aside could not be filed under R.106 of O.21. The inherent power of the Court was, therefore, invoked to set aside that order. The court below having found that there were sufficient grounds for setting aside that order, recalled it and allowed the application of the decree-holder and fixed 24th July, 1980 for taking steps in the case. Such an order could not be said to be capricious or arbitrary. The discretion exercised by the court below in setting aside the order dated 11th July 1980 could not therefore be interfered with. In fact the impugned order was passed in the interest of justice and taking of course the notice of the fact that the alternative remedy to file a fresh Execution Application had become barred by time. The petitioners have thus failed to make out a case warranting interference under S.115 of the Code of Civil Procedure."

16. Likewise, the question again fell for consideration before the Madhya Pradesh High Court in **Khoobchand Jain and another vs. Kashi Prasad and other.** In the said case, the decree put to execution was a money decree. The decree-holder applied for execution and after the judgment-debtor had put in appearance, a warrant of attachment of movables was issued, upon the decree-holder furnishing a list of movables and requisite process fee, within three days. The decree-holder took the requisite steps and warrant to attach the movables, in accordance with the list, was issued. The judgment-debtor, however, objected to the warrant before the Court on ground that suit as against him had been dismissed, and, therefore, his property could not be attached. In this circumstance, the Executing Court upheld the said objection and directed the decree-holder to furnish a list of movables of judgment-debtors and not the defendant against whom the suit was dismissed. The decree-holder could not furnish list of movables of the judgment-debtors, in consequence of which, no warrant of attachment could be issued. The Executing Court on the last date fixed had granted some further time to the decree-holder to furnish the requisite list of movables, and on such a list being furnished, ordered the warrant of attachment to be issued. The case was last adjourned for the purpose of furnishing that list to 21.08.1979. On the said date, neither the decree-holder or their counsel appeared in Court and the Execution Application was dismissed in default of the decree-holder's appearance. The decree-holder filed a restoration application under Order XXI Rule 106 of the Code on 24.09.1979, explaining the delay. The Application was opposed on ground of limitation by the judgment-debtor. The decree-holder filed an application for condonation of delay, which too was opposed by the judgment-debtor. The Executing Court rejected the application to set aside the order on ground that Section 5 of the Limitation Act does not apply to an application under Order XXI Rule 106 of the Code and a miscellaneous appeal to the District Judge was also dismissed. On a Revision being filed to the High Court, it was held thus in paragraph 17, 18, 19 and 20 of the report:

17. Rule 106 of O. 21 of the Civil P.C. provides that if the Court is satisfied that there was sufficient cause for non-appearance, when the application was called for 'hearing', the Court shall set aside the order. No such order shall be made unless the application is made within 30 days from the date of order.

Rule 105 contemplates dismissal of the application on a date of 'hearing', while Rule 106 provides, for restoration of application on making out sufficient cause for non-appearance, when the application was called for 'hearing'.

18. In my opinion, the date on which the Execution Application was dismissed for default of appearance of the decree-holders, namely, 21-8-1979 was not a date fixed for 'hearing' within the meaning of Rule 105. It was a date awaiting report as to execution of the warrant which was supposed to be issued on submission of a list of moveable property by the decree-holders within three days of the earlier order dated 21-7-1979. Consequently, the dismissal of Execution Application on 21-8-1979 was not under Rule 105(2) of O. 21 of the Civil P.C., and therefore, the provisions of R. 106 are not attracted. The dismissal of the Execution Application in default of appearance on 21-8-1979 is referable to inherent powers of the Court.

19. I have pointed out above that there is a specific provision for dismissal of suit for non-payment of costs etc. in O. 9, while there is no analogous provision in O. 21 of the Civil P.C. Consequently, the dismissal of Execution Application for non-payment of process-fee or for failure to comply with any direction of the Court, will be in exercise of inherent powers. In the present case, the dismissal was not failure of the decree-holders to pay process fee or to submit a list of property, but was in default of appearance of the decree-holders. The Courts below committed a mistake in treating the dismissal of Execution Application under R.105 so as to attract R.106 of O.21 of the Code. The orders passed by the Courts below cannot be sustained.

20. Since the dismissal of the Execution Application on 21-8-1979 was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time limit is prescribed for invoking the inherent powers of the Court.

17. The same question fell for consideration before the Orissa High Court in **Dambarudhar Mohanta vs. Mangulu Charan Naik and others.** In the said case, the Execution Application was dismissed in default on a certain date because requisite steps were not taken by the decree-holder. A restoration application made under Section 151 C.P.C., beyond the period of 30 days was rejected on ground that provisions of Section 151 were not applicable, in view of specific provisions of Order XXI Rule 106 CPC, where a time barred application to set aside an order dismissing the Execution Application in default was not maintainable. In the context of the said facts, a Revision from the said order was allowed by the District Judge on ground that the provisions of Order XXI Rule 106 were not attracted. It was held in paragraph 6 of the report thus.

"6. On perusal of the impugned orders and the order of learned Civil Judge, provision under Order 21, Rule 106, CPC and the aforesaid contention of the petitioner, this Court finds that the view expressed by the District Judge relating to non-applicability of the provision of Order 21, Rule 106 relating to restoration of an execution case dismissed for default is correct. In other words, the execution proceeding dismissed in such a manner cannot be restored on an application under Order 21,

Rule 106, CPC. In that respect in the absence of any specific provision in the Code of Civil Procedure. Provision in Section 151, CPC is the only provision to consider the prayer for restoration....."

18. The question was also considered by the Supreme Court in **Damodaran Pillai and others vs. South Indian Bank Ltd.,** where the Execution Application, that was set down for hearing, was dismissed in default on 1.11.1990. The restoration application was filed on 4.4.1998 on ground that the decree-holder came to learn about the dismissal of the application on 25.3.1998, and not earlier. The restoration application was rejected by the Subordinate Judge, and so was the Revision by the Kerala High Court. Their Lordships of the Supreme Court upheld that order after distinguishing the decision of the Madhya Pradesh High Court in **Khoobchand Jain and another** (*Supra*), which verifies the legal position that the provisions of Order XXI Rule 106 C.P.C. apply if the application has been set down for hearing but not otherwise. It was held in **Damodaran Pillai and others** (*Supra*) by their Lordships thus:

"19. Mr Joshi, however, placed strong reliance upon Khoobchand Jainv.Kashi Prasad[AIR 1986 MP 66 : 1986 MPLJ 52] . The said decision, in our opinion, has no application to the facts and circumstances of the present case. Therein the Execution Application was dismissed on a day which was not fixed for hearing. The said order of dismissal, therefore, was not passed in terms of sub-rule (2) of Rule 105 of Order 21 of Code of Civil Procedure. In that situation it was opined: (AIR p. 69, para 15)

"15. In the present case, the decree-holders had already applied for execution and paid process-fee for issuance of a warrant of attachment. It was, therefore, for the Court to issue a warrant of attachment of such property as was in possession of the judgment-debtors. Submission of the inventory of movable property in possession of the judgment-debtors is not necessary under the relevant rules. In case, the warrant is returned unexecuted, the decree-holders could, in their discretion, make an application for examination of the judgment-debtors under Rule 41 or could resort to any other mode to recover the decretal amount."

It was further observed: (AIR p. 70, para 20)

"20. Since the dismissal of the Execution Application on 21-8-1979 was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time-limit is prescribed for invoking the inherent powers of the Court."

19. The question was considered by this Court in **Arjun Prasad vs. Sameer Jahan Begum.** It is a case where the Execution Application had been dismissed on a date that was not fixed for hearing but for summoning the file. In that context Janardan Sahai, J. held thus:

"Sub Rule 1 of Rule 105 provides that the court before which an application under Order 21 is pending may fix a day for the hearing of the application. It is thus clear that it is not every date fixed in a pending application which is a date for hearing. A date for hearing would be a date fixed by the court for that purpose. A date for hearing would

be one where the court proposes to hear the case or to apply mind to the case. The power of dismissal of the application in the absence of the applicant provided under Sub Rule (2) can be exercised on a day fixed for hearing or on a day to which the hearing has been adjourned. When the court fixes a date for production of the file it does not fix a date for hearing within the meaning of Sub Rule 1. If the record is not produced on that date and the court fixes another date for the production of the record, such adjourned date would not be a date to which the hearing has been adjourned within the meaning of Sub Rule (2) of Rule 105.

In the present case it has been held by the courts below that the date fixed was for summoning the file. The date was not one where the court proposed to apply mind or to hear the parties. Such a date cannot be treated as the date for hearing within the meaning of Rule 105 (2) of Order 21 CPC. The application for restoration in such a case would lie under Section 151 CPC and not under Rule 106."

20. This question was again considered by this Court in **State of U.P. vs. Saifi Abdul Hasan Nimachawala,** where after survey of most of the decisions refered to in detail hereinabove, it was held thus:

"**15.** The consistent view therefore, is that Rule 106 would apply only when the execution proceedings is fixed for hearing in terms of Rule 105 of Order XXI and in the event of the petition being dismissed prior to the stage of hearing, in absence of a specific provision, the court is competent ot restore the petition in exercise of its inherent power."

21. A perusal of the order dated 27.3.2010 does not spare the slightest doubt that 16.4.2010 was not a date fixed for hearing but orders or disposal of the service report, regarding steps earlier directed to be taken vide orders 31.10.2009 and 30.01.2010, and may be, also on the document that was filed, bearing paper no. 24 BC on 27.3.2010. It was certainly not a date that was fixed for hearing the application within the meaning of sub-rule (2) of Rule 105 of Order XXI C.P.C. Thus, the order dismissing the Execution Application on 16.4.2010 cannot be said to be an order passed in exercise of jurisdiction under Order XXI Rule 106 of the Code. That being so, a restoration application, or an application to set aside the order 16.4.2010 is not at all one made under Rule 106 of Order XXI, so as to attract the bar of limitation, under Sub-rule (3). It is clearly an application under Section 151 CPC to which the rule of limitation, under Sub-rule (3) of Rule 106 of Order XXI, does not apply.

22. Since, the impugned order dated 23.1.2019 proceeds entirely on the basis that the application is barred by limitation, which cannot be condoned treating it in manifest error to be an application under Order XXI Rule 106 of the Code, the impugned order aforesaid passed by the learned IVth Additional District Judge/Special Judge E.C. Act, Bulandshahar is manifestly illegal and liable to the set aside.

23. In the result, this petition succeeds and is **allowed.** The impugned order dated 23.01.2019 passed by the learned IVth Additional District Judge/Special Judge (E.C.) Act, Bulandshahar in Miscellaneous Case No. 1418 of 2017 is

hereby set aside with a remit of the matter to the learned IVth Additional District Judge/Special Judge (E.C.) Act, Bulandshahar to redetermine the belated application for restoration, together with the delay condonation application filed in its aid in proper sequence, in accordance with law, after hearing all parties concerned, afresh. In doing so, the learned IVth Additional District Judge/Special Judge (E.C.) Act, Bulandshahar will bear in mind what has been said in this judgment. The learned IVth Additional District Judge/Special Judge (E.C.) Act, Bulandshahar will decide Miscellaneous Case No. 1418 of 2017 within a period of two months from the date of receipt of a certified copy of this order.

(2019)10ILR A 1201

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2019

BEFORE

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

Habeas Corpus Writ Petition No. 562 of 2019
&
Habeas Corpus Writ Petition No. 564 of 2019

Aashif ...Petitioner/Detainue (In detention)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Singh, Sri Chandrakesh Mishra

Counsel for the Respondents:
G.A., A.S.G.I., Annapurna Singh, Sri Kuldeep Singh Chauhan, Sri R.P.S. Chauhan

A. National Security Act , 1980 - Section 3(2) read with Section 3(3) – Detention on basis of solitary incident and irrelevant considerations-no cogent material to enable a logical inference that on being released on bail, the petitioners would indulge in activity prejudicial to the maintenance of the public order or supplies and services essential to the community. (Para 26,27,28,34 & 35)

Ordinarily a solitary act may not be sufficient to sustain an order of preventive detention but where that act is of such a nature that it is reflective of, or has manifestation of, an organized criminal activity, or is so grave that it reflects the propensity of that person to repeat such an act, then even a solitary act could well be made basis for passing an order of preventive detention.

Except for the criminal history of Aas Mohd., the brother of the petitioner (Aashif) and uncle of the petitioner (Adil), which, in our view was extraneous and not a relevant consideration, particularly, in absence of further details as to how the petitioners were linked with him in his criminal activity, there is no material, cogent enough, to enable a logical inference, on the basis of a solitary incident, that on being released on bail, the petitioners would indulge in activity prejudicial to the maintenance of the public order or supplies and services essential to the community.

The incident was not such from which any inference could be drawn about the propensity of the petitioners to repeat, or indulge in, such activities. No co-accused similarly situated has been preventively detained.

Consequently, both the habeas corpus petitions are allowed. The detention orders quashed. Both the petitioners shall be set at liberty forthwith unless wanted in any other case.

Habeas Corpus petition allowed (E-3)

Case law discussed: -

1. Attorney General for India Vs Amratlal Prajivandas & ors. reported in 1994 (5) SCC 54

2. Surya Prakash Sharma Vs St. of U.P. & ors.

1994 (Supp.) 3 SCC 195

3. Yogendra Murari Vs St. of U.P. & ors. (1988) 4 SCC 559

4. Khudiram Das Vs St. of W.B. (1975) 2 SCC 81

5. Vashisht Narain Karwaria Vs St. of U.P. (1990) 2 SCC 629

6. Sama Aruna Vs St. of Telangana & anr. (2018) 12 SCC 150

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

1. These two habeas corpus petitions have been filed by uncle (Aashif) and nephew (Adil) questioning their detention under the provisions of the National Security Act (for short the Act, 1980) under separate detention orders dated 16th April, 2019, passed by the District Magistrate, Ghaziabad in exercise of powers under Section 3(2) read with Section 3(3) of the Act, 1980.

2. As the impugned orders seeking detention of the petitioners are based on identical grounds and the arguments advanced by learned counsel for the parties are same in both the petitions, with the consent of learned counsel for the parties, these petitions are being decided by a common judgment and order.

3. We have heard Sri Daya Shanker Mishra, learned senior counsel, assisted by Sri Sunil Singh and Sri Chandrakesh Mishra, for both the petitioners; Sri Deepak Mishra, learned A.G.A. for the State as well as the other State-Officers including the detaining authority in both the petitions; Sri G.P. Singh holding brief of Sri R.P.S. Chauhan for the Union of India in Habeas Corpus Petition No. 262 of 2019; and Ms. Annapurna Singh for the Union of India in Habeas Corpus Petition No. 564 of 2019; and have perused the record.

4. The impugned detention orders dated 16th April, 2019 would reveal that the District Magistrate, Ghaziabad (the Detaining Authority) has passed the order of detention by taking notice of an incident dated 25.05.2019 relating to a clash between two group of persons, namely, the petitioners along with seven named associates and others on the one side and Ata Ilahi and his seven named associates on the other side, at Rawali Surana Main Road near Bilal Masjid, which had breached public order. The order of detention was passed to prevent repeat of such activity so as to ensure maintenance of public order and essential services as well as civil supplies.

5. A perusal of the grounds of detention would show that on 25.3.2019 the police received an information that at Rawali Surana main road, near Bilal Masjid, two group of persons were indulging in exchange of fire and brickbats to establish their authority and hold over the area thereby causing utter confusion and panic in that area. Upon receipt of that information, the police reached the spot. The perpetrators, upon seeing the police, dispersed and escaped. From the spot few cartridge empties were recovered. Upon enquiry from persons found there, information was gathered regarding involvement of the petitioners and others in the incident. FIR was lodged naming 20 persons including the petitioners, though five or six others were left unnamed. FIR was registered as Case Crime No. 262 of 2019 at P.S. Muradnagar, District Ghaziabad, under Sections 147, 148, 149, 307, 341, 336,

504, 188 I.P.C. and section 7 Criminal Law Amendment Act, 1934. It was alleged that by the said activity of the petitioners, despite prohibitory orders issued under section 144 CrPC in view of impending Lok Sabha elections, there had been a breach of public order including disruption in movement of vehicles as well as civil supplies. The grounds of detention drew support not only from the police reports but also newspaper reports dated 26.03.2019 published in Hindustan; Dainik Jagran; and Amar Ujala. The news daily Hindustan reported that in the middle of the road for half-an-hour there was exchange of brickbats and fire between two groups. The news daily Dainik Jagran reported that at Muradnagar there had been indiscriminate firing. News daily Amar Ujala reported that there was exchange of fire and brickbats between two groups on account of money dispute.

6. After narrating the incident as above, in paragraph 8 of the grounds of detention, on the one hand it was stated that the petitioner and his family members are habitual criminals whereas, on the other hand, it was stated that no other case is reported against them. Though it was added that no one dares to lodge a complaint against them. The criminal history of Aas Mohd., who is brother of Aashif and Uncle of Adil, comprising 42 cases relating to abduction; murder; attempt to murder; Goonda Act; Arms Act; Gangster Act; and Extortion, was cited.

7. After completing the narrative, as above, by showing awareness that the petitioner(s) is/are in jail in connection with case crime no. 262 of 2019 (supra) and are striving for bail, it was observed that as there is likelihood of they being released on bail and indulge in activity that would disturb public order, with a view to prevent them from acting in a manner that might be prejudicial to the public order, it was necessary to detain them under the Act, 1980.

8. The grounds of detention were accompanied by reports of the Deputy Inspector General of Police, Ghaziabad/ Senior Superintendent of Police, Ghaziabad; Superintendent of Police, Rural, Ghaziabad; Circle Officer, Sadar, Ghaziabad; and Prabhari Nirikshak, P.S. Muradnagar, Ghaziabad as also photocopies of the Act, 1980 and Article 22 of the Constitution of India.

9. The report of the Superintendent of Police, Rural, Ghaziabad disclosed that the petitioners had filed Crl. Misc. Writ Petition No. 8099 of 2019 for pre-arrest protection which stood disposed off on 01.04.2019 by giving protection to the petitioners for a specified period with liberty to move for bail within that period. It was also reported that pursuant to the order dated 01.04.2019 the petitioners had surrendered on 10.04.2019 in the Court of Additional Chief Judicial Magistrate, VIth and had applied for bail which was rejected but, on the same day, bail application was moved in the Court of District & Sessions Judge, which was pending. The report also indicated that the Additional District & Sessions Judge-II, Ghaziabad, after hearing both sides on the bail prayer, had rejected the prayer for interim bail but had fixed 16.04.2019 for consideration of prayer for regular bail. With that background, it was reported that there was real possibility of the petitioners being released on bail.

10. The order of detention dated 16.04.2019 was approved by the State

Government, under Section 3(4) of the Act, 1980, and, thereafter, upon receipt of positive report from the Advisory Board, by order dated 24.05.2019, the same was confirmed and detention was directed, provisionally, for a period of three months. This detention period has been extended up to six months, starting from the date of initial detention, vide order dated 12.07.2019.

11. Learned counsel for the petitioner has urged that the detention order passed against the petitioners is discriminatory. It has been submitted that the incident which forms the basis of the detention order is in respect of exchange of fire and brickbats between two group of persons in which no person received injury of any kind. Moreover, as per allegations in the FIR, the moment the police force arrived, the accused persons dispersed without offering any resistance to the police. The police, thereafter, named as many as 20 persons, including the petitioners, and left 5-6 other accused unnamed. But, except the two petitioners, detention order was not imposed against anyone else which suggests that the petitioners have been maliciously picked up for depriving them of their liberty.

12. In paragraph 7 of both the writ petitions, it has been stated that brother of the petitioner (Aashif), namely, Sri Vahab Chaudhari, who is uncle of the other petitioner (Adil), is MLA from Bahujan Samajwadi Party. It is stated that for Lok Sabha Elections 2019, the voting at Ghaziabad was in the first phase and, therefore, prohibitory order, under Section 144 Cr.P.C, was in existence. The petitioners along with family members were campaigning in support of the Mahagathbandhan (opposition) candidate, that is against the ruling party. The alleged incident was shown with a view to implicate the petitioners so as to exert pressure upon them.

13. It has been urged that if the incident had the potentiality to disturb the public order then all the persons named ought to have been detained. But the detention order is only against the petitioners, which is clearly reflective of misuse and abuse of executive power.

14. It has also been submitted that even assuming that the incident narrated had the potentiality to disturb the public order, detention could be justified only if there was any material to show or suggest that upon being released on bail, the petitioners would have repeated such activity that would be prejudicial to the maintenance of the public order. It has been submitted that the petitioners admittedly had no previous criminal history and the extraneous material relating to the criminal history of Aas Mohd, the brother of Aashif (petitioner of H.C. Petition No. 562 of 2019) and uncle of Adil (petitioner of H.C. Petition No. 564 of 2019), is completely irrelevant so as to infer that the petitioners would indulge in repeat of the act if let out.

15. It was urged that the incident, as reported in the first information report, did not disclose any organized activity from which it could be inferred that there was likelihood of the petitioners repeating such activity.

16. In addition to above, it has been submitted that as the first information report discloses that the moment the police arrived on the spot the accused persons escaped, without offering any

resistance to the police, the incident did not have the potentiality to disturb the public order and was a mere breach of law and order. It has been urged that the statement that doors were shut and shutters of shops were downed is only to add color to the case for detaining the petitioner.

17. In addition to above, various other submissions were made by learned counsel for the petitioners, which are being noticed, in brief, below:-

(i) That before extension of the period of detention, which was initially for a period of three months only, a report was obtained from the District Magistrate but copy of that report was not supplied to the petitioners to enable them to effectively represent against the order extending the period of detention.

(ii) That the sponsoring authority though furnished the criminal history of Aas Mohd, the brother of petitioner (Aashif) and uncle of petitioner (Adil), but the criminal history was incomplete as it did not provide complete information regarding the current status of those cases and, otherwise also, papers relating to those cases were not provided, which has affected the right of the petitioners to make an effective representation against the order of extension of detention.

(iii) That the Sponsoring Authority in his report though disclosed about filing of Crl. Misc. Writ Petition No. 8099 of 2019 but copy of that writ petition was not supplied to the detaining authority and its copy was also not provided to the petitioners even though the same was a relevant document inasmuch as it contained the defence of the petitioners.

18. **Per contra,** the learned A.G.A. submitted that the grounds of detention reflect that the detention order was passed upon consideration of the activity of the petitioners with reference to the incident dated 25.03.2019 which had clearly disturbed public order inasmuch as parties had exchanged brickbats as well as fire on a busy street near Bilal Masjid. Hence, as the detention order was passed after showing awareness that the petitioners were in jail and striving for bail and on being released on bail they would indulge in similar activity which had the potentiality to disturb the public order, the satisfaction of the detaining authority, having been arrived at on the basis of relevant material, cannot be questioned and, therefore, no case for interference is made out. It has also been urged that the satisfaction of the detaining authority cannot be questioned on the ground that no detention order has been passed against co-accused. It was also urged that the copy of the Crl. Misc. Writ Petition No. 8099 of 2019 was not relevant as it sought quashing of the FIR which prayer was not accepted by the writ court. Otherwise, copy of the order passed therein was supplied by the sponsoring authority to the detaining authority.

19. Learned A.G.A. also urged that mere mentioning of criminal history of relative of the detenu would not vitiate the detention order on the ground that extraneous material had been taken into consideration because the detention order can be sustained on a solitary ground in view of Section 5-A of the Act, 1980.

20. It was also submitted that once the Advisory Board opines that the grounds of detention are sufficient and germane to detain a person under the Act,

1980, the period for which the detenu is to be detained is in the exclusive domain of the State Government and, therefore, if, for taking decision, to review the period of detention, the State Government considered report of detaining authority, which is confidential in nature, such report need not be supplied to the detenu. It has been submitted that Article 22 (5) of the Constitution of India provides for supply of grounds of detention to afford earliest opportunity to the detenu to make a representation. The material relating to the period for which a detenu is to be detained would not fall within the meaning of the phrase "the grounds of detention", therefore such material need not be supplied/shown to the detenu. It has thus been argued that neither the detention order suffers from any infirmity nor the continued detention has been rendered illegal, hence the petition is liable to be dismissed.

21. We have considered the rival submissions and have carefully perused the record.

22. Although several submissions have been noticed by us but since we propose to allow both the petitions on ground hereinafter stated, we do not propose to deal with the merits of the other submissions raised.

23. Before we deal with the ground on which we propose to allow the petition, it would be useful for us to notice the legal position as to when an order of preventive detention can lawfully be passed on a solitary act of the detenu. In this regard, it would be useful for us to notice the decision of nine-judges Bench of the Apex Court in ***Attorney General For India vs Amratlal Prajivandas and others reported in 1994 (5) SCC 54.*** In paragraph 48 of the judgment, as reported, the apex court has held as follows:-

"48. Now, it is beyond dispute that an order of detention can be based upon one single ground. Several decisions of this Court have held that even one prejudicial act can be treated as sufficient for forming the requisite satisfaction for detaining the person. In Debu Mahato v. State of W.B. it was observed that while ordinarily-speaking one act may not be sufficient to form the requisite satisfaction, there is no such invariable rule and that in a given case one act may suffice. That was a case of wagon-breaking and having regard to the nature of the Act, it was held that one act is sufficient. The same principle was reiterated in Anil Dey v. State of W. B. It was a case of theft of railway signal material. Here too one act was held to be sufficient. Similarly, in Israil SK v. District Magistrate of West Dinajpur. and Dharua Kanu v. State of W.B. single act of theft of telegraph copper wires in huge quantity and removal of railway fish-plates respectively was held sufficient to sustain the order of detention. In Saraswati Seshagiri v. State of Kerala , a case arising under COFEPOSA, a single act, viz., attempt to export a huge amount of Indian currency was held sufficient. In short, the principle appears to be this: Though ordinarily one act may not be held sufficient to sustain an order of detention, one act may sustain an order of detention if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity. The gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in

similar prejudicial activity. That is the reason why single acts of wagon-breaking, theft of signal material, theft of telegraph copper wires in huge quantity and removal of railway fish- plates were held sufficient. Similarly, where the person tried to export huge amount of Indian currency to a foreign country in a planned and premeditated manner, it was held that such single act warrants an inference that he will repeat his activity in future and, therefore, his detention is necessary to prevent him from indulging in such prejudicial activity. If one looks at the acts the COFEPOSA is designed to prevent, they are all either acts of smuggling or of foreign exchange manipulation. These acts are indulged in by persons, who act in concert with other persons and quite often such activity has international ramifications. These acts are preceded by a good amount of planning and organisation. They are not like ordinary law and order crimes. If, however, in any given case a single act is found to be not sufficient to sustain the order of detention that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention."

(Emphasis Supplied)

24. In ***Surya Prakash Sharma v. State of U.P and others : 1994 (Supp.) (3) SCC 195,*** the petitioner was already in jail in connection with a murder case. The petitioner had no criminal history though there was a solitary case of broad day light murder registered against him. The argument raised before the apex court was that on the basis of that solitary case against the detenu, there could be no apprehension in the mind of the detaining authority that the detenu on being released would indulge in any such activity that would be prejudicial to the maintenance of public order. The apex court found that there was no cogent material placed before the court or before the detaining authority to enable an inference that the detenu on being released on bail would indulge in such offence that would be a threat to public order. The apex court, accordingly, quashed the order of detention and, while doing so, in paragraphs 5 and 6, as reported, observed as follows:

"5.The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in Rameshwar Shaw v. District Magistrate, Burdwan, [1964] 4 SCR 921. To eschew prolixity we refrain from detailing all those cases except that of Dharmendra Suganchand Chelawat v. Union of India, AIR (1990) SC 1196 wherein a three Judge Bench, after considering all the earlier relevant decisions including Rameshwar Shaw (supra) answered the question in the following words:

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention: and (ii) there were compelling reasons justifying

such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implied that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

6. When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in judicial custody at the time of making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the averment: made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail 'he may again indulge in serious offences causing threat to public order", (emphasis supplied), To put it differently, the satisfaction of the detaining authority that the detenu might indulge in serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified."

25. In ***Yogendra Murari v. State of U.P. and others : (1988) 4 SCC 559,*** the apex court had the occasion to deal with a submission whether the detention order could be considered discriminatory on the ground of non-detention of co-accused in the same incident. Rejecting the claim of discrimination, raised on behalf of the petitioner, in paragraph 9 of the judgment, the apex court observed as follows:-

"9. There is no merit whatsoever in the petitioners grievance of discrimination on the ground that the other co- accused persons have not been detained. The role of the petitioner and that of the others are not identical and the reasonable apprehension as to their future conduct must depend on the relevant facts, and circumstances which differ from individual to individual. It would have been wrong on the part of the detaining authority to take a uniform decision in this regard only on the ground that the persons concerned are all joined together as accused in a criminal case."

26. From the decisions noticed above, what is clear is that though ordinarily a solitary act may not be sufficient to sustain an order of preventive detention but where that act is of such a nature that it is reflective of, or has manifestation of, an organized criminal activity, or is so grave that it reflects the propensity of that person to repeat such an act, then even a solitary act could well be made basis for passing an order of preventive detention.

27. In the instant case, the incident which forms the basis of the detention order by no stretch of imagination can be taken as an incident of an organized crime. The incident appears to be a clash between two group of persons. The clash is not shown to be communal in nature. Though brickbats and fire is said to have been exchanged but no injury is shown to

have been sustained by any one. In fact, a specific stand has been taken by the petitioners that not a single person had sustained injury and no private person has made any complaint. Admittedly, the first information report was lodged by the police and a bare perusal of the first information report would indicate that as soon as the police arrived and challenged the persons, who were exchanging brickbats, all of them escaped without defying or challenging the authority of the police or even attempting to throw a single brick at the police. Under the circumstances, drawing an inference only against two participants, out of 25 odd persons who participated in that incident, that they were likely to repeat their act and be a threat to maintenance of public order, in our view, could not have been drawn merely on the basis of gravity of that incident/ act. Rather, it appears to us that it has been drawn on the basis of extraneous material that is the criminal history of Aas Mohd., a relative of the petitioners. Had the gravity of the incident been the reason to impose the order of detention not only the petitioners but other participants also would have been subjected to detention. Whereas, here, admittedly, the detention order has been passed only against the petitioners, which clearly reflects that the detention order has been passed on the basis of some other material which appears to be the criminal history of the relative of the petitioners.

28. Interestingly, in the grounds of detention as well as the report of the sponsoring authority, it is mentioned that there is not a single case registered against the petitioner except the one in respect of the incident dated 25.3.2018, yet, in paragraph 8 of the grounds of detention it is stated that the detenu and the members of his family are habitual criminals. In support of that statement criminal history of 42 cases of Aas Mohd., starting from the year 1995 and spread across two decades and a half, without any supporting documents in respect thereto, has been cited.

29. In **Khudiram Das v. State of W.B., (1975) 2 SCC 81,** a constitutional bench of the apex court while examining the scope of judicial review of the court against a preventive detention order, in paragraph 9 of its judgment, as reported, had observed as follows:

"9. But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. ..... Then there may be a case

where the power is exercised dishonestly or for an improper purpose : such a case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body.....the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which it is required to be satisfied. Then again the satisfaction must be grounded "on materials which are of rationally probative value". ..... The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad....."

(Emphasis Supplied)

30. The practice of submitting reports to the detaining authority touching the character of the detenu, without supporting material, has been deprecated by the apex court, and in ***Vashisht Narain Karwaria v. State of U.P., (1990) 2 SCC 629,*** the detention was held bad for consideration of such extraneous material.

31. In a recent decision of the apex court in ***Sama Aruna v. State of Telangana and another : (2018) 12 SCC 150,*** the apex court upon finding that the detention order was based on stale grounds, while setting aside the order of detention, made certain observations, in paragraph 17 of the judgment, as reported, which are relevant and are accordingly extracted below:-

"The detention order must be based on a reasonable prognosis of the future behavior of a person based on his past conduct in light of the surrounding circumstances."

32. Thereafter, in paragraph 26 of the said judgment, the apex court further observed as follows:-

"The influence of the stale incidents in the detention order is too pernicious to be ignored, and the order must therefore go; both on account of being vitiated due to malice in law and for taking into account matters which ought not to have been taken into account."

33. At this stage, we may revert to the averments made in paragraph 7 of the petition wherein it has been stated that the other brother of the petitioner, namely, Vahab Chaudhary was an MLA from

Bahujan Samaj Party and the petitioners were supporting the political party other than the ruling party. The District Magistrate though in his counter-affidavit has stated that the sub-Inspector has not lodged the FIR under political pressure but the fact that the brother of the petitioner was MLA and that they were supporting the other party has not been denied.

34. When we take a conspectus of the facts and circumstances of the case, we are of the view that except for the criminal history of Aas Mohd., the brother of the petitioner (Aashif) and uncle of the petitioner (Adil), there is no material, cogent enough, to enable a logical inference, on the basis of a solitary incident, that on being released on bail, the petitioners would indulge in activity prejudicial to the maintenance of the public order or supplies and services essential to the community. The incident dated 25.03.2019 is not reflective of organized criminal activity and, admittedly, was not an incident where any person died or got seriously injured. Thus, in our view, the incident was not such from which any inference could be drawn about the propensity of the petitioners to repeat, or indulge in, such activities. For the reasons stated above as also keeping in mind that no co-accused similarly situated have been preventively detained, we are of the considered view that the order of detention has been passed by being influenced with the criminal antecedents of petitioners' relative, which, in our view was extraneous and not a relevant consideration, particularly, in absence of further details as to how the petitioners were linked with him in his criminal activity. We are therefore of the considered view that on the basis of the solitary incident dated 25.3.2019 the detention order against the petitioners is not sustainable and as such the impugned detention orders are liable to be quashed.

35. Consequently, both the habeas corpus petitions are **allowed.** The detention orders dated 16th April, 2019, passed by the District Magistrate, Ghaziabad in respect of Aashif (petitioner in Habeas Corpus Petition No. 562 of 2019) and Adil (petitioner in Habeas Corpus Petition No. 564 of 2019) are hereby quashed. Both the petitioners shall be set at liberty forthwith unless wanted in any other case. There is no order as to costs.

(2019)10ILR A 1211

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019
BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Matter Under Art. 227 No. 6482 of 2019 (Civil)

Pawan Kumar & Anr.
...Petitioners (Defendants)
Versus
Smt. Sita Devi ...Respondent (Plaintiff)

Counsel for the Petitioners:
Sri Manu Khare

Counsel for the Respondent:
Sri Chetan Prakash

A. Transfer of Property Act, 1882- Sections 106 & 113-Notice u/s. 106 issued determining the tenancy (month to month)- on expiry of the period of notice dated 09.09.2013 the relationship of landlady and tenant came to an end-the landlady has

acquired right to obtain possession of the disputed shop by evicting the tenant.

B. Waiver u/s. 113-essentials being-Intention of landlord- to treat the lease as subsisting and knowledge of his conduct amounts to waiver-it cannot be said that mere acceptance of rent amounts to waiver of notice unless proved otherwise-landlady instituted and is contesting SCC Suit. Thus, no element of waiver of notice can be inferred.

Writ Petition dismissed. (E-8)

List of Cases Cited: -

1. Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors 2005 2 SCC 217

2. Union of India and another v. Sudarshan Lal Talwar, AIR 2002 (Allahabad) 212

3. Man Kaur (dead) by Lrs. Vs. Hartar Singh Sangha (2010)10 SCC 512

4. Sarup Singh Gupta Vs. S. Jagdish Singh and others (2006) 4 SCC 205

5. Ganga Dutt Murarka Vs. Kartik Chandra Das & others, AIR 1961 SC 1067

6. Anis Ahmad Vs. Special Judge/Additional District Judge, Saharanpur 1997(2) ARC

7. Jeevan Dass vs. L.I.C. (1994) Suppl. 3 SCC 694 32

8. Sri Ram Urban Infrastructure Ltd. vs. High Court of Bombay, (2015) 5 SCC 539

9. Vasantkumar Radhakisan Vora vs. Board of Trustees of the Port of Bombay, (1991) 1 SCC 761

10. Tata Steel Limited vs. State of Jharkhand, (2015) 15 SCC 55

11. V. Dhanapal Chettiar v. Yesodai Arnrnal, (1979) 4 SCC 214

12. Majati Subbarao vs P.K.K. Krishna Rao, (1989) 4 SCC 732

13. Mangilal vs. Suganchand Rathi, AIR 1965 SC 101

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

"Waiver of notice to quit u/s 113, determination of tenancy U/S106 and deposition by power of attorney holder on behalf of landlord are the main questions involved in this petition."

1. Heard Shri Manu Khare, learned counsel for the defendants-tenants/petitioners and Shri Chetan Prakash, learned counsel for the plaintiff-respondent.

Facts

2. A shop in house No. D-58/12A-82, Gandhi Nagar, Sigra, Varanasi, was let out by its owner and landlady Smt. Sita Devi Agarwal (the plaintiff-respondent) to the defendants-tenants/petitioners no. 1 & 2 under a rent agreement dated 06.01.2009 at the monthly rent of Rs. 2,005/-. The tenancy commenced from 01.01.2009. Thereafter mutually the rent was enhanced with effect from 11.02.2011, from Rs. 2,005/- to Rs. 3,000/- per month. On 09.09.2013, the plaintiff-landlady/respondent issued a notice under Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as "the Act 1882") to the defendants-tenants/petitioners determining the tenancy. Since the notice was not complied with by the defendants-tenants/petitioners, therefore, the plaintiff-landlady filed SCC Suit No. 49 of 2014 (Smt. Sita Devi Agarawal v. Pawan Kumar & Ors.) which was decreed by judgment and decree dated 24.08.2017 passed by the Judge Small Cause Court, Varanasi. Aggrieved with this judgment the defendants-tenants/petitioners filed S.C.C. Revision No. 15 of 2017 (Pawan Kumar and Anr. v. Sita Devi), which was

dismissed by the Additional District Judge/ FTC-1, Varanasi by judgment dated 15.07.2019. Aggrieved with these two judgments, the defendants-tenants/ petitioners have filed the present petition under Article 227 of the Constitution of India.

Submissions

3. **Learned counsel for the defendants-tenants/ petitioners, submits as under:-**

i. The plaintiff-landlady has not appeared in the witness box rather her son and power of attorney holder Anoop Kumar Agarwal appeared and gave evidence, which is impermissible in view of the law laid down by Hon'ble Supreme Court in **Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors 2005 2 SCC 217, (para 13).** The judgment of learned Single Judge in **Union of India and another v. Sudarshan Lal Talwar, AIR 2002 (Allahabad) 212** relied by the plaintiff-respondent, has no application in view of the judgment of Hon'ble Supreme Court.

ii. A power of attorney was executed by the landlady Sita Devi Agarwal in favour of her son Anoop Kumar Agarwal on 17.07.2014 and thereafter, suit was instituted on 05.08.2014. Therefore, if the son of the plaintiff was well acquainted with all the facts of the case and competent to depose on behalf of the plaintiff-landlady, there was no need to execute the power of attorney. In fact, the son of the plaintiff-landlady was not aware of the facts of the case and therefore, he was not competent to depose on behalf of the plaintiff-landlady.

iii. In view of Section 111(h) readwith Section 113 of the Transfer of Property Act, 1882, the institution of a suit after one year of the notice would amount to waiver of the notice. The notice given by the plaintiff-landlady under Section 106 of the Act, 1882 was no notice in the eyes of law.

iv. The aforesaid notice was issued by the plaintiff-landlady for setting up the business for her son in the disputed shop who wanted to take franchise of Raymond.

v. Subsequently the plaintiff-landlady stated that she could not get franchiese of Raymond because the place was not available whereas in his cross examination son of the plaintiff-landlady has admitted that the shop was not suitable for franchiese of Raymonds. Thus, the need set up by the plaintiff-landlady was not bonafide.

vi. The defendants-tenants/petitioners have not violated any of the conditions of the rent agreement dated 06.01.2009. Therefore, the court below could not have granted a decree of eviction.

vii. Notice was issued by the plaintiff-landlady on 11.09.2013 under Section 106 of the Act, 1882 while the suit was instituted on 05.08.2014 and, therefore, the notice stood waived.

4. In support of his submissions Sri Khare, has relied upon the judgment of Hon'ble Supreme Court in **Man Kaur (dead) by Lrs. Vs. Hartar Singh Sangha (2010)10 SCC 512 (para 18)** and **Sarup Singh Gupta Vs. S. Jagdish Singh and others (2006) 4 SCC 205 (para 6).**

5. **Learned counsel for the plaintiff-landlady/respondent submits as under:-**

(i) The plaintiff has neither waived notice nor there is any material to

indicate that there was any intention of the plaintiff to waive the notice. On the contrary after giving notice, the plaintiff-landlady instituted the suit on 05.08.2014. Thus, the submissions of learned counsel for the petitioner that the notice stood waived is wholly incorrect and misconceived

(ii) Anoop Kumar Agarwal is the only son of the plaintiff-landlady to whom she has given power of attorney. He gave evidence as P.W. 1 in his personal capacity. That apart he was well aware of all the facts of the case and, therefore, was competent to depose. Submission of learned counsel for the petitioner are wholly incorrect. Both the courts below have also found that the evidence given by plaintiff's son was in his personal capacity.

(iii) After giving notice to the tenant the tenancy stood determined. Therefore, the defendant-tenant/petitioner was bound to vacate the disputed shop. That apart the bonafide need of the disputed shop was fully established by the plaintiff-landlady/respondent.

6. In support of his submissions, learned counsel for the plaintiff-landlady/ respondent has relied upon a judgment of this court in **Union of India Vs. Sudarshal Lal Talwar, 2002 AIR (All) 212.**

Discussion & Findings

7. I have carefully considered the submissions of learned counsels for the parties.

Waiver of Notice

8. The submission of learned counsel for the defendant-tenant/petitioner that the plaintiff-landlady has waived notice dated 11.09.2013 by filing the suit after about 11 months on 05.08.2014 is wholly misconceived. **Section 106** of the Act 1882 provides for termination of tenancy by notice. It does not provide that the notice of the landlord terminating the tenancy shall stand waived if suit is not filed within a particular period. Likewise **Section 111(h)** of the Act 1882 also does not provide for any limitation for filing a suit after giving notice to quit. On the contrary it provides that lease of immovable property shall stand determined on expiration of a notice to determine the lease or to quit, or of intention to quit, the property leased, duly given by one party to the other. **Section 113** of the Act 1882 provides that notice given under Section 111 Clause (h) is waived, with the **express or implied consent** of the person to whom it is given, by any act on the part of the person giving it **showing an intention to treat the lease as subsisting.**

9. Section 113 of the Act 1882 contains two conditions to waiver, namely :-

(i) Express or implied consent of the person to whom it is given, by any act on the part of the person giving it

(ii) which shows an intention to treat the lease as subsisting.

10. The **principles of waiver** are well settled. A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. **Intention**

of the landlord to treat the lease as subsisting and his knowledge of the fact that his conduct amounts to waiver, are the basic essentials of waiver contained in Section 113 of the Act 1882.

11. Facts of the present case leaves no manner of doubt that the plaintiff-landlady/respondent has never waived notice under Section 113 of the Act 1882. On the contrary, after determining the tenancy by notice dated 11.9.2013, she instituted SCC Suit No.49 of 2014 (Sita Devi Vs. Pawan Kumar and others) on 5.8.2014. She has been contesting the suit. **Thus, no element of waiver of notice can be inferred on the facts of the present case.** In the present case even rent was not accepted by her after determining the tenancy. Hon'ble Supreme Court in **Ganga Dutt Murarka Vs. Kartik Chandra Das & others, AIR 1961 SC 1067** and this court in **Anis Ahmad Vs. Special Judge/Additional District Judge, Saharanpur 1997(2) ARC 32** have held that mere **acceptance of arrears of rent after expiry of notice or acceptance of rent for the period subsequent to the date of termination of tenancy by the landlord, does not amount to waiver of notice determining the tenancy under Section 106.** Similar view has also been taken by this Court in **Union of India and another Vs. Sudarshan Lal Talwar (supra).**

12. The provisions of Section 113 of the Act has again been interpreted by Hon'ble Supreme Court in **Sarup Singh Gupta's case (supra)** which also does not support the case of the petitioner. Paragraph 6 and 8 of the said judgment is reproduced below:-

"6. The Learned Senior Counsel also relied upon a decision of a learned Single Judge of the Calcutta High Court in Manicklal Dey Chaudhuri v. Kadambini Dassi AIR 1926 Cal 763 wherein it was held that where rent is accepted after the notice to quit, whether before or after the suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting and, therefore, where rent deposited with the Rent Controller under the Calcutta Rent Act is withdrawn even after the ejectment suit is filed, the notice to quit is waived. In our view, the principle laid down in the aforesaid judgment of the High Court is too widely stated, and cannot be said to be an accurate statement of law. A mere perusal of section 113 leaves no room for doubt that in a given case, a notice given under section 111, clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such notice is given must also be established. The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances, and the mere fact that rent has been tendered and accepted, cannot be determinative.

8. In the instant case, as we have noticed earlier, two notices to quit were given on 10-2-1979 and 17-3-1979. The suit was filed on 2-6-1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself constitutes an act on the part of the landlord showing an intention to treat the lease as subsisting. **In our view, mere acceptance of rent did not by itself constitute an act of the nature envisaged by section 113, Transfer of Property Act showing an intention to treat the lease as**

subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted the rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by the courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. **It cannot, therefore, be said that mere acceptance** of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended. In the instant case, we find no other fact or circumstance to support the plea of waiver. On the contrary the filing of and prosecution of the eviction proceeding by the landlord suggests otherwise."

13. In view of the discussion, I do not find any force in the submission of learned counsel for the defendant-tenant/petitioner that the notice dated 11.9.2013 stood waived

Determination of Tenancy by notice U/S 106 of the Act, 1882 and Bonafide need

14. Section 106 of the Act 1882, provides as under :-

"106. Duration of certain leases in absence of written contract or local usage-

"(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose ***shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.***

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section(1) shall commence from the date of receipt of notice.

(3) A Notice under sub-section(1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section(1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

15. Admittedly, the rent of the disputed shop was Rs.3000/-, per month. Therefore, the provisions of U.P. Act No.XIII of 1972 are not applicable. The notice dated 11.09.2013 under Section 106 of the Act, 1882 was issued by the plaintiff-landlady for termination of the tenancy on expiry of 30 days. Thus, the tenancy stood terminated on expiry of the period of notice.

16. In **Jeevan Dass vs. L.I.C. (1994) Suppl. 3 SCC 694, Hon'ble Supreme Court** held that *"Section 106 of the T.P. Act does indicate that the landlord is entitled to terminate the tenancy by giving 15 days' notice, if it is a premises occupied on monthly tenancy and by giving 6 months' notice and if the premises are occupied for agricultural or manufacturing purposes; and on expiry thereof proceedings could be initiated.* ***Section 106 of the T.P. Act does not contemplate of giving any reason for terminating the tenancy."*** Undisputedly in the present set of facts, the tenancy was on month to month basis and a notice date 09.09.2013 determining the tenancy was issued by the plaintiff landlady to the defendant-tenant and the tenancy stood determined on expiry of the period of notice on 30 days. Thereafter the plaintiff-landlady instituted SCC Suit No.49 of 2014 for eviction of the defendant-tenant.

17. In **Sri Ram Urban Infrastructure Ltd. vs. High Court of Bombay, (2015) 5 SCC 539 (Para-18),** Hon'ble Supreme Court held that "if the notice is a short of the period specified in Sub-Section (1) but the suit or proceeding is filed after the expiry of the period mentioned in Sub-Section (1), the notice shall not be deemed to be invalid even though the suit was filed after six months of the notice."

18. In **Vasantkumar Radhakisan Vora vs. Board of Trustees of the Port of Bombay, (1991) 1 SCC 761 (Para-6)**, Hon'ble Supreme Court held that "by issuance of notice to quit automatically the right created thereunder, namely, cessation of the lease, does not become effective till the period prescribed in the notice or in the statute i.e. Section 106 expires. On expiry thereof the lease becomes inoperative and the lessor acquires right to have the tenant ejected. When the tenant fails to deliver vacant possession, the lessor would be entitled to have the tenant ejected and to take possession in due process of law."

19. In **Tata Steel Limited vs. State of Jharkhand, (2015) 15 SCC 55 (Para-33),** Hon'ble Supreme Court held that *"Section 111 of the Transfer of Property Act specifies various contingencies in which a lease of immovable property determines.* ***Clause (h) stipulates that expiration of a notice to determine the lease duly given by the lessor (in compliance with the requirement of Section 106) is one of such contingencies but the Transfer of Property Act, does not authorise the lessor to physical recovery of possession of the property on the determination of the lease.*** *The lessor is still required to approach the competent court for recovery of possession of the property over which the lease is terminated."* Thus, on expiry of period of notice under Section 106 of the Act, 1882, the contractual tenancy of the disputed property stood determined. For recovery of possession, the plaintiff-landlady has approached the competent court by filing the SCC suit.

20. In **V. Dhanapal Chettiar v. Yesodai Arnrnal, (1979) 4 SCC 214,** a Seven Judges Constitution Bench of Hon'ble Supreme Court held that *"in the matter of determination of tenancy,* ***the State Rent Acts do not permit a landlord to snap his relationship with the tenant merely by serving on him a notice to quit as is the position under the Transfer of Property Act."*** The landlord can recover possession of the property only on one or

more of the grounds enacted in the relevant section of the Rent Act. Even after the termination of the contractual tenancy, the landlord under the definitions of landlord and tenant contained in the Rent Acts, remains a landlord and a tenant remains a tenant. The difference between the position obtaining under the Transfer of Property Act and the Rent Act in the matter of determination of a lease is that under the former Act in order to recover possession of the leased premises, determination of the lease is necessary because during the continuance of the lease, the landlord cannot recover possession of the premises while under the Rent Acts, the landlord becomes entitled to recover possession only on the fulfilment of the conditions laid down in the relevant sections. He cannot recover possession merely by determining the tenancy. Nor can he be stopped from doing so on the ground that he has not terminated the contractual tenancy. The principle laid in **V. Dhanapal Chettiar** (supra) **has also been followed in Majati Subbarao vs P.K.K. Krishna Rao, (1989) 4 SCC 732 (Para-5).** In **V. Dhanapal Chettiar** (supra), a Seven Judges Constitution Bench of Hon'ble Supreme Court in para-6 appropriately explained the provisions of Section 106 and Section 111 (h) of the Act, 1882 and held as under:-

"6. Section III deals with the question of determination of lease, and in various clauses (a) to (h) methods of determination of a lease of immovable property are provided. Clause (g) deals with the forfeiture of lease under certain circumstances and at the end are added the words "and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease." The notice spoken of in clause (g) is a different kind of notice and even without the State Rent Acts different views have been expressed as to whether such a notice in all cases is necessary or not. We only observe here that when the State Rent Acts provide under what circumstances and on what grounds a tenant can be evicted, it does provide that a tenant forfeits his right to continue in occupation of the property and makes himself liable to be evicted on fulfilment of those conditions. Only in those State Acts where a specific provision has been made for the giving of any notice requiring the tenant either to pay the arrears of rent within the specified period or to do any other thing, such as the Bombay Rent Act or the West Bengal Rent Act, no notice in accordance with clause (g) is necessary. A lease of immovable property determines under clause (h):-

"On the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other."

It is this clause which brings into operation the requirement of section 106 of the Transfer of Property Act. Without adverting to the effect and the details of waiver of forfeiture, waiver of notice to quit, relief against forfeiture for non-payment of rent etc. as provided for insections 112to114Aof the Transfer of Property Act, suffice it to say that under the said Act no ground of eviction of a tenant has to be made out once a contractual tenancy is put to an end by service of a valid notice undersection 106of the Transfer of Property Act. Until and unless the lease is determined, the lessee is entitled to continue in possession. Once it is determined it becomes open to the lessor to enforce his

right of recovery of possession of the property against him. In such a situation it was plain and clear that if the lease of the immovable property did not stand determined under any of the clauses (a) to (g) of section 111, a notice to determine it undersection 106 was necessary. But when under the various State Rent Acts, either in one language or the other, it has been provided that a tenant can be evicted on the grounds mentioned in certain sections of the said Acts, then how does the question of determination of a tenancy by notice arise? If the State Rent Act requires the giving of a particular type of notice in order to get a particular kind of relief, such a notice will have to be given. Or, it may be, that a landlord will be well advised by way of abundant precaution and in order to lend additional support to his case, to give a notice to his tenant intimating that he intended to file a suit against him for his eviction on the ground mentioned in the notice. But that is not to say that such a notice is compulsory or obligatory or that it must fulfil all the technical requirements of section 106 of the Transfer of Property Act. Once the liability to be evicted is incurred by the tenant, he cannot turn round and say that the contractual lease has not been determined. The action of the landlord in instituting a suit for eviction on the ground mentioned in any State Rent Act will be tantamount to an expression of his intention that he does not want the tenant to continue as his lessee and the jural relationship of lessor and lessee will come to an end on the passing of an order or a decree for eviction. Until then, under the extended definition of the word 'tenant' under the various State Rent Acts, the tenant continues to be a tenant even though the contractual tenancy has been determined by giving a valid notice undersection 106of the Transfer of Property Act. In many cases the distinction between a contractual tenant and a statutory tenant was alluded to for the purpose of elucidating some particular aspects which cropped up in a particular case. That led to the criticism of that expression in some of the decisions. Without detaining ourselves on this aspect of the matter by any elaborate discussion, in our opinion, it will suffice to say that the various State Rent Control Acts make a serious encroachment in the field of freedom of contract. It does not permit the landlord to snap his relationship with the tenant merely by his act of serving a notice to quit on him. In spite of the notice, the law says that he continues to be a tenant and he does so enjoying all the rights of a lessee and is at the same time deemed to be under all the liabilities such as payment of rent etc. in accordance with the law."

21. In the aforesaid judgemnt in **V. Dhanapal Chettiar** (supra), a Seven Judges Constitution Bench of Hon'ble Supreme Court referred to the earlier Five Judges Bench judgment of **Mangilal vs. Suganchand Rathi, AIR 1965 SC 101** in which it was held as under:-

"The Accommodation Act does not in any way abrogate Chapter V of the Transfer of Property Act which deals with leases of immovable property. The requirement of Section 106 of the Transfer of Property Act is that a lease from month to month can be terminated only after giving fifteen days' notice expiring with the end of a month of the tenancy either by the landlord to the tenant or by the tenant to the landlord. ***Such a notice is essential for bringing to an end the relationship of landlord and***

tenant. *Unless the relationship is validly terminated the landlord does not get the right to obtain possession of the premises by evicting the tenant.* ***Section 106 of the Transfer of Property Act does not provide for the satisfaction of any Additional requirements****. But then, Section 4 of the Accommodation Act steps in and provides that unless one of the several grounds set out therein is established or exists, the landlord cannot evict the tenant."*

22. Thus, in the present set of facts after the tenancy was terminated by the landlady on expiry of the period of notice dated 09.09.2013 under Section 106 of the Transfer of Property Act, the consequence is that the relationship of landlady and tenant between the plaintiff-landlady and the defendant-tenant/ petitioner came to an end and the landlady has right to obtain possession of the disputed shop by evicting the tenant.

23. Much insistence has been laid by learned counsel for the tenants-petitioners on two lines of the evidence of P.W. 1 that the space of the disputed shop is not sufficient for the franchise. I have looked into the evidence of P.W. 1. The evidence of P.W. 1 has to be read as a whole and not in isolation. I find that P.W.1 has very specifically stated that adjoining the disputed shop is the shop of his father of Hosiery Goods. He narrated in detail that the tenants-petitioners have not vacated the disputed shop even after the tenancy was determined. Negotiations were going on for the franchise but he could not get the franchise. In his evidence on 17.11.2016, P.W.1 stated that for dealership company gave six months time to arrange for accommodation but the accommodation could not be arranged.

24. Both the courts below have recorded the concurrent findings of fact based on consideration of relevant evidences on record that need of the plaintiff-landlady for the disputed shop is her bonafide need. Therefore, it requires no interference.

Whether son/power of attorney holder of a landlord can depose on behalf of the landlord in a rent case in regard to matters involving personal knowledge:-

25. In support of his submission that the P.W. 1 could not have deposed on behalf of the plaintiff-landlady, learned counsel for the defendants-tenants/petitioners has relied upon the judgment of Hon'ble Surpeme Court in **Man Kaur (supra)(paragrap 18),** as under:-

"18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) ***An attorney holder*** *who has signed the plaint and instituted the suit, but* ***has no personal*** *knowledge of the transaction* ***can only give formal evidence*** *about the validity of the power of attorney and the filing of the suit.*

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. ***If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.***

(c) ***The attorney holder cannot depose or give evidence in place of his***

principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) ***Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.***

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) ***Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his ''readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or ''readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.***

26. The judgment of Hon'ble Supreme Court in **Janki Vashdeo Bhojwani case (supra)** relied by learned counsel for the petitioner has no application on the facts of the present case since it relates to filing of a suit due to non payment of loan by the borrower and not in a rent case.

27. Besides above, both the courts below have found that the P.W. 1 Anoop Kumar is the only son and power of attorney holder of the plaintiff landlady who has given his evidence in his personal capacity. This is a findings of fact.

28. Undisputedly, the plaintiff-landlady has appointed her power of attorney to Sri Anoop Kumar Agarwal who is the only son of the plaintiff-landlady. **In paragraph-2 of the plaint of the S.C.C. Suit No.49 of 2014, it was clearly stated that the plaintiff-landlady is an old lady and often remains ill, and, therefore, on her behalf, her son Anoop Kumar Agarwal has always been looking after and maintaining the disputed house and collecting rent from**

tenants and taking action for eviction etc. The contents of this paragraph has been admitted by the defendant-tenant/ petitioner in paragraph-2 of the written statement. Thus, the evidence given by the power of attorney holder Sri Anoop Kumar Agarwal (son), falls under the recognised exception of the requirement of giving evidence by the landlord who seeks eviction of his tenant on the ground of his bona fide need. Admittedly, power of attorney holder and the only son Sri Anoop Kumar Agarwal has been exclusively managing the affairs relating to the house in question owned by his mother Smt. Sita Devi who is an old lady and often remains ill. Therefore, the deposition made by him, cannot be said to suffer from any legal infirmity, particularly in view of the law laid down by Hon'ble Supreme Court in the case of Man Kaur (supra).

Conclusion:-

29. Conclusions reached in foregoing paragraphs of this judgment, are briefly summarized as under:

(i) Intention of landlord to treat the lease as subsisting and his knowledge of the fact that his conduct amounts to waiver, are the basic essentials of waiver contained in Section 113 of the Act 1882.

(ii) Facts of the present case leaves no manner of doubt that the plaintiff-landlady/respondent has never waived her notice under Section 113 of the Act 1882. On the contrary, after determining the tenancy by notice dated 11.9.2013, she instituted SCC Suit No.49 of 2014 (Sita Devi Vs. Pawan Kumar and others) on 5.8.2014. She has been contesting the suit. **Thus, no element of waiver of notice can be inferred on the facts of the present case.**

(iii) **Mere acceptance of rent did not by itself constitute an act of the nature envisaged by section 113 of the Transfer of Property Act showing an intention to treat the lease as subsisting. Even after accepting the rent tendered, a landlord may file a suit for eviction, and even while prosecuting the suit he may accept the rent which was being paid to him by the tenant. It cannot, therefore, be said that mere acceptance** of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended.

(iv) Section 106 of the T.P. Act does indicate that the landlord is entitled to terminate the tenancy by giving 15 days' notice, if it is a premises occupied on monthly tenancy and by giving 6 months' notice if the premises is occupied for agricultural or manufacturing purposes; and on expiry thereof proceedings could be initiated. **Section 106 of the T.P. Act does not contemplate of giving any reason for terminating the tenancy.**

(v) By issuance of notice to quit automatically the right created thereunder, namely, cessation of the lease, does not become effective till the period prescribed in the notice or in the statute i.e. Section 106 expires. On expiry thereof the lease becomes inoperative and the lessor acquires right to have the tenant ejected. When the tenant fails to deliver vacant possession, the lessor would be entitled to have the tenant ejected and to take possession in due process of law.

(vi) The difference between the position obtaining under the Transfer of Property Act and the Rent Act in the matter of determination of a lease is that

under the former Act in order to recover possession of the leased premises, determination of the lease is necessary because during the continuance of the lease, the landlord cannot recover possession of the premises while under the Rent Act, the landlord becomes entitled to recover possession only on the fulfilment of the conditions laid down in the relevant sections. He cannot recover possession merely by determining the tenancy. Nor can he be stopped from doing so on the ground that he has not terminated the contractual tenancy.

(vii) In the present set of facts after the tenancy was terminated by the landlady on expiry of the period of notice dated 09.09.2013 under Section 106 of the Transfer of Property Act, the consequence is that the relationship of landlady and tenant between the plaintiff-landlady and the defendant-tenant/ petitioner came to an end and the landlady has acquired right to obtain possession of the disputed shop by evicting the tenant.

(viii) Both the courts below have recorded concurrent findings of fact based on consideration of relevant evidences on record that need of the plaintiff-landlady for the disputed shop is her bonafide need. Therefore, it requires no interference.

(ix) **Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his ''readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or ''readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.**

(x) Admittedly, power of attorney holder and the only son Sri Anoop Kumar Agarwal has been exclusively managing the affairs relating to the house in question owned by his mother Smt. Sita Devi who is an old lady and often remains ill. Therefore, the deposition made by him, cannot be said to suffer from any legal infirmity, particularly in view of the law laid down by Hon'ble Supreme Court in the case of Man Kaur (supra).

30. For all the reasons aforestated, I do not find any merit in this petition. Consequently, the petition is hereby dismissed.

31. After this judgment was dictated in open court, learned counsel for the defendant-tenant/petitioner states on instructions that the petitioner shall vacate the disputed shop and shall handover its vacant and peaceful possession to the plaintiff-landlady/respondent on or before 31.03.2020 and shall also pay to the plaintiff-landlady a sum of Rs.30,000/- for the use and occupation of the disputed shop for the period from today till

31.03.2020, within a month and, therefore till 31.03.2020 the defendant-tenant/petitioner may not be dispossessed from the disputed shop. Learned counsel for the plaintiff-landlord/respondent has no serious objection to the aforesaid request.

32. Considering the statement made by the defendant-tenant/petitioner as aforenoted, it is provided as under:-

i). If the defendant-tenant/petitioner submits an undertaking to the aforesaid affect before the court below and also deposit Rs.30,000/- within a month from today, then in that event he shall not be dispossessed from the disputed shop till 31.03.2020.

ii). In the event, either the undertaking as aforesaid is not submitted or a sum of Rs. 30,000/- is not deposited within the stipulated period, then the protection given to the defendant-tenant/petitioner under this order shall automatically stand vacated.

iii). In the event, the defendant-tenant/petitioner does not vacate the disputed shop and does not hand over its vacant and peaceful possession to the plaintiff-landlady/respondent on or before 31.03.2020, then apart from other consequences as may follow, the defendant-tenant/petitioner shall also pay a sum of Rs. 1,000/- per day for each day of delay after 31.03.2020, in vacating the disputed shop and handing over its vacant and peaceful possession to the plaintiff-landlady/ respondent.

(2019)10ILR A 1224

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2019
BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Matter Under Article 227 No. 3147 of 2019 (Civil)

Sri Ram Krishna Vivekanand Shishu Niketan ...Petitioner
Versus
Sri Onkarnath and Ors. ...Respondents

Counsel for the Petitioner:
Sri Nirvikar Gupta, Sri Tosh Kumar Sharma

Counsel for the Respondents:
Sri Shariq Shamim, Sri Rajneesh Tripathi, Sri Tarun Agrawal, Sri Tarun Varma, Sri Divakar Rai Sharma

A. Code of Civil Procedure,1908 - Section 96(3) & 100 - Whether petition u/art. 227 maintainable or second appeal would lie against the impugned order/judgement of the first appellate court or the same is barred by Section 96 (3) of the Code of Civil Procedure?

B. Compromise between parties-duly signed & verified- Appellate Court recorded the compromise in part and refused to record the remainder (in favour of plaintiff)-further passed a decree in terms thereof-to be challenged by way of second appeal u/s. 100-as the bar contained u/s. 96(3)-not attracted.

Held: - The preparation of decree or formal order in terms of the impugned judgement is a ministerial act. Even if a formal order has been prepared and not decree in pursuance of the impugned judgement of the appellate court, it would not detract from the true nature of the order nor would denude the petitioner of its right to avail the statutory remedy of filing second appeal- Section 96 (3) is based on doctrine of estoppel which would equally apply to a consent decree passed in appeal. However, for other reasons stated in earlier part of the judgement, the bar under Section 96 (3) C.P.C. would not come in way of the petitioner in filing second appeal.

Writ Petition Dismissed (E-8)

List of Cases Cited :-

1. Banwari Lal Vs. Chando Devi (Smt.) (Through Lrs.) and another

2. Kishun alias Ram Kishun Vs. Behari

3. Thakur Prasad Vs. Bhagwandas Pushpa Devi

4. Bhagat Vs. Rajinder Singh

5. Daljit Kaur and another Vs. Muktar Steels Private Limited and others

6. Rana Narang Vs. Ramesh Narang

7. Shyam Sunder Sharma Vs. Pannalal Jaiswal and others

8. Ratan Singh Vs. Vijayasingh and others [(2001) 1 SCC 469

9. Sheodan Singh Vs. Daryao Kunwar

10. Messrs Mela Ram and Sons Vs. The Commissioner of Income Tax, Punjab

11. Thambi vs. Mathew (1987 (2) KLT 848)

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

1. An interesting question as to whether second appeal would lie against the impugned order/judgement of the first appellate court or the same is barred by Section 96 (3) of the Code of Civil Procedure (for short 'Code' or 'C.P.C.') arises for consideration in the instant petition filed before this Court invoking its supervisory jurisdiction under Article 227 of the Constitution. In case, an appeal is maintainable, this Court in view of availability of efficacious remedy under the Code would decline to entertain the instant petition.

2. The backdrop in which the controversy has arisen is as follows:-

3. Two suits were instituted by the petitioner (hereinafter referred to as 'the plaintiff') bearing Original Suit Nos.381 of 1987 and 800 of 1987. In Original Suit No.381 of 1987, the plaintiff prayed for permanent injunction, declaration of its title in respect of the suit property and mandatory injunction against respondents no.1 to 14 (hereinafter referred to as 'the defendants 1st set). The declaration of title was sought on the ground that the suit property was donated to it by Dwarika Nath Bhargava, Kedar Nath Bhargava and Onkar Nath Bhargava by an unregistered instrument dated 10.3.1969. Since then, the plaintiff had been in possession of the same as its owner without any objection from any one and thus perfected its title by adverse possession. In alternative, the plaintiff also prayed for mandatory injunction directing defendants 1 to 10 as well as defendants 11, 12 and 13 to execute registered gift deed in pursuance of an alleged agreement dated 12.2.1969. In Original Suit No.800 of 1987, the plaintiff took the same stand and prayed for permanent injunction against respondents 12 to 20 (hereinafter referred to as 'the defendants 2nd set). Both the suits were dismissed by the trial court by judgement dated 14.12.2018. The trial court held that the plaintiff was not able to prove its title to the suit property; that it also failed to prove its possession and thus, also not entitled to declaration as owner on basis of adverse possession. Aggrieved by the judgement of the trial court, the plaintiff filed an appeal under Section 96 CPC. It was registered as Civil Appeal No.213 of 2018. During pendency of the appeal, the plaintiff entered into a compromise with defendants 12/1 and 14 (Paper No.18 Ka/4). The compromise was signed by the parties/their authorised representatives and their signatures were

duly verified by respective counsel for the parties except respondents 1 to 11 and 13, who were discharged from the suit and also the compromise. There is a map annexed with the compromise, according to which, the portion of land shown with letters DEFH was admitted to be in possession of the plaintiff and would continue in its possession; ABHF was recognised as belonging to defendant 12/1 and BCDH as belonging to defendant no.14. On 22.1.2019 the date on which compromise application Paper No.18 Ga was filed before the appellate court, one Kapil Dev Upadhyay filed an application seeking his impleadment alleging title in respect of 322.66 sq. yards of the suit property on basis of a sale deed dated 18.1.2019 executed in his favour by Narain Das Agrawal, power of attorney holder of Desh Bandhu Kagaji (son of defendant no.13 of Original Suit No.381 of 1987 and defendant no.1 of Original Suit No.800 of 1987) and Manager of Phool Chandra Kagaji HUF. According to him, the original owner of the suit property namely Thakur Madan Mohan Ji Maharaj had executed registered lease deed on 29.12.1987 in favour of Phool Chandra Kagaji HUF with respect to 1320 sq. yards of the suit property. It is also his case that Phool Chandra Kagaji HUF had also obtained a sale deed dated 7.10.1987 (registered on 15.1.1988) in respect of the same land from the Bhargavas, through whom the plaintiff also claims title to the suit property. It is common ground between the parties that the predecessor of Bhargava family namely Late Girdhar Das Bhargava obtained the said property by way of a registered perpectual lease deed dated 21.8.1943 from the then Shebiat of Thakur Madan Mohan Ji Temple, the original owner of the property. According to both the parties, after death of Girdhar Das Bhargava, his three sons inherited the suit property. According to the plaintiff society, the three sons of Girdhar Das Bhargava donated the suit land to the plaintiff and since then, it has been in possession of the same.

4. The Appellate Court, by order dated 1.2.2019, rejected the impleadment application observing that intervention of a third party at the appellate stage when the matter had remained pending for last 32 years would not be in interest of justice. However, on the same date, it proceeded to pass order on the compromise application as well. The Appellate Court accepted the compromise in part i.e. in respect of defendant no.12/1 and 14 but it refused to decree the suit in favour of the plaintiff for the suit land DEFH observing that as per boundaries, it is the same land in respect of which Kapil Dev Upadhyay had filed impleadment application claiming title on basis of registered lease deed of thirty years. The Appellate Court has held that the plaintiff had failed to bring on record any document to prove its title; consequently, the compromise application in respect of land shown with letters DEFH was rejected. In pith and substance, the Appellate Court, in absence of any document of title with regard to the portion of land shown with letters DEFH, declined to grant declaration in favour of the plaintiff. The operative part of the order/judgement of the Appellate Court dated 1.2.2019 reads thus:-

"उपरोक्त सम्पूर्ण विश्लेषण के प्रकाश में संधि पत्र 18क/1–3 एवं उसके साथ संलग्न नक्शा संधि पत्र 18क/4 में दर्शित सम्पत्ति निशानी अक्षर डी. ई. एफ. एच को छोड़कर शेष भाग हेतु संधि पत्र व नक्शा संधि पत्र सत्यापित किया जाता है ।

तदनुसार संधि पत्र 18क/1–3 एवं नक्शा संधि पत्र 18क/4 के अनुसार यह सिविल अपील

निर्णीत की जाती है। निशानी अक्षर डी. ई. एफ. एच से दर्शित सम्पत्ति को छोड़कर संधि पत्र 18क/1–3 एवं नक्शा संधि पत्र 18क/4 डिक्री का भाग होगा।

पक्षकार अपना–अपना वाद व्यय स्वयं वहन करेंगे।

पत्रावली नियमानुसार दाखिल दफ्तर हो।"

5. Being aggrieved by the above order/judgement of the Appellate Court, declining to record compromise in respect of the claim of the plaintiff while deciding the appeal, the instant petition has been filed.

6. Sri Diwakar Rai Sharma Advocate appearing on behalf of respondent no.14 raised a preliminary objection relating to maintainability of the instant petition under Article 227 of the Constitution. Sri Tarun Agrawal Advocate appearing on behalf of Kapil Dev Upadhyay, the applicant seeking impleadment also submitted that the petitioner has remedy of challenging the impugned judgement by filing a second appeal under Section 100 CPC. It is urged that since the remedy is available under the Code itself, therefore, the present petition under Article 227 of the Constitution should not be entertained and the petitioner should be relegated to the remedy available under the Code. It is urged by them that a second appeal would lie against the impugned order/judgement in view of Order 43 Rule 1-A read with Order 42 Rule 1 CPC and Section 100 and 108 CPC. In support of their contention, they have placed reliance upon the judgements of the Supreme Court in **Banwari Lal Vs. Chando Devi (Smt.) (Through Lrs.) and another, Kishun alias Ram Kishun Vs. Behari** and a Division Bench judgement of Madhya Pradesh High Court in **Thakur Prasad Vs. Bhagwandas.**

7. On the other hand, Sri Nirvikar Gupta, learned counsel appearing on behalf of plaintiff-petitioner submitted that the impugned order recording compromise in part and declining to record other part would not amount to a decree. He points out that even no decree has been drawn in pursuance of the impugned order. It is urged that clause (m) of Rule 1 of Order 43 under which an appeal was maintainable against an order recording or refusing to record an agreement, compromise or satisfaction was omitted by Act No.104 of 1976 w.e.f. 1.2.1977. Consequently, it is submitted that no appeal would lie against such an order. He further submitted that since rights of parties have not been decided under the impugned order, therefore, it would not amount to a judgement nor would result in a decree, therefore, Order 43 Rule 1-A (2) will also have no application. He placed a strong reliance on Section 96 (3) CPC and the same judgments upon which reliance was placed by the other side in contending that no appeal is maintainable from a decree passed by court with consent of the parties.

8. Before adverting to the submissions advanced by learned counsel for the parties, certain amendments carried out in the Code by Act No.104 of 1976 are worth noticing. Order 23 Rule 3 CPC envisages compromise of suit. Prior to its amendment by Act No.104 of 1976, it read as follows in its application to the State of Uttar Pradesh:-

*"**R.3.** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or*

where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

" ALLAHABAD.- (1) In Rule 3 of Order 23 between the words " or compromise" and "or where" insert the words "in writing duly signed by parties"; and between the words "subject matter of the suit" and the words "the Court" insert the words "and obtains an instrument in writing duly signed by the plaintiff."

(2) At the end of the Rule 3 of Order 23 add the following, namely:

"Provided that the provisions of this rule shall not apply to or in any way affect the provisions of Order XXXIV, Rules 3, 5 and 8.

Explanation.- The expression "agreement" and "compromise", include a joint statement of the parties concerned or their counsel recorded by the Court, and the expression "Instrument" includes a statement of the plaintiff or his counsel recorded by the Court"- U.P. Gaz., 31-8-1974, Pt.II, p.52 (31-8-1974)"

9. Order 43 Rule 1 (m) enabled a party aggrieved by an order passed under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction to challenge the order in appeal. Clause (m) was to the following effect:-

"(m) an order under Rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;"

10. Section 96 (3) placed a specific embargo on maintainability of appeal from a decree passed by the court with the consent of parties. It reads thus:-

"96 (3). No appeal shall lie from a decree passed by the Court with the consent of parties."

11. Under Order 43 Rule 1 (m), an order recording or refusing to record an agreement, compromise or satisfaction could be directly challenged by filing an appeal even before the final judgement is passed in the suit. In cases where the decree is passed by the court with consent of parties, no appeal would lie in view of the prohibition contained under Section 96 (3). It was settled by a series of precedents that the prohibition under Section 96 (3) would remain limited to cases where the parties, after complying with the procedure prescribed under Order 23 Rule 3 CPC, invites the court to pass decree in a particular manner to which they had agreed to and the court acts accordingly. However, in cases where a party disputes being signatory to the compromise or the compromise decree is challenged on ground of fraud, undue influence or misrepresentation, the bar stipulated under Section 96 (3) would not come in way of filing an appeal. It was also open to such a party to file a regular civil suit challenging the compromise decree on the ground of it being void or voidable.

12. After the Code was amended by Act No.104 of 1976, clause (m) of Rule 1 of Order 43 was omitted, meaning thereby that an order recording or refusing to record an agreement, compromise or satisfaction is no more appealable. By the same amendment, Rule 1-A was inserted in Order 43. Sub-rule (2) thereof, which is relevant for our purpose, is as follows:-

"(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

13. At the same time, certain amendments were also made in Rule 3 of Order 23 conferring jurisdiction upon the same court to decide whether adjustment or satisfaction has been arrived at where it is so alleged by one party while denied by the other. It has also been made mandatory that the compromise should be in writing and signed by the parties. An *Explanation* has also been inserted clarifying that an agreement or compromise, which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this rule. Rule 3-A, inserted by the same Amending Act of 1976 specifically bars a suit before civil court for setting aside a compromise decree on the ground that it was not lawful. Order 23 Rule 3 and Rule 3-A as amended by Act No.104 of 1976 are as follows:-

*"**3. Compromise of suit.**-Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, [in writing and signed by the parties] or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:*

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

[Explanation.-An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]"

*"**3-A. Bar to suit.**- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."*

14. In **Pushpa Devi Bhagat Vs. Rajinder Singh,** a two Judge Bench of the Supreme Court, after considering Rule 3 and 3-A of Order 23, summed up the statement of law emerging from these provisions as follows:-

"13.1. no appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC;

13.2. no appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) of Rule 1, Order 43;

13.3. no independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A; and

13.4. a consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23."

15. Even before the above principles were laid down by the Supreme Court, another Division Bench in **Banwari Lal (supra)** considered the interplay between Order 43 Rule 1-A added by Act No.104 of 1976 and Section 96 (3) as well as the impact of deletion of clause (m) of Rule 1 of Order 43. The Supreme Court has observed that the amendments were carried out taking into consideration the past experiences, as on many occasions, parties used to file compromise on basis of which suit used to be decreed but later on, for one reason or the other, the validity of such compromise was challenged by way of separate suit dragging the litigation for years together. By the amendments made by 1976 Act, special requirements were introduced before a compromise is recorded by the court. The compromise should be lawful, must be in writing and signed by the parties. The relevant observations made in this regard by the Supreme Court in **Banwari Lal (supra)** are extracted below:-

"7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise saying:

"3-A. Bar to suit.-No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

8. Earlier under Order 43, Rule 1(m), an appeal was maintainable against an order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction. But by the amending Act aforesaid that clause has been deleted, the result whereof is that now no appeal is maintainable against an order recording or refusing to record an agreement or compromise under Rule 3 of Order 23. Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1-A has been added to Order 43 which is as follows:"

16. The 1976 Amendment, while on one hand conferred right to challenge decree passed in suit after recording a compromise or refusing to record a compromise by filing regular appeal but at the same time, Section 96 (3) of the Code, which says that no appeal shall lie from a decree passed by the court with the consent of the parties, was left untouched. The impact of insertion of Rule 1-A (2) upon Section 96 (3) was explained thus:-

"9. Section 96(3) of the Code says that no appeal shall lie from a decree passed by the Court with the consent of the parties. Rule 1-A(2) has been introduced saying that against a decree passed in a suit after recording a compromise, it shall be open to the

appellant to contest the decree on the ground that the compromise should not have been recorded. When Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). If the order recording the compromise was set aside, there was no necessity or occasion to file an appeal against the decree. Similarly a suit used to be filed for setting aside such decree on the ground that the decree is based on an invalid and illegal compromise not binding on the plaintiff of the second suit. But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) of the Code shall not be a bar to such an appeal because Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute."

17. Once again, in paragraph 13 of the Law Report, the Supreme Court explained the interplay between the above provisions as follows:-

"13. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act..." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of Compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1-A of Order 43 of the Code."

(emphasis supplied)

18. Again, in **Kishun alias Ram Kishun (supra)** it was held that where the compromise is contested, the bar under Section 96 (3) will not come into play. The order passed by the court on such contest and the resultant decree would be subject to appeal and second appeal. It has been observed that *"when there is a contest on the question whether there was a compromise or not, a decree accepting the compromise on resolution of that controversy, cannot be said to be a decree*

passed with the consent of the parties. Therefore, the bar under Section 96(3) of the Code could not have application. An appeal and a second appeal with its limitations would be available to the party feeling aggrieved by the decree based on such a disputed compromise or on a rejection of the compromise set up."

19. The law laid down in **Ram Kishun** has been reiterated by the Supreme Court in a more recent judgement in **Daljit Kaur and another Vs. Muktar Steels Private Limited and others** holding that bar under Section 96 (3) CPC will not get attracted where the compromise is disputed. In my considered opinion, the same would also be the position where the court refuses to record compromise or part of it on the ground that it is not lawful, as in the instant case.

20. The legal position which thus emerges after amendment of Civil Procedure Code by Act No.104 of 1976 is that the appellant in an appeal against a decree passed in suit after recording a compromise or refusing to record a compromise is entitled to contest the decree on the ground that the compromise should, or should not, have been recorded (Order 43 Rule1-A). The same principle would apply where the court records some part of the compromise while declines to record the remaining part. In such cases, the bar contained under Section 96 (3) CPC would not get attracted. These principles would also apply to appeals from appellate decrees in view of Order 42 Rule 1 read with Section 108 CPC.

21. In the instant case, as would appear from the facts noted above, the appellate court, while deciding appeal under Section 96 CPC, has passed a composite order recording compromise in part and refusing to record other part of compromise in so far as it relates to the plaintiff-petitioner. On the same date, the appellate court has also proceeded to decide the appeal finally. This takes the Court to the other limb of the argument of learned counsel for the petitioner i.e. the order passed by the appellate court would not qualify to be a decree, as there had been no adjudication of its rights. Consequently, no appeal would lie at this stage.

22. The submission made in this regard, albeit attractive, is bereft of any substance. A plain reading of the order passed by the appellate court on 1.2.2019 reveals that the appellate court has not only recorded the compromise in part and refused to record the remainder, but has also proceeded to pass a decree in terms thereof. The order specifically provides that the compromise application and the map would form part of the decree except in respect of property shown with letters DEFH. There is a specific direction for consigning the file to the record room. The operative part evinces a clear intention that the proceedings of the appeal have thereby terminated. It is not the case of the petitioner that the appellate court is incompetent to pass a composite order verifying/refusing to verify the compromise and also pass decree in accordance therewith on the same date. The main thrust of the argument of learned counsel for the petitioner is that the appellate court has not adjudicated the rights of the plaintiff in the suit land, consequently, the order impugned would not qualify to be a 'decree' within the meaning of Section 2 (2) CPC.

23. In **Rana Narang Vs. Ramesh Narang**, the Supreme Court has held that

a compromise decree is as much a decree as a decree passed on adjudication. It is not merely an agreement between the parties. In passing the decree by consent, the court adds its mandate to the consent.

24. A similar controversy arose before a Three Judges Bench of the Supreme Court in **Shyam Sunder Sharma Vs. Pannalal Jaiswal and others** though in a slightly different context. The issue before the Supreme Court was whether an order of dismissal of appeal as barred by limitation would amount to a decree or not. The contention before the Supreme Court was that in such a case there is no adjudication of lis on merits, therefore, it is merely an 'order' and would not amount to a 'decree'. The Supreme Court, while deciding the said issue, considered an earlier judgement by Two Judges Bench in **Ratan Singh Vs. Vijayasingh and others**, wherein it was held that dismissal of an application for condonation of delay would not amount to a decree, therefore, dismissal of appeal as time barred was also not a decree. The Supreme Court overruled the said judgement relying on previous judgments by Larger Bench taking a contrary view. The Supreme Court observed as follows:-

"12. Learned counsel placed reliance on the decision in Ratansingh vs. Vijaysingh and others [(2001) 1 SCC 469] rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in Messrs Mela Ram and Sons and Sheodan Singh (supra) were not brought to the notice of their Lordships. The principle laid down by a three Judge Bench of this Court in M/s Mela Ram and Sons (supra) and that stated in Sheodan Singh (supra) was, thus, not noticed and the view expressed by the two Judge Bench, cannot be accepted as laying down the correct law on the question....."

25. The judgement rendered in **Sheodan Singh Vs. Daryao Kunwar** was rendered by Four Judges Bench of the Supreme Court holding thus:-

"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

26. In **Messrs Mela Ram and Sons Vs. The Commissioner of Income Tax, Punjab** on which reliance was placed by the Supreme Court in **Shyam Sunder Sharma (supra),** it was held as follows:-

".....although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer."

27. The Supreme Court concluded by holding that dismissal of an appeal on ground of delay in filing the same has the effect of confirming the decree appealed against. Para 10 from the said judgement reads thus:-

"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi vs. Mathew (1987 (2) KLT 848). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal. "

28. The order by the appellate court deciding appeal results in merger of the judgement of the trial court with that of the appellate court. A perusal of the operative part of the judgement would reveal that the judgement passed by the trial court stands superseded by the decree now passed by the appellate court whereunder rights of respondents 12/1 and 14 have been specifically recognised, while that of the plaintiff in respect of part of the suit land shown with letters DEFH has not been accepted. It is the judgement of the appellate court which would govern the rights of the parties and not the one passed by the trial court.

29. The questions (i) whether the appellate court was justified in declining to record part of the compromise, (ii) whether it was justified in dismissing the claim of the plaintiff straightaway after refusing to record part of the compromise without giving the petitioner opportunity to establish its claim on basis of other material on record and (iii) whether the finding recorded in the impugned order that there is no evidence on record to establish the title of the plaintiff-appellant in respect of property DEFH may or may not be correct, but on that score the remedy of further appeal provided under the Code would not be lost. The nature of the order has to be ascertained in accordance with the legal principles discussed above. The preparation of decree or formal order in terms of the impugned judgement is a ministerial act. Even if a formal order has been prepared and not decree in pursuance of the impugned judgement of the appellate court, it would not detract from the true nature of the order nor would denude the petitioner of its right to avail the statutory remedy of filing second appeal.

30. Before parting, I would also like to deal with an alternative submission made by Sri Tarun Agrawal, learned counsel appearing for the applicant seeking impleadment. He urged that the bar contained under Section 96 (3) regarding filing of appeal against consent decree is only applicable to first appeals and not to second appeals filed under

Section 100 CPC. However, the submission is devoid of any force. Section 108 CPC specifically provides that the provisions of Part VII relating to appeals from original decree shall as far as may be applied to appeals from appellate decrees. Section 96 (3) is contained in Part VII. Section 96 (3), as noted above, is based on doctrine of estoppel which would equally apply to a consent decree passed in appeal. However, for other reasons stated in earlier part of the judgement, the bar under Section 96 (3) C.P.C. would not come in way of the petitioner in filing second appeal.

31. In consequence, the instant petition is dismissed on the ground of availability of alternative remedy of second appeal under the Code itself. The petitioner shall be free to avail the said remedy, in which event, nothing observed herein would be taken as expression of opinion on merit of the case.

32. Office is directed to return certified copies of the impugned judgments to counsel for the petitioner after retaining photo copies on record.

(2019)10ILR A 1235

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Matter Under Art. 227 No. 6077 of 2019 (Civil)

Shrawan @ Sarvan Gupta ...Petitioner
Versus
Smt. Renu Kushwaha & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Nandan

Counsel for the Respondents:
Sri Anoop Trivedi, Sri Nitin Chandra Mishra

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972- Rule 32- U.P. Act 13 of 1972- Section 21- Code of Civil Procedure, 1908- Section 151- rejecting the restoration application, filed by the applicant-petitioner for recall of the ex-party judgment and decree dated 07.04.2018

Held : - The alleged substituted service was shown with respect to the tenant-defendant 1st set and the tenant-defendant 2nd set by single publication in one and the same newspaper i.e. "Jagat Asha" and the court below itself held in its order dated 08.04.2019 filed by the tenant-defendant 1st set for setting aside the judgment and decree dated 07.04.2018, that the substituted service by publication in the newspaper "Jagat Asha" is not valid. Therefore, there was no valid substituted service upon the tenant-defendant 2nd set. (Para-30). Relevant Paras 27 to 29.

Writ Petition allowed (E-8)

List of Cases Cited: -

1. Ram Prakash Agarwal and Another Vs. Gopi Krishnan (Dead through L.Rs.) and Others 2013(4) AWC 3856(SC)

2. Heera Lal Sharma Vs. XVth Addl. District Judge, Kanpur & others 1983 ARC 535

3. Tara Shankar Vs. Vinod Kumar Verma and others 1993 (2) ARC 6

4. Indian Bank vs M/S Satyam Fibres (India} Pvt.Ltd, (1996) 5 SCC 550

5. A.R. Antulay Vs. R.S. Nayak & Anr. (1988) 2 SCC 602

6. Budhia Swain and others Vs. Gopinath Deb and others (1999) 4 SCC 396

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Siddharth Nandan, learned counsel for the applicant - petitioner and Sri Anoop Trivedi, learned Senior Advocate, assisted by Sri Nitin Chandra Mishra, learned counsel for the plaintiff - opposite party no.4.

2. This petition under Article 227 of the Constitution of India has been filed praying to set aside the order dated 30.04.2019 in Misc. Case No.45 of 2018 (Shrawan Vs. Javed) under Rule 32 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to "Rules, 1972") read with Section 151 C.P.C. passed by the Civil Judge (S.D.), Court No.18, Deoria, rejecting the restoration application 4 Ga, filed by the applicant-petitioner for recall of the ex-party judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017 {Javed Ahmad Vs. Smt. Renu Kushwaha, Dipu Kushwaha, Gaurav Kushawaha (defendant 1st set) and Venketeshwar (defendant 2nd set)}.

3. Learned counsel for the petitioner has submitted at the very outset that he is not pressing the relief no.2 since the application has been decided by the impugned order.

Facts:-

4. Briefly stated facts of the present case are that the **defendant 1st set/respondent nos.1, 2 and 3 are the tenants** of a portion of the disputed house and **the defendant no.4 Venketeshwar (defendant 2nd set) is tenant of a separate portion/shop in the disputed house No.201, Ward No.22, Abubkar Nagar, Station Road, Tappa - Deoria, Pargana - Salempur Majhauli, Tehsil & District - Deoria. The aforesaid disputed house was originally owned by one Brijish Johara,** son of Farukh Chisti who had let out separate portions in the aforesaid house to the defendant 2nd set and the father of the defendant 1st set. **He sold the disputed house to the plaintiff-opposite party no.4 Sri Javed Ahmad by a registered sale deed dated 10.04.2013.** The aforesaid **plaintiff/opposite party no.4 Javed Ahmad filed a P.A. Case No.01 of 2017,** alleging that a registered notice dated 22.09.2015 and 10.02.2014 were given by him to the defendant 1st set and the defendant 2nd set to vacate the disputed house **on the ground of *bonafide* need** of the disputed accommodation. The notices were shown to be served by substituted service i.e. by the alleged publication of notice in some news paper "Jagat Asha". Thereafter the P.A. Case was proceeded *ex-parte* and an *ex-parte* judgment and decree dated 07.04.2018 was passed by Civil Judge (S.D.), Court No.18, Deoria, giving reasons and his findings as under:-

"प्रस्तुत वाद में दाखिल साक्ष्य के आधार पर न्यायालय का यह मत है कि वादी विवादित मकान का स्वामी व मकान मालिक है तथा प्रतिवादी प्रथम पक्ष व द्वितीय पक्ष किरायेदार है। वादी को विवादित मकान की सद्भावी आवश्यकता है। यदि वादी सदभावी आवश्यकता के आधार पर प्रश्नगत मकान को उसके पक्ष में अवमुक्त नही किया गया तो वादी को अधिक कठिनाई कारित होगी।

पत्रावली पर उपलब्ध मौखिक व दस्तावेजी साक्ष्यो के अवलोकन के उपरान्त न्यायालय इस मत का है कि वादी अपने वादपत्र के कथनों को साबित करने में एकपक्षीय रूप से सफल रहा है। इसके खण्डन में पत्रावली पर ऐसा कोई साक्ष्य नहीं है

जिससे वादी के कथनों पर अविश्वास किया जाये। अतएव वादी का आवेदन आज्ञप्त किये जाने योग्य है।"

5. It was well within the knowledge of the plaintiff-opposite party no.4 Javed Ahmad that the defendant 2nd set, namely Sri Venketeshwar is missing since the year 2013. It appears that when one **Sri Subhas son** of the defendant 2nd set heard about the aforesaid P.A. Case No.01 of 2017, **he filed an impeleadment application 28 Ga** stating that the defendant no.4 is missing since the year 2013 and, therefore, he may be impleaded as defendant. The Impleadment application 28 Ga was rejected by the Civil Judge (S.D.) Court No.18, Deoria, by an order dated 16.02.2018 on the grounds firstly that the applicant - Subhash son of Venketeshwar could not file any evidence to establish that his presence is necessary in P.A. Case No.01 of 2017 for effective disposal of the case and secondly that seven years have not passed since the missing of defendant no.4 Venketeshwar, therefore, his civil death can not be assumed.

6. The aforesaid Subhash son of the defendant no.4 has filed an appeal challenging the aforesaid ex parte judgment and decree dated 07.04.2018 which is stated to be pending.

7. **The defendant 1st set,** namely, Renu Kushwaha and others filed an **application 4 Ga** under Rule 32 read with Section 22 (b) of the Rules 1972 for setting aside the aforesaid judgment and decree dated 07.04.2018, which was registered as Misc. Case No.46 of 2018 (Renu Kushwaha Vs. Javed). **It was allowed** by the Prescribed Authority/Civil Judge (S.D.), Court No.18, Deoria, **by order dated 08.04.2019** in which the Prescribed Authority recorded a finding that the news paper in which the notice of P.A. Case No.01 of 2017 was published, had no circulation in the area. Accordingly, the service of notice upon the defendant 1st set was held to be not sufficient. Consequently the judgment dated 07.04.2018 was set aside and the P.A. Case no.01 of 2017 (Javed Ahmad Vs. Smt. Renu Kushwaha and others) was restored to its original number with respect to the defendant 1st set (defendant nos. 1 to 3). It was also observed that service of notice was not made upon the defendants as per rules and the impugned *ex-parte* judgment has been passed without proper service upon the defendants.

8. **The applicant/petitioner is the son of the defendant 2nd set, namely, Sri Venketeshwar.** He also filed an application 4 Ga, dated 14.05.2018 under Order IX Rule 13 read with Section 151 C.P.C. and Rule 22 of the Rules, 1972. The defendant 1st set and the applicant-petitioner herein both have filed the recall applications simultaneously. In his recall application the applicant petitioner has clearly stated that he came to know about the ex parte judgment dated 07.04.2018 in P.A. Case No.01 of 2017 when the plaintiff-opposite party no.4 herein threatened him for eviction on the basis of the aforesaid judgment and decree then he contacted his counsel and enquired and got inspected the file of the case on 10/11.05.2018 and came to know that fraudulently the plaintiff-opposite party no.4 had instituted the P.A. case and got it decreed *ex-parte* by judgment and decree dated 07.04.2018 and no notice of the aforesaid case was served. The aforesaid recall application of the applicant/petitioner was registered as

Misc. Case No. 45 of 2018 (Shravan Vs. Javed) which was rejected by the impugned order dated 30.04.2019, passed by the Civil Judge (S.D.), Court No.18, Deoria, observing as under :-

"पत्रावली के साथ पी0ए0वाद सं0–01/17 की पत्रावली उपलब्ध है, जिसके परिशीलन से यह प्रकट होता है कि उक्त मामले में वर्तमान प्रकीर्ण वाद के कायमीदाता जावेद अहमद की ओर से एक प्रार्थना पत्र 28ग प्रस्तुत किया गया था तथा उक्त प्रार्थना पत्र के माध्यम से प्रार्थी के द्वारा यही तर्क लिया गया था कि उसके पिता बैकटेश्वर जो कि प्रतिपक्षी सं0–4/ द्वितीय पक्ष है। 4–5 वर्षो से गायब है। अतः उसे उपरोक्त मामले में उनके विधिक प्रतिनिधि के तौर पर पक्षकार कायम कर लिया जाय। जिस प्रार्थना पत्र पर दिनांक 16.02.18 को न्यायालय द्वारा गुण दोष पर आदेश पारित करते हुये प्रार्थी को वाद का उचित एवं आवश्यक पक्षकार होना नही माना गया तथा उसका पक्षकार बनाये जाने का प्रार्थना पत्र 28ग गुण दोष पर निरस्त कर दिया गया है, जिस आदेश के विरूद्ध प्रार्थी/ कायमीदाता की ओर से कोई अपील/ रिवीजन प्रस्तुत नही की गयी है तथा उक्त आदेश अंतिम हो चुका है जो इस न्यायालय पर भी बाध्यकारी है।

आदेश–9 नियम–13 सी0पी0सी0 में दिये गये प्रावधान के अनुसार "किसी ऐसे मामले में जिसतकं डिक्री किसी प्रतिवादी के विरूद्ध एकपक्षीय पारित की गयी है, वह प्रतिवादी अपास्त कराने के आदेश के लिये आवेदन उस न्यायालय में कर सकेगा, जिसके द्वारा वह डिक्री पारित की गयी थी और यदि वह न्यायालय का यह समाधान कर देता है कि सम्मन का तामीला सम्यक् रूप से नही की गयी थी या वहवाद की सुनवाई के लिये पुकार होने पर उससंजात होने से किसी पर्याप्त हेतुक से निवारित रहा था तो खर्चे के बारे में न्यायालय में जमा करने के या अन्यथा ऐसे निबंधनो पर जो वह ठीक समझे, न्यायालय यह आदेश करेगा कि जहां तक डिक्री उस प्रतिवादी के विरूद्ध है वहां तक वह अपास्त कर दी जाय, और वाद में आगे कार्यवाही करने के लिये दिन नियत करेगा:

परन्तु जहां डिक्री ऐसी है कि केवल ऐसे प्रतिवादी के विरूद्ध अपास्त नही की जा सकती है वहां वह अन्य सभी प्रतिवादियो या उनमें से किसी या किन्ही के विरूद्ध अपास्त की जा सकेगी:

परन्तु यह और कि यदि किसी न्यायालय का यह समाधान हो जाता है कि प्रतिवादी को सुनवाई की तारीख की सूचना थी और उपसंजात होने के लिये और वादी के दावे का उत्तर देने के लिये पर्याप्त समय था तो वह एकपक्षीय पारित डिक्री को केवल इस आधार पर अपास्त नही करेगा कि सम्मन की तामीला में अनियमिता हुई थी।"

अर्थात् जहां प्रतिवादी को वाद की सुनवाई की तारीख की सूचना थी वहां तामीला में अनियमिता के आधार पर एकपक्षीय डिक्री को अपास्त नही किया जा सकता है। प्रस्तुत मामले में एकपक्षीय डिक्री दिनांक 07.04.18 को पारित की गयी है जबकि दिनांक 16.02.18 को प्रार्थना पत्र 28 ग जो कि प्रस्तुत मामले के कायमीदाता के द्वारा प्रस्तुत किया गया है, खारिज किया गया था अर्थात् कायमीदाता को उक्त वाद की पूर्ण रूप से जानकारी थी तथा वह उक्त मामले में उपस्थित भी रहा था। यद्यपि न्यायालय द्वारा उसे वाद का पक्षकार होना नही माना गया तथा न्यायालय के उक्त आदेश के विरूद्ध कोई चाराजोई नही किये जाने के कारण यह भी माना जायेगा कि उसके द्वारा अपने पक्षकार बनने के अधिकार का परित्याग भी कर दिया गया है। यदि प्रस्तुत मामले में उसका प्रार्थना पत्र 4ग कायमी हेतु स्वीकार किया जाता है तो इसका प्रभाव आदेश–1 नियम–10 सी0पी0सी0 में दिये गये प्रावधान के अनुरूप तृतीय पक्षकार को पक्षकार कायम करने जैसा होगा तथा अपने पूर्व आदेश दिनांक 16.02.18 को प्रतिकूल भी होगा जिसकी अनुमति विधि प्रदान नही करती है जैसा कि माननीय सर्वोच्च न्यायालय द्वारा विधि निर्णय ***Ram Prakash Agarwal and Another Vs. Gopi Krishnan(Dead through L.Rs.) and Others 2013(4) AWC 3856(SC)*** *में अवधारित भी किया गया है कि–*

" 16. --------Permitting an application under Order IX, Rule 13, CPC by a non-party, would amount to adding a party to the case, which is provided for under Order 1, Rule 10, CPC, or setting aside the ex-parte judgment and decree, i.e., seeking a declaration that he decree is null and void for any reason, which can be sought independently such a party.

20. In view of the above, the legal issues involved herein, can be summarised as under:

(I) an application under Order IX, Rule 13, CPC cannot be filed by a person who was not initially a party to the proceedings."

कायमीदाता के द्वारा भी कायमी प्रार्थना पत्र के माध्यम से अप्रत्यक्ष रूप से अपने प्रार्थना पत्र

28ग जो पी0ए0वाद सं0 01/17 में खारिज किया जा चुका है, को स्वीकार कराये जाने का प्रयास किया जा रहा है, जिसका इस न्यायालय को क्षेत्राधिकार प्राप्त नही है क्योंकि उक्त आदेश दिनांक 16.02.18 एक अंतिम आदेश है, अतः माननीय सर्वोच्च न्यायालय की विधि व्यवस्था ***Ram Prakash Agarwal and Another Vs. Gopi Krishnan(Dead through L.Rs.) and Others (SUPRA)*** *के अनुरूप कायमीदाता जो कि पी0ए0वाद सं0–01/17 का पक्षकार नही था उक्त पी0ए0वाद में पारित एकपक्षीय डिक्री को अपास्त कराने का अधिकारी नही है। प्रार्थना पत्र कायमीदाता पोषणीय नही है, खारिज किये जाने योग्य है।"*

9. **Aggrieved with the aforesaid order dated 30.04.2019 in Misc. Case No.45 of 2018** (Shravan Vs. Javed), passed by the Civil Judge (S.D.), Court No.18, Deoria, **the present petition under Article 227 of the Constitution of India has been filed by the applicant/petitioner.**

Submissions

10. **Learned counsel for the applicant-petitioner submits as under:-**

(i) The P.A. Case was filed by the plaintiff-opposite party no.4, fraudulently knowing it well that the tenant defendant 2nd set (father of the applicant) is missing. The applicant-petitioner is the legal representative of the defendant 2nd set , namely, Sri Venketeshwar and is occupying the tenanted portion but he was not impleaded as defendant. As and when the *ex-parte* judgment in P.A. Case no.01 of 2017 came to his notice, he filed the restoration application. Almost in similar set of facts the restoration application of the defendant nos. 1, 2 and 3 (defendant/tenant 1st set) was allowed by the court below but recall application of the applicant was arbitrarily and illegally rejected by the impugned order.

(ii) The provisions of Rule 22 (b) and Rule 32 of the Rules 1972 are applicable for setting aside the *ex-parte* judgment and restoration of the P.A. Case.

(iii) The impugned order has been passed illegally and contrary to the provisions of Rule 22(b) read with Rule 32 of the Rules, 1972 and Section 151 C.P.C.

11. In support of his submissions he relied upon the judgments of this Court in **Heera Lal Sharma Vs. XVth Addl. District Judge, Kanpur & others 1983 ARC 535 (para 11 to 14)** and **Tara Shankar Vs. Vinod Kumar Verma and others 1993 (2) ARC6 (paras 4 & 7).**

12. **Sri Anoop Trivedi, learned Senior Advocate, submits as under:-**

(i) The applicant-petitioner had no locus standi to file an application 4 Ga for recall of the *ex-parte* judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017, since the applicant-petitioner was not party to the aforesaid P.A. Case. Under Order IX Rule 13 C.P.C. only that person who is a party in the suit can apply for recall of the *ex-parte* judgment and decree.

(ii) Since the impleadment application of the brother of the petitioner (paper no.28 Ga) was rejected by the court below by order dated 16.02.2018, therefore, it shall operate as res judicata. Therefore, the restoration application 4 Ga filed by the applicant - petitioner was lawfully rejected by the courts below.

(iii) Application under Rule 22 of the Rules, 1972 could be filed only when a substitution in respect of defendant no.4 is made. Since from the date of missing of the defendant no.4

seven years have not passed, therefore, no one could be substituted in place of the defendant no.4 Venketeshwar. Therefore, without substitution, no application under Rule 22 read with Rule 32 of the Rules, 1972 was maintainable. Therefore, it was rightly rejected by the court below.

13. In support of his submissions Sri Anoop Trivedi, learned Senior Advocate, has relied upon a judgment of Hon'ble Supreme Court in **Ram Prakash Agarwal and another Vs. Gopi Krishan (Dead through Lrs.) and others, 2013 (4) AWC 3856.**

Discussion & Findings:

14. I have carefully considered the submissions of learned counsels for the parties and with their consent this petition is being finally heard without calling for a counter affidavit.

15. Undisputedly, a composite release application was filed by the plaintiff-opposite party no.4 against two distinct tenants of separate tenanted portions which was allowed by *ex-parte* judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017, passed by the Civil Judge, (S.D.), Court No.18, Deoria, which neither contained any discussion to the evidence led by the plaintiff-respondent no.4 to establish his *bonafide* need nor the comparative hardship to be in his favour. Conclusion based on no reason was recorded and the P.A. Case was decreed. The service of notices upon the defendants were shown by substituted service by publication of notices in some newspaper "Jagat Asha" which had no circulation in the area as has been observed by the same Civil Judge/Prescribed Authority while allowing the restoration application of the defendant 1st set/opposite party nos. 1,2 and 3, thereby setting aside the *ex-parte* judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017 and restoring the P.A. Case to its original number.

16. It is admitted case of the plaintiff-opposite party no.4 that the defendant 2nd set, namely, Venketeshwar (father of he applicant-petitioner herein) is missing since the year 2013, which fact is evident from his own application dated 30.10.2014 (paper no.25 Ga) filed in Suit No.592 of 2013 (Venketeshwar Vs. Javed Ahmad). Thus, at the time of giving notice dated 22.09.2015 or 10.02.2014 as well as at the time of filing P.A. Case no.01 of 2017, the plaintiff-opposite party no.4 was well aware of the fact that the defendant-2nd set, namely, Venketeshwar is missing since the year 2013 and yet he has deliberately not impleaded any of his legal representatives or his family members who were occupying the tenanted premises.

17. The application 4 Ga being Misc. Case No.45 of 2018 (Shrawan Vs. Javed) was filed by the applicant-petitioner and not by his brother Subhash. However, in the impugned order rejecting the said application the court below has proceeded with the assumption as if the applicant-petitioner Shrawan had earlier filed an Impleadment application 28 Ga. The Impleadment application 28 Ga was filed by the brother of the applicant-petitioner which was rejected by the court below by order dated 16.02.2018 for the reasons aforementioned which itself speaks about the correctness of the order. That order *prima facie* appears to have been passed leaving the tenants remedyless and denying them opportunity

of hearing before passing the ex parte judgment dated 07.04.2018.

18. The **application 4 Ga** filed by the applicant-petitioner herein for recall of the ex parte judgment dated 07.04.2018 refers to the provisions of Section 151 C.P.C. and Rule 22 of the Rules 1972. The relevant provisions in rent matters under U.P. Act 13 of 1972, for restoration of cases are the provisions of Section 34 (8) of U.P. Act 13 of 1972 and Rule 22 (b) and Rule 32 of the Rules, 1972, which are reproduced below:-

*"**Section 34 (8) - Powers of various authorities and procedure to be followed by them -** For the purposes of any proceedings under this Act and for purposes connected therewith the said authorities shall have such other powers and shall follow such procedure, principles of proof, rules of limitation and guiding principles as may be prescribed.*

***Rule 22 . Powers under the Code of Civil Procedure, 1908 [Section 34 (1) (g)] -** The District Magistrate, the Prescribed Authority or the Appellate or revising Authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908, when trying a suit, in respect of the following matters, namely-*

*(a) * * * * * * **

(b) the power to proceed ex parte and to set aside, for sufficient cause, an order passed ex parte;

*(c) * * * * * * **

*(d) * * * * * * **

*(e) * * * * * * **

*(f) * * * * * * **

***Rule 32 - Application for setting aside an ex parte order or for restoration [Section 34(8) and 41]-** The District Magistrate, the Prescribed Authority or the Appellant or Revising Authority, as the case may be, may for sufficient cause-*

(a) set aside an ex parte order deciding an application for the determination of a dispute under Section 8 or for the determination of Standard rent under Section 9 or for the release of any building or specified part thereof or any land appurtenant to such building under Section 21 or for allotment of a new building under sub Section (2) of Section 24or for restoration of any amenity under sub-section (1) of Section 27 or for major repairs under sub-section (4) of Section 28 or an appeal under Section 22 or a revision under Section 18;

(b) restore an application or an appeal or revision referred to in clause (a) as well as an application , for release of any building or part thereof or any land appurtenant to such building where such application or appeal or revision has been dismissed for default of appearance of the applicant or the appellant or revisionist, as the case may be, or his counsel."

Service of Notice under the U.P. Act XIII of 1972:-

19. Section 21(3) of U.P. Act 13 of 1972 specifically mandates that ***"no order shall be made under sub-section (1), or sub-section (1-A) or sub-section (2) except after giving to the parties concerned a reasonable opportunity of being heard,*** provided that where the tenant being a servant of Government or of any local authority or any public sector corporation does not contest the application, then a reasonable opportunity of being heard shall be given to the

District Magistrate, who shall have the right to oppose the application. Thus service of notice under Section 21 of the Act is sine qua non for the exercise of jurisdiction under the section 21. Section 34 provides for applicability of certain provisions of the Code of Civil Procedure Code 1908 in matters under U.P. Act 13 of 1972 for the purpose of exercising powers by various authorities and procedure to be followed by them. Rule 28 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 is referable to Section 34(8) of U.P. Act 13 of 1972 and it provides for service of notice. Rule 28 of the Rules 1972 is reproduced below:-

"Rule 28 :

Service of notice [(Section 34(8)] *(1) A notice Issued by the District Magistrate, the Prescribed Authority or the Appellate or Revising Authority under the provisions of the Act shall be served on the person concerned-*

(a) by giving or tendering it to such person, or his Counsel, or

(b) by giving or tendering it to any adult member of his family ; or

(c) if no such person is found, by leaving it at his last known place of abode or business or in the case of an appeal or revision at his address as given under Rule 6, or

(d) if none of the means aforesaid is available by affixing it on some conspicuous part of his last known place of abode, or business or in the case of an appeal or revision at his address as given under Rule 6.

(2) If party files a duly stamped and addressed envelope for service of any notice, then it shall be served by registered post.

(3) In the case of an appeal or revision unless the Appellant has taken action under Sub-rule (2), the Appellate or Revising Authority shall send the notices to the District Magistrate or the Prescribed Authority, as the case may be for having service effected."

20. The Rule 22, 28, and 32 have been framed in exercise of powers conferred under Section 34. Perusal of Rule 28 of the Rules 1972 shows that it does not provide for service of notice by publication. Clause (a) of Sub-section 1 of Section 34 of U.P. Act 13 of 1972 provides for ***"summoning and enforcing the attendance of any person and examining him on oath".*** It does not refer to service of notice of the proceedings under the Act to the parties against whom an action under Section 21(1) is sought to be taken. The language used in Section 34(1)(a) of the Act is plain. It refers to the procedure for procuring and enforcing attendance of a witness for being examined on oath. Rule 28 specifically provides the procedure for service of notice. It provides that a notice issued by the District Magistrate, the Prescribed Authority or the Appellate Authority or the Revising Authority under the provisions of the Act shall be served on the person concerned in the manner prescribed therein. It is as such this Rule which contains the procedure by which a notice contemplated by sub-section 3 of Section 21 of the Act had to be issued.

21. The provisions of Section 21(3), Section 34(1)(a) of the U.P. Act 13 of 1972 and Rule 28 of the Rules, 1972 have been explained by this Court in **Heera lal Sharma Vs. XVth Addl. District Judge, Kanpur and others, 1983 ARC 535**

(paras 8, 12 & 13) (which supports the view taken above), as under:-

"8. A copy of the order-sheet of the Court of the Prescribed Authority has been filed along with the writ petition and a certified copy thereof has been filed along with the rejoinder-affidavit. It indicates that before passing the order for the notices being published in a newspaper the Prescribed Authority was of the view that service of notice by other methods was not sufficient. If, therefore, it was not possible to serve the notice under Section 21 by publication it is a case where even on the own finding of the Prescribed Authority the notice of application under Section 21 had not been served under any of the modes provided under Rule 28 of the Rules. ***Sub-section (3) of Section 21 of the Act contemplates that no order shall be made under Sub-section (1) or Sub-section (1-A) or Sub-section (2) of Section 21 except after giving to the parties concerned a reasonable opportunity of being heard. The process of granting of reasonable opportunity of being heard starts by serving of notice on the person concerned to appear in order to have his say in the matter. As such, service of a notice under Section 21 of the Act is sine qua non for the exercise of jurisdiction under the said section. In Shantanu v. State {1970ALJ 1174(FB)}*** *a Full Bench of this Court has held that* ***service of a notice where such notice is required is preliminary to the acquisition of the jurisdiction to proceed in the matter.*** *It was further held relying on the decision of the Supreme Court in Kiran Singh v. Chaman Paswan AIR 1954 SC 340 that it was well settled that* ***an objection to lack of jurisdiction can be taken at any stage of the proceedings and even in collateral proceedings.*** *It is settled law that* ***plea of res-judicata raises a question of jurisdiction*** *(See Joy Chand v. Kamalaksha AIR 1949 PC 239). It is again settled law that* ***if a statute requires a particular thing to be done in a particular manner, it should be done in that manner or not at all*** *(See Asstt. Collector C.E v. N.T. Co. of India Ltd. AIR 1972 SC 2563 and Ram Chandra v. Govind : AIR 1975 SC 915). In the case of Ramchandra (supra) it was emphasised that* ***failure to comply with the prescribed provisions vitiate the consequential order and render it non est.*** *As already seen above Sub-section (3) of Section 21 of the Act contemplates a notice being given in order to enable the respondent to the application to have a say in the matter. In Mathura Prasad v. Dossibai, AIR 1971 SC 2356, it was held that a question relating to jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of that Court.* ***If by an erroneous interpretation of the statute the Court holds that it has the jurisdiction, the question would not operate as res-judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res-judicata between the same parties,*** *whether the cause of action in the subsequent litigation is the same or otherwise, because, if these decisions are considered as conclusive, it will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the legislature.*

12. The only clause on which reliance has been placed by Counsel for respondent No. 3 in support of his submission that recourse to service of

notice by publication could be taken is Clause (a) of Sub-section (1) of Section 34 of the Act which reads:

"(a) summoning and enforcing the attendance of any person and examining him on oath."

A perusal of Rules 9 to 20 of Order V, C.P.C. indicates that all the modes of service which are prescribed in Rule 28 of the Rules are to be found in one or the other rule between these Rules 9 to 20 of Order V. ***If Clause (a) of Section 34(1) of the Act is interpreted in such a manner as to confer on the authorities mentioned in Section 34 of the Act the power to take recourse to the modes of service prescribed in Order V, Rules 9 to 20 C.P.C. there would have been apparently no necessity of enacting Rule 28 of the rules at all*** *in as much as whatever is prescribed in Rule 28 is already to be found in one or the other rules between Rules 9 and 20 of Order V, C.P.C. Sub-clause (F) of Section 34(1) contemplates exercise of power in regard to any other matter which may be prescribed. Likewise Sub-section (8) of Section 34 contemplates prescription by rules in regard to such other powers.* ***The expression "such other powers" obviously means what has not already been provided in any of the Sub-clauses (a) to (f). This also makes it clear that the provisions contained in Rules 9 to 20 of Order V, C.P.C. had not been made applicable to the proceedings under the Act and Clause (a) of Section 34(1) of the Act cannot therefore be interpreted in a manner to include that power.***

13. Further as seen above, ***Clause (a) of Section 34(1) provides for summoning and enforcing the attendance of any person and examining him on oath.*** *This obviously refers to issuing of summons requiring a person to attend and given evidence as witness.* ***It does not refer to service of notice of the proceeding under the Act to the party against whom an action is sought to be taken. When a notice is issued to the Defendant or Respondent in a proceeding he is not required to attend for being examined on oath. Further, he is not compelled to appear. It is left to his choice whether or not to appear and contest the proceedings. In this view of the matter there is no question of enforcing his attendance. On the other hand a witness is required to attend for being examined on oath and if he fails to appear his attendance is to be enforced.*** *On the language used in Section 34(1)(a) of the Act it is plaint that this provision refers to the procedure for procuring and enforcing attendance of a witness for being examined on oath.* ***Rule 28 on the other hand provides that a notice issued by the District Magistrate, the Prescribed Authority or the appellate or revising authority under the provisions of the Act shall be served on the person concerned in the manner prescribed therein. It is as such this rule which contains the procedure by which a notice contemplated by the Sub-section (3) of Section 21 of the Act had to be issued."***
(Emphasis supplied by me)

22. In **Tara Shankar Vs. Vinod Kumar Verma and others, 1993 (2) ARC 6 (7) (paras 3 & 7),** Hon'ble Single Judge considered the provisions of Order 9 Rule 13 C.P.C. while dealing in trust matter and held as under:-

"3. The brief question that falls for consideration is whether a decree passed ex parte, affecting a person, who was not a party to the decree could be set aside under Order 9 Rule 13 C.P.C.

7. In the case of Surajdeo v. Board of Revenue U.P. Allahabad and others reported in ***AIR 1982 All 23,*** *this Court has observed that where a stranger who was not a party to a suit alleges that the decree passed therein is obtained by fraud and collusion, he can bring a regular suit for the reliefs claimed by him but there is no hard and fast rule that he cannot bring the correct facts to the notice of the court concerned that fraud had been practised upon the court and that the court had committed patent Illegality in passing the ex parte decree in favour of the Plaintiff in that suit specially when he was likely to be affected by the ex parte decree in favour of the Plaintiff in that suit.* ***It was held that when a stranger is vitally interested in the subject matter of the suit decree ex parte application by him to set aside the ex parte decree under order 9 Rule 13 Code of Civil Procedure is competent. It is maintainable under Section 151 Code of Civil Procedure also. It would not be correct to say that the trial court in such circumstances had no jurisdiction to set aside the ex parte decree, which was*** **obtained by collusion and fraud practised by the Plaintiff and the Defendants in that suit."**

(Emphasis supplied by me)

Inherent power to recall and set aside an order:-

23. In the case of **Indian Bank vs M/S Satyam Fibres (India} Pvt.Ltd, (1996) 5 SCC 550 (Para 23),** Hon'ble Supreme Court has held that the Court has inherent power to recall and set aside an order :-

(i) when fraud has been practised upon the Court

(ii) when the Court is misled by a party or

(iii) when the Court itself commits a mistake which prejudices a party

24. In **A.R. Antulay Vs. R.S. Nayak & Anr. (1988) 2 SCC 602** (para para 130), Hon'ble Supreme Court noticed motions to set aside **judgments being permitted where:** (i) a judgment was rendered in ignorance of the fact that **a party had not been served** at all and was shown as served or in ignorance of the fact that a **necessary party had died** and the estate was not represented, (ii) a judgment was **obtained by fraud,** (iii) a party has **had no notice** and a decree was made against him and such party approaches the Court for setting aside the decision *ex debito justitiae* on proof of the fact that there was no service.

25. In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment-Opening and Vacating" (paras.265 to 284, at pp. 487-510) the law on the subject has been stated. **The grounds on which the courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions.** Invalidity of the judgment of such nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter judgment may be vacated on that ground. However, in general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will

not be entered when the proper remedy is by some other proceedings, such as by appeal. The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or submits to it, waiver or estoppel results.

26. In **Budhia Swain and others Vs. Gopinath Deb and others (1999) 4 SCC 396 (paras 8 & 9)** Hon'ble Supreme Court again considered the scope of power of a Tribunal or a Court to recall an order and held as under:-

*"8.In our opinion **a tribunal or a court may recall an order earlier made by it if***

*(i) the proceedings culminating into an order suffer from the **inherent lack of jurisdiction** and such lack of jurisdiction is patent,*

*(ii) there exists **fraud or collusion** in obtaining the judgment,*

*(iii) there has been a **mistake of the court prejudicing a party,** or*

*(iv) a judgment was rendered in ignorance of the fact that **a necessary party had not been served at all or had died** and the estate was not represented.*

The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

9. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation. In Hira Lal Patni Vs. Sri Kali Nath AIR 1962 SC 199, it was held :-

".....The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

Whether ex parte judgment was liable to be recalled:-

27. The fact regarding missing of the tenant-defendant 2nd set (defendant no.4) since the year 2013, came to the notice of the Court during pendency of the P.A. Case No.16 of 2017. Order I Rule 10 sub-Rule 2 confers power upon the Court that the Court may at any stage of the proceedings, **either upon or without the application of either party,** and on such term as may appear to the Court to be just, **order that** the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that **the name of any person who ought to have been joined, whether as plaintiff or**

defendant, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. Thus, as per this provision, the Court may either upon or without the application of either party order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. The original tenant Venketeshwar (defendant 2nd set) was missing. His sons were occupying the tenanted portion as tenant. The applicant-petitioner is the son of tenant-defendant 2nd set. Therefore, the Court below should have added him as party inasmuch as the original tenant was not available to contest the P.A. Case because he was missing since the year 2013. Notice as contemplated under Section 21(3) of U.P. Act 13 of 1972 was not served upon the tenant-defendant 2nd set or upon the applicant-petitioner in the manner prescribed by Rule 28 of the Rules. In the matter of the tenant-defendant 1st set the court below found that there was no valid substituted service inasmuch as the newspaper in which the publication was made, had no circulation in the area. By one and the same publication in the same alleged newspaper the notices were sought to be served upon both sets of defendants. Therefore, once the Court itself found in the matter of the tenant-defendant 1st set that there was no valid substituted service, therefore, it can be safely concluded that there was no substituted service upon the tenant-defendant 2nd set also. Thus, the judgment and decree dated 07.04.2008 in P.A. Case No.01 of 2017, was passed *ex-parte* without service on notice upon the tenant and in breach of Section 21(3) of the Act and Rule 28 of the Rules.

28. Perusal of the aforequoted provisions leaves no manner of doubt that for sufficient cause an ex parte order can be set aside. It is not in dispute that the applicant-petitioner is the son of the tenant-defendant 2nd set (defendant no.4), who is stated to be missing since the year 2013. The plaintiff-opposite party No.4 had filed the P.A. Case in question on 31.01.2017. It is also not in dispute that the tenanted portion is in occupation of the sons of the tenant-defendant-2nd set (defendant no.4). The court below itself has held in its order dated 8.4.2019 in Misc. Case no.46 of 2018 (Smt. Renu Kushwaha Vs. Javed) arising from the same P.A. Case No. 01 of 2017 that the substituted service of notices upon the defendants by publication of notices in the news paper was not sufficient, but it set aside the *ex-parte* judgment and decree only with respect to the defendant no. 1 to 3. Therefore, since the impugned judgment in P.A. Case No.01 of 2017 was passed *ex-parte* without any service of notices upon the defendants including the tenant-defendant no.4 (defendant 2nd set), therefore, under the peculiar facts and circumstances of the case the impugned ex- parte judgment and decree should have been set aside in respect of the defendant no.4 also and the applicant petitioner(son of the defendant no.4) in occupation of the tenanted portion as tenant, should have been afforded an opportunity of hearing.

29. The judgment in the case of **Ram Prakash Agarwal (supra)** relied by learned counsel for plaintiff-respondent

does not support the case of the plaintiff-respondent. In paragraphs 28.2 and 28.3 of the aforesaid judgment, Hon'ble Supreme Court has observed that inherent power under Section 151 C.P.C. can be exercised by the court to redress only such grievance for which no remedy is provided under C.P.C. and that in the event such an order has been obtained from the Court by playing fraud upon it, it is always open to the court to recall the order on the application of the person aggrieved. Perusal of the release application of the plaintiff-opposite party no.4 shows that even knowing it well that the defendant no.4 is missing yet the plaintiff-opposite party No.4 has neither mentioned this fact in his application nor impleaded the defendant No.4 through his sons. This shows malafide intention of the plaintiff-opposite party no.4 to get an ex parte decree of eviction. Therefore, the principles laid down in the judgment in the case of **Ram Prakash Agarwal (supra)** do not support the case of the plaintiff-opposite party no.4 rather it is against him.

Conclusion:-

30. The discussion made above are briefly summarised as under:-

(a) In a case filed under Section 21(1) of U.P. Act 13 of 1972, no order can be made under sub-section 1 or sub-section (1-A) or sub-section 2 of Section 21, except after giving to the parties concerned a reasonable opportunity of being heard.

(b) Service of notice under Section 21 of the Act is *sine qua non* for the exercise of jurisdiction under Section 21(1)/(1-A)/(2) of the U.P. Act 13 of 1972.

(c) Rule 28 of the Rules, 1972 has been framed by the State Government in exercise of powers conferred under sub-section 8 of Section 34 of the U.P. Act 13 of 1972.

(d) Rule 28 prescribes the procedure of service of notice under the Act by the District Magistrate, the Prescribed Authority or the appellate authority or the revising authority.

(e) Notice as contemplated under Section 21(3) of the Act in the rent case under Section 21(1) of the Act was not served upon the tenant-defendant 2nd set in the manner prescribed by Rule 28 of the Rules.

(f) Service of notice required by the aforesaid provisions is preliminary to the acquisition of jurisdiction to proceed in a rent case under Section 21(1) of the Act. Since there was no service of notice upon the tenant-defendant 2nd set, therefore, the ex parte judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017 (Javed Ahmad Vs. Smt. Renu Kushwaha & others) with respect to the tenant-defendant 2nd set, is liable to be set aside and the P.A. Case is liable to be restored to its original number by setting aside the impugned order dated 30.04.2019 in Misc. Case No.45 of 2018 and allowing the application 4 G.

(g) The Court has inherent power to recall and set aside the order where:-

(i) fraud has been practised upon the Court, or

(ii) when the Court is misled by a party, or

(iii) when the Court itself commits a mistake which prejudices a party, or

(iv) judgment was rendered in ignorance of the fact that a party had not been served at all and was shown as served, or

(v) judgment was rendered in ignorance of the fact that a necessary party had died and the estate was not represented, or

(vi) a party has had no notice and a decree was made against him or

(vii) there is inherent lack of jurisdiction and such lack of jurisdiction is patent

(h) The alleged substituted service was shown with respect to the tenant-defendant 1st set and the tenant-defendant 2nd set by single publication in one and the same news paper i.e. "Jagat Asha" and the court below itself held in its order dated 08.04.2019 in Misc. Case No.46 of 2018 filed by the tenant-defendant 1st set for setting asdie the judgment and decree dated 07.04.2018, that the substituted service by publication in the news paper "Jagat Asha" is not valid. Therefore, there was no valid substituted service upon the tenant-defendant 2nd set.

(i) The principles of *res judicata* as argued by learned counsel for the plaintiff-respondent shall not apply on the facts and circumstances of the present case and also in view of the law laid down in judgments of this court and of Hon'ble Supreme Court as discussed above (paras 21 to 26)

31. For all the reasons aforestated, this petition is **allowed.** The impugned order dated 30.04.2019 in Misc. Case No.45 of 2018 (Shrawan Vs. Javed) arising from P.A. Case No.01 of 2017, passed by the Civil Judge (S.D.), Court No.18, Deoria, is hereby set aside. The application 4 Ga filed by the applicant/petitioner is allowed by setting aside the *ex-parte* judgment and decree dated 07.04.2018 in P.A. Case No.01 of 2017. P.A. Case No.01 of 2017 is restored to its original number with respect to the tenant-defendant No.4 also.

(2019)10ILR A 1249

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J
THE HON'BLE SAURABH LAVANIA, J

.

Misc. Bench No. 24229 of 2019

Dr. Neetu Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailendra Misra

Counsel for the Respondents:
C.S.C., Sri Abhinav N. Trivedi

A. U.P. King George Medical University Act, 2002 - Sections 14 and 23 - First Schedule - Chapter X- Petitioner is a Professor (Molecular Biology) at KGMU has sought a Writ of Quo-warranto against Respondent No.4 -working as Professor (Stem Cell/Cell Culture Lab) requiring him to show cause as to under which Authority of Law he is holding the post of Professor-post of professor-not a public office-it is merely employee-writ not maintainable.

Held: - a Teacher/Faculty Member is a full-time employee of the University- He is neither an Authority nor an Officer of the University. In view of the aforesaid, we are of the view that the teaching staff / faculty (Professor in the instant case) of King George's Medical University are not the holder of *Public Office*. - Writ not maintainable.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Dr P.S.Venkata Swamy Setty Vs University of Mysore AIR 1964 Mysore 159

2. The King V.Speyer,(1916))1 KB 595

3. Darley v.R., (1846) 12 537

4. in re, Chakkaral Chettiar , AIR 1953 Mad 96

5. Sivarama Krishnan v.Arumugha Mudliar, (S) AIR 1957 Mad 17

6. Biman Chandra V. Governor, West Bengal, AIR 1952 Cal 799

7. V.D.Deshpande v. State of Hyderabad(S) AIR 1955 Hyderabad 36

8. Dr D.K. Belsare Vs Nagpur University; (1980) 82 Bom LR 494

9. University of Mysore Vs Govinda Rao AIR 1965 SC 491

10. B. Srinivasa Reddy VS Karnataka Urban Water Supply and Drainage Board Employees Association (2006) 11 SCC 731 II

11. Shashi Bhushan Ray Vs Pramatha Nath Bandopadhyay (1966) SCC Online Cal 153

12. V.C.Shukla v.State(Delhi Admn),(1980)

13. In Re Miram's(1891)IQB 594

14. Agriculture Produce Market Committee VS Ashok Hariauni and another (2000) 8 SCC 61.

(Delivered by Hon'ble Saurabh Lavania, J.)

Heard Sri Shailendra Misra, learned counsel for the petitioner, learned C.S.C. for the opposite party No. 1 and Sri Abhinav N. Trivedi, learned counsel for the opposite party Nos. 2 and 3.

1. By means of the instant Writ Petition the Petitioner who is working as Professor in the Department of Centre for Advanced Research (Molecular Biology) of King George's Medical University (hereinafter referred to as "KGMU') has sought a Writ of Quo-warranto against Respondent No.4 Dr Shailendra Saxena working as Professor in the Department of Centre for Advanced Research (Stem Cell/Cell Culture Lab) requiring him to show cause as to under which Authority of Law he is holding the post of Professor.

In the present writ petition, following main relief has been sought:-

"(i) Issue a writ, order of direction in the nature of quo warranto requiring the opposite parties to show that by which authority opposite party No. 4 is holding the post of Professor Centre for Advance Research (Stem Cell/Cell Culture Lab) K.G.M.U., Lucknow."

2. The Writ Petition has been filed on the ground that the Respondent No.4 lacks the educational qualification as required by an incumbent for being appointed as Professor in Stem Cell/Cell Culture Lab and therefore, was in-eligible. In support of the aforesaid allegations, the Petitioner has contended that the Respondent No.4 does not possess qualifications as prescribed in the Advertisement against the post of Professor in Stem Cell/Cell Culture Lab.

3. Learned counsel representing the K.G.M.U, Sri Abhinav N. Trivedi, raised A Preliminary objection raised with regard to maintainability of the instant Writ Petition seeking a Writ of Co-Warranto on the ground that the post of *"**Professor**'* in KGMU is not a *''**Public Office**'*.

In support of preliminary objection, Sri Trivedi counel for the K.G.M.U,

placed reliance on the provision of Uttar Pradesh King George's Medical University Act, 2002 (in short "Act of 2002") and First Statute, 2011 (in short "Statute of 2011"). The reliance has also been placed on various authorities/judgments including the judgment of this Court dated 16.08.2019 passed in the Writ Petition No.19119 (SS) of 2019 [Kundan Singh Vs. State of U.P.].

4. It is submitted by Sri Trivedi that the The High Court in exercise of its Writ Jurisdiction, in the matter of Quo-Warranto, is required to determine at the outset as to whether a case has been made out for issuing a Writ of Quo-warranto. The jurisdiction of the High Court to issue a Writ of Quo-warranto is a limited one. A Writ of Quo-warranto can only be issued when three conditions are satisfied i.e. (1) the appointment is contrary to the Statutory Rules; (2) the holder of the post is a Usurper ; and (3) the post in question is a ***''Public Office'.***

5. Sri Trivedi further submitted that the law is well settled. The High Court in exercise of its writ jurisdiction in the matter of Quo-warranto is required to determine, at the outset, as to whether a case has been made out for issuance of a Writ of Quo-warrnto. The jurisdiction of the High Court to issue a Writ of Quo-warranto is a limited one which can only be issued when it is established that the incumbent is an alleged Usurper of a ***''Public Office'*** and the appointment is contrary to the Statutory Rules.

Per contra, the learned counsel for the petitioner submitted that K.G.M.U. is a Statutory Body constituted under the special Act and being so as well as in view of functions which K.G.M.U. is discharging i.e. providing medical education and treatment to the public at large, it, can safely be said that K.G.M.U. is discharging sovereign function and post of the Professor is "Public Office." Thus writ petition for the relief sought is liable to be entertained, being maintainable and be decided on merits.

6. Before dealing with case on merits on the basis of the factual matrix and dealing with the exposition of facts, as illustrated in the Writ Petition, it would be expedient to adjudicate the issue of maintainability of Writ Petition seeking a Writ of Quo-Warranto.

7. It would be necessary to refer to certain provisions of *''Uttar Pradesh King George's Medical University Act, 2002* and *''Uttar Pradesh King George's Medical University First Statute 2011'.*

7.1 Section 23 of the *Uttar Pradesh King George's Medical University Act 2002 [Act of 2002]* provides for **Authorities** of KGMU and Section 14 of Act of 2002 illustrates the **Officers** of *KGMU*. Whereas a **teacher of *KGMU*** is merely an employee of KGMU and is neither an **Authority or an Officer** as prescribed under Section 12 and 23 of Act of 2002, which is also apparent from a conjoint reading of Section 2 (12) of the Act of 2002 and Statute 10.01 (7) & (10) of *Uttar Pradesh King George's Medical University First Statute 2011 [Statute of 2011]*. For ready reference, the aforesaid provisions of the Act of 2002 and the Statute of 2011 are being reproduced here as under :

ACT OF 2002

Definitions 2. In this Act-

(12)'teacher' *means a teacher employed by the University for imparting*

instruction and guiding and conducting research in the University;

CHAPTER III- OFFICERS OF THE UNIVERSITY

Section 14. The following shall be the Officers of the University

a) The Chancellor;

b) The Vice-Chancellor;

c) The Pro-Vice-Chancellor;

d) The Finance Officer;

e) The Registrar;

f) The Controller of examination, if any,

g) The Deans of the Faculties;

h) The Dean of the Students Welfare

i) Such other Officers as may be declared by the Statutes to be the Officers of the University.

CHAPTER IV- AUTHORITIES OF THE UNIVERSITY

23. The following shall be the authorities of the University:

a) the Executive Council;

b) the Court;

c) the Academic Council;

d) the Finance Committee

e) the Boards of Faculties;

f) the Selection Committee for appointment of sovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereignsovereign ***sovereignsovereignSovereignSovereignSovereignSovereignSovereignsovereignSovereignsovereignsovereignsovereignSovereignSovereignSovereignSovereignSovereignSovereignSovereignSovereignSovereignsovereignsovereignsovereignSovereignSovereignSovereignSovereignsovereignsovereignsovereign*** *Teachers of the University;*

*g) the Admiss*ions Committee;

h) the Examination Committee; and

i) such other authorities as may be declared by the Statutes to be authorities of the University.

FIRST STATUTES, 2011

Chapter X - University Teachers / Faculty Members

Section 41 10.01

(1) As per provisions contained in Subsection (12) of Section 2 of the Chhatrapati Shahuji Maharaj Medical University Act, "teacher" means a teacher employed by the University for imparting instruction or guiding or conducting research in the University.

(2) The University teachers shall also be known as Faculty Members of the University.

(7) A teacher shall be a full time consultation for the indoor patients and likewise for the outdoor patients along-with their responsibilities as teachers.

(10) The appointment of the University teacher/s shall be on a whole time basis. ***He shall be a full time employee of the University.***

8. While referring to the aforesaid Statutory Provisions of the Act of 2002 and Statute of 2011, it has been contended that the post of Professor in KGMU is not a ***''Public Office'.*** It has further been submitted that in order to maintain a Writ of Quo-warranto, the Petitioner has to substantiate that the Office is a ***''Public Office'*** and the person against whom the Writ of Quo-warranto is sought is a usurper holding the Public Office without any legal authority. In support of this argument, reliance has been placed on various judgments of Hon'ble Supreme Court and different High Courts which are being discussed here under:

8.1 In case of *Dr P.S.Venkata Swamy Setty Vs University of Mysore-* **(AIR 1964 Mysore 159; Para 11,13,14)** it has been held that the Professors and Readers of a University do not exercise any governmental function nor they are vested with the power or charged with the duty of acting in execution or enforcement of law. They are merely employees of the Statutory Body. They cannot therefore in any sense be described as holders of Public Offices in respect of which a Writ of Quo-warranto would lie.

8.2 In *Dr P.S.Venkata Swamy Setty (Supra),* the University of Mysore though its Registrar, vide Notification dated 25th June,1959 invited Applications for various posts ofProfessors and Readers in different subjects. The Petitioner therein was one of the Applicants for the post of Reader in Physics. Several candidates were interviewed but none was selected and therefore, One Post of Professor and Three Posts of Reader in Physics were re-advertised and consequently the Private Respondents were selected. The Petitioner filed Writ Petition praying for a Writ of Mandamus or Writ of Quo-Warranto against the Private Respondents primarily on the ground that the appointments are invalid or unauthorized because qualifications set out in Second Notification were not shown to have been prescribed by Syndicate of the University and some of the Respondents did not possess the minimum qualifications.

Specific objection was raised with regard to maintainability of a Writ of Quo-warranto and after considering various judicial pronouncements, the Mysore High Court has held as under in Paragraph 11, 13 & 14:

"PARA 11

The peculiar characteristics of the writ of quo-warranto and the history of its development in England are found discussed in the leading case of The King V.Speyer,(1916))1 KB 595.Lord Reading , C.L, points out that originally a writ of quo warranto was available only for use by the King against encroachment of royal prerogative or of rights, franchise or liberties of the Crown but that later it gave place to the practice of filing information by the Attorney General on the strength of which the Court enquired into the authority whereby the respondent held any public position. Later still, the King's coroner commenced the practice of exhibiting the information of quo warranto at the instance of even private persons. To prevent the abuse of this practice, statutes were subsequently passed during the reign of the King William and Queen Mary, after which the practice of coroner filing information was stopped. Another statute was passed during the reign of Queen Anne making the issue of a writ of quo warranto subject to the discretion of the Court to grant or refuse the same upon the information exhibited by private persons. In a sense, the proceedings were criminal in nature because the party who laid information before the Court was merely in the position of an informer or a relator. The long history of the proceedings in quo qarranto led to considerable conflict of decisions. The matter was fully examined by the House of Lords in the case of Darley v.R.,(1846) 12 Cl. And F. 520 at p.537: 8 ER 1513, in which Tindal , C.J expressed his conclusion in the following of quoted words :-

"After consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in nature of quo warranto

will lie for usurping any office, whether created by charter alone , or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others".

PARA 13

In India we have a republican Constitution. Hence in India the nature of Office in respect of which quo warranto will lie must be taken to be an office created by the Constitution itself or by any statute and invested with the power or charged with the duty of acting in execution or in enforcement of the law. We might add that the office may be either an elective office or one in respect of which a nomination or appointment is made by a specified authority and that in the case of elective office, we generally have the procedure of election petitions which makes it unnecessary for any one to proceed by way of a writ of quo warranto.

Provided the office is of the character or nature described above, it is well established in England that the Petitioner who is only a relator need not have any personal interest in the matter. All that is necessary is that he should act bona-fide in public interest and should not be a mere man of straw acting at the instance of others or on ulterior motives. The writ, as already stated, is purely discretionary with the Court and will not issue unless the Court is satisfied that it is necessary to issue the writ in public interest.

PARA 14

The principles stated in the case of 1916, 1 KB 595 have been applied in India also. The only case where it was held that even in the case of quo warranto the petitioner must have a personal interest before he could move the Court is the decision of a single Judge Chandra Reddi, J. as he then was, of the Madras High Court reported in re ,Chakkaral Chettiar , AIR 1953 Mad 96. His Lordship purported to follow the decision of a Bench of that High Court reported at Page 94 of the same Volume. That Bench decision, however, related to a case of certiorari.The opinion of Chandra Reddi, J.,was dissented from by a subsequent Bench ruling of the Madras High Court in Sivarama Krishnan v.Arumugha Mudliar, (S) AIR 1957 Mad 17. It is pointed out in that case that no other High Court in India has accepted Justice Chandra Reddi's view, Among the rulings of other High Courts expressing such dissent are Biman Chandra V. Governor, West Bengal, AIR 1952 Cal 799 and V.D.Deshpande v. State of Hyderabad(S) AIR 1955 Hyderabad 36. In the latter decision other cases, both English and Indian, and found discussed and the principles formulated."

8.3 Similar observation have been made in the case of *Dr D.K. Belsare Vs Nagpur University;* **(1980) 82 Bom LR 494, Para 60,61,64,66.**

8.4 In *Dr D.K. Belsare (supra)* the Petitioner before the Bombay High Court filed a Writ of Quo-warranto against the incumbent appointed as Professor of Zoology. The Writ Petition was filed on the ground that: (a) the appointment is Malicious; (b) Selection Committee has not been constituted in terms of the provisions; and (c) Appointment of Respondent No.3 was illegal. After considering the provisions of the Act and the Statutes of the University and legal prepositions, the Bombay High Court held as under :

"PARA 60

We have presently pointed out earlier that in this case this submission about collateral attack is not at all maintainable. The next ruling is Alex Beets v. M.A Urmese. In this ruling, a writ for quo warranto was asked for by a medical graduate against an Hon.Medical Officer with certain other reliefs. It was contended that the Government has bound to observe the provisions of Art, 16 of the Constitution of India and to advertise invitations for applications thereof , which was not done in that case. It was held that in the absence of such a case in the Petition, this could not be urged at the final hearing. Consequently, it was held that a challenge under Art.16 cannot be urged by one who was not an aspirant to the post. It was further held that challenge under art.16 cannot be heard in a motion cannot be heard in a motion for quo warranto and breach of art.16 can be challenged in a writ of certiorari only and it was further held by the Kerala High Court that possession of a Public Office under a Government Order is not usurpation of Office, for which alone quo-warranto lies.

PARA 61

Then the next ruling is the University of Mysore v S.C.Govinda Rao, but there is nothing particular in this ruling and it only lays down the procedure and the next ruling is Dr P.S.Venkataswamy v.University of Mysore. In Para 11 of this ruling, the Mysore High Court observed as follows:

"In India we have a republican Constitution. Hence in India the nature of Office in respect of which quo warranto will lie must be taken to be an office created by the Constitution itself or by any statute and invested with the power or charged with the duty of acting in execution or in enforcement of the law."

PARA 64

We have already referred to the ruling of Rajasthan High Court. The Rajasthan High Court has held that it is a statutory post. We are respectfully not in agreement with the said reasoning of the Rajasthan High Court . It is admitted fact that Professor is appointed by the Executive Council upon recommendation made by the Selection Committee in that behalf. It is true that Professor is appointed under the powers vested in the Executive Council but that by itself does not go to show that the post of Professor is a statutory post created by Statute itself. We are in respectful agreement with the observations made by the Mysore High Court and we, therefore, hold that the post of Professor in Zoology, with which we are concerned in this case, is not a public office for which a writ of quo -warranto is issued.

PARA 66

We have already pointed out that it is not the contention of Mr.Oka that he is challenging the constitution of the Selection Committee but we have also pointed out that he is relying upon the statutory provisions to show that the Selection Committee was not properly constituted as per s.45 of the University Act. If the Petitioner were to challenge the very constitution of the Selection Committee itself, then the ruling on which Mr.Deshpande placed reliance, regarding collateral attach would have been applicable to the facts of the instant case but in as much as no such contention is raised by the Petitioner, there is no force in this contention raised by Mr.Deshpande. The only contention of the petitioner is that the post is not filled in accordance with the section, which was required to be made in accordance with law. In result, therefore, it will be seen that it cannot be held that the post of

Professor of Zoology is a public office and, therefore, a writ of quo warranto cannot be issued. The result is that there is no merit in this petition and it deserves to be dismissed and is accordingly dismissed. Rule is discharged, but in the circumstances of this case, there will be no Order as to costs."

8.5 In the case of *University of Mysore Vs Govinda Rao* **AIR 1965 SC 491; Para 6,** the Hon'ble Apex Court has held that the Quo-warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty. If the enquiry leads to the finding that the holder of the Office has no valid title to it, the issue of the writ of Quo-warranto ousts him from that Office.

8.6 In *Govinda Rao (Supra)* the Mysore High Court allowed the Writ Petition and consequently issued a Writ of Quo-warranto against the Research Reader in English in Central College, Bangalore, being aggrieved thereof Special Leave Petitions were filed which were converted into Civil Appeal No.417 and 418 of 1963. Allowing the Civil Appeals, the Hon'ble Supreme Court held as under:

PARA 6

"The Judgment of the High Court does not indicate that the attention of the High Court was drawn to the technical nature of the writ of quo-warranto which was claimed by the Respondent in the present proceedings, and the conditions which had to be satisfied before a writ could issue in such proceedings.

As Halsbury has observed:

"An information in the nature of a quo warranto took the place of the absolate writ of quo-warranto which lay against a person who claimed or usurped an Office, franchise, or liberty to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined.

Broadly stated, the quo-warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise , or liberty, is called upon to show by what right he holds the said office, franchise or liberty. If the enquiry leads to the finding that the holder of the Office has no valid title to it, the issue of writ of Quo-warranto ousts him from that Office. In other words, the procedure of quo-warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons, not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto , he must satisfy the court, inter-alia, that the office in question is a public office and is held by usurper without legal authority,

and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

8.7 In the case of *B. Srinivasa Reddy VS Karnataka Urban Water Supply and Drainage Board Employees Association* reported in **(2006) 11 SCC 731 II Para 76;** the judgment of Learned Single Judge directing for the ouster of Managing Director, Karnataka Urban Water Supply was affirmed by the Division Bench of High Court of Karnataka in Writ Appeal No.86 of 2006. The matter went up to the Hon'ble Supreme Court and after considering the definition of ***''Public Office'*** as defined in Black's Law Dictionary, the Hon'ble Apex Court has held that certain essential elements are to be established in order to hold an Office / Post as ***''Public Office'***.

8.8 The aforesaid essential elements can be summarized as under:-

a) Position must be created by constitution, legislature or authority conferred by legislature.

b) Portion of sovereign power of government must be delegated to such position.

c) Duties and powers must be defined directly or impliedly.

d) Duties must be performed independently without control or superior power other than law.

e) Position must have some permanency and continuity.

8.9 The Hon'ble Apex Court in *Srinivasa Reddy (Supra)* observed that the Appeals involve substantial questions of law regarding interpretation of certain provisions of *Karnataka Urban Water Supply and Drainage Board Act, 1973* and the Rules made there under **and also the principles of law governing the writ of quo warranto.**

Consequently the Hon'ble Apex Court has held as under:

"PARA 76

"The Notification dated 31.01.2004 clearly stated that the appointment is on contract basis and until further orders. While laying down the terms of appointment in its order dated 21.04.2004, the Government of Karnataka clearly stated that the "term of contractual appointment of Shri B.Srinivasa Reddy shall commence on 01.02.2004 and will be in force until further orders of the Government and this is a temporary appointment". Section 6(1) of the Act categorically states that the Managing Director shall hold Office during the pleasure of the Government. The power and functions of the Board are laid down in Chapter V of the Act. A reading of the Act clearly shows that neither the Board nor its Managing Director is entrusted with any sovereign function. Black's Law Dictionary defines public office as under:"

"Public Office- Essential characteristics of "public office' *and (1)authority conferred by law, (2) fixed tenure of Office, and (3) power to exercise some portion of sovereign functions of Government; key element of such test is that "Officer' is carrying out sovereign function, Spring v. Constantino. Essential elements to establish public position as* "public office' *are: position must be created by Constitution , legislature or through authority conferred by legislature, portion of sovereign power of Government must be delegated to position, duties and powers must be defined, directly or impliedly, by*

legislature or through legislative authority, duties must be performed independently without control or power other than law and position must have some permanency and continuity .State v.Taylor."

9. It is now a trite law that in order to maintain a Writ of Quo-Warranto it has to be established that the post held by the alleged usurper is a ***''Public Office'***.

10. In our opinion, one of the most important conditions which the person seeking a writ of quo-warranto must satisfy is that the Office in question is a ***''Public Office'*** and the same is of a public nature. If this condition is satisfied, only in such a case the Court may proceed further to inquire as to whether the appointment to the ***''Public Office'*** is really in violation of statutory rules and regulations or any provision of law.

11. Pre-requisite for maintaining a Writ of Quo-warranto is to establish and satisfy before the Court that the Office in question is a ***''Public Office'*** and it is held by a person without legal authority.

12. Accordingly, it is obvious to deal the fundamental question that whether the post of Professor is a Public Office and does it qualifies the essential characteristics of ***''Public Office'*** as illustrated herein above.

13. In the present case there is no assertion in the entire Writ Petition that the post of Professor in the Department of Centre for Advanced Research (Stem Cell/Cell Culture Lab) in KGMU is a ***''Public Office'***.

14. There is a distinction between ***Public Office, Public Authority*** and ***Public Duty***. A Professor of a University can be said to be discharging a Public Duty but that ipso-facto would not make the post of Professor as a ***''Public Office'*** for the purpose of maintaining a Writ of Quo-Warranto.

14.1 In regard to ***''Public Office'***, the Calcutta High Court in the case of *Shashi Bhushan Ray Vs Pramatha Nath Bandopadhyay* reported in **(1966) SCC Online Cal 153;Paragraph 45** has relied upon *Ferris Extra-ordinary Legal Remedies* (Page 168), and consequently observed that the Law is stated to be that a Public Office is the right, authority and duty created and conferred by law by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the Public, for the term and by the tenure prescribed by Law. In other words, it entails an obligation of the sovereign power.

14.2 ***''Public Office'*** as explained by the Major Law Lexicon IV Edition 2010 is as under:

''Public Office' *defined .55-6 V.c.40 S.4 A position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period.*

14.3 A ***''Public Office'*** is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of

tenure, duration, emoluments and duties. The determining factor, the test, is whether the Office involves a delegation of some of the solemn functions of government, either executive, legislative or judicial, to be exercised by the holder for the public benefit.(72 CWN 64,Vol.72) *[Extraordinary Legal Remedies, by Ferris as referred in V.C.Shukla v.State(Delhi Admn),(1980) Supp 249,266 Para 26*] In Re Miram's(1891)IQB 594 Cave.J, said "to make the Office a Public Office the pay must come out of national and not out of local funds the Office must be public in the strict sense of that term. It is not enough that the due discharge of the duties should be for the public benefit in a secondary and remote sense".

14.4 According to the Black's Law Dictionary 6th Edition, the term ***''Public Office'*** is explained as under:

*"Public Office, Essential characteristics of ''**Public Office**' are (1) authority conferred by law (2) fixed tenure of Office and (3) power to exercise some portion of sovereign functions of government; key element of such test is that "Officer" is carrying out sovereign function. Spring v. Constantino, 168 Conn.563,362 A...2nd 871, 875. Essential elements to establish public position as ''**Public Office**' are position must be created by Constitution, Legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity. State ex rel.Eli.Lily and Co. v Gaertner, Mo.App,619 S.W, 2D , 761, 764."*

15. What can be deduced from the term ***''Public Office'*** as explained by various authorities and the authoritative pronouncements is that a ***''Public Office'*** is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the **sovereign functions of the Government** to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of portion of sovereign power. It is a trust conferred by public authority for a public purpose, embracing the idea of tenure, duration, emoluments and duties. A public officer is, thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. The Common Law Rule is that in order for the writ of quo warranto to lie, the office must be of a public nature. The determining fact, the test, is whether the office involves a delegation of some of the solemn functions of Government either executive, legislative or judicial, to be exercised by the holder of such office for general public benefit at large. Unless his powers are of this nature, he is not a public officer.

16. Hon'ble Supreme Court in the case of *''Agriculture Produce Market Committee VS Ashok Hariauni and another'* reported in **(2000) 8 SCC 61.** In Paragraph 21 has held as under:

Para 21:

"In other words, it all depends on the nature of power and the manner of its exercise. What is approved to be

"Sovereign' is defence of the Country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory. These are not amenable to the jurisdiction of ordinary Civil Courts. The other function of the State including welfare activity of State could not be construed as "Sovereign' exercise of power. Hence every governmental function need not be "Sovereign'. State activities are multifarious, from the primal "Sovereign' power which exclusively inalienably could be exercised by the sovereign alone, which is not subject to challenge in any civil court to all the welfarte activities, which would be undertaken by any private person. So merely if one is an employee of statutory bodies would not take it outside the Central Act. If that be so then Section 2(a) of the Central Act read with Schedule I gives large number of statutory bodies which should have been excluded, which is not. Even if a statute confers on any statutory body, any function which could be construed to be "Sovereign' in nature would not mean every other functions under the same statute to be also sovereign. The court should examine the statute to sever one from the other by comprehensively examining various provisions of the Statute . In interpreting any statute to find if it is "industry' or not we have to find its pith and substance. The Central Act is enacted to maintain harmony between employer and employee which brings peace and amity in its functioning. This peace and amenity should be objective in the functioning of all enterprises. This is to the benefit of both the employer and employee. Misuse of rights and obligations by either or stretching it beyond permissible limits have to be dealt with within the framework of the law but endeavour should not be in all circumstances to exclude any enterprise from its ambit. That is why courts have been defining "industry' in the widest permissible limits and "sovereign' functioning within its limited orbit."

16.1 From the perusal of the judgment of Hon'ble Apex Court in *Agriculture Produce Market Committee (supra)* it is culled out that for a particular function to be a "sovereign function' would depends on the nature of the power and the manner in which it is exercised All Welfare Activities of the State could not be construed as ***''Sovereign'*** exercise of power. Hence, every governmental function need not be ***''Sovereign'.*** The mere fact that one is an employee of a statutory body would not ipso facto mean that the function exercised by such employee is ***''Sovereign'*** in nature.

16.2 Soverign has been defined in Black's Law Dictionary as under:-

Sovereign: adj.

(Of a state) characteristic of or endowed with supreme authority< sovereign nation> < sovereign immunity>.

Sovereign: n

1. A person, body or State vested with independent and supreme authority. **2.**The ruler of an independent state-

Sovereign people

The political body consisting of the collective number of citizens and qualified electors who possess the powers of sovereignty and exercise them through their chosen representatives.

Sovereign power

The power to make and enforce laws.

17. From the aforesaid discussions it is evident that the post of Professor of KGMU cannot be held to be a ***''Public Office'*** merely because the University is imparting education and is a Statutory Body enacted under the Act of 2002. Office of Professor does not seem to involve an obligation of any of the sovereign functions of the government either Executive or Legislative or Judicial for public benefit. It cannot be said that Public in general is interested and non observance of the obligations of his employment as a Professor, in any event, shall effect the interest of public at large; and even if it would affect, the same shall be too remote so as to make the Office of the Professor a ***''Public Office'***.

18. After considering the aforesaid preposition the Calcutta High Court in the case of *Shashi Bhushan Ray Vs Pramatha Nath Bandopadhyay (supra)* has held that the Principal of the University Law College is not a Public Office and his duties and functions are neither executive nor legislative nor judicial function.

PARA 45

"Even if doubts as to the petitioner's locus standi were overlooked the other important question in this case is whether the Court will at all intervene in the matter be reason of the fact that Dr.Bandopadhyay has resigned Counsel for the Respondents relied on the statement of law in Ferris Extraordinary Legal Remedies on two questions, first as to whether the office of Principal is a public office in regard to which the Court will intervene and secondly, whether the right has abated by reason of the resignation of Dr.Bandopadhyay. In regard to public office at page 168 in Ferris the law is stated to be that public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by Law. In other words, it implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose embracing the ideas of tenure, duration, emoluments and duties. Relying on this statement of law Counsel for the Respondents rightly contended that the Office of the Principal of the University Law College is not a public office and it was neither an executive nor a legislative nor a judicial function."

19. Taking note of various judicial pronouncements, in a recent judgment, this Court in the case of *Kundan Singh Vs State of U.P and Others* **[Writ Petition No. 19119 (S/S) of 2019]** the Learned Single judge has held that the post of Professor in KGMU is not a Public Office and consequently the Writ Petition seeking a Writ of Quo-warranto against the Professor was dismissed.

20. After considering the relevant provisions of the Act of 2002 and Statute of 2011 and various authorities, referred hereinabove, it is apparent that a **Teacher/Faculty Member** is a full time employee of the University. He is neither an **Authority** nor an **Officer** of the University.

21. In view of the aforesaid, we are of the view that the teaching staff / faculty (Professor in the instant case) of King George's Medical University are not the holder of ***Public Office***.

22. For the aforesaid reasons the instant Writ Petition is dismissed at

admission stage, being not maintainable for the reliefs sought. No order as to costs.

(2019)10ILR A 1262

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.09.2019

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.
THE HON'BLE RAJEEV SINGH, J.

Misc. Bench No. 1306 of 2005

Sub Inspector Parshu Ram Dohare & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dr. L.P. Mishra

Counsel for the Respondents:
Govt. Advocate, Sri Mahfooz Alam, Sri Mohammad Alishah Faruqi, Sri Qazi Sabihur Rahman, Sri Qazi Vikil Ahmad, Sri Rajesh Mishra, Sri Umesh Chandra Tripathi

A. Code of Criminal Procedure- Section 173 - NDPS Act - Sections 8 & 20 - Investigating Agency/Officer is authorised to make further investigation in exercise of its statutory jurisdiction under Section 173(8) Cr.P.C. after informing the court and obtaining its approval at any stage of proceeding.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. C.B.I. & Anr. Vs. Rajesh Gandhi & Anr., AIR 1997 SC 93

2. Sandeep Kumar Yadav Vs. State of U.P., 2006 Crl.L.J. 3316

3. Smt. Reena Vs. State of U.P. & Ors., 2013 (2) JIC 215 (All)

4. Jeet Singh Vs. State of U.P. & Ors., 2013 (3) JIC 470 (All)

5. Parvez Ahmad Vs. State of U.P. & Ors., 2011 (1) JIC 448 (All)

6. Sweta Pandey Vs. State of U.P. & Ors., 2015 (1) JIC 429 (All)

7. State of Andhra Pradesh Vs. A.S. Peter, (2008) 2 SCC 383

8. K. Chandrashekhar Vs. State of Kerala & Ors., (1998) 5 SCC 223

9. Ramachandran Vs. R. Udhayakumar & Ors., (2008) 5 SCC 413

10. Koneru Vara Prasada Rao. Vs. State of A.P. Rep. by Sub-Divisional Police Officer & Ors., 2007 CrLJ 2898

11. Vinay Tyagi Vs. Irshad Ali @ Deepak & Ors., (2013) 5 SCC 762

12. Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel & Ors. (Criminal Appeal No. 1171 of 2016)

13. Dharam Pal Vs. State of Haryana & Ors., 2016 (4) SCC 160

14. Chandra Babu @ Moses Vs. State through Inspector of Police & Ors. (Criminal Appeal No. 866 of 2015)

15. Zahira Habibulla H Sheikh & Anr. Vs. State of Gujrat & Ors. (Criminal Appeal No. 446-449 of 2004)

16. State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors., (2010) 3 SCC 571

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

1. Heard Shri L.P. Mishra, learned counsel for the petitioners, Shri Sachindra Pratap Singh, learned A.G.A. and Shri Qazi Vakil Ahmad for the complainants.

2. This petition has been filed seeking the following main reliefs:

"(a) To issue a writ, order or direction in the nature of certiorari quashing the impugned Government Order dated 24.12.2003 passed by the Opp-Party No. 1 together with all the consequential orders passed and the action taken in furtherance of the said Government Order dated 24.12.2003 by declaring the same as void, the true copy of which is contained as Annexure No. 1 to the writ petition.

(b) To issue a writ, order or direction in the nature of certiorari quashing the impugned F.I.R. dated 19.02.2005 lodged against the petitioners U/S 342, 379, 427, 467, 468, 471, 120-B IPC and U/S 8/20/29 NDPS Act at Police Station Nawabganj, district Bahraich giving rise to the case crime No. 67 of 2005, the true copy of which is contained as Annexure No. 2 to the writ petition."

3. Facts giving rise to the dispute are that the petitioners, who are the police personnels, arrested one Sarfaraz Khan s/o Izhar Khan on 18th June, 2003 with one kilogram "Charas' and prepared the recovery memo dated 18.06.2003. On the basis of the said recovery memo, an F.I.R. bearing Case Crime No. 202 of 2003 under Section 8/20 of NDPS Act, P.S. Nawabganj, District Bahraich was registered by petitioner no. 1 being Station House Officer and petitioner no. 2, being the Investigating Officer, recorded the statement of witnesses. After completion of the investigation, a charge sheet dated 6th July, 2003 in accordance with the provisions of Section 173 (2) of the Code of Criminal Procedure was prepared and submitted before the competent court against the accused, Sarfaraz Khan under Section 8/20 NDPS Act. The competent court took cognizance on the aforesaid charge sheet on 28th July, 2003. In the meantime, respondent no. 7, who is the father of the accused-Sarfaraz Khan made complaints to the Human Rights Commission as also to the State Government with the allegation that his son was taken into custody by the police illegally on 16th June, 2003 in connection with the abduction of one girl, namely, Sarita Devi d/o Chhote Lal Madesia r/o Nawabganj, Bahraich. Superintendent of Police, Bahraich ordered for inquiry on the complaint of respondent no. 7 by appointing Circle Officer, Nanpara, District Bahraich, namely, Sukh Ram Bharti as Inquiry Officer on 15th October, 2003. In this connection, Special Secretary, Home Department, Government of U.P. also sought report from the Superintendent of Police, Bahraich in writing vide letter dated 31st October, 2003. Circle Officer, Nanpara inquired into the matter and submitted his report to the Superintendent of Police, Bahraich on 17th November, 2003 with the finding that the application of respondent no. 7 is not tenable as the trial of Case Crime No. 202 of 2003, under Section 8/20 of NDPS Act against Sarfaraz is pending before the competent court on the basis of charge sheet No. 62 dated 06.07.2003 and, therefore, no any investigation is required by C.B.C.I.D. Superintendent of Police vide letter dated 19.11.2003 also recommended that there is no necessity for the matter being inquired by the C.B.C.I.D.

4. State Government vide impugned Government Order No. 4488(1)/Chha Pu-14-60(35)/2003 dated 24.12.2003 directed to handover the papers of Case Crime No. 202 of 2003, under Section 8/20 NDPS Act, P.S. Nawabganj, Bahraich to C.B.C.I.D. and also ordered to investigate the case. In pursuance to the aforesaid

Government Order, further investigation was conducted by Nihal Prasad-respondent no. 5, Inspector, C.B.C.I.D., who submitted final report on 10th February, 2005 in Case Crime No. 202 of 2003 (supra) and wrote a letter to the Station Officer of police station Nawabganj, District Bahraich to register F.I.R. against the petitioners under Section 342, 379, 427, 467, 468, 471 and 120-B I.P.C. and Section 8/20/29 NDPS Act. Similarly, Sector Officer, C.B.C.I.D., Gorakhpur also requested to the Superintendent of Police, Bahraich to direct the Station Officer, Nawabganj to lodge the F.I.R. against the petitioners. Thereafter, Superintendent of Police, Bahraich ordered for lodging of the F.I.R. against the petitioners, which was registered as Case Crime No. 67 of 2005 under Sections 342, 379, 427, 467, 468, 471 and 120B IPC and Sections 8/20/29 of NDPS Act, P.S. Nawabganj, District Bahraich on 19th February, 2005 against six persons (petitioners herein).

5. Hence, this petition.

6. Submission of Shri L.P. Mishra, learned counsel for the petitioners is that the petitioners, in discharge of their duties as police personnels, on 18th June, 2003 arrested one Sarfaraz Khan s/o Izhar Khan with one kilogram "Charas' and also prepared the recovery memo. On the basis of the said recovery memo, F.I.R. bearing Case Crime No. 202 of 2003 under Section 8/20 of NDPS Act, P.S. Nawabganj, District Bahraich was registered against the Sarfaraz Khan. He further submitted that statements of the witnesses were recorded and after completion of the investigation, Charge Sheet No. 62 of 2003 was prepared on 6th July, 2003 and submitted before the court concerned. Learned counsel for the petitioners also submitted that the cognizance on the aforesaid charge sheet was also taken by the competent court on 28th July, 2003.

7. Learned counsel for the petitioners submitted that Sarfaraz Khan s/o Intezar Khan, who is a permanent resident of 95/35, Pench Bagh, Kanpur Nagar was arrested on 18th June, 2003 at 9.00 p.m. at village Sagar Gaon, Tiraha Bandha (Nepal border) with one kilogram illicit "Charas' from his possession. He further submitted that when Sarfaraz Khan was arrested and charge sheeted then respondent no. 7-Izhar Khan, who is the father of the accused, started making frivolous applications to various authorities with the allegation that his son was arrested by the police illegally on 16th June, 2003 in connection with the abduction of one girl Sarita Devi d/o Chote Lal Madesia r/o Nawabganj, Bahraich. Learned counsel for the petitioners further submitted that the Superintendent of Police, Bahraich had ordered for the matter being inquired in regard to the allegations made by respondent no. 7 by appointing Circle Officer, Nanpara, District Bahraich, namely, Sukh Ram Bharti as Inquiry Officer on 15th October, 2003. Circle Officer, Nanpara inquired into the matter and submitted his report to the Superintendent of Police, Bahraich on 17th November, 2003 with the clear finding that the application of respondent no. 7 is not tenable. The Inquiry Officer also recommended that since the trial is pending before the competent court, therefore, no investigation in the matter is required by the C.B.C.I.D. Learned counsel for the petitioners further submitted that the Circle Officer, Nanpara

before submitting the report dated 17.11.2003 had taken into consideration the telegram of one Riyazuddin, who is the real brother of respondent no. 7, which was sent on 18th June, 2003 at 10.15 p.m., i.e., after 1 hour and 15 minutes of the arrest of the accused Sarfaraz Khan. The Inquiry Officer also noted in his report that the said telegram was sent by Riyazuddin r/o 95/35, Pench Bagh, Kanpur Nagar and not from Bahraich. Learned counsel for the petitioners made emphasis that this circumstance is sufficient to show that Sarfaraz Khan was arrested on 18th June, 2003 at 9.00 p.m. and not on 16th June, 2003, as was alleged in the complaint made by respondent no. 7. He further submitted that the respondent no. 7 has alleged that Sarfaraz Khan was beaten brutally by petitioner no. 1, but in the medical report dated 19th June, 2003 of Sarfaraz Khan, who was medically examined at the time of admission into jail by the doctor, no injury was found on the body of the Sarfaraz Khan.

8. Another submission of the learned counsel for the petitioners is that from a perusal of the General Diary dated 16th June, 2003 of Police Station Nawabganj, the allegation that petitioner no. 1 arrested the accused Sarfaraz Khan on 16th June, 2003 itself becomes falsified, as it is clear that petitioner no. 1 was not accompanied by any of the other petitioners, who were the members of the police party at the time of arrest of Sarfaraz Khan on 18th June, 2003, but was accompanied by two other constables, namely, Bajrangi Yadav and Ravindra Nath Sharma and had visited the police out post Samtalia at the Nepal border.

9. Learned counsel for the petitioners further submitted that on the report sought by the State Government vide letter dated 31.10.2003, Superintendent of Police, Bahraich, on the basis of detail report submitted by the Circle Officer, Nanpara dated 17th November, 2003 in the matter, vide letter dated 19.11.2003 informed that the matter is pending before the competent court and also recommended that fresh investigation by C.B.C.I.D. is not required. However, all of sudden, impugned Government Order No. 4488(1)/Chha Pu-14-60(35) of 2003 dated 24th December, 2003 was issued by the State Government. In pursuance of the said Government Order dated 24.12.2003, respondent no. 5 was appointed as Investigating Officer by respondent no. 2 by means of order dated 13th January, 2004. Thereafter, vide letter dated 26th February, 2004, respondent no. 6 asked to Superintendent of Police, Bahraich for handing over the papers, case diary and other documents to the authorised Constable, in pursuance to which, Circle Officer, Nanpara sent a report dated 26th February, 2004 that all the papers are in the trial court. It has, thus, been submitted that respondent no. 5 only did the table work and prepared the statement of witnesses without any interaction with them and also prepared all the Parchas of the case diary in a fraudulent manner. However, on 8th April, 2004, respondent no. 5 moved an application before the Special Judge, Court No. 10, District Bahraich and informed that as per the order of the State Government, the matter had to be further investigated by the C.B.C.I.D. and prayed for staying of the trial of Case Crime No. 202 of 2003 (supra) till conclusion of the further investigation. Learned counsel for the petitioners also submitted that since the charge sheet dated 28th July, 2003 in Case Crime No. 202 of 2003 had already

been submitted by petitioner no. 2 in the matter and the trial was also pending before the court of Sessions Judge, Bahraich after framing of charge against the Sarfaraz Khan, therefore, it was not open to the State Government to direct for further investigation by another Investigating Agency. Moreover, no permission of any kind was taken by the State Government from the competent court before issuance of the impugned order dated 24th December, 2003 and the same is wholly illegal and contrary to the provisions of the Code of Criminal Procedure and is liable to be quashed. He also submitted that the Order dated 24th December, 2003 is politically motivated.

10. It has also been submitted that the illegal investigation, which had started on the basis of the impugned Government Order dated 24th December, 2003, culminated into filing of the final report dated 10th February, 2005 in Case Crime No. 202 of 2003. It has next been submitted by the learned counsel for the petitioners that the F.I.R. bearing Case Crime No. 67 of 2005 under Sections 342, 379, 427, 467, 468, 471 and 120B IPC and Sections 8/20/29 of NDPS Act, P.S. Nawabganj, District Bahraich, which had been lodged against the petitioners at the behest of M.L.A. from Bahraich only with the intention to save Sarfaraz Khan, is also liable to be quashed with a direction to the trial court to proceed on the charge sheet filed by petitioner no. 2 in Case Crime No. 202 of 2003.

11. Shri L.P. Mishra summarised his argument by submitting that once an Investigating Officer submitted a charge sheet under Section 173 Cr.P.C. in a criminal case and the court of competent jurisdiction took cognizance of the offence so mentioned in the charge sheet, the State Government is not at all competent to pass an order directing for further investigation by another Investigating Agency. He further submitted that any police officer belonging to any Investigating Agency could, at best, submit a report of investigation to a Magistrate of competent jurisdiction, and cannot issue a direction to Officer-in-Charge of a police station to lodge an F.I.R. against its police officers.

12. Relying on the decision of the Hon'ble Supreme Court in the case of **C.B.I. & Anr. Vs. Rajesh Gandhi & Anr., AIR 1997 SC 93** and also the decisions of this Court in the case of **Sandeep Kumar Yadav Vs. State of U.P., 2006 Crl.L.J. 3316, Smt. Reena Vs. State of U.P. & Ors., 2013 (2) JIC 215 (All), Jeet Singh Vs. State of U.P. & Ors., 2013 (3) JIC 470 (All), Parvez Ahmad Vs. State of U.P. & Ors., 2011 (1) JIC 448 (All)** and **Sweta Pandey Vs. State of U.P. & Ors., 2015 (1) JIC 429 (All),** Shri Mishra has submitted that during the pendency of trial, investigation of a case cannot be transferred to another Investigating Agency at the behest of an accused person. He also relied on the Government Orders dated 5th September, 1995 and 22nd October, 2014 to submit that the investigation cannot be transferred on the request of the accused.

13. Further, placing reliance on the decisions of the Hon'ble Supreme Court in the case of **State of Andhra Pradesh Vs. A.S. Peter, (2008) 2 SCC 383, K. Chandrashekhar Vs. State of Kerala & Ors., (1998) 5 SCC 223, Ramachandran Vs. R. Udhayakumar & Ors., (2008) 5 SCC 413, Koneru Vara Prasada Rao. Vs. State of A.P. Rep. by Sub-Divisional**

Police Officer & Ors., 2007 CrLJ 2898 and **Vinay Tyagi Vs. Irshad Ali @ Deepak & Ors., (2013) 5 SCC 762,** he submitted that investigation cannot be transferred to another Investigating Agency after submission of charge sheet and taking cognizance by the competent authority.

14. Shri Sachindra Pratap Singh, learned A.G.A. as well as Shri Qazi Vakil Ahmad and Shri Umesh Chandra Tripathi, Advocates appearing for the complainant have vehemently opposed the arguments of the learned counsel for the petitioners.

15. Learned counsel for the complainant, on the contrary, has placed a different narrative of the case. He submitted that respondent no. 7, namely, Izhar Ahmad Khan is a permanent resident of 95/35 Pench Bagh, P.S. Bekanganj, Kanpur Nagar, but was running a restaurant in Kasba Nawabganj, P.S. Nawabganj, District Bahraich in the name of Sarfaraz restaurant. His son, namely, Sarfaraz Khan also accompanied respondent no. 7 to run the said restaurant. He further submitted that adjacent to the restaurant, family of one Chote Lal Madesia was also residing, who has two daughters, namely, Pinki (elder) and Sarita (younger). Sarfaraz Khan and Sarita were liking each other and were in relation and they decided to get married on their own choice. The decision of marriage of her daughter with Sarfaraz Khan was strongly opposed by Chote Lal Madesia as well as his family members. As a result, Sarita left her parental house in the night of 10th June, 2003. Chote Lal Madesia approached to the Police Station Nawabganj to register the F.I.R., but the same was not registered, therefore, he approached to the then Housing and Urban Minister, U.P. Government, Lucknow and on his direction, a recommendatory letter was written by his subordinate official to the Superintendent of Police, Bahraich and requested for recovery of the daughter of Chote Lal Madesia. The copy of the aforesaid letter is appended as Annexure SA 1 to the supplementary affidavit dated 18th April, 2019. In pursuance to the aforesaid letter, the police took action and recovered Sarita along with Sarfaraz Khan on 16th June, 2003 at about 4 p.m. from the house of Abdul Karim, Mohalla Maholipura, City Bahraich in presence of a lot of persons and both were brought to the police station Nawabganj by the police. It has further been stated that during the arrest, from 16.06.2003 upto 18.06.2003, Sarfaraz Khan was brutally harassed and tortured by the police, as had been stated by respondent no. 7 in his complaint (Annexure 5 to the writ petition). Pressure was also made upon Sarita to change her stand, but since she was not ready for the same and had stood with Sarfaraz Khan, she was handed over to her father. Then the petitioners planted one kilogram Nepali "Charas' on Sarfaraz Khan and registered F.I.R. bearing Case Crime No. 202 of 2003 under Section 8/20 NDPS Act. Learned counsel for respondent no. 7 also submitted that the uncle of Sarfaraz Khan, namely, Riyazuddin, as soon as came to know about the incident, sent a telegram to Superintendent of Police, Bahraich as well as Chief Minister, U.P. The said telegram is appended as Annexure 6 to the writ petition. Learned counsel for the respondent no. 7 also drew attention of the Court towards Annexure 3 to the supplementary affidavit dated 18.04.2019, which is a news item published in the daily news paper, Dainik Jagran on 25th June, 2003 and submitted

that the recovery of Sarita along with Sarfaraz Khan was published in several news papers.

16. Learned counsel for the respondent no. 7 has next submitted that the police of P.S. Nawabganj had wrongly submitted charge sheet in Case Crime No. 202 of 2003 without considering the grievance of respondent no. 7. Thereafter, respondent no. 7 made a detail complaint to the National Human Rights Commission, New Delhi on 2nd August, 2003. (Annexure 4 to the supplementary affidavit), which was forwarded to the Superintendent of Police, Bahraich vide letter dated 5th October, 2003 and also asked for a report regarding the action taken within six weeks from the date of receipt of the letter. A copy of the letter dated 5th October, 2003 issued by Assistant Registrar (Law), National Human Rights Commission is appended as Annexure 5 to the supplementary affidavit. In pursuance to the aforesaid letter, Superintendent of Police directed to Circle Officer, Nanpara vide letter dated 15th October, 2003 to conduct inquiry in relation to the contents of the complaint dated 2nd August, 2003, in pursuance to which, Circle Officer, Nanpara, Bahraich conducted an inquiry and recorded the statements of complainant-respondent no. 7, Hazi Mohammad Ali, Mohd. Arif, Dr. Intezar. The aforesaid persons categorically stated that Sarfaraz Khan was running a hotel near Hajjin Masjid, Kasba Nawabganj, Bahraich since last several years and he fell into love with the daughter of Chote Lal Madesia. Learned counsel for the complainant further submitted that during the aforesaid inquiry, respondent no. 7 has also stated that Sarfaraz Khan had a telephone connection in his own name, which was installed in the restaurant bearing No. 262384. Chote Lal Madesia, in his statement, has categorically stated that Sarfaraz Khan is basically a resident of Kanpur Nagar and about six years back, he came to Kasba Nawabganj and started a hotel and since last two years, he had taken a rented accommodation from his cousin brother, namely Onkar s/o Auri Lal Madesia to run the hotel. Chote Lal Madesia also admitted in his statement that he has two daughters, Pinki as well as Sarita and Sarita was married near Nepalganj, Village Gureya, District Banke, Nepal and was living in her in-laws house since about one month. Learned counsel for respondent no. 7 submitted that the date of marriage of Sarita has not been mentioned by Chote Lal Madesia, therefore, it is clear that at the time of incident, i.e., on 16th June, 2003, she was not married at all. In fact, Sarita was married with Radheyshyam s/o Late Kaledeen r/o House No. 259, village Parwanigod, P.S. Motiganj, District Bahraich, which is evident from the Parivar register. Circle Officer, Nanpara, in his report dated 17th November, 2003 gave a finding that Sarfaraz Khan was running a restaurant near Hajjin Masjid, Kasba Nanpara, Bahraich and the family of Chote Lal Madesia was also living near to his restaurant.

17. It has been submitted by the learned counsel for respondent no. 7 that despite the aforesaid facts, Circle Officer, Nanpara, has reported that since the matter is sub-judice before the Court, therefore, there is no requirement of investigation by the C.B.C.I.D. The inquiry report of the Circle Officer dated 17th November, 2003 is annexed as Annexure 6 to the writ petition. He further submitted that Superintendent of Police,

Bahraich also wrongly relying on the aforesaid inquiry report of Circle Officer wrote to the Special Secretary (Home) that the appears not requirement to conduct the inquiry by C.B.C.I.D.

18. Learned counsel for the respondent no. 7 has lastly submitted that the Government of U.P., after due consideration, decided to transfer the investigation of Case Crime No. 202 of 2003 with immediate effect to the C.B.C.I.D. vide impugned Government Order dated 24.12.2003. He further submitted that the aforesaid Government Order was not challenged before any court of law and the Investigating Officer of C.B.C.I.D., respondent no. 5 rightly took over the investigation and moved an application before the Special judge on 8th April, 2004 informing the court that the investigation of Case Crime No. 202 of 2003 has been transferred to C.B.C.I.D. and also requested to stay the further trial till conclusion of the investigation. It has further been submitted that after proper investigation, respondent no. 5 found that Sarfaraz Khan had not committed any offence and, thus, the final report dated 10th February, 2005 was submitted in Case Crime No. 202 of 2003 requesting the S.H.O., Nawabganj to register the F.I.R. against the petitioner. Thereafter, on 19th February, 2005, Case Crime No. 67 of 2005 under Sections 342, 379, 427, 467, 468, 471 and 120B I.P.C. and Section 8/20/29 NDPS Act, P.S. Nawabganj, District Bahraich was registered against the petitioners. It has further been submitted that Special Judge (SC/ST Act), Bahraich vide order dated 4th January, 2006 rejected the said final report ex parte, without hearing the C.B.C.I.D. or the counsel appearing for Sarfaraz Khan. Learned counsel for the respondent no. 7 has also submitted that a Criminal Misc. Case No. 1316 of 2006 under Section 482 Cr.P.C. was filed challenging the charge sheet, which was disposed of ex parte with the direction to file discharge application vide order dated 18th September, 2012. In pursuance to the order dated 18th December, 2012, a discharge application was moved before the trial court, which was rejected, in challenge to which, Criminal Revision No. 411 of 2013 was filed, which is pending before this Court and is also connected with this petition.

19. In support of his submission that there is no illegality in the aforesaid Government Order, learned counsel for the respondent no. 7 relied on the decision of the Hon'ble Apex Court in the case of **Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel & Ors. (Criminal Appeal No. 1171 of 2016), Dharam Pal Vs. State of Haryana & Ors., 2016 (4) SCC 160, Chandra Babu @ Moses Vs. State through Inspector of Police & Ors. (Criminal Appeal No. 866 of 2015)** and **Zahira Habibulla H Sheikh & Anr. Vs. State of Gujrat & Ors. (Criminal Appeal No. 446-449 of 2004).** He also submitted that Government Order dated 24.12.2003 is well within the purview of Section 3 of Police Act, 1861.

20. Learned counsel for the respondent no. 7 also submitted that the present petition is not maintainable in relation to the prayer no. 2, which for quashing of the F.I.R. bearing Case Crime No. 67 of 2005 which was lodged by Nihal Prasad, Inspector, C.B.C.I.D., Gorakhpur. He also submitted that there is no rider on the cross F.I.R., as in both the FI.Rs., there are two different versions

and the first was lodged by petitioner no. 1 against Sarfaraz Khan and the second F.I.R. was lodged by Nihal Prasad, Inspector, C.B.C.I.D. after investigation of Case Crime No. 202 of 2003. He further submitted that learned counsel for the petitioners has only addressed in relation to the Government Order dated 24th December, 2003 by which the investigation of Case Crime No. 202 of 2003 was transferred by the State Government to C.B.C.I.D., but he has not addressed on the issue for quashing of the F.I.R. of Case Crime No. 67 of 2005.

21. We have considered the arguments advanced by learned counsel for the parties.

22. The main thrust of the argument advanced by the learned counsel for the petitioners has three folds, which are as under:

1. Investigation cannot be transferred on the request of the accused persons.

2. Once an Investigating Agency has submitted a police report/charge sheet under Section 173(2) Cr.P.C., and the court has taken the cognizance of the offence so mentioned in the charge sheet, the State Government is not at all competent to pass an order directing for furtherinvestigation by another Investigating Agency, without taking leave from the court concerned.

3. Any police officer belonging to any Investigating Agency could only submit a report of investigation to the court of competent jurisdiction and could not direct to the officer-in-charge of a police station to lodge F.I.R. against its police officers.

After going through the contents of pleadings as well as the written submissions, it is found that the impugned Government Order dated 24th December, 2003 was issued on the representation of the Izhar Khan, respondent no. 7, and the investigation of Case Crime No. 202 of 2003 was transferred to C.B.C.I.D. It is also evident from the record that F.I.R. as Case Crime No. 202 of 2003 under Section 8/20 NDPS Act, P.S. Nawabganj was registered on 18th June, 2003, on the written complaint of S.H.O., Parshu Ram Dohare (petitioner no. 1) alleging that during the course of duty, he was checking the luggage at village Sagar Gaon, Tiraha Bandha on 18th June, 2003. At about 9 p.m., one person, who was coming from Bandha to village Holia, when asked about his name after stopping him, informed that he was Sarfaraz Khan s/o Izhar Khan r/o 95/35 Pench Bagh, P.S. Begum Ganj, District Kanpur. Sarfaraz Khan was having one black polybag and after checking inside the said polybag, one kilogram Nepali "Charas' was found.

23. However, on a perusal of Annexure 1 of the supplementary affidavit dated 18.04.2019 filed by respondent no. 7, it is evident that, as a matter of fact, the daughter of Chote Lal Madesia was missing and the subordinate official deployed with the then Minister of Housing & Urban Development wrote a letter dated 12th June, 2003 to Superintendent of Police, Bahraich for making effective efforts for recovery of girl and registering of the case. It is also evident from the record that a telegram was also sent by the brother of respondent no. 7, Riyazuddin on 18th June, 2003 to various authorities that his nephew Sarfaraz Khan had been taken into custody by the police deployed at P.S. Nawabganj, District Bahraich and he might be implicated in the fake case.

24. It is also evident from the record that in relation to the Case Crime No. 202 of 2003 (supra), Sub Inspector Shrinath Yadav was appointed as Investigating Officer, who prepared the charge sheet on 6th July, 2003, which was numbered as 62 of 2003 and filed it in the court below (Annexure 4 to the petition), on which the trial court took cognizance on 28th July 2003. In the meantime, respondent no. 7 and his family members were running from pillar to post and moving applications to several authorities including the Chairman, Human Rights Commission, New Delhi. The copy of the complaint is appended as Annexure 5 to the petition. It is also relevant to mention here that the said complaint was forwarded by the Human Rights Commission to the Superintendent of Police, Bahraich, who directed the inquiry to be conducted by Circle Officer, Nanpara. In the said inquiry report also, it is clearly emerged that Sarfaraz Khan was running a restaurant at Nawabganj. In the complaint of the respondent no. 7, it was the specific allegation that Sarfaraz Khan and Sarita d/o Chote Lal Madesia were in love, but since Chote Lal Madesia was not agreed with their relations, therefore, Sarfaraz Khan and Sarita started living at Mohalla Mahlipura, District Bahraich in the house of Abdul Karim. Due to interference of the subordinate official of the Minister of the State Government, on the initiative of Chote Lal Madesia, Sarfaraz Khan and Sarita were recovered on 16th March, 2003 at 4 p.m., which was evidenced by a large number of persons and were brought to the police station and the girl was handed over to her parents forcefully and Sarfaraz Khan was beaten brutally on the direction of petitioner no. 1 and thereafter he was booked in a false case by planting one kilogram Nepali "Charas'.

25. Further, from the report dated 17th November, 2003 of the Circle Officer, Nanpara, it is evident that in their statements, Hazi Mohammad Ali, Mohd. Arif, Dr. Intezar r/o Nawabganj have specifically stated that it was the S.H.O. himself, who while interacting with them, informed that Sarfaraz Khan had enticed away the girl of Chote Lal Madesia. Chote Lal Madesia had also stated in his statement that Sarfaraz Khan was living in Kasba Nawabganj since last six years and was running a restaurant in the shop of his cousin brother since last two years. He had also admitted that the news item in relation to the Sarfaraz Khan and his daughter was published in the news paper and submitted that it was false news. Chote Lal Madesia had further stated that his elder daughter, Pinki was married four years ago, but when asked about his daughter Sarita, he stated that she was married at Nepal and was living in her in-laws house since one month.

26. Apparently, in the conclusion part of the inquiry, Circle Officer, Nanpara has not given any finding about the elopement of Sarfaraz Khan and Sarita, and only submitted that Sarfaraz Khan was arrested in Case Crime No. 202 of 2003 under Section 8/20 NDPS Act, in which charge sheet was filed and the trial is pending before the court concerned after taking cognizance and, therefore, there is no requirement for further investigation of the matter by the C.B.C.I.D.

27. It is also evident from the record that in pursuance of the Government Order dated 24.12.2003, the investigation was started by the Inspector, C.B.C.I.D., respondent no. 5 after giving the proper application to the court concerned on 8th April, 2004 and had submitted the final

report in Case Crime No. 202 of 2003. Respondent no. 5, when, after proper investigation, found guilt of police officials, who implicated Sarfaraz Khan in a false case, requested the S.H.O. concerned to lodge the F.I.R. against them. Second Investigating Officer of Case Crime No. 202 of 2003, i.e., respondent no. 5 prepared Parcha no. 8 on 21.12.2004 with the finding that during investigation, it was found that the illicit "Charas' was planted on Sarfaraz Khan and he was challaned on 18.06.2003 on the behest of petitioner no. 1, then Station House Officer. It has further been mentioned by respondent no. 5 in his letter dated 10.02.2005 that the final report/ charge sheet was sent for approval to the Director General of C.B.C.I.D., which has been approved for submitting in the court concerned. The letter dated 10.02.2005, for ready reference, is reproduced as under:

"5. अपराध शाखा के सम्पूर्ण विवेचना से पाया गया कि अभियुक्त सरफराज कस्बा नवाबगंज में चाय मीठा नमकीन की दुकान करता था उसके दुकान के बगल श्री छोटे लाल महेशिया की मकान है श्री छोटे लाल की वयस्क पुत्री सरिता उर्फ पिंकी से प्रेम सम्बन्ध होने के कारण एक दूसरे की रजामंदी से दिनांक 10.6.03 को कस्बा नवाबगंज छोडकर बहराइच शहर में किराये के मकान लेकर बतौर पति पत्नी रह रहे थे, लडकी के पिता छोटे लाल की शिकायत पर एस0ओ0 नवाबगंज मय फोर्स दिनांक 16.6.03 को बहराइच शहर से अभि0 सरफराज व लडकी को उनके सामान सहित पकडकर थाना नवाबगंज लाकर दिनांक 18.6.03 तक बेजा हिरासत में रखे तथा लडकी को जबरन उसके माता पिता को सुपुर्द कर सरफराज के दूकान की तोड फोड कर उनके पास से फर्जी चरस की बरामदगी दिखाये है अपराध शाखा की विवेचना से अभि0 के विरूद्ध धारा 8/20 एन0डी0पी0एस0 ऐक्ट का अपराध प्रमाणित नहीं पाया गया। अतः विवेचना जरिए अन्तिम रिपोर्ट समाप्त कर विवेचना की कार्यवाही से न्यायालय को अवगत कराया जा रहा है कि स्थानीय पुलिस द्वारा अभि0 सरफराज के विरूद्ध प्रेषित सी एस अन्तर्गत धारा 8/20 एन0डी0पी0एस0 ऐक्ट पर विचारण गुण दोष के आधार पर किया जाय।

विवेचना समाप्त कर दोषी कर्मचारी के विरूद्ध विभागीय कार्यवाही/अभियोग अंकित हेतु पत्राचार संबंधित की होगी

संलग्नक

1- रो0खास 1 वर्क

2- एफ0आर0 3/2005 1 वर्क

3- आदेश एस0पी0सी0बी0सी0आई0डी0 छायाप्रति 1 वर्क

ह0 अपठनीय

10-2-05"

29. Thereafter, the written complaint was given to the Station Officer, P.S. Nawabganj, District Bahraich for lodging of the F.I.R. against the accused officials on 10th February, 2005, but the same was not registered and only when the Sector Officer, C.B.C.I.D., Gorakhpur wrote a letter to the Superintendent of Police, Bahraich for lodging the F.I.R., then only the impugned F.I.R. as Case Crime No. 67 of 2005 was registered on 19th February, 2005 against the petitioners herein.

30. Now before dealing with the first issue that the investigation cannot be transferred on the request of an accused, it is requisite to first go through the U.P. Police Regulations. As per the provisions of para 107 of U.P. Police Regulations, Investigating Officer of a case is under an obligation to conduct the investigation to find out the truth and not merely to obtain convictions. He must not prematurely commit himself to any view of the facts for or against any person and though he need not go out of his way to hunt an evidence for the defence in a case in which he has satisfactory grounds for believing that an accused person is guilty, he must always give accused persons an opportunity of producing defence evidence before him, and must consider such evidence carefully, if produced.

31. Para 107 of the U.P. Police Regulation is reproduced as under:

"107. An investigating officer is not to regard himself as a mere clerk for the recording of statements. It is his duty to observe and to infer. In every case he must use his own expert observations of the scene of the offence and of the general circumstances to check the evidence of witnesses, and in cases in which the culprits are unknown to determine the direction in which he shall look for them. He must study the methods of local offenders who are known to the police with a view to recognizing their handiwork, and he must be on his guard against accepting the suspicions of witness and complainants when they conflict with obvious inferences from facts. He must remember that it is his duty to find out the truth and not merely to obtain convictions. He must not prematurely commit himself to any view of the facts for or against any person and though he need not go out of his way to hunt a evidence for the defence in a case in which he has satisfactory grounds for believing that an accused person is guilty, he must always give accused persons an opportunity of producing defence evidence before him, and must consider such evidence carefully if produced. Burglary investigations should be conducted in accordance with the special orders on the subject."

32. In the present case, the grievance of respondent no. 7 was that the police personnels arrested Sarfaraz along with the daughter of Chote Lal Madesia, namely, Sarita, on the basis of the letter of subordinate official of the Minster of the State Government and the girl was handed over to her parents forcefully. Thereafter, Sarfaraz was challaned under the provisions of Sections 8 and 20 of the NDPS Act by planting "Charas'. Under the directions of Human Rights Commission given on the complaint of respondent no. 7, an inquiry was conducted by the Circle Officer, Nanpara. During the enquiry, statements of local residents of Nawabganj, place of incident, namely, Hazi Mohammad Ali, Mohd. Arif, Dr. Intezar were recorded. While interacting with them, they had categorically informed that they were called in the month of June by the S.O. and when they went to police station, S.O. asked them that Sarfaraz enticed away the girl of Chote Lal Madesia and also directed for cooperation in the recovery of girl and the arrest of Sarfaraz. However, in the conclusion part of the inquiry report, Circle Officer, Nanpara had not given any findings in relation to the ingredients of the complaint of respondent no. 7. The Investigating Officer had observed that Sarfaraz was arrested since illicit "Charas' was recovered from him, as such, he was challaned in Case Crime No. 202 of 2003 (supra). Circle Officer, Nanpara also recommended in his report dated 17th November, 2003 that it is not needed to conduct any enquiry/investigation from the C.B.C.I.D., mentioning that the allegations levelled in the complaint of respondent no. 7 are incorrect.

33. While going through the judgments relied by the learned counsel for the petitioners in support of his submission that the accused person or his family members cannot request for transfer of investigation, viz., **CBI Vs. Rajesh Gandhi** (supra), **Sandeep Kumar Yadav** (supra), **Smt. Reena** (supra), **Jeet Singh** (supra), **Parvez Ahmad** (supra) and **Shweta Pandey** (supra), we find that though in these judgments, it has been observed that the accused person does not

have the right to choose the Investigating Agency, but the issue, that if the accused has falsely been implicated by the police officials, then also he cannot request for the fair investigation, has not been dealt with. Therefore, the decisions of the aforesaid judgments are not applicable in the present case.

34. Learned counsel for the petitioners has also placed reliance on the Government Orders dated 5th September, 1995 and 22nd October, 2014 in support of his submission.

35. From a perusal of the Government Order dated 5th September, 1995, it is evident that the State Government has itself made it clear that, in case, it is found to be difficult to conduct impartial investigation by the local police, then the investigation can be transferred. In the present case, the allegations were levelled against the police personnels itself, who were posted in the concerned district and in such circumstances, Sarfaraz and his family members, who are the victims, had requested for transfer of the investigation.

36. A Constitutional Bench of the Hon'ble Supreme Court in the case of **State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors., (2010) 3 SCC 571** has explicitly held that the victim also has the right to pray for transfer of the investigation and the State has a duty to ensure the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers.

37. Relevant portion of the judgment is quoted hereunder:

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. **The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers.** In certain situations even a witness to the crime may seek for and shall be granted protection by the State. (emphasized by us)

38. In view of aforesaid facts and circumstances, constitutional right of an accused cannot be curtailed. As the specific allegations of sending the Sarfaraz to jail in the false case by planting the "Charas', were levelled against the petitioners, who were the police personnels, in such circumstances, even the accused person, i.e., Sarfaraz or his family members are having all the rights to pray for fair investigation and the "fair investigation' includes the ingredients for transfer of the investigation and there is no illegality in transferring the investigation on the request of the family members of the accused, who were being the victim of the incident. Hence, the first argument of the learned counsel for the petitioners has no legs to stand and is hereby rejected.

39. On the point of second argument, it is found that the police of State of U.P. is governed by the Police Act, 1861, because it has not enacted any Police Act of its own. In Section 1 of the

Act, the word 'Police' is defined to include all persons who shall be enrolled under the Act and the words "general police districts' are defined to embrace any presidency, State or place, or any part of any presidency, State or place, in which the Act shall be ordered to take effect. Section 3 of the Indian Police Act provides as under:

"3. The superintendence of the police throughout a general police-district shall vest in and, shall be exercised by the State Government to which such district is subordinate; and except as authorised under the provisions of this Act, no person, officer or Court shall be empowered by the State Government to supersede or control any police functionary."

40. The general power of superintendence as conferred by Section 3 of the Act would comprehend the power to exercise effective control over the actions, performance and discharge of duties by the members of the police force throughout the general district. The word "superintendence" would imply administrative control enabling the authority enjoying such power to give directions to the subordinate to discharge its administrative duties and functions in the manner indicated in the order.

41. In terms of Section 3 of the Police Act, 1861 when read with Section 36 of the Code of Criminal Procedure, the State has ultimate supervisory jurisdiction over the investigation of an offence and if it intends to hand over further investigation to other Investigating Agency, even after filing of the charge sheet, it may do so. An order of further investigation in terms of Section 173(8) of the Code by the State in exercise of its jurisdiction under Section 36 of the Code read with Section 3 of the Police Act stands good.

42. Sections 36 and 173(8) Cr.P.C. read as under:

"36. Powers of superior officers of police.--Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station."

"173. Report of police officer on completion of investigation.--

(1) ....

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

43. Hon'ble Supreme Court in the case of Amrutbhai Shambhubhai Patel (supra) has held that the Investigating Agency/Officer is authorised to make further investigation in exercise of its statutory jurisdiction under Section 173(8) Cr.P.C. after informing the court and obtaining its approval at any stage of proceeding.

44. In such circumstances, we have no hesitation in holding that once an

Investigating Agency has submitted a police report/charge sheet under Section 173(2) Cr.P.C. and the court has taken cognizance of the offence, the State Government is competent enough to pass an order directing for further investigation by another Investigating Officer without taking leave from the court concerned, but it is the duty of the Investigating officer to inform the Court before going ahead in pursuance of the order of the State Government for further investigation. In the present case, the court was duly informed by the respondent no. 5, Nihal Prasad-Investigating Officer, before starting further investigation. Thus, the decisions relied by learned counsel for the petitioners on this point are not applicable in the present case and there is no illegality in the order passed by the State Government or in conducting the further investigation by respondent no. 5 in pursuance of the impugned Government Order dated 24.12.2003. Second argument also does not have any force and is hereby rejected.

45. In relation to the third question that whether a police officer belonging to any Investigating Agency can lodge any other F.I.R. on the basis of the conclusion of the investigation of a crime, it has been brought into the notice of the Court by the learned A.G.A., Shri Sachindra Pratap Singh that the Director General of Police, U.P. issued a Circular being D.G. 21/16 dated 26.04.2016 that in relation to one incident, multiple F.I.R.s cannot be registered, but, in case, any cross version is found, then fresh F.I.R. has to be lodged and there is no illegality in the same.

46. In the present case, in pursuance of the Government Order dated 24.12.2003, further investigation was conducted by respondent no. 5, Investigating Officer, C.B.C.I.D. in Case Crime no. 202 of 2003 (supra), who found that, as a matter of fact, Sarfaraz and Sarita went away against the wishes of her father, Chote Lal Madesia, as a result, on the interference of official of one Minster of the State Government, Sarfaraz and Sarita were recovered and Sarita was handed over to her father and Sarfaraz was illegally challaned by planting 'Charas' in the aforesaid case and police report was submitted in the court below. In these circumstances, a request was made by respondent no. 5 for lodging F.I.R. against the petitioners, as a result of which, the F.I.R. as Case Crime No. 67 of 2005, P.S. Nawabganj, District Bahraich under Sections 342, 379, 427, 467, 468, 471, 120-B IPC and U/S 8/20/29 NDPS Act, Police Station Nawabganj, District Bahraich was lodged and there is no illegality in lodging the F.I.R. as Case Crime No. 67 of 2005 (supra) against the petitioners.

47. For the facts and discussions made above, writ petition has no merit and is accordingly, dismissed. Consequences to follow.

(2019)10ILR A 1276

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2019

BEFORE

THE HON'BLE ASHOK KUMAR, J.

Election Petition No. 14 of 2017

Rakesh Agarwal ...Petitioner
Versus
Dr. Arun Kumar & Anr. ...Respondents

Counsel for the Petitioner:

In person, Sri Rakesh Agarwal, Sri Mayank Agarwal, Sri Mayank Kumar Agrawal

Counsel for the Respondents:
Sri Ankit Saran, Sri K.R. Singh, Sri Siddharth Singhal

A. Representation of People Act, 1951-Section 81(3), 81(1) and 86(1) - Copy of election petition served upon the Respondent No.1 not attested by the petitioner to be the true copy of the original petition - Provisions of Section 86 of the Act are mandatory and must be complied with in letter and spirit. (Para 47,49 52,54, 58 & 59)

Representation of People Act, 1951-Section 81(3) , 81(1) and 86 - Analysis of Sub Section (3) of Section 81 would reveal that every election petition should be accompanied by as many copies as there are respondents and that every copy should be attested by the petitioner to be a true copy of the petition under his own signature. If these requirements are not followed strictly and literally, it would result in dismissal of the election petition without any trial as provided by Section 86 of the Act.

A perusal of the certified copy of the election petition as served upon the respondent No.1 reveals that it has not been attested by the petitioner to be a true copy of the original petition.

Since the provisions of Section 86 of the Act are mandatory and must be complied with in letter and spirit, the election petition is liable to be dismissed for non-compliance of Section 81(3) of the Act with cost of Rs.25,000/- to be deposited with the registry of the Court

Election Petition dismissed with cost (E-3)

Case law relied upon/discussed: -

1. Sharif-Ud-Din Vs Abdul Gani Lone AIR 1980 SC 303

2. Rajendra Singh Vs Usha Rani AIR 1984 SC 956

3. Shitla Prasad Sonkar Vs Arun Kumar Nehru & ors. AIR 1987 Alld. 51

(Delivered by Hon'ble Ashok Kumar, J.)

1. This election petition has been filed by the petitioner arising out of election to 124 Bareilly City Assembly Constituency held in March, 2017 and the result of which was declared in which the respondent no. 1 was declared elected.

2. Brief facts of the case are that the petitioner has filed the nomination paper to contest the election to 124 Bareilly City Assembly Constituency. The petitioner claims that he has deposited security amount and has also submitted his detailed affidavit, additional affidavit and the revised affidavit.

3. The petitioner claims that he opened a fresh bank account and had complied all other conditions as instructed by the returning officer.

4. It is submitted by the petitioner that on 30.01.2017 the Returning Officer has rejected his nomination on the ground that in the revised affidavit in part 'Kha', in Column '8 Kha (iii)' Columns 5,6,7 and 8 are left blank by the petitioner. The petitioner claims that there was no concealment as alleged.

5. The petitioner therefore claims that the omission in part A, as pointed out by the Returning Officer, may be fatal but not in part B, which is exclusively founded on part A.

6. He therefore claims that in view of the aforesaid, the affidavit filed by the petitioner can not be treated either incomplete or defective therefore the rejection of nomination paper by the Returning Officer was uncalled for and arbitrary as such dictatorial exercise of power.

7. The nomination paper of the petitioner was scrutinized by the Returning Officer and the Returning Officer has found that the same was inadequate and incomplete, hence the same was rejected.

8. The objection filed by the petitioner dated 30.01.2017 against the rejection of his nomination was dealt with by the Returning Officer and the Returning Officer has reiterated his decision rejecting the nomination paper filed by the petitioner holding that the petitioner is disqualified to be chosen to fill the Assembly seat in question.

9. The respondent no. 1 was declared elected.

10. Against the order declaring the respondent no. 1 as elected Member of Legislative Assembly the present election petition has been filed by the petitioner with the allegation that the respondent no. 1 committed corrupt practice of undue influence upon the Returning Officer as a result of which the petitioner's nomination paper was rejected.

11. This election petition was nominated to this Court by Hon'ble the Chief Justice and thereafter the same was listed with the consent of the respective parties on 22nd September, 2017. After 22.09.2017 the petition was not listed on the date fixed as such was listed only on 02.02.2018 with the office report.

12. On the request of the petitioner, who appeared personally, the notice was issued to the respondent no. 1 under Rule 5 of Chapter XV-A of the Rules of the Court. Office was directed to send the notice through R.P.A.D. and the matter was directed to be listed on 23.03.2018. The office has submitted its report dated 23.03.2018. The office report indicates that neither the acknowledgement nor undelivered notices has been returned back.

13. The petition thereafter has been taken up on 06.04.2018 when an amendment application has been filed on behalf of the petitioner by one Sri Arvind Singh, who claims that he is the clerk of the counsel who has filed the vakalatnama on behalf of the petitioner.

14. In the said affidavit, it has been mentioned that the respondent no. 1 has shifted his clinic to other place and therefore it was prayed (in the said amendment application/affidavit) that the details of the respondent no. 1 requires the amendment in the original election petition as also the new addresses.

15. The petitioner was present when the aforesaid proceedings were taken up.

16. During the aforesaid proceedings the counsel has filed the vakalatnama on behalf of the respondent no. 1 and since the averments of the amendment application / affidavit were doubtful, it was directed by the Court to the counsel who had filed the amendment application to file a proper amendment application disclosing the source of the contents / change of addresses of the respondent no. 1 and since the petitioner himself was present he was directed to file the proper affidavit.

17. The proceedings on 06.04.2018 were held even after advocates' strike as the petitioner himself appeared and with the consent of the parties the matter was listed for 27.04.2018.

18. The office report dated 27.04.2018 indicates that the registered post AD was neither received back nor undelivered notice has been returned back. However, the Court has proceeded as the counsel for respondent no. 1 appeared and accordingly the amendment application was allowed and the petitioner was allowed to carry out the necessary amendments.

19. Thereafter, as jointly agreed, the case was directed to be listed in the third week of May, 2018. On 25.05.2018 the petition was listed and an application without an affidavit was filed on 25.05.2018 by the petitioner.

20. The Court has directed the petitioner to file an affidavit in support of his application. The petitioner however has insisted for acceptance of the said application without an affidavit.

21. The following detailed order has been passed on 25.05.2018:-

"An application dated 25th May, 2018 is filed by the petitioner Sri Rakesh Agarwal which is not supported by an affidavit.

Sri Rakesh Agarwal, petitioner is directed to file this application supported by an affidavit but he has stated that this application may be taken on record even without supported by an affidavit. The court has noticed that several original documents are annexed along with this application. According to the Court legible photostate copies should by filed supported by an affidavit.

This application be taken on record and whenever a fresh application along with photostat copy of all the documents supported by an affidavit, is filed the same be taken on record and if the petitioner desires the original copies enclosed with this application be returned to the petitioner.

In paragraph nos.5, 6, 8, 9, 12, 13, 14, 15, 17, 18, 19 and 20, in the instant election petition, the petitioner has made several allegations against Sri Manoj who was the Returning Officer.

The petitioner has informed the Court that Sri Manoj, the Returning Officer, who has conducted the election which was held in March, 2017, is now posted as Chief Revenue Officer at Deoria.

Let notice be issued to Sri Manoj, now posted as Chief Revenue Officer, Deoria.

Petitioner shall take steps for service of notice through speed post within three days.

Office is directed to send the notice to Sri Manoj, Chief Revenue Officer Deoria, who was Returning Officer of the U.P. Legislative Assembly election held in the month of March, 2017 of District Bareilly (City). Sri Manoj may file counter affidavit within six weeks.

List this petition on 10th August, 2018.

Sri Ankit Saran, Advocate representing the respondent no.1 is directed to file counter affidavit within six weeks. A copy of the counter affidavit be served upon the petitioner through registered post at his address given in the election petition. Respondent no.2 has not filed any reply so far. As a last opportunity six weeks time is allowed to him to file the reply."

22. The office report dated 10.08.2018 indicates that the Chief Standing Counsel, Sri K.R. Singh has filed an affidavit on behalf of Returning Officer.

23. No counter affidavit was filed by the respondents and the counsel for the respondent no. 2 was not present therefore with the consent of the petitioner the date has been fixed as 22.10.2018.

24. On 22.10.2018 the Court has passed the following order:-

"This Court vide order dated 25.5.2018 had granted six weeks' time to the learned counsel for respondent No.1 to file the written statement/counter affidavit. It was also directed to the learned counsel for respondent No.1 to serve a copy of the written statement/counter affidavit upon the petitioner at his registered postal address.

Sri Ankit Saran, learned counsel for respondent No.1 was not present on the last date which was fixed by this Court, vide order dated 25.5.2018, being 10.8.2018.

Today when the case is taken up, Sri K.R. Singh, learned Additional Chief Standing Counsel has informed the Court that an application along with an affidavit has been filed by Sri Manoj, who was the Returning Officer. The said affidavit of Sri Manoj is available on record. Since the copy of the said affidavit filed by Sri Manoj is not served on the petitioner, it is hereby directed that the same be served upon the petitioner, who is personally present, during the course of the day.

Sri Ankit Saran, learned counsel representing respondent No.1 has prayed for further time to file the reply/written statement on behalf of the respondent No.1. Three weeks and no more time is allowed to respondent No.1 to file the counter affidavit/written statement.

The petitioner, Sri Rakesh Aggarwal, has placed reliance on provisions of Civil Procedure Code, 1908 particularly Order 8 Rule 1, Rule 5, Rule 10 and has submitted that the Court while allowing further time to the respondent No.1 may impose the cost.

Having heard the learned counsel for the parties and the petitioner, this Court proposes to fix this petition on 20.11.2018 with a specific direction that on the next date fixed, the counsel for the respondent No.1 must file the written statement/counter affidavit, a copy of which must be supplied to the petitioner before 17.11.2018.

Let the petition be listed at the top of the list on 20.11.2018."

25. The case was heard on 20.11.2018 and the following order has been passed in presence of the petitioner and the counsel for the respondent:-

"On the last date, on the request of Sri Ankit Saran, who appeared on behalf of respondent no.1, three weeks' time was granted to him to file the reply/written statement on behalf of respondent no.1. It was clearly indicated that no further time will be allowed to the respondent no.1 to file the written statement/counter affidavit.

In the order dated 22.10.2108 while fixing the petition for 20.11.2018 this Court has directed the counsel for the respondent no.1 to file written statement/counter affidavit on the next date fixed which is 20.11.2018 and a copy of the said written statement/counter affidavit must be supplied to the petitioner before 17.11.2018.

Today Sri K.R. Singh and Sri Siddharth Singhal filed their Vakalatnama on behalf of respondent no.1 and an endorsement is made by Sri Ankit Saran, Advocate that he has no objection. The said Vakalatnama be taken on record.

The election petitioner, Sri Rakesh Agarwal has pointed out that the copy of the written statement filed on behalf respondent no.1 is served upon him today at 3.15 P.M. and apart from the written statement, three applications are also served upon him, being application under Order 7 Rule 11 of C.P.C., under Order 6 Rule 11 of C.P.C. read with Section 86(1) of the Representation of People Act, 1951 and application under Section 86(1) of the Representation of the People Act, 1951.

The election petitioner has pointed out that the respondent no.1, in fact, has disobeyed the order of this Court dated 22.10.2018 and has not served/supplied the copy of the written statement on or before 17.11.2018, hence cost be imposed upon the respondent no.1.

As requested by the petitioner, a week's time is allowed to file the replication to the written statement and the reply to the aforesaid three applications.

As jointly prayed by the petitioner and learned counsels for the respondent no.1, list this petition on 30.11.2018."

26. The office report dated 30.11.2018 / 06.12.2018 indicates that the petitioner has not filed the reply to the written statement or the reply to the applications filed by the respondent no. 1. On the next date fixed when the case was listed, after hearing the parties following order was passed:-

"Sri K.R. Singh, learned counsel representing the respondent no. 1 has filed an application supported by an affidavit, a copy of which is served upon the petitioner, Sri Rakesh Agarwal today. Sri Rakesh Agarwal may file reply, if he so desire within ten days.

Sri Rakesh Agarwal, the petitioner has filed replication, the reply to the application supported by the affidavit as well as three counter affidavits, which are the reply to the affidavits/application filed by the respondent no. 1. All the aforesaid affidavits/applications/replication be taken on record.

The petitioner, Sri Rakesh Agarwal has also filed an affidavit/ reply to the counter affidavit filed by Sri Manoj, who was the then returning officer, a copy of which is served upon the learned Additional Chief Standing Counsel, Sri K.R. Singh.

As prayed by Sri K.R. Singh, learned counsel for the respondent no. 1, two weeks' time is allowed to file the replies to the above counter affidavits/replication filed by the petitioner, Sri Rakesh Agarwal.

As agreed by the parties, list this petition on 11th January, 2019."

27. On the next date fixed i.e. on 11.01.2019, three rejoinder affidavits were filed by the respondent no. 1 and another rejoinder affidavit was filed by the Returning Officer, respondent no. 2.

28. A counter affidavit to the delay condonation application has been filed by the petitioner and the petitioner has contested the delay condonation application therefore the counsel for the respondent no. 1 has prayed for short time to file the reply to the counter affidavit. The case was adjourned for 23.01.2019.

29. On 23.01.2019 the case was taken up and was heard and following order has been passed fixing 24.01.2019 for further hearing:-

"In pursuance of the order dated 22.10.2018 the respondent no. 1 has filed the written statement on the date fixed, being 20.11.2018 granting the time to the respondent no. 1 to file the written statement.

Though this Court has observed that copy of the written statement be served/supplied to the petitioner on or before 17.11.2018.

The written statement filed be taken on record. The reply has been filed by the petitioner to the affidavit filed by the then Returning Officer- Sri Manoj, which is also available on record.

The petitioner- Sri Rakesh Agarwal has filed a counter affidavit to the affidavit filed in support of the written statement stating therein that the written statement is not acceptable for the reason that the respondent no. 1 failed to comply the order dated 22.10.2018 and failed to supply the copy of the written statement to the petitioner on or before 17.11.2018 and the copy of the written submission was supplied to the petitioner only on 20.11.2018 which was the date fixed.

The petitioner therefore has prayed that the written statement filed by the respondent no. 1 is not acceptable as the same is filed in contravention of the directions of this Court.

Sri K.R. Singh, learned counsel representing the respondent no. 1 has filed the affidavit to the objection filed by the petitioner saying therein that there was no deliberate delay on the part of the respondent no. 1 and in fact the written statement was prepared at Allahabad and an affidavit was sworn at Allahabad on 18.11.2018 and since the written statement was prepared at Allahabad on 17.11.2018 and swearing was done on 18.11.2018, the same practically could not be supplied to the petitioner as the petitioner resides at District Bareilly and as soon as the petitioner reached at Allahabad on the date fixed i.e. 20.11.2018, a copy of the written statement was supplied to the petitioner on 20.11.2018.

I have perused the objections of the petitioner and also the reasons given by the respondent no. 1 and in my opinion neither there was any deliberate default on the part of the respondent no. 1 nor there was any ill intention, hence the objection of the petitioner can not sustain.

In view of the aforesaid, this Court proposes to proceed the proceedings on merit.

Put up tomorrow i.e. 24.01.2019 at 12.00 p.m. for further hearing."

30. On 24.01.2019 the matter was heard and following order has been passed:-

"Learned counsel for the respondent no. 1, Sri K.R. Singh has placed reliance of the provisions of Section 87 of Representation of People Act, 1951 as well as the procedure prescribed therein. He has further placed reliance of provision of Order 6 Rule 14A and Order 7 Rule 19-25 of Amended Allahabad Rules.

Learned counsel for the respondent no. 1 has therefore submitted that instant election petition is not maintainable as the copy which has been provided/supplied to the respondent no. 1 by the petitioner is an incomplete document. He has pointed out that in the index of the election petition there are only 26 pages referred and the copy supplied to the respondent no. 1 indicates total number of pages of the election petition as 26.

During the course of proceedings when the counsel for the respondent no. 1 has pointed out about

irregularity on the part of the petitioner, the Court has seen the documents and it is noticed that the affidavit filed in support of the election petition starts from page 20, which runs in three pages and the verification of the affidavit is on page 22. Page 23 refers the list of the address of the petitioner which is signed by the petitioner on 25.04.2017. Page A-3/24 is a document of the photostat copy of the Registration of the petitioner as an Advocate which is issued by the Bar Council of U.P. Allahabad. Next to the above document is the list of all document on which the petitioner relies as evidence in support of his claims which starts from page A-3/25 to A-3/ 28 which is also signed by the petitioner and the date is mentioned being 25.04.2017. The last paper is the document in which the number is mentioned as A-3/29 which is the receipt issued by the registry/ tender notice acknowledging the deposit of Rs. 2000/- made by the petitioner on 25.04.2017.

The contention of the counsel for the respondent no. 1 is that the petitioner has not proceeded in accordance with law as he failed to provide the address of service.

In the aforesaid background the petitioner- Sri Rakesh Agarwal has prayed as also the counsel for the respondent no. 1, Sri K.R. Singh that both of them may be permitted to go through peruse the original complete record of the election petition.

In view of the aforesaid, the respondent no. 1 and the petitioner are allowed to proceed in the matter and adopt the appropriate steps for permission by the appropriate authority / registry authority to permit them for inspection of all the original records.

As agreed and prayed by Sri Rakesh Agarwal and learned counsel for the respondent no. 1, Sri K.R. Singh, list this case again on 27th February, 2019.

In the meantime the petitioner and the respondent no. 1 will inspect the original record."

31. On the next date fixed i.e. on 27.02.2019 an application supported by an affidavit was filed under Section 86(1) of the Representation of People Act, 1951 (herein after referred as 'The Act') by the respondent no. 1.

32. Along with the application / affidavit two documents are enclosed, which are, the complete copy of the election petition filed by the petitioner which was served upon the respondent no. 1 in original being annexure 1 to the affidavit and the certified copy of the election petition, which is obtained by the respondent no. 1 from the office of the registry of this Court.

33. The petitioner prayed and was allowed ten days time to file the reply to the said application / affidavit filed by the respondent no. 1 and with the consent of the parties the case was fixed on 15.03.2019.

34. On 15.03.2019, On the request of the petitioner, the case was adjourned and following order has been passed:-

"Sri Saroj Giri, Advocate associated with the chamber of Mr. Mayank Agarwal, Advocate, who previously represents the petitioner- Sri Rakesh Agarwal has informed the Court that the petitioner- Sri Rakesh Agarwal, who was appearing in person before this Court in the instant election petition, is not feeling well, therefore he has requested him to request the Court to pass over the case today.

This case is specially fixed by this Bench on the request of Sri Rakesh

Agarwal for today vide order dated 27.02.2019.

Since the petitioner, who himself is arguing his case is not well, the case is passed over for the day.

List this petition after four weeks."

35. When the case was listed on 29.05.2019 it was again adjourned on the request of the petitioner as he was not feeling well and therefore on his request the case was fixed for 31.05.2019.

36. On 31.05.2019, a counter affidavit has been filed by the petitioner to the application / affidavit filed by the respondent no. 1 under Section 86(1) of 'The Act'.

37. On the request of the counsel for the respondent no. 1 three weeks time was allowed to file the rejoinder affidavit to the counter affidavit and as jointly agreed the date was fixed for 12.07.2019.

38. On 12.07.2019, two weeks and no more time was allowed to respondent no. 1 to file the rejoinder affidavit and as jointly agreed the date was fixed for 02.08.2019. The rejoinder affidavit is filed on 02.08.2019.

39. The case is heard at length on 02.08.2019.

40. Learned counsel for the respondent no. 1 has submitted that the copy of the election petition served upon the respondent no. 1 is not the true copy of the election petition, which has been filed by the petitioner before this Court.

41. According to the counsel for the respondent no. 1, the original copy of election petition contains two extra pages, which are not part of the copy of the election petition served / supplied by the petitioner to the respondent no. 1. It is contended by the counsel for the respondent no. 1 that the copy of the election petition was made available / filed by the petitioner himself in the registry of this Court. He has submitted that the petitioner has not made any endorsement on the copy of the election petition served upon the respondent no. 1 that it is the true copy of the original election petition.

42. Learned counsel for the respondent no. 1, has submitted that the petitioner therefore has not complied with the mandatory provisions of Section 81(3) of Representation of People Act, 1951. He has referred the provision of Section 81(1) of the Representation of People Act, 1951, which reads as follows:-

"Section 81. Presentation of petitions.- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of Section 100 and Section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one retured candidate at the election and dates of their election are different, the later of those two dates].

Explanation.- In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not."

43. Learned counsel for the respondent no. 1 has placed reliance of

the provision of Sub Section (3) of Section 81, which reads as follows:-

"Section 81(3). Every election petition shal be accomplanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

44. Learned counsel for the respondent no. 1 has also placed reliance of the provision of Section 86 of 'The Act'.

45. Section 86 of the Act of 1951 provides the trial of election petitions. Sub Section (1) of Section 86 reads as follows:-

"Section 86. Trial of election petitions. *(1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.*

Explanation.- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98."

46. Learned counsel for the respondent no. 1 therefore submits that while deciding the election petition the Court possess no common law power. He has further submitted that the statutory requirements of the election law must be strictly observed and complied with.

47. Learned counsel for the respondent no. 1 therefore submits that in view of the provision of Section 81 and Section 86 of the Act the present election petition is not maintainable as such is liable to be dismissed.

48. The Court thereafter has asked the petitioner to submit his reply to the objection about the maintainability of the present election petition. The petitioner who appeared in person instead of replying the arguments and the objections of the counsel for the respondent no. 1 has stated that he do not want to give any reply to the objection / submission of the counsel for the respondent no. 1 and has submitted that this Court should not proceed further in the matter and to release the case. The Court thereafter has asked the petitioner that why such irrelevant submission is made by the petitioner, the petitioner has repeated again and again for release of the case.

49. Analysis of Sub Section (3) of Section 81 would reveal that every election petition should be accompanied by as many copies as there are respondents and that every copy should be attested by the petitioner to be a true copy of the petition under his own signature. If these requirements are not followed strictly and literally, it would result in dismissal of the election petition without any trial as provided by Section 86 of the Act.

50. In the instant case the main point raised by the respondent no. 1 was that the sets of copies, which were filed by the election petitioner before this Court are different then those copies, which are made served by the petitioner upon the respondent no. 1.

51. The admitted fact is that the petitioner has filed two sets of copy of the election petition in the High Court Registry. The first / original copy of the election petition contains first 17 pages, which are numbered by hand by sketch

pen thereafter page 18 and 19 is the affidavit filed and signed by the petitioner. Page 20 is another affidavit filed by the petitioner in support of allegations of corrupt practice and page 20 and 21 are also marked by sketch pen, whereas the next page, which provides the verification part is not marked by sketch pen. The signature of the petitioner are on two places on unnumbered page and the date has been mentioned as 25th Day of April, 2017 and the time is mentioned by hand in blue ink as " at April 1.40 p.m."

52. After the unnumbered page, another page is tagged, which provides the list of address of the petitioner in which the details are mentioned and the petitioner has signed at the middle and the date is mentioned as 25.04.2017, thereafter page 22 is tagged, which is numbered by sketch pen which provides the identification ID of the petitioner issued by the Bar Council of U.P., Allahabad. Thereafter pages 24 to 26 are again numbered by sketch pen and are tagged providing the list of all documents on which the petitioner relies as evidence in support of his claim. Page 26 is signed, which provides the date and time as 25th April, 2017 about 1.40 p.m. by the oath commissioner.

53. Learned counsel for the respondents has filed an affidavit dated 17.02.2019 and had enclosed with it the certified copy of the election petition which was served upon him as annexure-1. The aforesaid certified copy of the election petition has been filed so as to enable the court to compare it with the original.

54. A perusal of the certified copy of the election petition as served upon the respondent No.1 reveals that it has not been attested by the petitioner to be a true copy of the original petition. It does not contain any endorsement that it is a true copy of the original election petition.

55. A comparison of the aforesaid copy of the election petition served upon the respondent No.1 with the original reveals that there are two additional pages tagged with the election petition which provide the list of address of the petitioner and identification proof of the petitioner which are missing in the copy of the election petition served/supplied by the petitioner to the respondent No.1.

56. In view of the aforesaid facts and circumstances, the copy of the election petition supplied to the respondent No.1 is not in conformity with Section 81(3) of the Act.

57. In **Sharif-Ud-Din Vs. Abdul Gani Lone, AIR 1980 SC 303** observed as under:-

"The object of requiring the copy of an election petition to be attested by the petitioner under his own signature to be a true copy of the petition appears to be that the petitioner should take full responsibility for its contents and that the respondent or respondents should have in their possession a copy of the petition duly attested under the signature of the petitioner to be the true copy of the petition at the earliest possible opportunity to prevent any unauthorised alteration or tampering of the contents of the original petition after it is filed into Court."

58. A three Judges Bench of the Supreme Court in **Rajendra Singh Vs.**

Usha Rani AIR 1984 SC 956 while considering the provisions of Section 81(3) and 86 of the Act opined that filing of the incorrect copies of the election petition and providing an incorrect copy upon the respondents amounts to non-compliance of Section 81(3) which entails dismissal of the election petition.

59. A learned Single Judge of the Allahabad High Court in **Shitla Prasad Sonkar Vs. Arun Kumar Nehru and others AIR 1987 Alld. 51** following the above decision of the Supreme Court held ommision of certain paragraphs in the copy of the election petition supplied to the respondents is fatal and the election petition is liable to be dismissed in view of Section 83(3) and 86(1) of the Act as such a defect cannot be permitted to be rectified.

60. In view of the aforesaid facts and circumstances as well as legal position narrated, since the provisions of Section 86 of the Act are mandatory and must be complied with in letter and spirit, the election petition is liable to be dismissed for non-compliance of Section 81(3) of the Act.

61. Accordingly, election petition is **dismissed** under Section 86 of the Act with cost of Rs.25,000/- to be deposited with the registry of the Court.

(2019)10ILR A 1287

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.10.2019

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal (u/s 378(4) of Cr.P.C.) No. 168 of 2019

State of U.P. ...Applicant
Versus
Jitendra Kumar Yadav ...Opposite Party

Counsel for the Applicant:
Government Advocate

Counsel for the Opposite Party:

A. Indian Penal Code, 1860 - Sections 363,366,376 & Code of Criminal Procedure - Section 378(3) -Application to grant leave to appeal - rejection - even if another view is possible, in absence of any compelling and substantial reason, the appellate court dealing with appeal against acquittal would not interfere with the acquittal unless the approach of the court below is found to be manifestly vitiated while it makes consideration of evidence.
(Para 10,11,12,16,17,23,34 & 36)

Criminal Appeal dismissed (E-6)

Precedent followed: -

1. St. of Raj. Vs Shera Ram alias Vishnu Dutta (2012) 1 SCC 602

2. Shyam Babu Vs St. of U.P. (2012) 8 SCC 651

3. Ram Lakhan Sheo Charan & ors. Vs St. of U.P. 1991 Cri.L.J. 2790

4. Phool Chand and etc. Vs St. of U.P. 2004 Cri.L.J. 1904

5. Ram Kishan Singh Vs Harmit Kaur & ors. (1972) 3 SCC 280

6. Utpal Das & anr. Vs St. of W.B. (2010) 6 SCC 493

7. Rajendra Singh & ors. Vs St. of Bihar (2000) 4 SCC 298

8. Vishnu @ Undrya Vs St. of Mah. (2006) 1 SCC 283

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Mohd. Faiz Alam Khan, J.)

1. This application by the State of U.P. under Section 378 (3) of the Code of Criminal Procedure has been filed with the prayer to grant leave to appeal against the judgment and order dated 18.07.2019 rendered by the learned Additional Sessions Judge, FTC-Ist, in Sessions Trial No. 4/2007 which arose out of Case Crime No. 32/2006, under Sections 363, 366, 376 I.P.C., Police Station Ahirauli, District Ambedkar Nagar, whereby the respondent-accused-Jitendra Kumar Yadav has been acquitted of the charges under Sections 363, 366, 376 of the I.P.C.

2. In brief, the facts of the case are that the informant-Ram Tej Verma lodged an First Information Report on 01.05.2006 at Police Station Ahirauli, District Ambedkar Nagar with the assertion that his daughter (hereinafter referred to as the "victim') was student of Class-11 in Jhinka Devi Balika Inter College, Fattepur, Belabagh, who at 06.30 a.m. on 21.04.2006 had gone to attend her school, however, she had not come back and accordingly the informant made all endeavours to trace her and further that his daughter had been enticed away by the accused-Jitendra Kumar Yadav son of Tribhuwan Yadav who is resident of his village. In the F.I.R., it was also stated that that Raja Ram Verma and Brij Lal Verma and others had seen the victim being taken away by the accused.

3. On the basis of said F.I.R., Case Crime No. 32 of 2006, under Sections 363, 366, 376, I.P.C., at Police Station Ahirauli, District Ambedkar Nagar was registered and after investigation a charge sheet was submitted against the accused-Jitendra Kumar Yadav, under Sections 363, 366, 376, I.P.C. The Chief Judicial Magistrate, Ambedkar Nagar took cognizance and summoned the accused. On appearance of the accused, the case was committed to the sessions court. Charges against the accused were framed under Sections 363, 366, 376, I.P.C. who pleaded not guilty to the charges and claimed trial. Accordingly, the trial commenced.

4. The prosecution in order to bring home the charges against the accused examined seven prosecution witnesses, namely, the informant-Ram Tej Verma (P.W.1), the victim (P.W.2), Brij Lal Verma (P.W.3), Raja Ram (P.W.4), Ramesh Chandra, Investigating Officer (P.W.5), Rama Devi Verma, Principal of the School (P.W.6) and Dinesh Kumar Bhaskar, Chief Pharmacist, District Women Hospital, Ayodhya (P.W.7). The prosecution also placed certain documentary evidences including statement of the victim recorded before the Magistrate under Section 164, Cr.P.C. and her medical report.

5. After closure of the evidence of the prosecution, the statement of the accused was recorded under Section 313, Cr.P.C. who denied the allegations and stated that he had falsely been implicated. However, no evidence by the defence was led.

6. Learned trial court considered the evidence available on record and finding material contradiction in the statement of the victim recorded before the court and the one recorded by her before the Magistrate under Section 164, Cr.P.C. and also finding various discrepancies in the

statement of the other witnesses has given a finding that the prosecution has not been able to prove the charges against the accused beyond reasonable doubt and accordingly, acquitted the accused of the charges for which the accused was tried giving him benefit of doubt.

7. Seeking leave to appeal in this case, learned Additional Government Advocate has argued that the prosecutrix herself in her deposition before the court has completely supported the case of the prosecution, however, learned trial court by not finding her evidence credible has committed manifest error and thus, it is a case where leave to appeal should be granted.

8. It has further been argued by the learned counsel appearing for the State that reliance placed by the learned trial court on the statement of the prosecutrix under Section 164, Cr.P.C. in preference to her deposition made before the court is an approach adopted by the learned trial court which cannot be approved of.

9. We have considered the arguments made by learned Additional Government Advocate appearing for the State.

10. As observed above by Hon'ble Supreme Court in the case of **State of Rajasthan Vs. Shera Ram alias Vishnu Dutta, reported in (2012) 1 Supreme Court Cases 602,** though there is no substantial difference between an appeal against conviction and an appeal against acquittal, however, what is to be borne in mind while dealing with an appeal against acquittal is that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the lower court is a reasonable one and the conclusion reached by it is based on the material on record, the acquittal may not be interfered with. The Hon'ble Supreme Court goes on to further observe in the case of **Shera Ram (supra)** that though there is no absolute restriction to re-look the entire evidence on which the order of acquittal is based, however, it is only if the appellate court finds that the lower court's decision is based on an erroneous view and is against the settled principles of law that the order of acquittal should be set aside. Paragraphs 10 and 11 of the judgment in the case of **Shera Ram (supra)** are relevant which are extracted herein below :

"10. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience.

11. Also, this Court in Abdul Mannan case had the occasion to state the principles which may be taken into consideration by the appellate court while dealing with an appeal against acquittal. There is no absolute restriction in law to review and re-look the entire evidence on which the order of acquittal is founded. If, upon scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside".

11. Yet in another case of **Shyam Babu Vs. State of U.P., reported in (2012) 8 Supreme Court Cases 651,** Hon'ble Supreme Court has reiterated the principles on which the appellate court may interfere with the order of acquittal passed by the trial court. Hon'ble Supreme Court has stated in the said case of **Shyam Babu (supra)** that the appellate court while entertaining the appeal against the judgment of acquittal rendered by the trial court is though entitled to re-appreciate the evidence and come to an independent conclusion, however, such interference with the order of acquittal should not be made unless the decision of the trial court is found perverse or unreasonable resulting in miscarriage of justice. The said principle laid down by Hon'ble Supreme Court can be found in para-16 of the judgment in the case of **Shyam Babu (supra)**, which is reproduced herein below:-

"16. It is true that it would not be possible for the appellate Court to interfere with the order of acquittal passed by the trial Court without rendering specific finding, namely, that the decision of the trial Court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate Court while entertaining an appeal against the judgment of acquittal by the trial Court is entitled to re-appreciate the evidence and come to an independent conclusion. We are conscious of the fact that in doing so, the appellate Court should consider every material on record and the reasons given by the trial Court in support of its order of acquittal and should interfere only on being satisfied that the view taken by the trial Court is perverse and unreasonable resulting in miscarriage of justice. We also reiterate that if two views are possible on a set of evidence, then the appellate Court need not substitute its own view in preference to the view of the trial Court which has recorded an order of acquittal".

12. Keeping in view the aforesaid principles of law enunciated by the Hon'ble Supreme Court regarding scope and ambit of this Court in an appeal filed against the judgment of acquittal, we now proceed to examine whether the prayer made by the State in this case for grant of leave to appeal can be granted. Such grant of leave will be permissible only if the judgment of acquittal in this case is found suffering from any manifest legal infirmity or is found based on erroneous appreciation of evidence.

13. As observed above, the prosecution has examined seven prosecution witnesses. The statement of victim (P.W.2) is relevant to be discussed at this juncture. She before the court deposed that on 21.04.2006 at 06.30 a.m. she was going to attend her school, namely, Jhinka Devi Patel Balika Inter College, Fattepur, Belabagh, District

Ambedkar Nagar. She further stated that when she reached Barwa Bazar, the accused forcibly got her seated on his motor-cycle and when the said attempt of accused was opposed, he threatened her that he will kill her if she resisted. She has further deposed that thereafter accused took her to Faizabad via Mahboobganj and parked his motor-cycle in the Agency and thereafter took her to Lucknow by Bolero(a motorized four wheeler). She further stated in her deposition before the court that the accused took her to railway station at Lucknow and thereafter he took her to Amratsar where he kept her in a rented room and committed rape on her without her consent and that the accused forcibly detained her at Amratsar for 5-6 months. In her deposition, she further stated that when the accused came to know that F.I.R has been lodged and attachment proceedings were also undertaken then the accused took her to Akbarpur at her aunt's house (Mausi). However, accused was apprehended by the police at Akbarpur Railway Station whereupon both of them were taken to Police Station where she had made her statement before the police. In her deposition, she further stated that she made the statement under Section 164, Cr.P.C. as well. However, when the statement recorded under Section 164, Cr.P.C. was read over to her she stated that she had not given any such statement. It is on record that the victim in her statement recorded under Section 164, Cr.P.C. had stated that she had relationship with the accused-Jitendra Kumar Yadav for the last 3-4 years and when her father settled her marriage elsewhere then she went away with the accused with a plan and accordingly on 21.04.2006 (the date of alleged occurrence), she went to Barwa Bazar from her residence where the accused was waiting for her and thereupon she with the accused went to Ayodhya via Mahboobganj and they got married in a temple at Ayodhya. In the said statement, she further deposed that after getting married they came to Faizabad and left the motor-cycle at the Agency for servicing and thereafter they went to Lucknow by Marshell (a motorized four wheeler) and took train at Lucknow railway station for Amratsar and on reaching Amratsar they started living together in a room where the accused worked as labourer and from there both of them left for Gurgaon where the accused did some computer related work.

14. In the said statement, the victim also stated that on coming to know about attachment proceedings both of them left for their residence and when they reached Akbarpur, both of them were apprehended. In her statement under Section 164, Cr.P.C. she also stated that the accused had not taken her away forcibly and that she had gone with him willingly and both of them had lived as husband and wife and that the accused did not commit any forcible act on her. She also stated that she is aged about 20 years, though her age was not recorded in the school correctly and in school her age recorded is less then her actual age. The victim also stated in her deposition under Section 164, Cr.P.C. (Exhibit Ka-2) that she was 20 years of age and that she had gone with the accused on her own willingness and on 21.04.20106 she solemnized marriage with the accused in Ayodhya and that she wanted to live with the accused.

15. However, when the victim was produced before the Court as witness,

after 11 years from the date of occurrence, as P.W.2, she for the first time stated that on 21.04.2006 the accused had forcibly got her seated on his motor-cycle and took her to Amratsar where he kept her in a rented room and committed rape forcibly upon her and further that he kept her there for 5-6 months.

16. Learned trial court in the judgment of acquittal has thus found that there is substantial and material contradiction between the statement made by the victim under Section 164, Cr.P.C. and her statement recorded during trial before the court. Learned trial court has also observed that in case there is material contradiction between the statement recorded under Section 164,Cr.P.C. and the statement made before the court during trial and no sufficient believable explanation comes-forth from the victim for such material contradiction, the benefit should go to the accused. The learned trial court after noticing the statement made by the victim under Section 164, Cr.P.C. has stated that though in her examination-in-chief she stated that she did not give such a statement under Section 164, Cr.P.C. however, in her cross-examination she admitted that she had gone to get her statement recorded under Section 164, Cr.P.C. alone and that she had put her signatures on the said statement with her willingness. In her cross-examination the victim further stated that the statement recorded under Section 164, Cr.P.C. is the same which was stated by her on the asking of the Magistrate. She also stated that after reading the statement recorded under Section 164, Cr.P.C. she had put her signatures and when the victim was shown the statement made by her under Section 164, Cr.P.C. she stated that it is the same statement which she had got recorded before the Magistrate.

17. Based on the deposition made by the victim in her cross-examination, the learned trial court has recorded a categorical finding that no satisfactory explanation could be furnished by the victim for the material contradiction in her statement. Learned trial court has also recorded various other contradictions in the statement made by the victim and has concluded that she had made the statement after 11 years from the date of occurrence which is in complete, contrast and contradiction of the statement made by her under Section 164, Cr.P.C.

18. It is well settled by various decisions of this Court as also those of Hon'ble Supreme Court that the statement under Section 164, Cr.P.C. cannot be used as a substantive evidence, rather it can only be used to contradict and corroborate the statement of a witness given in the court. Regard in this respect can be had to a Division Bench Judgment of this court in the case of **Ram Lakhan Sheo Charan and others Vs. State of U.P., reported in 1991 Cri.L.J. 2790,** para 12 of which is quoted herein below:

"12. The trial was held when the new Code of Criminal Procedure had come into force. The wordings of S.164 in the new and old Code of Criminal Procedure with little changes are the same. As early as in Manik Gazi v. Emperor, AIR 1942 Cal 36 : (1942) 43 Cri LJ 277 a Division Bench of the Calcutta High Court had held that the statements Under Section 164 of the Code can be used only to corroborate or contradict the statements made Under Section 145 and 157 of the Indian

Evidence Act. In Brij Bhushan Singh v. Emperor, AIR 1946 PC 38 and in Mamand v. Emperor, AIR 1946 PC 45 : (1946) 47 Cri LJ 344) the Privy Council had observed that the statement Under Section 164 of the Code cannot be used as a substantive evidence and which can only be used to contradict and corroborate the statement of a witness given in the Court. Similar observations, as made in the two cases below, were made by the Privy Council, in Bhuboni Sahu v. Kind, AIR 1949 PC 257 : (1949) 50 Cri LJ 872) and in Bhagi v. Crown, 1950 Cri LJ 1004 : (AIR (37) 1950 HP 35). It was also held by a single Bench of the Himachal Pradesh Judicial Commissioner's court that statement Under Section 164 of Code cannot be used as a substantive piece of evidence. In State v. Hotey Khan, 1960 ALJ 642 : (1960 Cri LJ 1167). A division Bench of this Court had also observed that statements Under Section 164 of the Code cannot be used as a substantive evidence".

19. Similar view has been expressed yet in another Division Bench judgment in the case of **Phool Chand and etc. Vs. State of U.P., reported in 2004 Cri.L.J. 1904.**

20. Hon'ble Supreme Court in the case of **Ram Kishan Singh Vs. Harmit Kaur and another, reported in (1972) 3 Supreme Court Cases 280** has held that a statement under Section 164 of the Code can be used to corroborate the statement of a witness and it can also be used to contradict a witness.

21. In **Utpal Das and another Vs. State of West Bengal, reported in (2010) 6 Supreme Court Cases 493,** the Hon'ble Supreme Court has again held that the statement recorded under Section 164, Cr.P.C. can never be used as substantive evidence of truth but it may be used for contradictions and corroboration of a witness. It has further been held that the statement made under Section 164, Cr.P.C. can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. Thus, the legal principle in respect of the provision of Section 164, Cr.P.C. which can be deduced is that the said statement can be used to impeach the credibility of the prosecution witness. The relevant observation made by Hon'ble Supreme Court in the case of **Utpal Das (supra)** is extracted herein below:

"16. Likewise, statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness....."

22. Learned trial court has also taken into account the medical report (Exhibit Ka-11), according to which no external and internal injury on the body of the victim was found and has observed that though for arriving at the conclusion regarding rape, it is not necessary that the victim should suffer any injury on her body, however, this circumstance is to be looked into in the context of the facts and circumstances of a particular case.

23. Having examined the judgment passed by the trial court what we find is

that learned trial court has considered the evidence on record thoroughly and has rightly given a finding that the victim in this case had attempted to make deliberate improvement on the material point. She has also not been able to give any explanation which can be said to be satisfactory on any count about material contradiction between her statement recorded during trial and the one made by her under Section 164, Cr.P.C. As a matter of fact, though in her examination-in-chief the victim has denied making the statement as recorded under Section 164, Cr.P.C., however, in her cross-examination she has admitted to have made the statement that she at the time of occurrence was 20 years of age and that she had gone with the accused on her own volition and further that on 21.04.20106 itself she got married with accused at Ayodhya and that she wanted to live with the accused. In view of the said admission of the victim in cross-examination in respect of her such statement made under Section 164, Cr.P.C. in our considered opinion, the learned trial court has rightly held that the evidence of the victim cannot be held to be reliable.

24. As per section 145 of the Evidence Act, a witness can be cross-examined as to the previous statements made by him in writing or reduced into writing and is relevant to the matter in question, without such writing being shown to him, or being proved. However, if a witness is to be contradicted by the writing, his attention must be drawn to those parts of the statement reduced in writing which are to be used for the purpose of contradicting him. Section 145 of the Evidence Act is reproduced herein under :

"145.Cross-examinationas to previous statements in writing: A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".

25. Object of section 145 of the Evidence Act is to give the witness a chance of explaining discrepancy or inconsistency. This provision will have application in a situation where the witness disowns having made any statement previously which is inconsistent with his present testimony in court. However, the statement would not be vitiated until while such witness is cross-examined, the procedure prescribed in Section 145 of the Evidence Act is followed, that is to say if the maker of the statement is sought to be contradicted, his attention should be drawn to his previous statement.

26. Hon'ble Supreme Court in the case of **Rajendra Singh and others Vs. State of Bihar, reported in (2000) 4 Supreme Court Cases 298** has categorically held that if a witness during trial is intended to be contradicted by his previous statement made then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him, however, the provision contained in the second limb of Section 145 needs to be complied with, that is to say, the witness has to be confronted with his earlier statement made or reduced in writing.

27. In the instant case, the contradiction in the statement made by the

victim before the court during trial vis-a-vis her statement made under Section 164, Cr.P.C. is visible. During cross-examination, she was confronted with the statement made by her under Section 164, Cr.P.C. as in fact her attention was drawn to the said statement which is clear from the following extract of the judgment rendered by the learned trial court :

"परन्तु जिरह में पीड़िता ने यह माना हैं कि मजिस्ट्रेट के सामने बयान देने वह अकेली गयी थी । बयान पर उसने हस्ताक्षर पढ़कर अपनी मर्जी से बनाया था । मजिस्ट्रेट साहब ने जो पूँछा था, उसने बताया था, वही लिखा गया था पढ़कर उसने बयान 164 दं0प्र0सं0 पर हस्ताक्षर बनाया था । गवाह ने 164 दं0प्र0सं0 के बयान को पढ़कर कहा कि यही बयान उसने मजिस्ट्रेट को दिया था । अतः पीड़िता द्वारा अपनी मुख्य परीक्षा में यह कहा गया हैं कि जैसा बयान 164 दं0प्र0सं0 का पत्रावली पर मौजूद हैं, वैसा बयान उसने नही दिया और यह भी कहा हैं कि उसका बयान जबरदस्ती पुलिस वालों व जितेन्द्र के घरवालों ने दिलाया था परन्तु जिरह में यह कहा हैं कि मजिस्ट्रेट ने उससे जो भी पूँछा था, उसने बताया था, वहीं लिखा गया था और उसने पढ़कर अपनी मर्जी से हस्ताक्षर किया था । यह भी कहा हैं कि उसने जो बोला था, वही लिखा गया था । ऐसी स्थिति में पीड़िता द्वारा साक्ष्य में परस्पर विरोधाभाषी कथन किये जा रहें हैं और पीड़िता द्वारा अपने धारा 164 दं0प्र0सं0 के बयान व न्यायालय के समक्ष दिये गये बयान में आये परस्पर विरोधाभाषी कथनो के संबंध में कोई भी संतोषजनक कारण नही दिया जा सका हैं ।"

28. The statement of the victim thus is not worth being given any credence.

29. Regarding age of the victim, the prosecution has relied upon a photocopy of the certificate depicting her age to be 25.07.1990 issued by the Education Board. To prove the said document Principal of the School, Ms. Rama Devi Verma (P.W.6) has been examined who in her cross-examination has stated that at the time of enrollment of the victim in the School, no certificate of date of birth was produced and that whatever date of birth of the student is revealed by their parents at the time of enrollment that is recorded. In this regard statement of father of the victim (P.W.1) may also be looked into who in his deposition before the trial court has stated that he cannot tell the date of birth of his children and that he had not gone with his daughter to School at the time of her enrollment. He has further stated that he cannot tell as to how his daughter was got enrolled in the School.

30. Based on the said statement of P.W.1, learned trial court has given a finding that this witness (P.W.1) does not know that exact date of birth of the victim. Learned trial court has also relied upon the statement of the Principal of the School who in her deposition before the trial court has stated that no certificate regarding date of birth of the victim is available in the School.

31. In view of these evidences, learned trial court has doubted the date of birth recorded in her certificate issued by the education board. Learned trial court has also referred to the medical report based on medication examination of the victim which has been issued by the Chief Medical Officer, according to which, the age of the victim was opined to be 19 years. Learned trial court has also referred to the statement of the victim recorded under Section 164, Cr.P.C. where she had stated that her age was 20 years. Thus, the case of the prosecution that the victim at the time of occurrence was not major, has been rejected by the learned trial court.

32. Reference at this juncture may be had to a judgment of Hon'ble Supreme Court rendered in the case of **Vishnu @ Undrya Vs. State of Maharashtra,**

reported in (2006) 1 SCC 283. This case also related to the trial under Section 376/366 I.P.C. In the said case, according to the prosecution the prosecutrix was below 16 years of age at the time of commission of offence on the basis of certain documents, however, some doubt arose in respect of date of birth of the prosecutrix which according to one document was 29.11.1964 and according to other it was 29.06.1963. Thus, two documents contradicting each other in respect of date of birth of the prosecutrix in the said case created a doubt and circumstances of the said case became capable of two opinions, one in favour of accused and the other in favour of the prosecution.

33. In the said case of **Vishnu (supra),** the Hon'ble Supreme Court went on to observe that it is a common knowledge that very often parents furnish incorrect date of birth to the School authorities to make up the age in order to secure admission of their children and accordingly Hon'ble Supreme Court did not find any infirmity in the statement of the witness in the said case who stated that prosecutrix was born on 29.11.1964.

34. In any case, even if another view is possible, in absence of any compelling and substantial reason, the appellate court dealing with appeal against acquittal would not interfere with the acquittal unless the approach of the court below is found to be manifestly vitiated while it makes consideration of evidences.

35. In the light of the discussion made above, what we find is that in the instant case the view taken by the learned trial court for acquitting the accused was a possible and plausible view on the basis of analysis of evidence available on record and further, we do not find any perversity in the finding recorded by the learned trial court.

36. Accordingly, the application seeking leave to appeal in this case is hereby **rejected.**

37. The appeal is also, thus, **dismissed.**

(2019)10ILR A 1296

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALAHABAD 06.08.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Rent Control No. 12289 of 2019

Pradeep Kumar @ Pradeep & Anr.
...Petitioners
Versus
Smt. Meena Devi Sahu & Anr.
...Respondents

Counsel for the Petitioners:
Sri Vijayendra Pratap Singh

Counsel for the Respondents:
Sri Pankaj Saksena

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1) A- Interpretation of word "entertained"- the waiver of period of six months' notice and comparative hardship - concurrent findings of fact - No perversity-no interference under Article 226 of the Constitution of India

Held:- The word "entertained" would necessarily mean entertain the grounds for

consideration for the purpose of adjudication of merits and not at any stage prior thereto The phrase *"entertained"* used in the 1st proviso to Section 21(1)A of U.P. Act No.13 of 1972 would mean that the period of three years since the date of purchase by the landlord must have expired when the Prescribed Authority is required to entertain the release application on the grounds mentioned in Clause A of Section 21(1) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 -requirement of six months' notice under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, is mandatory but it can be waived by the tenant- No perversity could be pointed out - concurrent findings of fact has been recorded by the courts below with regard to the *bonafide* need to be in favour of the plaintiff-landlady - cannot be interfered with in writ jurisdiction under Article 226 of the Constitution of India. The defendant-tenant/petitioner neither raised any objection nor filed an application under Order VII Rule 11(d) of the Civil Procedure Code for dismissal of the release application on the ground that it is premature or barred by the proviso to Section 21A.of the Act which establishes that the defendant-tenant/petitioner has waived the protection of six months' notice as provided in the proviso to Section 21(1) of the Act. (Para 19 & 20)

Writ petition dismissed (E-7)

List of Cases Cited: -

1. Martin & Harris Ltd. Vs VIth Addl. Distt. Judge & ors. (1998) 1 SCC 732

2. (All), Rajendra Kumar Agarwal Vs Krishna Gopal (2013) 4 AWC 3584

3. Vithalbhai Pvt. Ltd. Vs Union Bank of India AIR 2005 SC 1891

4. M/s Pushpa Sahakari Avas Samiti Ltd. Vs M/s. Gmiti Ltd. Vs M/s. Gangotri Sahkari Avas S. Ltd. & ors. 2012 JT (3) SC 563

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

Interpretation of word "entertained" used in Section 21(1)(a) of U.P. Act No.13 of 1972, and the waiver of period of six months notice and comparative hardship are the questions involved in the present petition.

1. Heard Sri V.P. Singh, learned counsel for the defendant-tenant/petitioners and Sri Pankaj Saksena, learned counsel for the plaintiff-landlady/respondent.

2. Briefly stated facts of the present case are that one Umashanker Bohare was original owner and landlord of House No.291 (new No.628, current No.186), Azadganj, Sipri Bazar, Jhansi. Ancestor of the defendant-tenant/petitioners was the tenant and the tenancy was succeeded by the petitioners. The aforesaid Umashanker Bohare sold the disputed house to the plaintiff-landlady/respondent no.1 by a registered sale deed dated 21.01.2010. According to the plaintiff-landlady/respondent no.1, the intimation of purchase of the aforesaid house was given by her to the defendant-tenant/petitioners on 21.01.2010 itself. However, rent was not paid by the defendant-tenant/petitioners. Therefore, the plaintiff-landlady issued a notice dated 03.08.2010 to the defendant-tenant/petitioners terminating the tenancy and demanded arrears of rent. Neither the house was vacated nor the rent was paid by the defendant-tenant/petitioners. Therefore, the plaintiff-landlady/respondent no.1 filed the release application on 28.08.2010, under Section 21(1)(a) of U.P. Act No.13 of 1972, on the ground of her *bonafide* need and default in payment of rent.

3. The defendant-tenant/petitioners filed a written statement on 29.11.2010 in

which he specifically denied the ownership of plaintiff-landlady stating that the house was owned by one Shanker Lal and after his death it was inherited by his son Hira Singh and thereafter it was inherited by Tara Devi, wife of Hira Singh. The plaintiff-landlady has specifically denied it and stated on the basis of evidences on record that a Suit No.31 of 1965 in respect of the disputed house was filed and the aforesaid Hira Singh lost it. Thereafter, he filed First Appeal No.330 of 1977 which was dismissed by the High Court by judgment dated 16.10.1979. He filed the Second Appeal No.670 of 1980 before the Hon'ble Supreme Court which was dismissed by Hon'ble Supreme Court by judgment dated 27.04.1994. Thereafter, his wife Tara Devi filed Suit Nos.386 of 1999 and 44 of 2000, in the Court of Civil Judge (S.D.) which were jointly heard and dismissed by judgment dated 30.04.2011. Copies of all these judgments were filed alongwith an affidavit. Thus, relevant judgments were brought on record that Umashanker Bohare was the owner and landlord of the disputed house who sold it to the plaintiff-landlady/respondent no.1.

4. In paragraph 21 of the written statement the defendant-tenant/petitioners have raised an objection that the release application has been filed without exhausting three years period from the date of purchase of house and, therefore, the release application is barred by the proviso to Section 21(1) of U.P. Act No.13 of 1972.

5. The release application being P.A. Case No.121 of 2010 (Smt. Meena Devi Sahu Vs. Pradeep Kumar and Another) was dismissed by judgment dated 16.4.2016, passed by the Prescribed Authority/Judge Small Cause Court, Jhansi, on the ground that the release application was filed before expiry of three years period from the date of purchase of house, and therefore, it was barred by the proviso to Section 21(1) of U.P. Act No.13 of 1972. However, the Prescribed Authority held that there is landlord - tenant relationship between the plaintiff-landlady/respondent No.1 and the defendant-tenant/petitioner. Aggrieved with this judgment, the plaintiff-landlady/respondent No.1 filed a Rent Control Appeal No.7 of 2016 and the defendant-tenant/petitioner filed a Rent Control Appeal No.8 of 2016. By the impugned judgment dated 15.03.2019 Rent Control Appeal No.7 of 2016, filed by the plaintiff-landlady/respondent no.1 was allowed and the P.A. Case was decreed. By judgment of even date i.e. 15.03.2019 the appellate court dismissed the Rent Control Appeal No.8 of 2015, filed by the defendant-tenant/petitioner. Aggrieved with these judgments the defendant-tenant/petitioner has filed the present petition under Article 227 of the Constitution of India.

Submissions:-

6. **Learned counsel for the defendant-tenant/petitioner submits** that the release application was filed by the plaintiff-landlady/respondent no.1 before expiry of three years period from the date of purchase of the disputed house. Therefore, the release application was barred by the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972. The defendant-tenant/petitioner has no house in the city of Jhansi, therefore, the comparative hardship was in his favour. He further submits that the plaintiff-landlady/respondent no.1 has one house in

the city of Jhansi and, therefore, comparative hardship can not be said to be in her favour. The release application was filed before expiry of six months from the date of notice dated 03.08.2010, therefore, it was not entertainable.

7. **Sri Pankaj Saksena, learned counsel for the plaintiff-landlady/respondent** supports the impugned judgment passed by the appellate court.

Discussion & Findings:-

8. I have carefully considered the submissions of learned counsels for the parties.

9. From the submissions made by learned counsels for the parties, following three questions arise for consideration in the present petition:-

QUESTIONS

10. (a) Whether under the facts and circumstances of the case the release application filed by the plaintiff-landlady/respondent no.1 before expiry of three years from the date of purchase of the house was barred by the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972?

(b) Whether under the facts and circumstance of the case, the defendant-tenant/petitioner has waived the condition of six months notice required under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972?

(c) Whether under the facts and circumstance of the case the comparative hardship of the disputed house has been rightly held to be in favour of the plaintiff-landlady/respondent no.1?

11. **Question No. (a) Whether under the facts and circumstances of the case the release application filed by the plaintiff-landlady/respondent no.1 before expiry of three years from the date of purchase of the house was barred by the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972?**

Admittedly the disputed house was purchased by the plaintiff-landlady/respondent no.1 by a registered sale deed dated 21.01.2010. According to the plaintiff-landlady/respondent no.1, the notice regarding purchase of house was given to the defendant-tenant/petitioner on 21.01.2010. A notice dated 03.08.2010 was issued by the plaintiff-landlady/respondent no.1, terminating the tenancy and demanding arrears of rent. Despite purchase of the house by the plaintiff-landlady/respondent no.1, the rent was not paid by the defendant-tenant/petitioner to the plaintiff-landlady/respondent no.1 although it was demanded and the fact of purchase was brought to his notice. The release application under Section 21(1)(a) on the ground of *bonafide* need and default in payment of rent by the defendant-tenant/petitioner, was filed by the plaintiff-landlady/respondent no.1 on 28.08.2010. It was registered as P.A. Case No.121 of 2010 and was decided by the Prescribed Authority/Judge Small Cause Court, Jhansi by judgmnt dated 16.4.2016.

12. The phrase that *"no application shall be **entertained** on the grounds mentioned in Clause (a), unless a period of three years has elapsed since the date of such purchase"* has been interpreted by Hon'ble Supreme Court in the case of Martin & Harris Ltd. Vs. VIth Additional Distt. Judge & Ors. (1998)1 SCC 732, and it has been held as under:

*"**7.** In view of the aforesaid rival contentions the **following points arise for our consideration;***

1. Whether the respondent-landlord's application under Section 21(1)(a) of the Act was not maintainable in view of the proviso to the said Section as it was filed before the expiry of three years from the date of purchase of the suit premises by the respondent.

2. Whether the said application was not maintainable on the additional ground that it was filed prior to the expiry of six months from the date on which notice was given by the respondent to the appellant as required by the very same proviso.

3. Whether the bona fide requirement of the respondent landlord did not survive in view of the subsequent event, namely, that respondent's wife had acquired an undivided interest in the adjoining part of the building in which the suit premises were situated and wherein the respondent-landlord was staying with his wife.

*8. .....A mere look at the aforesaid provision of the first proviso to Section 21(1) of the Act shows that no application filed by a landlord is to be entertained by the prescribed authority on grounds mentioned in clause (a) unless a period of three years has expired since the date of purchase of the property by the landlord when the building which is purchased is having a sitting tenant. It is not in dispute between the parties that the appellant was a sitting tenant since 1966 in the said building when it was purchased by respondent Landlord on 30th June 1985, It is, of course, true that respondent landlord moved an application for possession, against the appellant both under Section 21(1) (a) of the Act and also under Section 21(1-a) of the Act. However, so far as the ground under Section 21(1)(a) of the Act is concerned the application was filed before the expiry of three years from the date of such purchase. It was in fact filed within seven months from the date of purchase of the premises. The moot question is whether the very filing of such application was barred by the provisions of the said proviso. **It must be kept in view that the proviso nowhere lays down that no application on the grounds mentioned in clause (a) of Section 21(1) could be 'instituted' within a period of three years from the date of purchase. On the contrary, the proviso lays down that such application on the said grounds cannot be 'entertained' by the authority before the expiry of the period. Consequently it is not possible to agree with the extreme contention canvassed by the learned senior counsel for the appellant that such an application could not have been filed at all within the said period of three years.** .....*

The statutory scheme of Section 21(1) contra-indicates such a contention, sub-Section (1) of Section 21 lays down that 'the prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists.....' Section 21(1) deals with grounds mentioned not only in clause (a) but also in clause (b) The proviso to Section 21(1) bars entertainment of the application only on the grounds mentioned in clause (a) thereof, It is easy to visualise that an application for possession may be filed by the landlord not only invoking grounds mentioned in clause (a) of Section 21(1) but even other grounds mentioned in that

sub-section. ***Therefore, the stage at which the court has to consider whether grounds mentioned in clause (a) are made out be the plaintiff or not will be reached when the Court takes up the application for consideration on merits.*** *It has to be kept in view that applications for possession filed under Section 21(1) of the Act are not placed for admission before the prescribed authority. Once they are filed they are to be processed for being decided on merits after issuing notices to the parties concerned.* ***Therefore, when the application reaches final hearing on merits the authority has to sift the grounds on which the application is based and if it finds that the application is based, amongst others, on the grounds mentioned in clause (a)) it has to ascertain whether three years' period has expired since the day of the purchase of the said property by the plaintiff- landlord and if the period of three years is found to have expired then the grounds mentioned in clause (a) would become alive for consideration of the authority. If not, said grounds would not be entertained for consideration. Thus the word 'entertain' mentioned in the first proviso to Section 21 (1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned senior counsel, Shri Rao, for the appellant. Neither at the stage at which the application is filed in the office of the authority nor at the stage when summons is issued to the tenant the question of entertaining such application by the prescribed authority would arise for consideration.***

9. Even that apart there is an internal indication in the first proviso to Section 21(1) that the legislature has made a clear distinction between 'entertaining of an application for possession under Section 21(1) (a) of the Act and 'filing' of such application. so far as the filling of such application is concerned it is clearly indicated by the Legislature that such application cannot be filled before expiry of six months form the date on which notice is given by the landlord to the tenant seeking eviction under Section 21(1) (a) of the Act. The words, 'the landlord has given a notice in that behalf to the tenant not less than six months before such application', would naturally mean that before filing of such application or moving of such application before the prescribed authority notice must have preceded by at least six months. similar terminology is not employed by the Legislature in the very same proviso so far as three years' period for entertaining such application by the prescribed authority is concerned. ***Therefore, it must necessarily mean that when the prescribed authority is required to entertain an application on the grounds mentioned in Clause (a) of Section 21(1) a stage must be reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds for possession mentioned in clause (a) of Section 21(1) of the Act.*** *Consequently on the very scheme of this Act it cannot be said that the word 'entertain' as employed by the Legislature in the firs proviso to Section 21(1) of the Act would mean 'Institution' of such proceedings before the prescribed or would at least mean taking cognizance of such an application by the prescribed authority by issuing summons for appearance to the tenant-defendant. It must be half that on the contrary* ***the term 'entertain' would only show that by the time the application for possession on the grounds mentioned in***

clause (a)) of Section 21(1) is taken up by the prescribed authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord.

10. In the present case, therefore, it must be held that ***when the Legislature has provided that no application under Section 21 (1) (a) of the Act shall be entertained by the prescribed authority on grounds mentioned in clause (a) of Section 21(1) of the Act before expiry of three years from date of purchase of property by the landlord it must necessarily mean consideration by the prescribed authority of the grounds mentioned in clause (a) of Section 21(1) of the Act of merits.*** *On the facts of the present case, as we have seen earlier, that stage was reached after 1988 when the prescribed authority on the basis of the affidavit evidence led before it took up the* ***plaintiff's case for consideration on merits of the grounds under Section 21 (1) (a) of the Act and at that stage more than three years had expired. From the date on which the respondent-landlord had purchased the property.***

13. Similar view has been taken by this Court in **Rajendra Kumar Agarwal Vs. Krishna Gopal 2013(4) AWC 3584 (All) (Paras 2,3 & 4).** In **Vithalbhai Pvt. Ltd. Vs. Union Bank of India, AIR 2005 SC 1891** Hon'ble Supreme Court laid down the law that if a suit is filed premature (in that case before the expiry of period of notice suit had been filed), however, it becomes mature during its pendency then the same will have to be decided on merit. The aforesaid judgment has been followed in **M/s Pushpa Sahakari Avas Samiti Ltd. Vs. M/s. Gangotri Sahkari Avas S. Ltd. and others 2012 JT (3) SC 563** and in the matter of execution case it was held that if execution application had been filed before time but during pendency the execution application became mature then it has to be decided on merit.

14. From the bare reading of 1st proviso to Section 21(1) of U.P. Act No.13 of 1972 and principles of law laid down by Hon'ble Supreme Court in the case of **Martin & Harris Ltd.(supra) and Vithalbhai Pvt. Ltd.(supra),** it can be safely concluded that the phrase "entertain" used in the 1st proviso to Section 21(1)(a) of U.P. Act No.13 of 1972 would mean that the period of three years since the date of purchase by the landlord must have expired when the Prescribed Authority is required to entertain the release application on the grounds mentioned in Clause (a) of Section 21(1) of U.P. Act 13 of 1972. This would be a stage reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds mentioned in clause (a) of Section 21(1) of the Act. The word **"entertained"** mentioned in the first proviso to Section 21(1) in connection with the grounds mentioned in Clause (a) **would necessarily mean entertain the grounds for consideration for the purpose of adjudication of merits and not at any stage prior thereto i.e.** neither at the stage at which the application is filed in the office of the Prescribed Authority nor at the stage when summons is issued to the tenant. The crux of the conclusion is that by the time the application for possession on the grounds mentioned in Clause (a) of Section 21(1) is taken up by the Prescribed Authority for consideration on

merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord/landlady. In the present set of facts, the disputed house was purchased by the plaintiff-landlady/respondent no.1 on 21.01.2010 and the case has been taken up for consideration on merit and was decided by the Prescribed Authority on 16.04.2016. Therefore, the 1st proviso to Section 21(1) of the Act stood complied with. Question No.(a) is answered accordingly.

15. **Question No.(b) Whether under the facts and circumstance of the case the defendant-tenant/petitioner has waived the condition of six months notice required under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972 ?**

Bare perusal of the written statement filed by the defendant-tenant/petitioner shows that the question of six months notice was not raised. The objection as to the filing of the release application before expiry of six months period from the date of notice, was not raised by the defendant-tenant/petitioner before the Prescribed Authority. He has also not filed any application under Order VII Rule 11 (d) of the Civil Procedure Code for rejection of the application on the ground that it is premature and barred by the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, on the ground that the application was filed before expiry of six months period of notice. Thus, the mandatory requirement of six months notice was waived by the defendant-tenant/petitioner.

16. A similar question was considered by Hon'ble Supreme Court in the case of **Martin & Harris Ltd.(supra)** and it has been held as under:-

"11. so far as this point is concerned it must be held on the clear language of the first proviso to Section 21(1) of the Act that application for possession under Section 21(1) (a) had to be filed by the landlord concerned not earlier than expiry of six months from, the date of issuance of the notice by the landlord. On the facts of the present case it cannot be disputed that when the notice was issued on 20th September 1985 the application for possession could not have been filed by the respondent invoking the grounds mentioned in clause (a) of Section 21(1) of the Act, at leas till 20th March 1986, while the application was filed in January 1986. To that extent it can be said that the application was premature. The provision in this connection has to be treated to be mandatory.

12. However the further question survives for consideration, namely, whether the beneficial provision enacted by the Legislature in this Connection for the protection of the tenant could be and in fact was waived by the tenant. So far as this question is concerned on the facts of the present case the answer must be in the affirmative. As we have noted earlier after the suit was filed the appellant filed its written statement on 17th September 1986. In the said written statement the appellant, amongst others, did take up the contention that the application as filed by the respondent-landlord under Section 21(1) (a) was not maintainable and was premature as six months ' period had not expired since the service of notice dated 20th September 1985 when the suit was filed. ***But curiously enough*** *thereafter the said contention raised by the appellant in written statement was given a go by for reasons best known to the appellant.* ***It is***

easy to visualise that if at that stage the appellant had pressed for rejection of the application on the ground of Section 21(1) (a) as not showing completed clause of action due to non-expiry of six months from the date of Service of notice invoking Order VII Rule 11(a) and (d), CPC, alleging that the plaint did not disclose a cause of action or it appeared to be barred by law, respondent-plaintiff could have withdrawn the suit on the that ground under Order XXIII Rule, 1 Sub-rule (3), CPC as the suit based on grounds under Section 21 (1) (a) of the Act would have been shows to have suffered from a formal defect and he would have been entitled to claim liberty to file a fresh suit on the same cause of action after the expiry of six months' period from the date of service of notice. That opportunity was lost to the respondent-landlord as the appellant did not pursue this contention any further. On the contrary appellant joined issues on merits by seeking permission to cross-examine the plaintiff on merits of the case on grounds as pleaded under Section 21(1) (a) of the Act. *When the decree was passed against the appellant, even while challenging the said decree in appeal no such ground was taken in the Memo of Appeal, nor was it argued before the First Appellate Court. Under these circumstances, the High Court rightly held that the contention, regarding the suit being premature as filed before expiry of six months from the date of the notice, must be treated to have been waived by the appellant.*

.....

The decision of the Privy Council referred to with approval by this Court in the aforesaid decision clearly indicates that if a proceeding before a Court is barred by a law, ***a plea to that effect being a pure question of law can be agitated any time. But if the prohibition imposed by the Statute is with a view to a fording projection to a party, such protection can be waived by the party. He may avail of it or he may not avail of it as he may choose.*** *It is not the case of the appellant that the application for possession as filed by the respondent-plaintiff was barred by any provision of law. All that was contended was that it was prematurely filed as six months period had not expired from the date of issuance of the suit notice.* ***That provision obviously was enacted for the benefit and protection of the tenant. It is for the tenant to insist on it or to waive it.*** *On the facts of the present case there is no escape from the conclusion that the said benefit of protection, for reasons best known to the appellant, was waived by it though it was alive to the said contention as it was mentioned at the outset in the written, statement filed before the prescribed authority. Thereafter it was not pressed for consideration.*

Result was that the respondent landlord by the said conduct of the appellant irretrievably changed his position and would set prejudiced if such a contention is entertained at such a late stage as was tried to be done before the high Court after both the courts had concurrently held on facts that the respondent-plaintiff had proved his case on merits.

13. It is not possible to agree with the contention of the learned senior counsel for the appellant that the provision containing the proviso to Section 21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class tenants who are sitting tenants and whose premises are subsequently

purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by Section 21(1) (a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants as found in the proviso would give the tenants concerned a locus penintentiae to avail of it or not. ***It is easy to visualise that proceedings under Section 21(1) (a) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed an called for adjudication by the prescribed authority. The ground raised by the Landlord under Section 21(1) (a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.***

.....

Consequently it must be held that the provision for six months' notice before initiation of proceedings under Section 21(1) of the Act, though is mandatory and confers protection to the tenant concerned, it can be waived by him.

14. Apart from waiver the appellant was stopped from taking up such a contention as the respondent, on account of the aforesaid contention of the appellant, had irretrievably changed his position to his detriment and lost an opportunity of seeking leave of the Court to withdraw the suit with liberty to file a fresh suit, as seen earlier. The second point for consideration is, therefore, answered in the negative, in favour of the respondent-landlord and against the appellant."

17. From the discussion made above and the law laid down by Hon'ble Supreme Court as aforequoted, it can be safely concluded that requirement of six months notice under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, is mandatory but it can be waived by the tenant. These proceedings under Section 21(1)(a) of the Act are neither of public nature nor it involves any public interest. It would be between landlord and tenant. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and called for adjudication by the Prescribed Authority. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived. In the present set of facts the defendant-tenant/petitioner neither raised any objection nor filed an application under Order VII Rule 11(d) of the Civil Procedure Code for dismissal of the release application on the ground that it is premature or barred by the proviso to Section 21(a) of the Act. This clearly established that the defendant-tenant/petitioner has waived the protection of six months' notice as provided in the proviso to Section 21(1) of the Act. Therefore, the submission of

learned counsel for the defendant-tenant/petitioner deserves rejection and is hereby rejected. If an objection would have been raised before the Prescribed Authority in the very beginning then the plaintiff-landlady/respondent would have an opportunity to take leave of the Court to withdraw the release application and to file a fresh release application after expiry of six months period.

18. **Question No.(c) Whether under the facts and circumstance of the case the comparative hardship of the disputed house has been rightly held to be in favour of the plaintiff-landlady/respondent no.1?**

The **last submission of learned counsel for the defendant-tenant/petitioner also deserves rejection.** Undisputedly, the defendant-tenant/petitioner has acquired the house in the city of Jhansi. Considering the facts and circumstances of the case and evidences on record, both the courts below have recorded concurrent findings of fact with regard to the *bonafide* need of the plaintiff-landlady/respondent and comparative hardship to be in her favour. No perversity could be pointed out in these findings of fact. Therefore, these findings can not be interfered with in writ jurisdiction under Article 226 of the Constitution of India. That apart, it would be relevant to mention that denial of title of the landlord by the tenant is in itself a valid ground of eviction of the tenant.

19. Considering the entire facts and circumstance and the evidences on record, concurrent findings of fact has been recorded by the courts below with regard to the *bonafide* need to be in favour of the plaintiff-landlady. No perversity could be pointed out in the aforesaid finding of fact, therefore, these findings of fact can not be interfered with in writ jurisdiction under Article 226 of the Constitution of India.

Conclusions

20. The legal position and conclusions stated above are briefly summarized as under:-

(i) The phrase *"entertained"* used in the 1st proviso to Section 21(1)(a) of U.P. Act No.13 of 1972 would mean that the period of three years since the date of purchase by the landlord must have expired when the Prescribed Authority is required to entertain the release application on the grounds mentioned in Clause (a) of Section 21(1) of U.P. Act 13 of 1972. This would be a stage reached when the Court applies its judicial mind and takes up the case for decision on merits concerning the grounds mentioned in clause (a) of Section 21(1) of the Act. The word **"entertained" would necessarily mean entertain the grounds for consideration for the purpose of adjudication of merits and not at any stage prior thereto i.e.** neither at the stage at which the application is filed in the office of the Prescribed Authority nor at the stage when summons is issued to the tenant. The crux of the conclusion is that by the time the application for possession on the grounds mentioned in Clause (a) of Section 21(1) is taken up by the Prescribed Authority for consideration on merits, at least minimum three years' period should have elapsed since the date of purchase of the premises by the landlord/landlady. In the present set of facts, the disputed house was purchased by the plaintiff-landlady/respondent no.1 on 21.01.2010

and the case has been taken up for consideration on merit and was decided by the Prescribed Authority on 16.04.2016. Therefore, the 1st proviso to Section 21(1) of the Act stood complied with. Question No.(a) is answered accordingly.

(ii) requirement of six months notice under the 1st proviso to Section 21(1) of U.P. Act No.13 of 1972, is mandatory but it can be waived by the tenant. These proceedings under Section 21(1)(a) of the Act are neither of public nature nor it involves any public interest. It would be between landlord and tenant. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and called for adjudication by the Prescribed Authority. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.

(iii) In the present set of facts the defendant-tenant/petitioner neither raised any objection nor filed an application under Order VII Rule 11(d) of the Civil Procedure Code for dismissal of the release application on the ground that it is premature or barred by the proviso to Section 21(a) of the Act. This clearly established that the defendant-tenant/petitioner has waived the protection of six months' notice as provided in the proviso to Section 21(1) of the Act.

21. For all the reasons aforestated, the writ petition is **dismissed.**

(2019)10ILR A 1307

APPELLATE JURISDICTION
CIVIL SIDE

DATED: LUCKNOW 15.10.2019

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

FAFO No. 298 of 2006

The New India Assurance Co. Ltd. ...Appellant

Versus

Smt. Maya Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Jitendra Narain Mishra

Counsel for the Respondents:
Sri R.A. Kanojia, Sri Amit Kumar Singh Bhadoria, Sri Anshuman Patnaik, Sri R.A. Kanaujia, Sri Raj Kumar Verma, Sri Rajendra Jaiswal, Sri Shivendra Pratap Singh, Sri Subodh Awasthi

Motor Vehicles Act 1988 - Section 15 (1) - Driver not having valid licence on the date of accident - Insurer cannot be fastened with the liability of paying compensation.

Tribunal held that since prior to accident and after the accident the driver had valid and effective driving licence therefore it would be treated that he was having the valid and effective driving licence on the date of accident also

Held:- Driver of the tractor not having a valid and effective driving licence *on the date of accident* so there was a breach of terms and conditions of policy, therefore, the Insurance Company cannot be fastened with the liability of paying compensation on behalf of owner of the vehicle - Compensation has to be paid by the owner of tractor – Insurance Company to make the payment of the compensation to the claimants with liberty to recover the same from the owner of the vehicle. (Para 24 & 30)

First Appeal From Order Partly Allowed (E-5)

List of cases cited: -

1.Oriental Insurance Company Ltd. Vs Shri Nanjappan & ors. (2004) 13 SCC 224 (relied upon)

2. M.P. Electricity Board Vs Shail Kumari & ors. (2002) 2 SCC 162

3. Oriental Insurance Company Ltd. Vs Nathuni Prasad & anr. (2004) 1 T.A.C. (All.)

4. Ram Babu Tiwari Vs United India Insurance Co. Ltd. & ors. (2008) 3 T.A.C. 769 (S.C.)

5. Ishwar Chandra & anr. Vs Oriental Insurance Co. Ltd. & ors. (2007) 2 T.A.C. 393 (S.C.)

6. National Insurance Company Ltd. Vs Vidhyadhar Mahariwala & ors. (2008) 12 SCC 701

7. New India Assurance Company Ltd. Vs Yadu Sambhaji More (2011) 2 SCC 416 (2011) 99 AIC 135

8. Rita Devi Vs New India Assurance Co. Ltd. (2000) 5 SCC 113

9. U.P.St. Road Transport Corporation & anr. Vs Rajendra Kumar Gupta 7 ors.2012 SCC Online All 994

10. Singh Ram Vs Nirmala & ors. (2018) 3 SCC 800

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Shri Jitendra Narain Mishra, learned counsel for the appellant and Shri Shivendra Pratap Singh, learned counsel for the respondent no.7. None appeared for other respondents.

2. The instant appeal has been preferred against the judgment and award dated 11.11.2005, passed in M.A.C.No.208 of 2000;Smt. Maya Devi and others Versus The Harak Chand Flour Mills and others by Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Sitapur by which the claim petition has been allowed and an amount of Rs.2,95,000/- alongwith interest @ 6% per annum has been directed to be paid by the appellant-New Indian Assurance Company Limited.

3. Brief facts of the case are that the deceased Sobaran Lal was working on the post of Munim in M/s. Harak Chand Flour Mills i.e. opposite party no.5. On 28.05.2000 at about 2.15 in the day he was going on tractor No.USH-3956 on bye-pass road in Police Station Ramkoat, district Sitapur for the work of the Mill. The Trolly No.USX-4189 attached with the tractor touched the hanging electric wire. Consequently the electric current came down in the tractor and in the accident the deceased Sobaran Lal died on the spot. Therefore the claim petition was filed claiming compensation.

4. The respondent no.1 i.e. the opposite party no.5 herein (M/s.Harak Chand Flour Mills) filed its written statement denying that the deceased was working as Munim in the Mill and stated that he was working as labour and getting Rs.2000/- per month as salary. The respondent no.1 also denied that it has any relation with the tractor No.USH-3956. It was also stated that Tribhuwan Lal Driver, loading the waste of the mill on tractor trolly, was going from the back gate to dispose it off. When the trolly was going out from the back gate the live wire of 11000 k.w. which was hanging for the last many days, touched the trolly and at that time Sobaran Lal was sitting at the tractor trolly as labour. On account of electric current he jumped but slipped on the floor and died on the spot. It has denied the negligence of the tractor driver and stated that the tractor and trolly were ensured with the New India Assurance Company Limited and it is not liable for payment of any compensation. Tribhuwan Lal, tractor driver had not filed any written statement.

5. The appellant-New India Assurance Company Ltd. denied the accident and stated that there was no fault of the tractor driver in the accident in question and therefore it is not liable to pay any compensation.

6. The Uttar Pradesh Power Corporation had filed written statement denying the accident and stated that under the Motor Accident Claim Petition no compensation can be awarded against it. It was also stated that since the accident had not occurred from its vehicle so no cause of action has accrued against it under the Motor Vehicles Act. It was also stated that the electric wires were not loose at the spot of accident and there was no negligence of the electricity department, therefore, it is not liable to pay any compensation.

7. Considering the pleadings of the parties four issues were framed. Smt. Maya Devi, wife of the deceased as P.W.1 and Dhani Ram as P.W.2 were got examined on behalf of opposite party nos.1 to 4/claimants. A certified copy of the General Diary, copy of the post mortem report of deceased Sobaran Lal and 7 photographs of the spot of accident were filed by the respondents/claimants. The opposite parties got examined the tractor driver Tribhuwal Lal as O.P.W.1. They had filed copy of the cover note of Insurance Policy, driving licence of the driver Tribhuwan Lal, photocopy of certificate of tax of tractor and photocopy of cover note of the Insurance Policy of the tractor trolly, report of Inspector and certificate of licensing authority.

8. After hearing the parties and considering the material available on record learned Tribunal allowed the claim petition and awarded the amount as aforesaid and directed to the appellant Insurance Company to pay the compensation. Hence the present appeal has been filed.

9. Learned counsel for the appellant had submitted that the accident in question had occurred due to negligence of the U.P. Power Corporation as the live electric wires were hanging on the road, therefore the appellant-Insurance Company is not liable to pay the compensation awarded by the Tribunal. To buttress his arguments he submitted that the P.W.2, the eye witness, has stated in his evidence that the accident had occurred as the hanging electric wires had touched the tractor trolly. In the cross examination he has stated that if the trolly would have been of normal height the live wires would not have touched the trolly. The O.P.W.1 Tribhuwan Lal has also stated in his evidence that the wires were hanging so the trolly touched it. In his cross examination he has stated that the electric wires were hanging and if he would have driven the tractor keeping it left or right side, the accident could have been saved, but there was no other way as there were ditches on the road. The learned Tribunal has recorded a finding in regard to issue no.1 that if the tractor driver would have driven the tractor cautiously after seeing the electric wires the accident could have been saved. Therefore, the accident in question had occurred due to hanging of the live electric wires which was on account of negligence of the electricity department and therefore the U.P. Power Corporation Ltd. is liable to pay the compensation. In this regard learned counsel for the appellant has relied on the judgment of Hon'ble Apex Court in the case of **M.P.**

Electricity Board Versus Shail Kumari and others;(2002) 2 SCC 162.

10. He further submitted that as per the certificate issued by the licensing authority Sitapur i.e. Paper No.60-Ga tractor driver Tribhuwan Lal was having the driving licence for driving the tractor w.e.f. 22.12.1990 to 21.12.1995 and from 09.06.2000 to 08.06.2003. The accident in question had occurred on 28.05.2000, therefore, on the date of accident he was not having valid and effective driving licence, but the learned Tribunal on the basis of the judgment of this court in the case of **Oriental Insurance Company Ltd. Versus Nathuni Prasad and another;2004(1) T.A.C. (All.)** dealing with the issue no.3 held that since prior to accident and after the accident the driver had valid and effective driving licence therefore it would be treated that he was having the valid and effective driving licence on the date of accident also. The learned counsel for the appellant submitted that the finding recorded by the learned Tribunal is erroneous and perverse because the said judgment is not applicable on the facts and circumstances of the present case because there is a big difference of about 5 years between the validity of both the licences. Therefore, the said judgment could not have been applied in the present case. There was violation of terms and conditions of the Insurance Policy and it cannot be deemed that he was having valid and effective driving licence on the date of accident only because he had obtained the driving licence w.e.f. 09.06.2000 immediately after the accident. In this regard learned counsel for the appellant has relied on **Ram Babu Tiwari Versus United India Insurance Co.Ltd. and others;2008(3) T.A.C. 769 (S.C.), Ishwar Chandra and others Versus Oriental Insurance Co.Ltd. and others;2007(2) T.A.C. 393 (S.C.) and National Insurance Company Limited Versus Vidhyadhar Mahariwala and others;(2008) 12 SCC 701.**

11. Lastly, learned counsel for the appellant submitted that the deceased Sobaran Lal was sitting on the tractor as a gratuitous passenger which is apparent from the evidence of P.W.2. He has stated in his cross examination that at the time of accident the deceased was sitting on the left side of the driver. O.P.W.1; driver of the tractor Tribhuwan Lal has also stated in his cross examination that Sobaran Lal had himself sat on the tractor. He was not asked by him or owner of the Factory. But it has not been considered by the learned Tribunal while dealing with the issue no.2. However, he fairly admitted that this plea was not taken before the Tribunal but submitted that under Section 168 of the Motor Vehicles Act 1988 (here-in-after referred as the Act of 1988) on receipt of an application for compensation made under Section 167 the Claims Tribunal is required to hold an inquiry into the claim. The Claims Tribunal has all the powers of the Civil Court under Section 169 of the Act, therefore, if the inquiry would have been held by the learned Tribunal in accordance with law it would have come out because there was evidence to this effect.

12. On the basis of above learned counsel for the appellant submitted that the impugned judgment and award passed by the learned Tribunal is not sustainable in the eyes of law and is liable to be set aside and the appeal is liable to be allowed.

13. Learned counsel for the respondent no.7 submitted that the claim

petition was filed under the Motor Vehicles Act, 1988 before the Motor Accident Claims Tribunal and no liability can be fastened on the opposite party no.7 i.e. the U.P.Power Corporation Limited under the Motor Vehicles Act, 1988. The learned Tribunal has rightly allowed the claim petition against the appellant-Insurance Company in accordance with law. There is no illegality or error in the judgment and award passed by the learned Tribunal. Therefore the appeal is liable to be dismissed against the opposite party no.7.

14. I have considered the submissions of the learned counsel for the parties and perused the record of FAFO as well as the trial court.

15. The deceased Sobaran Lal was going with the work of the Mill on 28.05.2000 at about 2.15 in the day from tractor No.USH-3956 when the wires of the electricity touched the trolly No.USX-4189 attached with the tractor. Consequently electric current came down into the tractor and the deceased died on the spot. P.W.2, an eye witness has stated in his evidence that the driver Tribuwan Lal was driving the tractor rashly and negligently and if he would have been driving slowly and the wires tight, the accident could have been saved. In his cross examination he has stated that angles of 4-5 fit height were installed in the trolly above normal height and if trolly would have been of the normal height the electric wires would not have touched it and the accident would not have occurred. The O.P.W.1; Tribhuwan Lal has stated in his cross examination that he had not seen the electric wires prior to accident. He has further stated in his cross examination that if he would have driven the tractor left or right the accident would have saved but there was no other way because there were ditches on the road.

16. After considering the evidence and material on record learned Tribunal has recorded a categorical finding in regard to issue no.1 that there is no fault of the electricity department and if the tractor driver would have driven the tractor carefully and after seeing the electric wires the accident would not have occurred. Therefore the accident in question is the outcome of the negligence of the tractor driver in which the deceased Sobaran Lal had died. Admittedly 4-5 fit heigh angles were fitted with the trolly, therefore the trolly was 4-5 fit higher than the height of the trolly of normal height. A perusal of the photographs filed by the respondents-claimants also indicates that the angles of 4-5 fit height were fitted over normal height of the trolly. In such a situation the tractor driver was to be more careful while driving the tractor. As per his statement he had not seen the wires prior to the accident, on the other hand he stated that if he would have driven the tractor from left or right, the accident could have been saved, so he must have seen the wires before accident but he has given contradictory statements to save him. This court is in agreement with the findings recorded by the learned Tribunal in regard to issue no.1 on the basis of material and the evidence on record. The learned Tribunal has rightly held that there was no fault of the electricity department in the accident therefore the judgment relied by the learned counsel for the appellant in this regard is of no assistance to his case.

17. The petition for compensation was filed under Section 163-A read with Section 166 of the Motor Vehicles Act,

1988. Section 163-A provides that the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the second schedule, to the legal heirs or the victim, as the case may be. Section 166 of the Act provides that an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made by the persons mentioned under sub clause (a) to (d). Section 165 provides that the State Government may constitute the Motor Accident Claims Tribunals for the purpose of adjudicating upon the claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of the motor vehicles, or damages to any property of a third party so arising, or both. Therefore the claims under the Motor Vehicles Act can be filed before the Motor Accident Claims Tribunal claiming compensation in regard to death due to accident arising out of the use of motor vehicle. Therefore when the Tribunal comes to the conclusion that the accident had occurred arising out of the use of motor vehicle, the respondents-claimants are entitled for the compensation under the Act.

18. The Hon'ble Apex Court interpreted the words "accident arising out of the use of a motor vehicle" in the case of **New India Assurance Company Ltd. Versus Yadu Sambhaji More;(2011) 2 SCC 416; 2011 (99) AIC 135.** The facts of that case in brief were that a petrol tanker was got hit by a truck due to which petrol started leaking from the tanker. At day break the local people started collecting the petrol leaking out from the tanker. In the melee the petrol caught fire and there was a big explosion in which 46 persons lost their lives. The legal heirs filed the claim petition. The owner and insurer contested the claim petition on the ground that the fire and the explosion causing the death of those who had assembled at the accident site could not be said to be an accident arising out of the use of a motor vehicle. The claims Tribunal observed that the fire and the explosion could not be said to be an accident arising out of the use of the tanker. Against the order of the Claims Tribunal appeals were filed before the High Court. The learned Single Judge of the High Court allowed the appeal and reversed the order passed by the Claims Tribunal. Against the decision of the Single Judge, the owner of the petrol tanker and the insurance company filed a Letters Patent Appeal which was dismissed by the Division Bench of the High Court. The owner of the petrol tanker and the insurance company then approached to the Hon'ble Apex Court challenging the judgment and order of the High Court. The S.L.P. was dismissed by the Apex Court in view of the decision in Shivaji Dayanu Patil Versus Tatschala Uttam More;1991(3)SCC 530. The Hon'ble Apex Court, after considering the question as to whether the fire and explosion of the petrol tanker in which Deepak Uttam More lost his life could be said to have resulted from an accident arising out of the use of a motor vehicle namely the petrol tanker, answered the question in the affirmative, that is to say, in favour of the claimant and against the insurer.

19. The Hon'ble Apex Court, in the case of **Rita Devi Versus New India Assurance Co. Ltd.;(2000) 5 SCC 113,** relying on interpretation of Section 92-A

of the Motor Vehicles Act, 1939 in the case of Shivaji Dayanu Patil Versus Vatschala Uttam More;(1991) 3 SCC 530 held that the murder of the deceased was due to an accident arising out of the use of motor vehicle. The relevant paragraphs 16 to 18 are reproduced below:-

16. *In the case of Shivaji Dayanu Patil v. Vatschala Uttam More[(1991) 3 SCC 530 : 1991 SCC (Cri) 865] this Court while pronouncing on the interpretation of Section 92-A of the Motor Vehicles Act, 1939 held as follows: (SCC p. 532, para 12)*

"... Section 92-A was in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no-fault liability. In the matter of interpretation of a beneficial legislation the approach of the courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat that purpose."

17. *In that case in regard to the contention of proximity between the accident and the explosion that took place this Court held: (SCC pp. 549-50, para 36)*

"36. This would show that as compared to the expression "caused by', the expression "arising out of' has a wider connotation. The expression "caused by' was used in Sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A, Parliament, however, chose to use the expression "arising out of' which indicates that for the purpose of awarding compensation under Section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle' in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

18. *In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving the use of motor vehicle."*

20. A Division Bench of this court in the case of **U.P. State Road Transport Corporation and another Versus Rajendra Kumar Gupta and others;2012 SCC OnLine All 994** considered the accident "arising out of the use of a motor vehicle". The brief facts of the said case are that the deceased Vaibhav Gupta son of the claimant was travelling from Jaunpur to Lucknow by Bus no.UP-65-AR-1874 owned by U.P. State Road Transport Corporation. The deceased requested the bus driver to stop the bus to attend the natures call. The bus was stopped by the driver at a place where a live high voltage electric wire was hanging. While getting down from the

bus, the deceased got in touch with the electric wire, fell down on the road and died due to electric shock. The Motor Accident Claims Tribunal after considering the evidence and material on record came to the conclusion that the deceased died due to negligence of the driver of bus and passed the impugned order. The U.P.S.R.TC. challenged the order before this court. This court after considering the several judgments of the Hon'ble Apex court as well as the facts of the case came to the conclusion that it cannot be said that at the time of accident the deceased was not using the motor vehicle, or that the accident did not took place, arising out of the use of the motor vehicle and considering the other points also dismissed the appeal.

21. The other submission of the learned counsel for the appellant was that the driver was not having the valid and effective driving licence on the date of accident therefore the insurance Company is not liable to make payment of compensation. In regard to issue no.3 the learned Tribunal on the basis of a certificate of the licensing authority Sitapur has categorically recorded that the tractor driver Tribhuwan Lal was having driving licence w.e.f. 22.12.1990 to 21.12.1995 and w.e.f. 09.06.2000 to 08.06.2003 while the accident had occurred on 28.05.2000, therefore, undisputably the driver Tribhuwan Lal was not having valid and effective driving licence on the date of accident. But on the basis of the judgment of this court in the case of **Oriental Insurance Co.Ltd. Versus Nathuni Prasad and another (Supra)** the learned Tribunal held that the driver was having valid and effective driving licence on the date of accident. In the said case this court held that if the driver had a valid licence and it was again renewed in his favour, it shall be taken that he was competent to drive the vehicle and the claim petition cannot be dismissed on this ground.

22. The Hon'ble Apex Court, considering this issue, in the case of I**swar Chandra and others Versus Oriental Insurance Co.Ltd. and others (Supra)** and after considering Section 15(1) of the Act regarding renewal of driving licence held that the accident took place on 28th April, 1995 and as on the said date, the renewal application had not been filed, the driver, did not have a valid licence on the date when the vehicle met with the accident. The relevant paragraphs 7 to 10 are extracted below:-

*"**7.** Section 15(1) of the Act and the first proviso appended thereto reads as under :*

"15. Renewal of driving licences. (1) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the dale of its expiry:

Provided that in any case where the application for the renewal of a licence is made more than thirty days after the dale of its expiry, the driving licence shall be renewed with effect from the date of its renewal:"

***8.** From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15(1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed*

from the date of its renewal. The accident took place 28.04.1995. As on the said date, the renewal application had not been filed, the driver, did not have a valid licence on the date when the vehicle met with the accident.

9. *In Swaran Singh (supra), whereupon the learned counsel appearing on behalf of the appellants relied upon, it is stated :*

"45. Thus, a person whose licence is ordinarily renewed in terms of the Motor Vehicles Act and the Rules framed thereunder, despite the fact that during the interregnum period, namely, when the accident took place and the date of expiry of the licence, he did not have a valid licence, he could during the prescribed period apply for renewal thereof and could obtain the same automatically without undergoing any further test or without having been declared unqualified therefor. Proviso appended to Section 14 in unequivocal terms states that the licence remains valid for a period of thirty days from the day of its expiry.

46. Section 15 of the Act does not empower the authorities to reject an application for renewal only on the ground that there is a break in validity or tenure of the driving licence has lapsed, as in the meantime the provisions for disqualification of the driver contained in Sections 19, 20, 21, 22, 23 and 24 will not be attracted, would indisputably confer a right upon the person to get his driving licence renewed. In that view of the matter, he cannot be said to be delicensed and the same shall remain valid for a period of thirty days after its expiry."

10. *This aspect of the matter is now covered by a decision of this Court in National Insurance Company v. Kusum Rai & Others;(2006) 4 SCC 250:2006 (3) T.A.C.1, wherein this Court referring to Swaran Singh (supra), opined :*

"14. This Court in Swaran Singh clearly laid down that the liability of the Insurance Company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not possessed of a valid licence was considered in Swaran Singh stating: (SCC pp. 336-37, para 89)

89. Section 3of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are:

(a) motorcycle without gear,
(b) motorcycle with gear,
(c) invalid carriage,
(d) light motor vehicle,
(e) transport vehicle,
(f) road roller, and
(g) motor vehicle of other specified description.

The definition clause in Section 2of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are goods carriage, heavy goods vehicle, heavy passenger motor vehicle, invalid carriage, light motor vehicle, maxi-cab, medium goods vehicle, medium passenger motor vehicle, motor-cab,

motorcycle, omnibus, private service vehicle, semi-trailer, tourist vehicle, tractor, trailer and transport vehicle. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for motorcycle without gear, [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for light motor vehicle is found to be driving a maxi-cab, motor-cab or omnibus for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence."

23. The aforesaid judgment has been followed by the Hon'ble Apex Court in the case of **Ram Babu Tiwari Versus United India Insurance Co.Ltd. and others (Supra)** and **National Insurance Company Limited Versus Vidhyadhar Mahariwala and others (Supra).** Similar view has been taken by Hon'ble Apex Court in the case of Singh Ram Versus Nirmala and others;(2018) 3 SCC 800, relevant paragraphs 7 and 8 of which are extracted below:-

"7. In the present case it is necessary to note, as observed by the Tribunal, that the owner did not depose in evidence and stayed away from the witness box. He produced a licence which was found to be fake. Another licence which he sought to produce had already expired before the accident and was not renewed within the prescribed period. It was renewed well after two years had expired. The appellant as owner had evidently failed to take reasonable care [Proposition (vii) of Swaran Singh [National Insurance Co. Ltd.v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733]] since he could not have been unmindful of facts which were within his knowledge.

8. In the circumstances, the direction by the Tribunal, confirmed by the High Court, to pay and recover cannot be faulted. The appeal is, accordingly, dismissed. There shall be no order as to costs."

24. In view of above this court is of the considered opinion that the driver Tribhuwan Lal of the tractor, involved in the accident, was not having a valid and effective driving licence on the date of accident on 28.05.2000, as such there was breach of terms and conditions of policy. Therefore, the findings recorded by the learned Tribunal in regard to issue no.3 are perverse and erroneous and not sustainable and are hereby set aside.

25. The last submission of learned counsel for the appellant regarding sitting of the deceased as gratuitous passenger on the tractor, learned counsel for the appellant himself has admitted that the said plea was not taken before the tribunal, therefore, once the said plea was not taken before the tribunal, the same could not have been considered by the learned Tribunal. Now the question arises as to whether the learned Tribunal has

committed any illegality or error in not considering it while holding inquiry in to the claim as provided under Section 168 of the Act of 1988, exercising the powers of the Civil Court under Section 169 of the Act, 1988. Section 169 of the Act provides the procedure and powers of Claims Tribunal, which is extracted below:-

"169. Procedure and powers of Claims Tribunals.--

"(1) In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

26. Section 169(1) of the Act of 1988 provides that in holding any inquiry under section 168, the Claims Tribunal may, subject to any Rules that may be made in this behalf, follow such summary procedure as it thinks fit. Sub Section (2) of Section 169 provides that the claims Tribunal shall have all the powers of a Civil Court for the purpose as mentioned therein and for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Sub-section (3) of Section 169 of the Act provides that subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry. The Tribunal has to follow the summary procedure subject to the Rules while holding the inquiry under Section 168 of the Act.

27. In exercise of powers conferred under the Motor Vehicles Act 1988 the Uttar Pradesh Motor Vehicles Rules, 1998 have been framed. Chapter IX of the Rules deals with the Claims Tribunals. Rule 204 provides the application for compensation. Rule 209 provides that after considering the application and the written statements and oral statements of the parties, the Claims Tribunal shall proceed to frame the issues on which the right decision of the claim appears to it to depend. Rule 211 provides that after framing the issues the Claims Tribunal shall proceed to record evidence thereon which each party may like to produce. Rule 220 provides that the Claims Tribunal in passing orders, shall record concisely in judgment the findings on each of the issues framed and the reasons for such finding and make an award specifying the amount of compensation to be paid by the insurer or in the case of a vehicle exempted under sub-section (2) or (3) of Section 146 by the owner thereof and shall also specify the person or persons to whom compensation shall be payable.

28. In view of above, it is apparent that the Claim petition is to be decided as per the procedure prescribed under the Rules. The issues are to be framed on the pleadings of the parties to which right decision of the claim appears to depend. Therefore, the Claims Tribunal has to decide the petition on the basis of the pleadings. So far as the powers of Civil Court conferred on the Claims Tribunal, Rule 221 provides the provisions of the Code of Civil Procedure 1908, which may be applied to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX, Rule 3 to 10 of Order XIII, Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII. None of the provisions provide that the claims Tribunal would make an inquiry beyond pleadings for the right decision and award the just and reasonable compensation. Therefore the Claims Tribunal has to hold the inquiry into the claim for determining just and reasonable compensation on the basis of pleadings and law.

29. The Insurance Company can contest the claim arising out of the motor accident on the grounds mentioned in Section 149(2) of the Act of 1988, which includes the breach of a specified condition of the policy and a condition excluding liability for injury caused. The plea of gratuitous passenger is based on the terms and conditions of the Insurance policy which can be said to be a breach of the terms and conditions of policy and if the same has not been raised before the Tribunal and no issue was framed in this regard, it cannot be said that the learned Tribunal has committed any error in not considering the same.

30. In view of the aforesaid facts and circumstances since the driver of the tractor involved in the accident was not having a valid and effective driving licence on the date of accident so there was a breach of terms and conditions of policy, therefore, the Insurance Company cannot be fastened with the liability of paying compensation on behalf of owner of the vehicle. Therefore, this court is of the considered opinion that the compensation awarded by the learned Tribunal has to be paid by the owner of tractor no.USH-3956 and trolly no.USX-4189 i.e. the respondent no.5. The impugned judgment and award dated 11.11.2005 is liable to be modified to the extent that the appellant Insurance Company shall make the payment of the compensation awarded by the learned Tribunal with liberty to recover the same from the owner of the vehicle in accordance with law and the judgment of the Hon'ble Apex Court in the case of **Oriental Insurance Company Limited Versus Shri Nanjappan and others;(2004) 13 SCC 224.**

31. The appeal is **partly allowed.** The appellant-Insurance Company is directed to make the payment of awarded compensation to the claimants-respondents within a period of two months from today, if not paid, with liberty to recover the same from the owner of the vehicle as aforesaid. No order as to costs.

32. The Lower Court record and the amount deposited before this Court, if any alongwith the statutory deposit shall be remitted to the concerned Tribunal within a period of four weeks from today for adjusting towards the compensation to be paid to the claimants under the award.

(2019)10ILR A 1319

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2019

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
FAFO (D) No. 91 of 2018
&
FAFO (D) Cases No. 95 of 2018 & 93 of 2018

Bharat Petroleum Corporation Ltd.
...Appellant
Versus
Union of India ...Respondent

Counsel for the Appellant:
Sri SM Singh Royekwar

Counsel for the Respondent:
Sri Neerav Chitravansi

A. Railway Claims Tribunal Act, 1987 - Section 16 - Railway Claims Tribunal (Procedure) Rules, 1989 - Rule 3 & 9 - Practice and Procedure - Subsequent change in the territorial jurisdiction of the Bench - Application not be returned for presentation before the appropriate Tribunal.

Held:-If at the time when the application is moved a Bench had territorial jurisdiction over the matter then merely because of subsequent change in the territorial jurisdiction - the application is not be returned for presentation before the appropriate Tribunal - Jurisdiction of a court is to be normally ascertained at the time of the inception of a suit.

At the time the application seeking compensation was moved - Lucknow Bench had territorial jurisdiction – Application could not be returned to the appellant for their presentation before Gorakhpur Bench as a result of a subsequent change in the territorial jurisdiction of Lucknow Bench. (Para 33)

B. Practice and Procedure - Once the Tribunal holds that it had no territorial jurisdiction it became functus officio - it could not delve into the merits of the matter and give any findings on merit or make any clarification.

Held: -Once the Tribunal comes to the conclusion that it had no territorial jurisdiction over the matter, it is left with no other option but to pass an order for return of the applications. It is not open to the Tribunal to clarify that the appellant would not be entitled for exclusion of the period during which the applications remained pending before the Lucknow Bench from the period prescribed under law of limitation. The clarification made by the Tribunal is without jurisdiction. (Para 35,37 & 38)

Appeals allowed (E-5)

List of cases cited: -

1.Sharma Singh Vs Sadhu Singh AIR 1928 Lah 484

2.Raizada Topandas Vs Gorakhram Gokalchand AIR 1964 SC 1348

3.Athmanathaswami Devasthanam Vs K. Gopalaswami Ayyangar AIR 1965 SC 338

4.Alamchand Birumal Vs Motilal Balchand AIR 1968 MP 112

5.Harnam Das Vs Salamat Rai Civil Revision No. 140 of 1950

6.R.S.D.V. Finance Co. (P) Ltd. Vs Shree Vallabh Glass Works Ltd. (1993) 2 SCC 130

7.Prasant Kumar Choudhury Vs Union of India 2006 SCC OnLine Ori 58

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

1. FAFOD No. 91 of 2018, FAFOD No. 95 of 2018 and FAFOD No. 93 of 2018 involve a common question of law and as such they were heard together and are being decided by a common order.

FAFOD No. 91 of 2018

2. This first appeal from order has been filed challenging the order dated 10.03.2017 passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow in Case No. OA/I/02/2011 (Bharat Petroleum Corporation Ltd. v. Union of India).

3. On 04.07.2002, the Bharat Petroleum Corporation Limited (for short 'the Corporation') moved an application under Section 16 of the Railway Claims Tribunal Act, 1987 before the Railway Claims Tribunal, Lucknow Bench, Lucknow seeking compensation to the tune of Rs. 93,437/- against the respondent. It was alleged that on 19.09.2008, the appellant had booked a consignment of High Speed Diesel (HSD) under Railway Receipt No. 212006900 from Numaligarh (Assam) to Mughalsarai in District Chandauli (Uttar Pradesh). It was alleged that there was shortage in six tank wagons having No. SR 13895, WR 986693, NR 108103, WR 906925 and WR 906753 at the destination station.

4. The respondent resisted the claim of the appellant. In its written statement the respondent denied its liability for the alleged loss. For the purpose of adjudication of the present appeal, it is not necessary to set out in detail all the pleas taken by the respondents in their written statement. Based upon the pleadings of the parties, the Tribunal framed five issues. There was no issue with respect to the jurisdiction of the Tribunal.

5. On 10.03.2017 when the claim petition came up for hearing, the respondent raised an objection that the Lucknow Bench of the Tribunal had no territorial jurisdiction to hear the matter. The Tribunal after hearing the counsels for the parties held that it had no territorial jurisdiction and accordingly passed an order for returning the application to the appellant for presentation of the same before the appropriate forum. The Tribunal further added that while calculating the limitation before the other forum, the appellant would not be entitled to exclusion of the time spent in pursuing the matter before the Lucknow Bench. The relevant portion of the order dated 10.03.2017 is extracted below:-

"Learned counsel for the respondent has submitted short arguments. It has been contended therein that as per *legal position, since neither the booking point, Numaligarh nor the destination point Mughalsarai of the disputed consignment falls within territorial jurisdiction of this Bench, as such, claim application is liable to be rejected straightway.*

I agree with the contention of the respondent as the regional office of the company is in NOIDA. The originating and destination stations are on Eastern Railway, therefore, as per Schedule I, this case does not come within the territorial jurisdiction of the RCT Lucknow Bench.

Accordingly, in my opinion the applicant should approach the proper forum designated to entertain this case for appropriate remedy.

Under this situation, issues need not be determined and the application is liable to be returned to the applicant to present it before the appropriate forum competent to admit and decide this case.

ORDER

The application moved by the applicant Company, is hereby returned to

the applicant to present before the appropriate Tribunal. It is clarified that applicant shall not be entitled for exclusion of the period during which this case remained pending before this Tribunal from the period prescribed under law of limitation. Parties shall bear their own costs. After return as directed above, the remaining record shall be consigned."

(emphasis supplied)

FAFOD No. 95 of 2018

6. This first appeal from order has been filed challenging the order dated 25.11.2016 passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow in Case No. OR0200029 (Bharat Petroleum Corporation Ltd. v. Union of India).

7. On 28.03.2002, the Bharat Petroleum Corporation Limited (for short 'the Corporation') moved an application under Section 16 of the Railway Claims Tribunal Act, 1987 before the Railway Claims Tribunal, Lucknow Bench, Lucknow seeking compensation to the tune of Rs. 2,26,888/- against the respondent. It was alleged that on 30.11.2001, the appellant had booked a consignment of Motor Spirit (MS) under Railway Receipt No. 588435 from Numaligarh (Assam) to Mughalsarai in District Chandauli (Uttar Pradesh). It was alleged that there was short delivery of Motor Spirit loaded in tank wagon no. 95464 at the destination station.

8. The respondent resisted the claim of the appellant. In its written statement the respondent denied its liability for the alleged loss. For the purpose of adjudication of the present appeal, it is not necessary to set out in detail all the pleas taken by the respondents in their written statement.

9. On 25.11.2016, after hearing the counsels for the parties the Tribunal held that it had no territorial jurisdiction and accordingly passed an order for returning the application to the appellant for presentation of the same before the appropriate forum. The Tribunal further added that while calculating the limitation before the other forum, the appellant would not be entitled to exclusion of the time spent in pursuing the matter before the Lucknow Bench. The relevant portion of the order dated 25.11.2016 is extracted below:-

"The Regional office of the applicant company is in NOIDA. The originating station is on NEF Railway and destination station Mughalsarai is as present on East Central Railway, when the claim petition was filed it was on Eastern Railway. Mughalsarai is in Varanasi district which comes under the jurisdiction of Gorakhpur Bench of RCT, therefore as per Schedule I, the plaint does not come within the terrirorial jurisdiction of the RCT Lucknow Bench.

ORDER

The application moved by the applicant company, is hereby returned to the applicant to present before the appropriate Tribunal. It is clarified that applicant shall not be entitled for exclusion of the period during which this case remained pending before this Tribunal from the period prescribed under law of limitation. Parties shall bear their own costs. After return as directed above, the remaining record shall be consigned."

(emphasis supplied)

FAFOD No. 93 of 2018

10. This first appeal from order has been filed challenging the order dated 17.03.2017 passed by the Railway Claims Tribunal, Lucknow Bench, Lucknow in Case No. OR0200031 (Bharat Petroleum Corporation Ltd. v. Union of India).

11. On 28.03.2002, the appellant, the Bharat Petroleum Corporation Limited (for short 'the Corporation') moved an application under Section 16 of the Railway Claims Tribunal Act, 1987 before the Railway Claims Tribunal, Lucknow Bench, Lucknow seeking compensation to the tune of Rs. 8,15,930/- against the respondent. It was alleged that on 20.08.2000, the appellant had booked a consignment of High Speed Diesel (HSD) under Railway Receipt No. 583788 from Numaligarh (Assam) to Mughalsarai in District Chandauli (Uttar Pradesh) in good and sound condition. It was alleged that one of the tank wagons having No. ER 17020 had not been delivered at the destination station.

12. The respondent resisted the claim of the appellant. In its written statement the respondent denied its liability for the alleged loss. For the purpose of adjudication of the present appeal, it is not necessary to set out in detail all the pleas taken by the respondents in their written statement. Based upon the pleadings of the parties, the Tribunal framed three issues. There was no issue with respect to the jurisdiction of the Tribunal.

13. On 17.03.2017 when the claim petition came up for hearing, the respondent raised an objection that the Lucknow Bench of the Tribunal had no territorial jurisdiction to hear the matter. The Tribunal after hearing the counsels for the parties held that it had no territorial jurisdiction and accordingly passed an order for returning the application to the appellant for presentation of the same before the appropriate forum. The Tribunal further added that while calculating the limitation before the other forum, the appellant would not be entitled to exclusion of the time spent in pursuing the matter before the Lucknow Bench. The relevant portion of the order dated 17.03.2017 is extracted below:-

"Learned counsel for the respondent has submitted short arguments. It has been contended therein that *as per legal position, since neither the booking point, Numaligarh nor the destination point Mughalsarai of the disputed consignment falls within territorial jurisdiction of this Bench, as such, claim application is liable to be rejected straightway.*

I agree with the contention of the respondent as the regional office of the company is in NOIDA. *The originating and destination stations are on Eastern Railway, therefore, as per Schedule I, this case does not come within the territorial jurisdiction of the RCT Lucknow Bench.* But I don't agree with the arguments of learned counsel for the respondent that the application deserves to be rejected. *Obviously, when the Bench has no jurisdiction to entertain this case, the same cannot be rejected as it will amount disposal of the case wherefor this Bench has no jurisdiction.*

Accordingly, in my opinion the applicant should approach the proper

forum designated to entertain this case for appropriate remedy.

Under this situation, issues need not be determined and the application is liable to be returned to the applicant to present it before the appropriate forum competent to admit and decide this case.

ORDER

The application moved by the applicant Company, is hereby returned to the applicant to present before the appropriate Tribunal. It is clarified that applicant shall not be entitled for exclusion of the period during which this case remained pending before this Tribunal from the period prescribed under law of limitation. Parties shall bear their own costs. After return as directed above, the remaining record shall be consigned."

(emphasis supplied)

14. Sri S.M. Singh Royekwar, learned counsel for the appellant has made a two-fold submission: firstly, according to him, at the time when the applications was moved before the Lucknow Bench, it had territorial jurisdiction over the matter and as such by a subsequent change in the territorial jurisdiction of the Lucknow Bench, the applications moved by the appellant could not be returned for presentation before the appropriate Tribunal; secondly, the counsel submits that once the Tribunal came to the conclusion that it had no territorial jurisdiction in the matter it became *functus officio* and it could not have passed an order on merit or made any clarification.

15. Per contra Sri Neerav Chitravanshi, learned counsel for the respondent has supported the orders under challenge in the three appeals under consideration.

16. In order to provide relief to the rail-users by way of expeditious payment of compensation to the victims of rail-accidents and to those whose goods are lost or damaged in rail transit, the Government of India decided to establish the Railway Claims Tribunal with Benches in different parts of the country, and with judicial and technical members. For this purpose, the Government of India promulgated the Railway Claims Tribunal Act, 1987 (for short 'Act'). Section 13 of the Act, which provides for the jurisdiction, powers and authority of the Tribunal, reads as under:

"13. Jurisdiction, powers and authority of Claims Tribunal.-(1) The Claims Tribunal shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court or a Claims Commissioner appointed under the provisions of the Railways Act,--

(a) relating to the responsibility of the railway administrations as carriers under Chapter VII of the Railways Act in respect of claims for--

(i) compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to a railway administration for carriage by railway;

(ii) compensation payable under Section 82-A of the Railways Act or the rules made thereunder; and

(b) in respect of the claims for refund of fares or part thereof or for refund of any freight paid in respect of

animals or goods entrusted to a railway administration to be carried by railway.

17. The expression "appointed day' is defined in section 2(b) of the Act to mean the date with effect from which the Claims Tribunal is established under section 3 of the Act.

18. On the establishment of Railway Claims Tribunal under the Act, on and from the appointed day i.e. 08.11.1989, no court or authority except the Tribunal established under the Act alone had the jurisdiction to exercise power or authority in relation to the matters referred to under Section 13 of the Act and every suit, claim or other legal proceedings (other than an appeal) pending before any court, Claims Commissioner or other authority immediately before the appointed day dealing with the matters enumerated under Section 3 of the Act stood transferred to the Tribunal.

19. Section 14 of the Act which relates to the distribution of business amongst the Benches of the Claims Tribunal reads as under:

14. Distribution of business amongst Benches.--(1) Where any Benches are constituted, the Central Government may, from time to time, by notification, make provisions as to the distribution of the business of the Claims Tribunal amongst the Benches and specify the matters which may be dealt with by each Bench.

(2) If any question arises as to whether any matter falls within the purview of the business allocated to a Bench, the decision of the Chairman shall be final.

Explanation.--For the removal of doubts, it is hereby declared that the expression "matters" includes an application under Section 20.

20. In exercise of the power under Section 30 of the Railway Claims Act, 1987, the Railway Claims Tribunal (Procedure) Rules, 1989 (for short 'Rules') have been framed by the Central Government. Rule 3 and 9 of the Rules are being reproduced below for ready reference.

"3. Territorial jurisdiction of Benches.--(1) The number of Benches, the Headquarter of and the territorial jurisdiction of a bench shall be as specified in Schedule I and Schedule I(A).

(2) *If an application is received by a Bench which does not have territorial jurisdiction to deal with the matter, the Registrar of the Bench shall return the application to the applicant.*

(3) Notwithstanding anything contained in sub-rule (2) the applicant may apply to the Chairman and the Chairman may thereupon for reasons recorded in writing, direct a Bench other than the Bench before which an application has been filed to hear such application and issue such orders as may be necessary for the transfer of the application.

*

* *

9. Place of filing application for compensation for loss, damage, destruction, deterioration or non-delivery of goods or animals.--An application for compensation referred to in sub-clause (i) of clause (a) of sub-section (1) of Section 13 of the Act may be filed before the Bench *having*

territorial jurisdiction over the place where--

(a) the goods or animals were delivered for carriage; or

(b) where the destination station lies; or

(c) the loss, destruction, damage or deterioration of goods or animals occurred."

(emphasis supplied)

21. As per Schedule I of the Rules, the Headquarters of the Benches of the Tribunal were established at 17 places, mentioned therein, all over India. The districts over which the Benches were to exercise territorial jurisdiction were mentioned against their names in column 3. In the State of Uttar Pradesh, the Headquarters of the Benches were established at three places namely Ghaziabad, Gorakhpur and Lucknow. The relevant portion of Schedule I of the Rules is extracted below:

SCHEDULE I
(See Rule 3)

Sl. No.	Headquarters of the Bench of the Railway Claims Tribunal	Territorial jurisdiction of the Bench
(1)	(2)	(3)
9.	Guwahati	Assam, Sikkim, Mizoram, Arunachal Pradesh, Tripura, Manipur, Meghalaya, Nagaland.
11.	Gorakhpur	Districts of Gorakhpur, Deoria, Ballia, Gazipur, Azamgarh, Nau, Basti, Siddharthnagar, Mirzapur, Robertsgang, Jaunpur, Faizabad, Gonda, Bahraich, Sultanpur, Pratapgarh, Lakhimpur, Allahabad, Varanasi, Bareilly, Sitapur, Pilibhit, Nanital, Shahjahanpur, Badaun and Hardoi of Uttar Pradesh.
12.	Lucknow	All Districts of Uttar Pradesh except those included in Column (3) against serial no. 11

22. A perusal of column 3 corresponding to serial no. 11 of Schedule I of the Rules shows that district Chandauli, was not included therein. As per column 3 corresponding to serial no. 12, district Chandauli fell within the territorial jurisdiction of Lucknow Bench.

23. In exercise of the powers under Section 30 of the Act, by notifications dated 04.02.1997, 29.02.2000, 02.12.2002, 22.10.2003 and 15.02.2006, Schedule I of the Rules was amended, but District Chandauli continued to remain under the territorial jurisdiction of Lucknow Bench of the Tribunal. By notification dated 11.04.2007, Schedule I of the Rules was again amended and for the first time the territorial jurisdiction over district Chandauli was shifted from Lucknow Bench to Gorakhpur Bench. The relevant portion of the notification dated 11.04.2007 is extracted below:-

"1. (1) These rules may be called the Railway Claims Tribunal (Procedure) Amendment Rules, 2007.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Railway Claims Tribunal (Procedure) Rules, 1989, in the Schedule I at Serial Number 11, for the entry in Column 3, the following entry shall be *substituted* namely:-

"District Gorakhpur, Deoria, Ballia, Gazipur, Azamgarh, Mau, Basti, Siddharthnagar, Mirzapur, Robertsgang, Jaunpur, Faizabad, Gonda, Bahraich, Varanasi, Maharaj Ganj, Kushinagar,

Shravasti, Sant Kabir Nagar, *Chandauli*, Sant Ravi Das Nagar, Balrampur and Ambedkar Nagar of Uttar Pradesh."

(emphasis supplied)

24. As per Rule 9 of the Rules, the application for compensation for non delivery of goods could be filed either before the Bench having territorial jurisdiction over the place where the goods were delivered for carriage or before the Bench having territorial jurisdiction over the destination station. In the cases at hand, the consignment was booked at Numaligarh for Mughalsarai. Numaligarh, the booking station, fell in the State of Assam, whereas, Mughalsarai, the destination station, fell in district Chandauli in the State of Uttar Pradesh, and as such, as per Schedule I of the Rules, as it stood at the time of filing of the applications, the appellant could have invoked the jurisdiction of either the Guwahati Bench of the Tribunal, which had territorial jurisdiction over the entire State of Assam or before the Lucknow Bench which had territorial jurisdiction over district Chandauli, under which the destination station fell. The appellant chose Lucknow Bench over Guwahati Bench. It is not in dispute that at the time of filing the applications, the Lucknow Bench had territorial jurisdiction in the matter. It was only by a subsequent notification dated 11.04.2007 that the territorial jurisdiction with regard to District Chandauli was transferred to the Tribunal at Gorakhpur.

25. Under Sub-rule (2) of Rule 3 of the Rules, if an application is received by a Bench which does not have territorial jurisdiction to deal with the matter, the Registrar of the Bench is obliged to return the application to the applicant. In the present case, since at the time of filing the application, the Lucknow Bench had territorial jurisdiction over the matter, the application was not returned by the Registrar under Rule 3(2) of the Rules.

26. At this stage, it is necessary to delve into the law regarding return of plaint, where the court is found to be lacking territorial or pecuniary jurisdiction. In *Raizada Topandas v. Gorakhram Gokalchand, AIR 1964 SC 1348,* the Apex Court has held that the jurisdiction of a court is to be normally ascertained at the time of the inception of a suit. The Apex Court cited with approval the case of *Govindram Salamatrai* in the following words:-

"The jurisdiction of a Court is normally and ordinarily to be determined at the time of the inception of a suit. Therefore when a party puts a plaint on file, it is at that time that the Court has to consider whether the Court had jurisdiction to entertain and try that suit or not."

(emphasis supplied)

27. In *Sharma Singh v. Sadhu Singh, AIR 1928 Lah 484,* the Lahore High Court, while dealing with a matter relating to return of plaint under Order 7 Rule 10 of the Code of Civil Procedure, 1908 held that -

"Order 7, R. 10, Civil P.C., does not apply to cases where a Court originally had jurisdiction to try the suit but discovered at the time of passing a decree that it is incompetent to pass the decree because of the pecuniary valuation."

28. In *Alamchand Birumal v. Motilal Balchand, AIR 1968 MP 112*, the Madhya Pradesh High Court in paragraph 6 of the report has held:

"6. It cannot also be maintained that on the investment of the Court of Additional District Judge, Satna, with the powers of a Court of Small Causes by the notification dated the 1st January 1959, the Court of Civil Judge, Second Class, Satna was, under section 16 of the Provincial Small Cause Courts Act, 1887, deprived of the jurisdiction to try the suit. That provision is in the following terms--

"16. Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

This provision does not deprive a regular court altogether of jurisdiction in suits cognizable by a Court of Small Causes: it merely prevents the exercise of that jurisdiction by a regular court if at the time the suit is filed there is a Court of Small Causes having jurisdiction within the same local limits. Admittedly, in the present case there was no court of Small Causes at Satna having jurisdiction to try the suit when it was filed in the Court of Munsiff. Satna Section 16 does not, therefore, in any way oust the jurisdiction of the Court of Civil Judge, Second Class, Satna, where the suit stood transferred under section 27 of the Act, to try the suit. In this connection it would be pertinent to refer to Order 7, Rule 10 of the Code of Civil Procedure, which says--

"The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted."

Under this rule, a plaint can be returned only if at the time it was filed there was another court in which the suit should have been instituted. Here, at the time the suit was filed in the Court of Munsif, Satna, there was no Court of Small Causes and no small cause powers had been conferred on the Court of Additional District Judge, Satna. The subsequent conferment of small cause powers on the Court of Additional District Judge. Satna, could, therefore, afford no ground to the Civil Judge. Second Class, Satna, to return the plaint. In our judgment, the court of the Civil Judge, Second Class, Satna, continues to have jurisdiction to try the applicant's suit."

(emphasis supplied)

29. In *Harnam Das v. Salamat Rai, Civil Revision No. 140 of 1950*, a learned Single Judge of the High Court of PEPSU has held as under:-

"3. Order 7, R. 10(1), Civil P.C. says that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. The *words "in which the suit should have been instituted" obviously do not mean the Court in which the suit should be instituted.* The provisions of this rule regarding return of the plaint appear to me *to apply to cases in which the suit when originally instituted was not properly instituted and not to cases in which the suit was instituted in the proper Court, but subsequently that Court ceases to exercise jurisdiction and another Court with restricted pecuniary jurisdiction is constituted to take its place. It is thus the defect of presentation of the plaint in the first instance in a wrong Court that attracts the applicability of O. 7, R. 10,*

Civil P.C., and that rule does not govern cases where the suit when instituted did not suffer from any defect whatsoever.

(emphasis supplied)

30. Section 18 of the Act deals with the procedure and powers of Claims Tribunal. Relevant portion of section 18 is extracted below:-

"18. Procedure and powers of Claims Tribunal.- (1) The Claims Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Claims Tribunal shall have powers to regulate its own procedure including the fixing of places and times of its enquiry."

31. In *Prasant Kumar Choudhury v. Union of India, 2006 SCC OnLine Ori 58,* a learned Single Judge of Orissa High Court has considered the applicability of the Civil Procedure Code to the proceedings before the Railway Tribunal and has held as under:-

"On a plain reading of the aforesaid provision, it is not possible to accept the contentions of the learned counsel for the Railway since there exists no specific bar to the application of the Code of Civil Procedure in the aforesaid provision of law. On the contrary, *the said provision basically unshackles the Tribunal from the procedural laws mandated in the Code while at the same time maintaining the requirement of compliance of natural justice. The provision is clearly ''enabling' the provision and not a ''disabling' provision. This provision does not specifically take away from the Tribunal the power and authority to exercise any or all provisions of C.P.C.* and therefore, it is clear that Section 34, C.P.C. continues to be vested in the authority of the Railway Claims Tribunal."
(emphasis supplied)

32. This Court is in respectful agreement with the view expressed by the Orissa High Court, and as such the law on return of plaint, as laid down in the judgments discussed above, will also apply to the present case.

33. Regard being had to the aforesaid enunciation of law, it is to be seen whether the opinion expressed by the Tribunal is correct and justified. In the cases at hand, it is undisputed that at the time the applications seeking compensation were moved by the appellant before the Lucknow Bench, the Lucknow Bench had territorial jurisdiction over the matter and as such in view of the settled legal position, this Court is of the firm opinion that the applications could not be returned to the appellant for their presentation before Gorakhpur Bench as a result of a subsequent change in the territorial jurisdiction of Lucknow Bench. The impugned orders cannot be sustained.

34. The Tribunal has not only passed orders for returning the applications to the appellant but has also further added that the appellant would not be entitled to exclude the period during which the applications remained pending before the Lucknow Bench, from the period prescribed under the law of limitation.

35. It is settled that once a court comes to a conclusion that it has no jurisdiction, there is no occasion for it to

delve into the merits of the matter or give any other findings. In *Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, AIR 1965 SC 338* the Apex Court held as under:

"14. The last point urged is that when the civil court had no jurisdiction over the suit, the High Court could not have dealt with the cross-objection filed by the appellant with respect to the adjustment of certain amount paid by the respondent. This contention is correct. *When the Court had no jurisdiction over the subject-matter of the suit it cannot decide any question on merits. It can simply decide on the question of jurisdiction and coming to the conclusion that it had no jurisdiction over the matter had to return the plaint."*

(emphasis supplied)

36. In *R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130* the Apex Court reiterated that

"7. ... The Division Bench was totally wrong in passing an order of dismissal of suit itself when it had arrived to the conclusion that the Bombay Court had no jurisdiction to try the suit. *The only course to be adopted in such circumstances was to return the plaint for presentation to the proper court and not to dismiss the suit."*

(emphasis supplied)

37. In view of the settled legal position, once the Tribunal came to the conclusion that it had no territorial jurisdiction over the matter, it was left with no other option but to pass an order for return of the applications. It was not open to the Tribunal to clarify that the appellant would not be entitled for exclusion of the period during which the applications remained pending before the Lucknow Bench from the period prescribed under law of limitation. The clarification made by the Tribunal is without jurisdiction.

38. In any case, after return of the applications, it was for the Tribunal having jurisdiction, and where applications are subsequently filed, to apply its mind and arrive at a determination regarding whether the appellant was pursuing its remedy before the Lucknow Bench of the Tribunal in a bonafide manner and in good faith. Thereafter, depending upon the aforesaid determination, the Tribunal would have decided whether or not the appellant was entitled to the benefit of exclusion of the time spent in pursuing the remedy before the Lucknow Bench.

39. In view of the above, even if the applications moved by the appellant are to be returned for filing them before the appropriate Bench, the Tribunal in the present matters had no jurisdiction to pass orders that the appellant would not be entitled for exclusion of the period during which the claims remained pending before the Lucknow Bench of the Tribunal from the period prescribed under law of limitation. On this ground also the impugned order cannot be sustained.

40. In view of the discussion made above, the order dated 10.03.2017 passed in Case No. OA/I/02/2011 (Bharat Petroleum Corporation Ltd. v. Union of India) (under challenge in FAFOD No. 91 of 2018); the order dated 25.11.2016 passed in Case No. OR0200029 (Bharat

Petroleum Corporation Ltd. v. Union of India) (under challenge in FAFOD No. 95 of 2018); and the order dated 17.03.2017 passed in Case No. OR0200031 (Bharat Petroleum Corporation Ltd. v. Union of India) (under challenge in FAFOD No. 93 of 2018) by the Railway Claims Tribunal, Lucknow Bench, Lucknow are hereby set aside. The appeals stand allowed. All the three matters are remanded back to the Tribunal to decide the same in accordance with law.

41. Costs made easy.

(2019)10ILR A 1330

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.10.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE ABDUL MOIN, J.

Misc. Single No. 35387 of 2018

Smt. Rinki ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Mishra

Counsel for the Respondents:
C.S.C., Sri Subhas Bisaria, Sri W.U. Ahmad

A. Code of Civil Procedure - Reference made - instructions of S.G- not disclosing full and complete facts including the order passed by Hon'ble Supreme Court on the interlocutory application moved by State of U.P. itself-the said instructions could not be acted upon, however, in absence of any specific instruction to learned State counsel to submit before this Court that State did not have any objection if result of those admitted students is declared by the University, the contempt proceedings against officers of the State may not be initiated/instituted.

List of Cases Cited: -

1. College of Professional Education and others vs. State of U.P. and others 2013 (2) SCC 721

2. Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P. and others (2013) 2 SCC 617

3. Bharat Builder Pvt Ltd and others vs. Parijat Flat Owners Coop. Housing Society Ltd. (1999) 5 SCC 622

4. Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd and others (1985) 1 SCC 260

5. Cassel and Co. Ltd. v. Broome

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. This case concerns itself with the sanctity of admissions made by certain colleges in B.Ed course in the academic session 2013-2014 after 16.09.2013 and holding of examination of such students and declaration of their results. Hon'ble Single Judge in this case finding himself unable to agree with the judgment rendered on 03.12.2018 in a bunch of writ petitions, leading writ petition being ***Ankit Kumar and others vs. State of U.P. and others*** (hereinafter referred to as '**Ankit Kumar**'), vide order dated 17.12.2018 has referred the following two questions for consideration by a larger bench.

"(i). Whether it was open for the State Government or this Court to have relaxed the time schedule fixed under the orders of the Apex Court in College of

Professional Education (Supra), as reiterated and re-inforced in Maa Vaishno Devi Mahila Mahavidyalaya (Supra), as also the order dated 25.11.2013 passed in I.A. No. 109 and 110 of 2013 in College of Professional Education, fixing 16th September, 2013, by permitting/directing declaration of results of students admitted in B.Ed Course in the Academic Session 2013-14 after 16.09.2013?

(ii). Whether the instructions of the State Government dated 28th November, 2018 could be acted upon or that it amounts to an act in disobedience/derogation of the orders of the Apex Court, referred to above, rendering the responsible officers of the State liable to be proceeded with under contempt jurisdiction, in view of the observations contained in para 90.2 of the Supreme Court judgment in Maa Vaishno Devi Mahila Mahavidyalaya (supra)."

2. This larger bench has thus assembled to consider the aforesaid reference.

3. This petition by **Smt Rinki** has been filed with the prayer to issue a direction to the authorities of Chaudhary Charan Singh University, Meerut to declare her result of B.Ed examination for the academic session 2013-2014 in light of her admission made to the aforesaid course in pursuance of Government Orders dated 26.09.2013 and 08.10.2013.

4. Before dealing with the issues involved in this reference, the facts and circumstances which led the State Government to issue Government Orders dated 26.09.2013 and 08.10.2013, are necessary to be noticed.

5. For making admissions to B.Ed course in various Universities and the Colleges affiliated/associated with them in the State of U.P. for the academic session 2013-2014, a "Joint Entrance Examination B.Ed 2013' was held by Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur which was nominated as the Nodal University. On the basis of said Joint Entrance Examination, counselling of successful candidates for being given admission in various institutions was held between 01.06.2013 to 27.06.2013. After this counselling, a pooled counselling was held, however, even after the pooled counselling, around 50,000 seats remained vacant and accordingly to fill up these 50,000 seats, another pooled counselling was held between 04.08.2013 to 29.08.2013. Even after second pooled counselling, 34294 seats remained vacant. The State Government thus considered the situation which arose on account of 34924 seats remaining vacant and for the said purpose, a high level meeting chaired by the Principal Secretary of the State Government in the Department of Higher Education was held on 25.09.2013 which was attended to by the Special Secretary, Department of Higher Education, Registrar of the Nodal University i.e. the Gorakhpur University, Deputy Registrar and the State Nodal Officer, Joint Entrance Examination B.Ed-2013, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur. The order dated 26.09.2013 was thus issued by the State Government on the basis of deliberations held and decisions taken in the said meeting. As a matter of fact, the said order dated 26.09.2013 issued by the State Government is the minutes of meeting held on 25.09.2013.

6. Perusal of the said Government Order dated 26.09.2013 reveals that while taking decision to meet the exigency

which arose on account of unfilled 34294 seats, the Committee referred to the judgment of Hon'ble Supreme Court, dated 22.07.2011 passed in Special Leave to Appeal (Civil) No.13040 of 2010, ***College of Professional Education and others vs. State of U.P. and others, reported in 2013 (2) SCC 721.*** The State Government is thus said to have taken note of paragraph 4 (vi) (b) of the judgment in the case of ***College of Professional Education and others*** (supra) and decided in the meeting held on 25.09.2013 that a list of candidates, on the basis of their merit who appeared in Joint Entrance Examination and were not admitted, be sent to all self-financed B.Ed institutions and further that institutions shall then admit the students from the said list after inviting applications through advertisement to be published in newspapers, in accordance with the ranking of the candidates in the merit. The State Government also decided vide Government Order dated 26.09.2013 that last date for completing the process will be 15.10.2013. Pursuant to the said Government order dated 26.09.2013, the State Government issued another Government Order dated 08.10.2013 directing the Nodal University that admissions to B.Ed course shall be made only in accordance with the merit of the candidates as per the list to be provided by the Nodal University to the institutions and that the seats on which allotment of students could not be made on the basis of counselling, shall be treated to be vacant and further that the seats against which candidates do not take admission till 12.10.2013 shall also be treated to be vacant.

7. Assertion made by the petitioner in this case is that she was admitted on the basis of the process decided and implemented by the State Government in terms of the Government Orders dated 26.09.2013 and 08.10.2013 and thus her admission is lawful and accordingly she is entitled not only to take admission in B.Ed course but also for declaration of her result.

8. Reference made to this bench thus revolves around the time schedule fixed by Hon'ble Supreme Court in its judgment and order dated 22.07.2011 in the case of ***College of Professional Education and others*** (supra). Paragraph 4 of the said judgment contains a schedule which is based on broad consensus regarding procedure of admission between the institutions and the State Government. Paragraph 4 of the said judgment is thus extracted hereinbelow:-

"4. In regard to admissions for academic sessions 2012- 2013 and subsequent academic years, the institutions and the state government have arrived at a broad consensus regarding the procedure, the terms of which have been set out in the affidavit filed by Dr. R.K. Gupta, Associate Professor, Department of Higher Education, Government P.G. College, Noida on behalf of the state of U.P. The terms agreed are as under:

(i) To ensure that all seats in the colleges are filled through counseling pursuant to Entrance Examination, the Colleges are required to update their websites daily and display the number of students admitted as well as the number of seats vacant. For this purpose, each college shall have an official websites giving the details of total sanctioned seats, bank account etc. During the course of counseling, they will update

their official website on day to day basis regarding vacant seats after admissions. The colleges shall also communicate the said particulars on daily basis to the Registrar of concerned University (Examination conducting body) through e- mail/telephone/Fax.

(ii) Every college will display its Bank Account Number and its name on its website and also provide to the concerned University (the examination conducting body). Any student, who is allotted to a particular college through counseling after the B.Ed. Joint Entrance Examination, will deposit his fees directly with the CBS Branch of the said Bank Account of the college to which he is allotted, within three days from the day of counseling. Subsequently, the said student will make available the copy of the proof of fee deposited to the concerned college and the concerned University. The concerned college will display the same on its website along with the details of the students. If any student faces any difficulty in depositing of the fee in the CBS account of the college to which he is allotted, he can immediately contact the University, the college and if required then concerned District Magistrate.

(iii)The schedule for admission for the academic session 2012-13 and subsequent years, shall be as under:

1. Publication of Advertisement 01.02.2011

2. Sale of Application Forms and 10-2-2012 to 10-3-2012 their submission

3. Date of Entrance Examination 20.04.2012 to 25.04.2012

4. Declaration of Result 25.05.2012 to 30.05.2012

5. Commencement and completion of counselling 01.06.2012 to 25.06.2012

6. Last Date of Admissions after counseling 28.06.2012

7. Commencement of Academic session 01.07.2012

[Note : for subsequent years, the same dates and months will apply]

(iv) From 2012-13, there will be only one counseling, which will continue for a period of 25 days. During the counseling, if it is found that a candidate/s allotted to any college do not turn up to take admission, the college shall inform the Counseling Authority and upon receipt of such information, another set of candidates will be sent to such colleges after counseling. The said counseling will be continuous to expedite the procedure of admission till closure of admission, without any second or third round of counseling.

(v) As per the schedule agreed for the year 2011-12, as per order dated 11.3.2011 of the Supreme Court, the admission process will be completed by 31.07.2011 after the first counseling. Subsequently, any vacant seats ascertained, will be filled up through second phase of counseling conducted from 03.08.2011 to 07.08.2011. Thus, the whole process of admission to all the seats of B.Ed. course shall be completed by 14.08.2011.

(vi) After that date (14.08.2011) if any seat remains vacant in a private college then to fill up the same the following course may be followed to ensure filling up all the vacant seats through counseling only:-

(a) A waiting list in the form of pool of about 5000 candidates will be prepared. The waiting list may be enlarged as per the requirement to fill up the vacant seats. The candidates registered with the pool will have to give an undertaking to the effect that they can

be sent to any college having vacant seat for admission and they will have no objection. The candidates registered with the pool/waiting list will be arranged as per merit and will be allotted the colleges having vacant seats in their subjects according to their merit. This option will be exercised only after the end of counseling and be adopted only on the request of the colleges for filling up their remained vacant seats within three days from the last date of admission.

In such circumstances, the concerned university will provide the students from waiting list accordingly to fill up the seats but the entire process will be completed within 10 days, i.e. by 24.08.2011 for the session 2011-12 and 8th of July for the next consecutive years.

The wait listed pool candidates, shall along with the undertaking, deposit the fees with the University concerned and in case the candidates fails/refuses to join the allotted college as per his undertaking then the fee deposited with university will be remitted to the account of the college immediately, to which the students has been allotted by the university provided that the seats remained vacant during that academic session.

(b) After the counseling is over, the concerned University will continue to allot the candidates from the above mentioned waiting list against the vacant seats till all the seats in the colleges are filled up. It is further submitted that the organizing university will provide students only to the existing B.Ed. College and all those B.Ed. Colleges which will get affiliation up to dated 07.07.2011 will not be considered for counseling to the year 2011-12 and for the next consecutive years and onward the colleges which will be get affiliated on or before 10th of May of that year, would be considered for counseling.

(c) The organizing University will start online help service through which the complaints of the candidates will be redressed. All the colleges concerned will also provide their helpline separately and after receipt of the complaints the organizing university will forward the same to the concerned college for redressal, failing which the organizing university will seek the explanation from the college concerned and if any default or omission is found on the part of the college, then the same would be forwarded to the government for necessary actions against such college.

(d) The state shall take all endevour to ensure admissions only through counseling after holding State Level Entrance Examination against all the seats sanctioned in self-financing institutions running B.Ed. Course.

(e) That in case any unforeseen difficulty arises regarding filling up vacant seats in the concerned colleges despite strictly following the procedure agreed, even after 24.08.2011, the colleges will be entitled to approach, for filling up their vacant seats, to Principal Secretary/Secretary of the Department of Higher Education, Government of UP who will arrange to provide selected candidates from the wait-list pool within 3 days from receipt of application to fill up those vacant seats.

(f) The same procedure will mutatis mutandis apply for the academic years 2012-13 and thereafter.

(vii) The state government will adopt similar procedure in regard to filling of any vacant seats for the admission for the academic year 2012-13 and subsequent years."

9. The schedule as directed to be followed by Hon'ble Supreme Court in the case of ***College of Professional***

Education and others (supra) was however issued with a further direction to the State Government that the State Government will endeavour to formulate the said schedule in the form of appropriate admission and procedural rules. The judgment further provides that until the State Government makes such rules, the said procedure shall be applied. It also provides that same procedure will mutatis mutandis apply for the academic session 2013- 2014 and thereafter.

10. Hon'ble Supreme Court in its subsequent judgment dated 13.12.2012 in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P. and others, reported in (2013) 2 SCC 617*** reiterated the schedule mentioned in the case of ***College of Professional Education and others*** (supra) in relation to admissions, recognition, affiliation and commencement of B.Ed course. In this case Hon'ble Supreme Court even observed that in case of disobedience of the said schedule or any attempt to circumvent the judgment of Supreme Court and the directions contained therein, the person concerned shall become liable for proceedings under the Contempt of Courts Act, 1971 and for disciplinary action as well.

11. Paragraph 91.1 and 91.2 contained in the said judgment of Hon'ble Supreme Court in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra) are extracted herein below:-

"91.1. The Schedule stated in College of Professional Education and in this judgment in relation to admissions, recognition, affiliation and commencement of courses shall be strictly adhered to by all concerned including NCTE, the State Government and the University/examining body.

91.2. In the event of disobedience of schedule and/or any attempt of overreach or circumvent the judgment of this Court and the directions contained herein, the person concerned shall render himself or herself liable for proceedings under the Contempt of Courts Act, 1971 and even for departmental disciplinary action in accordance with law."

12. Admittedly, no separate procedural rules governing admission to B.Ed course in the State of U.P. have yet been formulated by the State Government and accordingly there cannot be any ambiguity that the schedule formulated by Hon'ble Supreme Court in the case of ***College of Professional Education and others*** (supra) as reiterated in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra) is binding not only on the State Government but also on the Nodal University which conducted the Joint Entrance Examination and also on the Universities and the Colleges/Institutions where admissions for the academic session 2013-2014 were made.

13. There cannot be any quarrel that by operation of Article 141 of the Constitution of India whatever is laid down by Hon'ble Supreme Court becomes law of the land and that its decision are binding on all. The law laid down by Hon'ble Supreme Court is applicable to every person including those who are not parties to that order.

14. Apart from the provision of Article 141 of Constitution of India which provides that law declared by Hon'ble

Supreme Court shall be binding on all, there is yet another provision in the Constitution of India in the form of Article 144 which needs to be taken note of at this juncture itself.

15. Article 144 declares that "All Authorities, Civil and Judicial in the territory of India shall act in aid of the Supreme Court". Thus, every authority in the country, without exception, is bound by the directions of the Hon'ble Supreme Court.

16. To reflect as to whether admissions in the B.Ed course in the academic session 2013-2014 made after 16.09.2013 can be said to be lawful entitling such students to appear in the examination and seek declaration of their result, we find it necessary to examine the Government Orders dated 26.09.2013 and 08.10.2013 in the background of directions of Hon'ble Supreme Court issued in the case of ***College of Professional Education and others*** (supra) as reiterated in the case of ***Maa Vaishno Devi Mahila Mahavidyalaya*** (supra). As per schedule in the case of ***College of Professional Education and others*** (supra), admission on the basis of extended second counselling could be made only till 14.08.2013. The direction contained in paragraph 4 (vi) (b) of the judgment in the case of ***College of Professional Education and others*** (supra), however permitted to fill up seats which remained vacant even after 14.08.2013 by following the course/procedure given therein. As per the said procedure, the University was to provide students from wait list to fill up vacant seats but such entire process could be completed within ten days from 14.08.2013 i.e by 24.08.2013.

17. As a matter of fact, an interlocutory application, namely, IA No. 109-110 of 2013 was filed by an Institution i.e. DAV College at Meerut-Hapur Road, District Meerut in Civil Appeal No.5914 of 2011 (***College of Professional Education and others***, decided on 22.07.2011) with the prayer that the said institution be permitted to admit students in B.Ed course against vacant seats. However, Hon'ble Supreme Court after considering the said prayer passed an order on 25.11.2013 whereby interlocutory application was dismissed. The order dated 25.11.2013 passed by Hon'ble Supreme Court in IA No.109-110 is reproduced hereunder:-

"We have not been granting any further relief to any party in case of admissions for the academic session 2013-2014 after 16.09.2013. These interlocutory applications are also dismissed.

It will however be open for the applicant to have the concerned court including this Court for further relief for the academic session 2014-2015."

18. Thus, at the most, admission to B.Ed course in the State of U.P. for the academic session 2013-2014 could have been made only till 16.09.2013 and any admission made thereafter would be in derogation of the directions issued by Hon'ble Supreme Court in its judgment dated 22.07.2011 in the case of ***College of Professional Education and others*** (supra). The decision of the State Government contained in the Government Order dated 26.09.2013 is thus to be considered in light of the aforesaid.

19. While examining the Government Orders dated 26.09.2013 and

08.10.2013, we may also record that State of U.P. filed Miscellaneous Application bearing IA No.1216 of 2017 in the case of ***College of Professional Education and others*** (supra) which was already decided on 22.07.2011 and prayed therein to provide that this Court shall be free to pass appropriate orders in certain pending writ petitions without being influenced by the order dated 25.11.2013 passed in IA No.109-110 of 2013. Another Miscellaneous Application bearing IA No. 1243 of 2017 was filed by a candidate-Rupam Sharma, in the case of ***College of Professional Education and others*** (supra) decided on 22.07.2011 where IA No.109-110 of 2017 were also dismissed on 25.11.2013, with the prayer that directions be issued that the order dated 25.11.2013 was not applicable to students who had taken admission pursuant to the Government Order dated 08.10.2013. Both these interlocutory applications i.e. IA No.1216 of 2017 and 1243 of 2017 were also dismissed by Hon'ble Supreme Court vide its order dated 10.09.2018 which is quoted herein below:-

"Upon hearing the counsel, the Court made the following order.

The applications are dismissed.

M.A. Nos.1216/2017 and 1243/2017 are disposed of accordingly."

20. The Government Order dated 26.09.2013 has been attempted to be justified by learned Advocate General appearing on behalf of State of U.P. by referring to the directions issued by Hon'ble Supreme Court in paragraph 4 (vi) (e) of the judgment in the case of ***College of Professional Education and others*** (supra). In support of his submission, learned Advocate General has submitted that the said paragraph in the judgment of ***College of Professional Education and others*** (supra) permitted admission in B.Ed course even after 24.08.2013 in case any unforeseen difficulty would arise in filling up vacant seats despite following the procedure. According to learned Advocate General the said directions issued by Hon'ble Supreme Court provided that institutions shall be entitled to approach the State Government for filling up their seats who would arrange to provide selected candidates from the wait list pool.

21. The direction of Hon'ble Supreme Court contained in paragraph 4 (vi) (e) in the case of ***College of Professional Education and others*** (supra) is extracted herein below:-

"(e) That in case any unforeseen difficulty arises regarding filling up vacant seats in the concerned colleges despite strictly following the procedure agreed, even after 24.08.2011, the colleges will be entitled to approach, for filling up their vacant seats, to Principal Secretary/Secretary of the Department of Higher Education, Government of UP who will arrange to provide selected candidates from the wait-list pool within 3 days from receipt of application to fill up those vacant seats".

22. It is true that the Hon'ble Supreme Court by the said directions permitted admission even after 24.08.2013, however it was subject to the condition that any unforeseen difficulty would have arisen regarding filling up vacant seats. The said direction further provides that in such an eventuality, the colleges shall approach the State

Government for filling up their vacant seats and thereafter the State Government shall arrange to provide selected candidates from the wait list pool, that too, within three days from receipt of application from the colleges to fill up the vacant seats. There is nothing on record which reveals, neither is it reflected from the Government Orders dated 26.09.2013 and 08.10.2013, that colleges had made any such request to the Principal Secretary/Secretary of the Department of Higher Education, Government of U.P. as envisaged in the directions contained in paragraph 4 (vi) (e) in the case of ***College of Professional Education and others*** (supra).

23. In this view of the matter, submission made by learned Advocate General that the Government Order dated 26.09.2013 was issued in light of the directions contained in paragraph 4 (vi) (e) in the case of ***College of Professional Education and others*** (supra), is not acceptable; rather merits rejection.

24. The Government Order dated 26.09.2013 refers to paragraph 4 (vi) (b) of the judgment in the case of ***College of Professional Education and others*** (supra) which provides that even after counselling is over the University concerned will continue to allot the candidates from the wait list against vacant seats till all seats in the college are filled up. However, the said directions, in our opinion, could not be construed by the State Government to make the process of admission in B.Ed course an unending one. The schedule as fixed in the said case was to be followed in every circumstance and after 24.08.2013 no admission could have been made except by following the procedure as provided by Hon'ble Supreme Court in paragraph 4 (vi) (e) in its judgment in the case of ***College of Professional Education and others*** (supra).

25. Hon'ble Single Judge in the case of ***Ankit Kumar*** has relied upon a communication dated 26.11.2018 issued by the Special Secretary in the Department of Higher Education and has observed that on the basis of said communication learned counsel representing the State of U.P. submitted that the State Government did not have any objection in case result of the petitioners of said case (bunch of writ petitions leading writ petition being Ankit Kumar and others vs. State of U.P) was declared by the University. The judgment dated 03.12.2018 in the case of ***Ankit Kumar*** is based on the statement made by learned State counsel on the basis of communication dated 28.11.2018. The communication dated 28.11.2018 was issued by the Special Secretary, Government of U.P. in the Department of Higher Education and is addressed to the Chief Standing Counsel who represented the State Government in the said case. Paragraph 2 of the said communication makes reference of order of Hon'ble Supreme Court dated 25.11.2013 while dismissing Interlocutory Application nos.109-110 of 2013 by observing therein that no further relief to any party in case of admission after 16.09.2013 had been granted. Paragraph 2 of the communication dated 28.11.2018 is extracted herein below:-

"मा0 सर्वोच्च न्यायालय द्वारा सिविल अपील स0 5914/2011 में दिनांक 25.11.2013 को यह निर्णय पारित किया गया कि किसी भी पक्षकार को शैक्षिक सत्र 2013–14 के लिए 16.09.2013 के बाद कोई अन्य अनुतोष प्रदान नहीं किया जायेगा। मा0

उच्चतम न्यायालय के आदेश दिनांक 22.07.2011 के अनुपालन में राज्य सरकार द्वारा बी0 एड0 की रिक्त सीटों के प्रवेश के लिए अन्तिम तिथि 15.10.2013 निर्धारित की गयी थी। इस निर्णय के फलस्वरूप दिनांक 15.10.2013 तक अनेक छात्रों को विभिन्न महाविद्यालयों में प्रवेश प्राप्त कर लिया गया था। महाविद्यालयों में दिनांक 16.09.2013 एवं 15.10.2013 के मध्य प्रवेश पाये छात्रों की परीक्षा आयोजित नही हो सकी, जिससे क्षुब्ध होकर छात्रों द्वारा मा0 उच्च न्यायालय में काफी संख्या में रिट याचिकायें योजित की गयी है। इन रिट याचिकाओं की अग्रणी रिट याचिका 4289 (एम0 एस0)/2014, अंकित कुमार व अन्य बनाम राज्य व अन्य में विभाग की ओर से शपथ पत्र व अनुपूरक शपथ पत्र दाखिल किये जा चुके है। इस संबंध में शासन के पत्र संख्या–रिट 09/सत्तर–3–2014, दिनांक 20.01.2015 एवं पत्र संख्या–रिट 19/सत्तर–3–2015–डब्ल्यू (35)/2012 दिनांक 24.04.2015 द्वारा पूर्व में शासन के पक्ष से अवगत कराया जा चुका है।"

26. The said communication, after referring to the order dated 25.11.2013, further recites that various students had taken admission even after 16.09.2013 till 15.10.2013, however their examination was not conducted whereupon they filed writ petitions and that in such petitions, including in the case of ***Ankit Kumar***, stand of the State had been submitted.

27. When we examine the instructions given to the State counsel by the Department of Higher Education, State of U.P. vide its communication dated 28.11.2018 what we find is that it does not in categorical and unambiguous terms state that the State had no objection in case results of the petitioners of the said petitions were declared by the University concerned.

28. Now coming to the first question referred to us by Hon'ble Single Judge, we may observe that in our constitutional scheme though Hon'ble Supreme Court and the High Courts are both courts of record and this Court is not a Court subordinate to the Supreme Court, however the provisions of constitution, especially the appellate jurisdiction assigned to Supreme Court, give a superior place to the Supreme Court over High Courts in the hierarchy. So far as the appellate jurisdiction vested in the courts in our country is concerned, in all matters, civil and criminal, Supreme Court is the highest court of appeal and it is the final interpreter of law. Under Article 141, the law declared by the Supreme Court is final and is binding on all courts including this Court. Under Article 144, all authorities, civil and judicial, which would include High Courts as well, are to act in aid of the Supreme Court. In the hierarchical judicial system envisaged by our Constitution, the Supreme Court is placed over the High Courts vertically. As a superior forum it has the jurisdiction to annul or modify or affirm any order or judgment which may be rendered by this Court. The corrective jurisdiction inherently encompasses in its fold power to issue direction to be followed by and is binding on the forum below. Any failure on the part of lower forum to obey or carry out such directions issued by higher forum may lead to destruction of the hierarchical system in administration of justice.

29. In this regard, we would like to refer to a judgment of Hon'ble Supreme Court in the case of ***Bharat Builder Pvt Ltd and others vs. Parijat Flat Owners Coop. Housing Society Ltd., reported in (1999) 5 SCC 622.*** The said judgment is a very short one. However, its reference in this case suffices to highlight the purpose for which makers of our constitution made Article 144 part of the Constitution. The judgment in the case of ***Bharat Builder Pvt Ltd and others*** (supra) is extracted herein below:-

"1. The respondent appears.
2. Leave granted.

3. The order under challenge was passed by a Division Bench of the High Court at Bombay on a review application in the following circumstances.

4. On 19-12-1997, on a special leave petition [SLP (C) No. 22776 of 1997] filed by the appellant against the respondent, the following order was passed:

"The Division Bench of the High Court at Bombay has, in the judgment and order under appeal, noted that the petitioner and the respondent had in an earlier writ petition, jointly filed, pleaded that the deed whose construction is relevant here 'is a sale and not a lease'. The High Court took the view that this pleading was sufficient to reach the conclusion that the deed 'is an agreement for a sale'.

We have been shown the relevant averments in the earlier writ petition. It appears that the High Court has not considered whether the admission is of a sale or an agreement to sell. We think that, in the circumstances, the petitioner should move the Division Bench of the High Court in this behalf, by the convenient means of a review petition.

We make it clear that the High Court shall decide, after hearing parties on the review petition, whether the admission is of a completed sale or of an agreement to sell and whether, by reason thereof, the provisions of the Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act will apply. Regardless of the technical limitations of the review petition, these questions shall be addressed.

Mr. K.K. Venugopal, learned Counsel for the petitioner, states that the review petition shall be moved within 4 weeks. Mr. Harish N. Salve, learned Counsel for the respondent, states that, pending the review petition, no steps shall be taken to execute the decree that is under challenge.

The SLP is disposed of accordingly."

(emphasis supplied)

5. The review petition was heard by the two learned Judges who had passed the order which was the subject-matter of the earlier SLP. The order on the review petition states

"It is contended that the Supreme Court while disposing of the above said SLP has called upon this Court to decide. In interpreting the document Exh. E whether the admission made by the parties construing the document Exh. E in the earlier writ petition is of a completed sale or an agreement to sale and whether by reason thereof the provisions of the Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act will apply. In fact the aforesaid question was not at all a question raised in the suit in the trial court or before this Court. In fact the main question that was posed in the appeal was as to whether Exh. E was properly construed by the lower court as one of agreement to sell or as indenture of lease".

The Division Bench has, therefore, come to the conclusion that

"rightly or wrongly an impression has been created while reading our judgment that we have solely relied upon the judgment of this Court in previous writ petition in interpreting the document Exh. E. This misunderstanding must have been crept in partly due to some clerical mistake occurred in some

places in the judgment by using phrases agreement for sale instead of agreement to sell. However, the issue posed to be examined as directed by the Supreme Court is not the issue which was raised in the trial court or the Appellate Court and it is not permissible for us to go into such a fresh issue in this review application, first time. In view of this we do not find any merit in the contentions of the applicant and review application is, therefore, liable to be rejected."

(emphasis supplied)

6. The Division Bench has not read the order that we passed on 19-12-1997. We have asked the Division Bench to consider the questions set out in the third paragraph of the order. To enable it to do so we have asked the appellants to move it 'by the convenient means of a review petition'. We have ordered: 'Regardless of the technical limitations of the review petition these questions shall be addressed.' Nonetheless, it has not done so.

7. It is necessary to point out to the High Court that the Constitution of India, in Article 144, requires all authorities, civil and judicial in the territory of India to act in aid of the Supreme Court.

8. It was imperative for the High Court, to have decided the questions that it was required to decide by this Court's order dated 19-12-1997. For this reason, very fairly, the respondents do not object to the order under challenge being set-aside the review petition being sent back to the High Court.

9. The appeal is allowed. The order under challenge is set aside. The review petition is restored to the file of the High Court to be heard and decided afresh. In so deciding, the High Court shall scrupulously follow the requirements of the order of this Court dated 19-12-1997. In the circumstances aforestated, it becomes necessary to require that the review petition shall be listed before learned Judges other than those that passed the order under challenge.

10. Pending further orders no steps shall be taken to execute the decree.

11. No order as to costs."

30. In the said case, the Hon'ble Supreme Court had required the High Court to consider certain issues and questions in review petition regardless of the technical limitations of review, however the High Court dismissed the review petition by observing that, *"the issue posed to be examined as directed by the Supreme Court is not an issue which was raised in the trial court or the appellate court and it is not permissible for us to go into such a fresh issue in this review petition, first time. In view of this, we do not find any merit in the contention of the applicant and review application is, therefore, liable to be rejected"*.

31. Hon'ble Supreme Court when considered the aforesaid judgment passed by High Court in review petition, it observed that it was imperative for the High Court to have decided the questions that it was required to decide by Hon'ble Supreme Court. While setting aside the order of the High Court, Hon'ble Supreme Court also reminded the High Court of Article 144 of the Constitution of India which requires all authorities, civil and judicial in the territory of India to act in aid of the Supreme Court.

32. Failure to comply with the direction of Hon'ble Supreme Court has

always been deprecated. In this regard, reference may be had to paragraph 9 of the judgment in the case of ***Bharat Earth Movers vs. Commissioner of Income Tax, Karnataka, reported in (2000) 6 SCC 645,*** which is extracted herein below:-

"9. Before parting, we would like to observe that when this appeal came up for hearing on 24.3.1999 we felt some difficulty in proceeding to answer the question arising for decision because the orders of the authorities below and of the Tribunal did not indicate how the leave account was operated by the appellants and the leave salary provision was made. To appreciate the facts correctly and in that light to settle the law we had directed the Income Tax Appellate Tribunal to frame a supplementary statement of case based on books of account and other relevant contemporaneous records of the appellant which direction was to be complied with within a period of six months. The hearing was adjourned sine die. After a lapse of sixteen months the matter was listed before the court on 20.7.2000. The only communication received by this court from the Tribunal was a letter dated 20th June, 2000 asking for another six months time to submit the supplementary statement of case which prayer being unreasonable, was declined. Under Section 258 of the Income Tax Act, 1961, the High Court or the Supreme Court have been empowered to call for supplementary statement of case when they find the one already before it not satisfactory. Article 144 of the Constitution obliges all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court. Failure to comply with the directions of this court by the Tribunal has to be deplored. We expect the Tribunal to be more responsive and more sensitive to the directions of this Court. We leave this aspect in this case by making only this observation."

33. Reflecting upon the necessity of accepting the decisions of higher courts by the courts of lower tier in the hierarchical system of courts, the Hon'ble Supreme Court in the case of ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd and others, reported in (1985) 1 SCC 260*** has observed as under:-

"We desire to add and as was said in Cassel and Co. Ltd. v. Broome we hope it will never be necessary for us to say so again that 'in the hierarchical system of Courts' which exists in our country, 'it is necessary for each lower tier', including the High Court, 'to accept loyally the decisions of the higher tiers'. "It is inevitable in a hierarchical system of Courts that there are decisions of the Supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary.....But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted". The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system. In Cassel & Co. Ltd. v. Broome, commenting on the Court of Appeal's comment that Rookes v. Barnard was rendered per incuriam Lord Diplock observed:

"The Court of Appeal found themselves able to disregard the decision of this House in Rookes v. Barnard by applying to it the label per incuriam. That label is relevant only to the right of an

appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal."

It is needless to add that in India under Article 141 of the Constitution the law declared by the Supreme Court shall be binding on all courts within the territory of India and under Article 144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court."

34. We may also notice that Government of India Act, 1935 under Section 210 (1) also had a provision similar to Article 144 of the Constitution of India. Section 210 (1) of Government of India Act, 1935 is reproduced below:-

"210. Enforcement of decrees and orders of Federal Court and orders as to discovery, etc- *(1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court".*

35. It is also worthwhile to observe that Article 144 of Constitution of India was adopted by Constituent Assembly on 27.05.1949 without any amendment in the draft constitution (Article 120) or even without any debate.

36. This clearly shows the significance and importance which is intended to be given to Article 144 of Constitution of India for maintenance and working of hierarchical system of courts in our judicial set up.

37. The principle of law as embodied in Article 141 and 144 of the Constitution of India as discussed by Hon'ble Supreme Court in the aforementioned judgments does not leave any scope whatsoever for either this Court or for any authority in the State Government not to act in accordance with the directions contained in any judgment or order passed by Hon'ble Supreme Court. Any act by any authority in derogation and even in contravention of an order passed by Hon'ble Supreme Court cannot be approved of on any count or for any reason whatsoever.

38. In the instant case, we have already seen and concluded that the Government Orders dated 26.09.2013 and 08.10.2013, are not in conformity with the directions issued by Hon'ble Supreme Court in its judgment dated 22.07.2011 in the case of ***College of Professional Education and others*** (supra). Further, it is noticed that the interlocutory applications, namely, IA No.109-110 of 2013 which were filed before Hon'ble Supreme Court with the prayer made by an institution to permit it to admit the students in B.Ed. course against vacant seats were already dismissed vide order dated 25.11.2013 passed by Hon'ble Supreme Court by observing that Hon'ble court had not been granting any further relief to any party in case of admissions after 16.09.2013. When the State Government moved IA No.1216 of 2017 before Hon'ble Supreme Court with the prayer to permit the High Court to pass appropriate orders in relation to declaration of results of B.Ed students admitted pursuant to the Government Order dated 08.10.2013, Hon'ble Supreme Court vide its order dated 10.09.2018 dismissed the same. The prayers made in the interlocutory application (IA No.1216 of 2017) is extracted herein below:-

"In the facts and circumstances of the case and in the interest of justice it is most respectfully prayed that Your Lordships may graciously be pleased to:

(i) permit the High Court to pass appropriate orders in relation to declaration of result of B.Ed. students admitted pursuant to Govt. Order dated 08.10.2013.

(ii) clarify the position that the High Court shall be free to pass appropriate orders in the pending Writ Petitions without being influenced by the order passed by this Hon'ble Court on 25.11.2013 in IA No.110/2013; and

(iii) Pass such other and further order (s) as this Hon'ble Court may deem just and proper in the premises of this case."

39. The said prayer was rejected, as observed above, by Hon'ble Supreme Court on 10.09.2018. Thus, it appears that the said order was not brought to the notice of this Court in the case of ***Ankit Kumar*** which was decided subsequent to the order dated 10.09.2018 passed by Hon'ble Supreme Court i.e. on 03.12.2018. Dismissal of IA No.1216 of 2017 filed by the State of U.P. by Hon'ble Supreme Court vide its order dated 10.09.2018 does not leave anyone in doubt that time schedule relating to admission etc. in B.Ed courses by Hon'ble Supreme Court in the case of ***College of Professional Education and others*** (supra) was to be strictly followed and in view of what we have discussed above in reference to provision of Article 141 and 144 of the Constitution of India, we have no hesitation to hold that it was not open for any authority or body, be it the State Government or even this Court, to have in any manner relaxed the time schedule as fixed by Hon'ble Supreme Court in the case of ***College of Professional Education and others*** (supra).

40. We thus answer the question no.1 referred to us as follows.

41. It was not open either for the State Government or this Court to have relaxed the time schedule fixed by Hon'ble Supreme Court in the case of ***College of Professional Education and others*** (supra) and that declaration of result of students admitted in B.Ed course in the academic session 2013-2014 after 16.09.2013 is impermissible.

42. As regards question no.2 referred to us, we may observe that instructions of the State Government contained in its communication dated 28.11.2018 did not instruct the State counsel to submit before this Court that the State Government did not have any objection if the result of the petitioners in the said matter, was declared. Nonetheless, we may notice that the said communication dated 28.11.2018 though notices the order dated 25.11.2013 whereby Interlocutory Application Nos. 109-110 were dismissed by Hon'ble Supreme Court, however, it does not make any mention of the order dated 10.09.2018 which was passed by Hon'ble Supreme Court on the interlocutory applications made by the State of U.P. itself (IA No.1216 of 2017) whereby prayer of the State Government for permitting this Court to pass appropriate orders for declaration of result of B.Ed students admitted in pursuance of the Government Order dated 08.10.2013, was rejected.

43. It is needless to say that it is the duty of every authority including the

authorities of the State Government and its instrumentalities as well not only to disclose correct facts before the Court but also to disclose full and complete facts so as to assist the Court appropriately in discharge of its judicial functions.

44. Having observed as above, we may only point out at this juncture that the communication dated 28.11.2018 did not instruct learned Standing Counsel appearing for the State of U.P. to make any such statement that the State had no objection in case result of the petitioners of the said case was declared by University. The manner in which the case of ***Ankit Kumar*** was conducted on behalf of State of U.P. though cannot be appreciated for non-disclosure of full and complete facts, however, we do not find it a case of any deliberate attempt by the officers of the State Government to mislead the Court so as to make the officers liable to be proceeded against, under contempt jurisdiction. In this view of the matter, question no.2 referred to us is answered as follows:

45. Since instructions of State Government contained in its communication dated 28.11.2018 did not disclose full and complete facts including the order dated 10.09.2018 passed by Hon'ble Supreme Court on the interlocutory application moved by State of U.P. itself (IA No.1216 of 2017), the said instructions could not be acted upon, however, in absence of any specific instruction to learned State counsel to submit before this Court that State did not have any objection if result of those admitted students is declared by the University, the contempt proceedings against officers of the State may not be initiated/instituted.

46. Reference made is answered thus.

47. Let writ petition be listed before Hon'ble Single Judge for hearing and decision accordingly.

(2019)10ILR A 1345

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ Tax No. 354 of 2017

Assotech Realty Pvt. Ltd. ...Petitioner
Versus
Addl. Commissioner, Gr.-1 Commercial Tax Ghaziabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suyash Agarwal, Sri R.R. Agarwal, Sri Rakesh Ranjan Agarwal

Counsel for the Respondents:
C.S.C.

A. U.P. Value Added Tax Act, 2008-Section 22, 29(7)-Completed assessment should not be reopened on the basis of the subsequent judgment-Reassessment notice dated 18.02.2017 was issued by Respondent No. 1, for re-opening assessment (AO dated 30.04.2013) for the year 2009-10, in view of SC judgment in *Larsen & Toubro Ltd. and others Vs. State of Karnataka and others,* 2013 NTN (153) 65. Respondent No. 1 vide impugned order dated 30.03.2017, granted permission and impugned show cause notice dated 22.04.2017 was issued. Allowing the petition, the High Court held-The Department cannot be authorized to reopen the assessment, which stood closed on the basis of law as it stood at the relevant time,

on the ground of the subsequent judgments of the Hon'ble Apex Court- Reopening of proceeding of completed assessment in question renders bad and in colorable exercise of power and without jurisdiction.

(Para 22, 23, 24, 25, 26 & 27)

Petition filed for quashing sanction order dated 30.03.2017, passed by Additional Commissioner, Grade- I, Commercial Tax Ghaziabad as well as consequential notice dated 22.04.2017, passed by Deputy Commissioner Commercial Tax, Ghaziabad for assessment year 2009-10.

Writ Petition allowed (E-4)

Precedent followed: -

1. K. Raheja Development Corpn. Vs St. of Karnataka, (2005) 5 SCC 162 (Para 3, 8)

2. Varun Beverages Ltd. Vs St. of U.P. & ors., (2017) 99 VST 393 (Para 12)

3. Hindustan Liver Ltd. Vs R.W. Wadkar ACIT, (2004) 268 ITR 332 (Para 13)

4. CIT Vs Kelvinator India Ltd., (2010) 320 ITR 561 (SC) (Para 14)

5. M/s BHEL Vs St. of U.P. & ors., Writ Tax No. 181 of 2014, decided on 28.02.2017 (Para 14)

6. St. of U.P. Vs Arayaverth Chawal Udyog Ltd., (2015) 17 SCC 324 (Para 16)

7. M/s Samsung Electronics (India) Pvt. Ltd. Vs St. of U.P. & 2 ors., (2017) UPTC 63 (Para 23)

8. Dy. Commissioner of Income Tax Vs Simplex Concrete Piles (India) Ltd., (2012) 25 taxmann.com, 283 (SC) (Para 24)

Precedent distinguished: -

1. Larsen and Toubro Limited and Others Vs. State of Karnataka and Others, 2013 NTN (153) 65 (Para 4, 5, 17, 18, 22)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the present writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the sanction order dated 30.03.2017 passed by the respondent no. 1 for the Assessment Year 2009-10 as well as the consequential notice dated 22.04.2017 for the Assessment Year 2009-10 passed by the respondent no. 2.

2. The facts of the case are that the petitioner is a Company incorporated under the provisions of Indian Companies Act, 1956 having its registered Office at 46, Janpath, 1st Floor, New Delhi and U.P. Office at Windsor Club, Vaibhav Khand, Indrapuram, Ghaziabad. The present Office of the petitioner is at Plot No. 22, Sector - 135, Noida. The petitioner is a builder and engaged in the business of construction and sale of flats to the interested persons/allottee, after purchasing the land from the Development Authorities and developed the land so purchased.

3. The petitioner had not entered into any tripartite agreement between the petitioner and the purchaser, as the petitioner developed the land after purchasing the same from the Development Authorities. In other words, the petitioner is a sole owner of the land on which the flats were constructed. According to the petitioner, the ownership of the flats continues with it from the time of construction till the execution of registered sale deed in favour of the interested person/prospective buyers and as such, the petitioner does not fall within the category of works contract. The original assessment order was passed for the year in dispute on 30.04.2013. The Assessing Authority, after considering all the materials available on record as well as the judgement of the Apex Court in the case of ***K. Raheja Development Corporation Vs. State of Karnataka,***

reported in (2005) 5 SCC 162, letter of allotment, etc., came to the conclusion that there is no transfer of any material in execution of works contract and the petitioner is not liable for payment of any tax.

4. Thereafter, reassessment notice dated 18.02.2007 was issued by the respondent no. 1 under section 29(7) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as, ' VAT Act') to show cause as to why permission may not be granted to the Assessing Authority for reopening the completed assessment in view of the judgement of the Apex Court in ***Larsen and Toubro Limited and Others Vs. State of Karnataka and Others,*** reported in 2013 NTN (153) 65, where the builders were liable for payment of tax on the transfer of material used in execution of works contract. In response to the notice, the petitioner submitted a detailed reply explaining each and every issue raised in the notice and stated that the proceedings for granting permission to reopen the completed assessment may be dropped, as there is no fresh material.

5. The respondent no. 1, by means of the impugned order dated 30.03.2017, granted permission to the respondent no. 2 to reopen the completed assessment on the ground that the petitioner has received booking amount from the prospective purchasers, which amounts to transfer of property in execution of works contract and hence, the turnover of the petitioner has escaped assessment. Further, on the basis of the judgement in ***Larsen and Toubro Limited*** (supra), the petitioner is also liable for payment of tax. In pursuance of the order dated 30.03.2017, the impugned reassessment show cause notice dated 22.04.2017 under section 29(7) of the Act has been issued. Hence, this writ petition.

6. We have heard Shri Rakesh Ranjan Agarwal, learned Senior Counsel, assisted by Shri Suyash Agarwal, learned counsel for the petitioner and Shri C.B. Tripathi, learned Special counsel for the respondents.

7. Learned counsel for the petitioner has submitted that admittedly, the petitioner is a builder, who purchases the land from the Development Authorities. Thereafter, it constructs flats over it being the sole owner of the land. The flats are sold only after completion through registered sale deed executed in favour of interested buyers. It is further submitted that the *modus operandi* of its business in the disputed year, i.e., 2009-10, was identical and similar with the previous as well as in subsequent years.

8. The learned counsel for the petitioner has further submitted that for the Assessment Years 2004-05 and 2005-06, the Assessing Authority had levied tax on the petitioner treating it as a dealer and imposed tax on the material used in the execution of works contract on the basis of the judgement of the Apex Court in the case of ***K. Raheja Development Corporation*** (supra). Against the said order, Writ Petition No. 997 of 2006 and Writ Petition No. 1238 of 2006 were filed before this Court, which were allowed on 23.03.2007. Against the said order, the State went in SLP before the Apex Court. The Apex Court, vide its order dated 30.12.2007, allowed the appeal filed by the State only on the limited ground that the writ petition against the assessment order was not maintainable. The petitioner

should have filed the appeal as provided under the Act.

9. In pursuance of the order of the Apex Court, the petitioner filed an appeal, the appellate authority allowed the appeal and remanded the matter back to the Assessing Authority for deciding afresh by order dated 20.10.2009. Against the aforesaid order, the petitioner preferred Second Appeal Nos. 231 and 232 of 2010 before the Commercial Tax Tribunal, Noida Bench, Noida, which were allowed vide order dated 11.06.2010. The Tribunal, after considering all the materials available on record, allotment letter and the judgement of the Apex Court as well as other judgements on the subject, came to the conclusion that the petitioner is not a work contractor and there is no liability for payment of tax on the material used in the execution of works contract. Since there was a mistake, apparent on record, hence an application under section 22 of the VAT Act was moved before the Tribunal and the same was also allowed on 12.07.2010. Against the order passed by the Tribunal, holding the petitioner was not liable for payment of tax on the material used in execution of works contract, the Department preferred a revision before this Hon'ble Court, which was dismissed on 20.09.2012.

10. It has further been argued that against the judgement and order of this Court dated 20.09.2012, holding that the petitioner is not a dealer and hence, not liable for tax on the material used for execution of works contract, neither any appeal was preferred by the State, nor any material was brought on record showing the order of this Court has been set aside/modified/recalled / stayed by the competent Court. In other words, the Department has accepted the order passed by this Court.

11. It is further argued by the learned counsel for the petitioner that once the issue has been settled inter-parties and there is no new material brought on record to suggest otherwise, the completed assessment in disputed, i.e., 2009-10, cannot be permitted to be reopened merely on the basis of change of opinion and therefore, the impugned order dated 30.03.2017 and consequential notice dated 22.04.2017 are liable to be set aside.

12. The counsel for the petitioner has relied upon the judgement of this Court in ***Varun Beverages Ltd. Vs. State of U.P. & Others*** reported in (2017) 99 VST 393 (All); wherein, this Court has held as under:-

"8. It is not disputed before us that if there is a change of opinion, reassessment under Section 29(7) is not permissible. When it can be said "change of opinion" has been recently considered by Apex Court in State of Uttar Pradesh and others Vs. Aryaverth Chawl Udyoug and others (2016) 91 VST 1 (SC) wherein after referring to its earlier decisions in Binani Industries Limited, Kerala Vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore 2007 (15) SCC 435 and A.L.A. Firm Vs. Commissioner of Income-tax 1991 (2) SCC 558 the Court said as under:

"If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an

assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment."

9. In the present case, entire material which is now being taken into consideration for the purpose of impugned notice and approval granted was available before Assessing Authority and after having considered the same, assessment was made. Now authorities, taking a different view, have issued impugned notice. Thus, it is a clear case of change of opinion, hence reassessment is not permissible in view of aforesaid exposition of law."

13. It is further argued that in the impugned order, the respondent has relied upon a survey report dated 22.09.2009 submitted by the SIB Unit, for which no notice, whatsoever, was given by the respondent no. 1. The said survey report has been relied upon behind the back of the petitioner as the petitioner was neither put to any notice while issuing notice dated 18.02.2007 under section 29(2) of the VAT Act (Anneuxre No. 6 to the writ petition), nor before passing the impugned order dated 30.03.2017 (Anneuxre No.8 to the writ petition). Therefore, the impugned order, relying upon the survey report, is also bad. On the said point, the petitioner has relied upon the judgement in ***Hindustan Liver Limited Vs. R.W. Wadkar ACIT,*** reported in (2004) 268 ITR 332 (Bom.) at page 338; wherein, following observation has been made:-

"21. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or

making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced."

14. Learned counsel for the petitioner further submitted that even assuming, without admitting, that the survey report dated 22.09.2009 was to be taken into account, but the same were already considered by the then Assessing Authority while passing the original assessment order. Therefore, there is no fresh or tangible material or information to form a reasonable belief to have a live-link with the information of belief that a turnover has escaped assessment, which could legally be permitted for initiation of reassessment proceedings under section 29(7) of the VAT Act. At best, it can be said that it is only a change of opinion, which is not permissible under the Act. In support of this submissions, learned counsel for the petitioner has relied upon the judgements in ***CIT Vs. Kelvinator India Limited,*** reported in (2010) 320 ITR 561 (SC) and ***M/s Bharat Heavy Electronics Limited Vs. State of U.P. and Others*** (Writ Tax No. 181 of 2014, decided on 28.02.2017), (see pages 11, 12, 19 & 20). The relevant observations made in the judgement are quoted below:-

"It is settled law that the jurisdiction to initiate reassessment proceedings arises only after the assessing authority records his reason to believe that any turnover has escaped assessment Thus, not only is the belief of escapement essential but more importantly, it is necessary for the Assessing Authority to record his reason/s as to existence of the belief of such escapement. In Commissioner of Sales Tax Vs. Bhagwan Industries (P) Ltd. (1973) 31 STC 293 (SC) the phrase "reason to believe"appearing in a similar provision in Section 21 of the U.P, Sales Tax Act, 1948 providing for reassessment was interpreted thus:

"The words "reason to believe" in Section 21 of the U.P. Sales Tax Act convey that there must be some rational basis for the assessing authority to form the believe that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the ground are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relavant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the ground are adequate or not is not a matter which would be gone into by the High Court or the Supreme Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency or reasons for the belief. At the same time, the belief must be held in good faith and should not be a mere pretence."

Applying the above principle, this court, in the case of Rathi Industries Limited Vs. State of U.P. and another has further elaborated-

From a perusal of the aforesaid, it is apparently clear that the words

"reason to believe" in Section 21 of the U.P. Trade Tax Act conveys that there must be some rational basis for the assessing authority to form a belief that the whole or any party of the turnover of a dealer has for any reasons escaped assessment. Such reason or reasonable ground to believe that the whole or any part of the turnover had escaped assessment must be germane to the formation of the believe regarding escaped assessment. Such reasons or grounds must have a nexus with the formation of the belief. The approach has to be practical and not pedantic."

In absence of any material it was not open to the authorities to assume existence of such facts for the purpose of acquiring jurisdiction and to later, in the course of reassessment proceedings to conduct an inquiry as to its existence or otherwise. The Supreme Court in the case of Arun Kumar & Ors Vs. Union of India & Ors (2007) 1 SCC 732 has categorically held :

74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.

75. In Halsbury's Laws of England, it has been stated:

"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs my be described as preliminary to, or collateral to the merits if, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling it not conclusive."

76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction.

84. From the above decisions, it is clear that existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

Thus we accept the contention of the petitioner that in this case, in the state of the reason to believe as contained in the proposal made by the petitioner's assessing authority, the jurisdictional fact of applicability of Rule 9 (3) of the Rules is not established.

15. It was further argued that while passing the original assessment order, the survey report dated 22.09.2009 was taken into account and the petitioner has given a satisfactory reply to the same as well. Even if the discovery of an inadvertent mistake or non-application of mind during the assessment would not be justifiable ground for re-initiating proceeding under section 29(7) of the Act.

16. In support of his submission, he has relied upon the judgement of the Apex Court in ***State of U.P. Vs. Arayaverth Chawal Udyog Limited*** (2015) 17 SCC 324; wherein, in paragraph nos. 30 & 31, the Apex Court has held as under:-

"30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings Under Section 21(1) of the Act on the basis of change in subjective opinion (Commissioner of Income-tax v. Dinesh Chandra H. Shah: [1972] 3 SCC 231 : and Income-tax Officer v. Nawab Mir Barkat Ali Khan Bahadur: [1975] 4 SCC 360.

31. The above observations regarding the import of the words "reason to believe" though made in the context of different statutes have, in our opinion, equal bearing on the construction of those words in Section 21 of the Act."

17. Rebutting the contentions of the learned counsel for the petitioners, learned counsel for the respondents has argued that it is not a case of change of opinion. The petitioner is a builder and is making construction for and on behalf of the prospective buyers after getting the booking amount and in view of the latest judgement in the case of ***Larsen and Toubro Limited*** (supra), where it has been held that the material used in the execution of works contract is liable to be taxed as the works contractor enters into the agreement. In the case in hand, the petitioner has issued the letter of allotment to the prospective buyers and was receiving payments in installment, which itself shows that the petitioner has entered into an agreement and therefore, is liable to be taxed, accordingly and the same has escaped to tax at the time of passing the original assessment order. Therefore, the present writ petition is liable to be dismissed.

18. We have perused the record. It is beyond doubt that the reassessment proceedings have been initiated against the petitioner to reopen the completed assessment in view of the subsequent judgement of the Apex Court in ***Larsen and Toubro Limited*** (supra). It is admitted fact that at the time of passing of the original assessment order, the Assessing Authority has taken note of survey report dated 22.09.2009 and thereafter, passed the original assessment order holding that the petitioner is not liable for payment of tax on the material used in the execution of works contract.

19. The facts are not disputed. The petitioner has not entered into any tripartite agreement with the prospective buyers or with any development authority from whom the land was purchased. The petitioner, after purchase of the land from the development authority, has constructed the flats as per the layout plan sanctioned by the local authorities. The ownership of the flat was never transferred before its completion. The flats are sold by the petitioner only after its completion through registered sale deeds executed in favour of the interested buyers. The petitioner's business module has been same in the previous and subsequent years. For the assessment years 2004 - 05 and 2005-06 tax was

levied, which was challenged before this Court in Writ Petition Nos. 997 & 1238 of 2006 and was allowed on 23.03.2007, against the said judgement, the State filed Special Leave Petition before the Apex Court and the Apex Court allowed the Special Leave Petition on the ground that against the assessment order, writ petition was not maintainable.

20. The petitioner contested the matter through the remedies provided under the Act and the Tribunal, by its order dated 11.06.2010, after recording a finding of fact, came to the conclusion that the petitioner was not liable for payment of tax on the material used in the execution of works contract, against which the Revenue preferred a Trade Tax Revision, which was dismissed by this Court on 20.09.2012 reported in ***2012 VSTI (15) B-923.*** It has been accepted, at the Bar, that against the order dated 20.09.2012 passed by this Court in ***CCT Vs. S/s Assotech Ralty Pvt. Ltd*** 2012 VSTI (15) B-923, no appeal has been preferred before the Apex Court. The Department has accepted the order passed by this Court. Once an order, which has been passed and has been confirmed by this Court under the provision of the Act, the case in hand, then in absence of any new material being brought on record, the completed assessment should not have been reopened.

21. We are not entering into the merit of the case, but confining it to the reassessment proceeding under section 29 of the Act.

22. The proceeding of reassessment has been initiated on the basis of a subsequent judgement passed in the case of ***Larsen and Toubro Limited*** (supra). The Honb'le Apex Court, time and again, has held that completed assessment should not be reopened on the basis of subsequent judgement being given.

23. This Court in the case of ***M/s Samsung India Electronics Pvt. Ltd. Vs. State of U.P. & 2 Others,*** reported in 2017 UPTC 63, in paragraph nos. 11, 14 & 15, has held as under:-

"11. Further, a subsequent judgment cannot be used to reopen assessments or disturb past assessments which have been concluded. [See Para 7, Austin Engineering V. JCIT (2009) 312 ITR 70 (Guj.) Para 4 and 5, Bear Shoes 2011 (331) ITR 435 (Mad.), B.J. Services Co. Middle East Ltd. v. Deputy Director (2011) 339 ITR 169 (Uttarakhand), Sesa Goa V. JCIT 2007 (294) ITR 101 (Bom.), Geo Miller and Co. 2004 (134) Taxmann 552 (Cal)]. Reliance is also placed on the decision of the Hon'ble Supreme Court in MEPCO Industries V. CIT, (2010) 1 SCC 434, where the CIT on the basis of a subsequent decision of the Supreme Court sought to rectify his earlier order. The Hon'ble Court held that this would amount to a change of opinion.

14. Impugned notices are bad and against principles enunciated by Apex Court in afore quoted decisions. This renders the notices and orders bad and have been passed in colourable exercise of powers and are without jurisdiction.

15. This writ petition has to be allowed with cost as law is well settled that assessment once having become final should not have been reopened on the basis of judgment of the Apex Court. "

24. Similarly, the Apex Court, in the case of ***Deputy Commissioner of Income***

Tax Vs. Simplex Concrete Piles (India) Limited reported in (2012) 25 taxmann.com 283 (SC) has held as under:-

"3. We see no error in the observation made by the Divisoin Bench of the High Court in the impugned judgement that once limitation period of four years provided under Section 147/149(1A) of the Income Tax Act, 1961 (for short, Rs. The Act') expires then the question of reopening by the Department does not arise. In any event, at the relvant time, when the assessment order got completed, the law as declared by the jurisdictional High Court, was that the civil construction work carried out by the assessee would be entitled to the benefit of Section 80HH of the Act, which view was squarely revsersed in the case of CIT Vs. N.C. Budharaja & CO. (1993) 204 ITR 412/70 Taxman 312 (SC). The subsequent reversal of the legal position by the judgement of the Supreme Court does not authorize the Department to reopen the assessment, which stood closed on the basis of the law, as it stood at the relevant time."

25. In view of the above cited judgements and the principles enunciated therein, reopening of the proceeding of completed assessment in question renders bad and in colourable exercise of powers and without jurisdiction.

26. It is evidently clear that the assessment, once has become final, should not have been reopened on the basis of subsequent judgment of the Apex Court.

27. In view of the aforesaid facts and circumstances, we are of the opinion that the present reassessment proceedings have been initiated on the basis of subsequent judgement of the Apex Court, which cannot be used to reopen assessment or disturb past assessment which have been concluded. The Department cannot be authorized to reopen the assessment, which stood closed on the basis of the law as it stood at the relevant time.

28. We also take judicial notice of the fact that the country is entering into a new era of taxation,i.e., Goods & Services Tax (GST), so the dealers and the Department are set to take up a new challenge of the said Goods & Services Tax. It will be in the interest of both, the dealers as well as the Department, that all old pending matters to be decided at the earliest and attain finality.

29. In the result, the writ petition succeeds and is allowed. The impugned order dated 30.03.2017 passed by the respondent no. 1 for the Assessment Year 2009-10 as well as the consequential notice dated 22.04.2017 for the Assessment Year 2009-10 issued by the respondent no. 2 are here by quashed.

(2019)10ILR A 1354

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.09.2019

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Contempt No. 2622 of 2015
&
15 Other Contempt Cases No. 2627 of 2015, 279 of 2016, 278 of 2016, 280 of 2016, 283 of 2016, 284 of 2016, 285 of 2016, 331 of 2016,

2007 of 2012, 2745 of 2012, 1657 of 2016, 95 of 2012, 97 of 2012, 3453 of 2011 & 2072 of 2017

Nirankar Pathak & Ors. ...Applicants
Versus
Sri Ashish Goel & Ors. ...OppositeParties

Counsel for the Applicants:
Sri Ramesh Kumar Srivastava

Counsel for the Opposite Parties:
Sri Ajay Kumar, Sri Bhanu Pratap Singh

A. Contempt of Courts Act, 1971- Section 2(b) - the contempt is between the Court and the contemnor and the aggrieved party cannot insist that the Court should exercise such jurisdiction-The discretion is exercised by the Court for maintenance of Court's dignity and majesty of law- Contempt jurisdiction is invoked and punishment is imposed to uphold the authority of Court to punish the contemnor and to act as a deterrent to others- This deterrent is motivated in the interest of the public in order to prevent future incidents of wilful disregard and disobedience of the Court orders by a party. (Para 22 to 43)

Contempt Application dismissed (E-6)

Case Law discussed: -

1. Mohd. Sartaj Vs St. of U.P. (2006) 2 SCC 313

2. Secretary A.P. Public Service Commission Vs Y. V.V.R. Srinivasulu & ors. (2003) 5 SCC 341

3. Rama Narang Vs Ramesh Narang & anr. (2006) 11 SCC 114

4. Nisha Kanto Roy Chowdhury Vs Smt. Saroj Bashini Goho AIR 1948 Calcutta 294

Bajranglal Gangadhar Khemka & anr. Vs Messrs. Kapurchand Ltd. AIR 1950 Bombay 336

5. Ashok Paper Kamgar Union & ors. Vs Dharam Godha & ors. AIR 2004 SC 105

6. T.M.A. Pai Foundation Vs St. of Kar. (2002) 8 SCC 481

7. Amar Singh Vs K. P. Geetakrishnan

8. S. Balasubramaniyam Vs P. Janakaraju & anr. 2004 (5) Kar L.J. 338

9. Bank of baroda Vs Sadruddin Hasan Daya & anr. (2004) 1 SCC 360

10. Kanwar Singh Saini Vs H.C. of Delhi (2012) 4 SCC 307

11. Daroga Singh Vs B.K. Pandey [(2004) 5 SCC 26 : 2004 SCC (Cri) 1521]

12. Niaz Mohammad & ors. Vs St. of HA. & Ors. (1994) 6 SCC 332

13. Ram Kishan Vs Tarun Bajaj & ors. (2014) 16 SCC 204

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. In all the contempt petitions, similar relief (s) has been prayed for by the applicants/petitioners, therefore, they are being decided collectively by this common order. For the sake of convenience, facts of Contempt Petition No.2622 of 2015 (Nirankar Pathak and others vs. Sri Ashish Goel, Posted As Prin. Secy. Basic Edu. Lko.& Ors.) are being taken up for deciding the matter.

2. All the contempt petitions have been filed for willful non-compliance of order dated 29.04.2008 passed by a Division Bench of this Court in a Bunch of Special Appeals leading Special Appeal No.530 of 2004 (U.P. Board of Basic Education vs. Om Prakash Shukla and others) by which it was directed to the opposite parties to consider the case of the appellants. The operative portion of the order reads as under:

"We, therefore, while upholding the order passed by the learned Single Judge direct that all such candidates be considered for being sent on training as per Rules and it norms by giving them preference but for that matter, age will not come in their way and their candidatures shall not be rejected merely on the ground of being over age.

Let aforesaid exercise be completed within a maximum period of two months. The candidates who are selected for being sent for Special B.T.C. Training Course shall be considered for appointment as per Rules. We further direct that all those candidates who have filed writ petitions and if they have worked, for any period, they shall be paid salary only for the period for which tehy had worked.

With the aforesaid directives, all the Special Appeals stands disposed of."

3. The brief facts of the case for proper adjudication of the contempt petitions are as follows:

i. On 19.01.1991, 315 posts of Assistant Teachers in Basic and Primary School, District Bahraich were advertised and the qualification of the candidates having B.T.C. or equivalent to B.T.C. were required. Some of the applicants, who had possessed B.Ed. degree have not been found eligible and their applications were not entertained. They have filed a Bunch of writ petitions leading No.2447 (S/S) of 1991 (Triveni Prasad Pandey and others vs. State of U.P. and others) before this Court. All the writ petitions were partly allowed by a common judgment and order dated 23.12.1992, against which the State of U.P. has preferred a Special Appeal bearing No.21 of 1993 (State of U.P. Vs. Triveni Prasad Pandey), which was dismissed on 01.11.2001. The Special Leave Petition was filed before the Hon'ble Suprme Court by the State against the judgment and order dated 01.11.2001 passed by the Division Bench. The Special Leave to Appeal was dismissed as withdrawn vide order dated 22.04.2002. Another Special Leave Petition has also been filed against the judgment and order dated 01.11.2001, which was also dismissed as withdrawn by the Hon'ble Apex Court vide order dated 01.08.2003.

ii. On 20.12.1995, nearly 1000 (one thousand) fresh vacancies of Assistant Teacher in Bahraich District were advertised in which the qualification was B.T.C. or equivalent to B.T.C. Against the said advertisement dated 20.12.1995, various writ petitions were filed. The said writ petitions were decided by common judgment and order dated 30.11.2002 extending the benefit of judgment and order dated 23.12.1992 passed in the Bunch of petitions leading No.2447 (S/S) of 1991 (Triveni Prasad Pandey and others vs. State of U.P. and others) and also the benefit of judgment and order dated 01.11.2001 passed in Special Appeal no.21 of 1993 (State of U.P. Vs. Triveni Prasad Pandey).

iii. Several contempt petitions were filed for non-compliance of the order dated 30.11.2012. The State of U.P. vide order dated 10.04.2003 and 28.05.2003 had given the appointment to all the candidates. They had joined their services.

iv. Vide order dated 07.08.2003; 08.08.2003 and 11.08.2003, the appointments so made as Assistant Teacher were cancelled by declaring all appointments as void abinitio.

v. Against the cancellation of the appointments, several writ petitions

were filed before the High Court. Interim orders were also passed by the High Court in the writ petitions. During the pendency of the writ petitions, an advertisement dated 22.01.2004 was issued for the selection of Special B.T.C. training. Vide order dated 26.05.2004, the High Court, Lucknow Bench has modified the interim order to the extent that the result of the selection for Special B.T.C. Training can be declared but the selected candidates shall not be appointed on the post of Assistant Teachers occupied by the writ petitioners. It was further directed that 263 posts shall be kept vacant till the disposal of the writ petitions. Subsequently, all the writ petitions which were filed against the cancellation of the appointment were decided by common judgment and order dated 17.09.2004 passed by the learned Single Bench. The operative portion of the order reads as under :

"In view of the above, all the aforesaid writ petitions are disposed of finally with the following directions :

The impugned orders of cancellation of appointment in case of the petitioners who were party to the writ petitions which were decided as bunch of writ petitions vide judgment dated 13.12.1992, Annexure 7, are set aside. They will be reinstated on their posts on which they were working at the time of issuance of the impugned orders of cancellation of appointments. They shall also be paid salary for the period they have worked as Teacher. They will be considered for sending Special B. T. C. Course, 2004.

In case of the other petitioners who are not party in the writ petitions decided on 23.12.1992 vide judgment Annexure 7, the impugned orders for cancellation of appointment are set aside on the statement of Advocate General with the direction to the opposite parties to consider their cases for selection to the special B.T.C. course irrespective of the fact whether they have applied for the same or not. If they are found suitable in accordance with the amended provision under the Basic Teachers Education Rules, they will be sent for Special B.T.C. Course 2004 in preference of others. The age limit will not come in their way if they have crossed the upper age limit in litigating the matter after their appointment and if they were within the maximum age limit on the date of the earlier appointment they will be entitled to get relaxation in age if they are over age on the date of consideration for special B.T.C. These petitioners will be paid salary for the period they have worked and they will not be entitled to get any salary till they are sent for training to Special B.T.C. They will be given the same allowance during the training period which other candidates of Special B.T.C. shall be paid and after completion of Special B.T.C. they will be given appointment on the post of Assistant Teacher in primary schools like others.

These directions shall be complied with within a period of four weeks from the date of this judgment."

vi. Against the said order dated 17.09.2004, various special appeals had been filed and the said special appeals were decided by common judgment and order dated 29.04.2008. The judgment and order dated 29.04.2008 were not complied with by the State/opposite parties, then the applicants have filed various contempt petitions including the present one before this Court.

vii. The State Government had preferred Special Leave Petition before Hon'ble the Apex Court. Hon'ble the

Apex Court vide order dated 26.09.2008, stayed the contempt proceedings pending before this court. Vide order dated 09.09.2011, the interim order dated 26.09.2008 was vacated. The State has filed the recall application of the order dated 09.09.2011, which was rejected vide order dated 07.12.2011 and the Hon'ble Apex Court directed to the opposite parties to comply with the judgment and order dated 29.04.2008 within a period of ten weeks.

viii. After the order dated 07.12.2011 passed by Hon'ble the Supreme Court, the Secretary, Basic Education had given an undertaking on 08.12.2011 to comply with the judgment and order dated 29.04.2008. On the basis of undertaking given, the Secretary, Basic Education has issued an order dated 06.03.2012 canceling the termination order dated 07.08.2003. Thereafter another Government Order dated 16.04.2012 was issued directing the Director of Basic Education, U.P., Lucknow to ensure the compliance of the order passed by this Court.

ix. Special Leave Petitions filed against the judgment and order dated 29.04.2008 came up for hearing on 03.09.2015, where statement was made that the process for issuance of appointment letters were in process and the decision shall be taken within four weeks. Vide order dated 14.10.2015, all the Special Leave Petitions were dismissed. The State has filed a recall application for recall of judgment and order dated 14.10.2015 but the same had been dismissed as withdrawn vide order dated 09.09.2016. The State has filed a review application for reviewing of the judgment and order dated 14.10.2015 before Hon'ble the Apex Court, which was also dismissed vide order dated 12.04.2017.

4. Learned counsel appearing on behalf of the petitioners has submitted that all the respondents have full knowledge of the judgment and order dated 17.09.2004, 29.04.2008 and 14.10.2015 but all the opposite parties were sitting tight over the matter and not complying with the directions given by this Hon'ble Court as well as the undertaking given before Hon'ble the Apex Court.

5. The learned counsel for the petitioners has submitted that against the common judgment and order dated 17.09.2003, various Special Appeals were filed by the respondents. While deciding all the Special Appeals, the Division Bench of this Court directed the opposite parties to consider the applicants for being sent on training within the maximum period of two months vide order dated 29.04.2008. The petitioners have served the copy of judgment upon the Basic Shiksha Adhikari on 07.06.2008 and the secretary Basic Education. The opposite parties have not complied with the orders passed by the Division Bench of this Court in the Special Appeals and the petitioners were not sent for the training as directed by the Court though all the petitioners are fully eligible and qualified to be sent for training of B.T.C. Course. When no action was taken on the basis of the judgment and order dated 29.04.2008, then the petitioners have filed the contempt petition bearing no.1485 of 2008. In the said contempt petition, notices were issued to the responsible officers i.e. the Secretary Basic Education, U.P., Lucknow, Director of Education Basic.

6. The learned counsel for the petitioners also submitted that after

receiving the notice under the Contempt of Courts Act, the opposite parties have preferred a Civil Appeal No.7792-78110 of 2011 before Hon'ble the Apex Court. Hon'ble the Apex Court has stayed the contempt proceedings. It is submitted that the said stay was vacated vide order dated 09.09.2011. The State had filed a recall application before Hon'ble the Apex Court and the same was rejected vide order dated 07.12.2011. The State has filed second application for recall of order dated 09.09.2011 but again the Hon'ble Apex Court had rejected the application for recall of order dated 09.09.2011 and directed the opposite parties to comply with the directions issued by the Division Bench of the High Court vide order dated 29.04.2008. The contempt petition was listed on 08.12.2011 on which date the then Secretary Basic Education has given an undertaking that the order of the High Court dated 29.04.2008 will be complied with within the period extended by the Hon'ble Supreme Court. On the statement/undertaking given by the then Secretary, Basic Education the contempt petition was dismissed on 08.12.2011.

7. Th learned counsel for the petitioners further submitted that the Civil Appeal Nos. 7792 - 78110 of 2011 have also been dismissed on 14.10.2015 by the Hon'ble Supreme Court. Learned counsel for the petitioners has submitted that the opposite parties have full knowledge of the judgment and order dated 17.09.2004, 29.04.2008 and 14.10.2015 but they have not complied with the orders passed by this Hon'ble Court as well as by Hon'ble the Apex Court. Therefore, the action of the opposite parties are deliberate, intentional and amounts to contempt of this Hon'ble Court and the opposite parties are liable to be punished under the Contempt of Courts Act, 1971.

8. The learned counsel for the petitioners has submitted that in the earlier contempt petition bearing No.1485 of 2008, an application for recall of the order dated 08.12.2011 was moved but since the said application is not maintainable, therefore, the present petition is preferred.

9. The learned counsel for the petitioners submitted that on 23.12.2016, the Coordinate Bench of this Hon'ble Court has directed the opposite parties to re-examine the issue and file an affidavit of compliance. In pursuance of the order dated 23.12.2016, the opposite party no.5 instead of re-examining the issue, has constituted a Committee of Director, Rajya Shaikshik Anusandhan Evam Prashikshan Parishad, Uttar Pradesh Lucknow who submitted its report on 10.02.2017 to the opposite party no.5 and on the basis of which, the opposite party no.5 has sought information from the then learned Advocate General and after receiving the information, the opposite party no.5 issued a letter to the opposite party no.2 and Director, S.C.E.R.T. Lucknow on 08.03.2017 that too without application of mind. Learned counsel for the petitioners has submitted that on the basis of the judgment and order dated 29.04.2008, 27 candidates belonging to the Ist Category, the proceedings of reinstatement be done and further proceeding for sending the training of one Gita Sonker be started but nothing has been done in respect of the 229 candidates belonging to the category II, III and IV.

10. It is submitted that the contents of the report of the committee related to the disputes of the illegal appointment of Assistant Teachers of District Bahraich inspite of the facts that this Hon'ble Court

was set aside the order of cancellation of the appointment and Special Leave Petition filed by the opposite parties had been dismissed by the Hon'ble Supreme Court. Therefore, the recommendation of the Committee is nothing but amounts to contempt of this Court.

11. The learned counsel appearing on behalf of the petitioners submitted that in respect of the candidates belonging to the Category II, III and IV, the Committee had given its finding that this Court has decided to send the candidates on training according to the Rules. The committee has further recorded the finding that the appointment of the Assistant Teacher are to be made according to the U.P. Basic Education (Teachers) Service Rules, 1981, which has been framed under the provisions of the U.P. Basic Education Act, 1972 and all the applicants were appointed on the basis of qualification of B.Ed./L.T. but the said qualification was not included in the Service Rules of 1981. The committee has further accorded the finding that all appointments were illegal. The committee has recorded the finding that from time to time the State Government has issued Government Order for training of B.Ed. candidates after approval from N.C.T.E. such as Special B.T.C. 2004.

12. Learned counsel for the petitioners also submitted that the committee has extended its brief in recording the finding that according to the present guidelines of N.C.T.E., the candidates having B.Ed. qualification are not eligible for appointment as Assistant Teacher in Primary School from Class 1 to 5. The Committee has further recorded the finding that if the Government is taken the decision to send them for training then in such situation, separate training of Special B.T.C. will be required for which approval from N.C.T.E. will be required.

13. Learned counsel for the petitioners has submitted that the report of the committee dated 10.02.2017 is perverse and incorrect on the following grounds :

(a) The order of cancellation of appointment was set aside and opposite parties were directed to consider the candidates for training of Special B.T.C. under the amended provisions of the Service Rules. The judgment of this Hon'ble Court dated 17.09.2004 was same for all the categories but committee has failed to understood the same judgment and order dated 17.09.2004.

(b) This Hon'ble Court while upholding the judgment of the Hon'ble Single Judge dated 17.09.2004 in Special Appeal has directed on 29.04.2008 that all such candidates be considered for being sent on training as per Rules and its norms by giving them preference, hence, this manner the finding of the Committee is perverse in nature in respect of Category II, III and IV.

(c) There is no difference of candidature of category I and candidates of category II, III and IV but the committee has adopted different creation in respect of category I and II and III and IV. Hence, the finding in respect of the category II, III and IV is perverse.

(d) The Committee in its report at para 2 page 21 has recorded the finding to the effect that this Hon'ble Court vide its judgment dated 29.04.2008 says that such candidate who are under zone of candidature of Special B.T.C. of 2004, will be considered for appointment

according to Rule but this Hon'ble Court has not said any word in such manner, hence, the finding of the committee is perverse in nature.

(e) The Committee has considered the procedure provided in the Government Order dated 14.01.2004 and 20.02.2004 but these Government orders are not applicable as the vacancy relates to the year of 1995 and these Government Orders were issued specially to provide Special B.T.C. Course to 46189 candidates holding B.Ed./L.T. qualification. Hence, the finding of the committee is perverse in nature.

(f) By the Government Order dated 20.02.2004 the candidature of C.P.Ed., D.P.Ed. and B.P.Ed. were only included but the Committee has applied the said Government Order dated 14.01.2004 and 20.02.2004 in the case of category II, III and IV. Hence the finding of the Committee is perverse in nature.

(g) The vacancy in respect of the candidates of category II, III and IV are relates to the year of 1995, hence the decision of the Committee which is based on the basis of the Government Order dated 14.01.2004 and 20.02.2004 is incorrect and perverse in nature.

(h) The committee has also considered the appointments which were made in district Basti, Gorakhpur and Mahrajganj but the fact of the present case are also absolutely different. Hence considering the appointment of other district and including the present case goes the report perverse.

(i) The Committee while giving his report dated 10.02.2017 has not given any preference to the applicants and examine the case of the applicants only on the basis of the Government Order dated 14.01.2004 and 20.02.2004 that too are not applicable in the present case. Hence, the finding of the committee is absolutely perverse and utter violation of the judgment and order passed by the Hon'ble Single Judge as well as by the Hon'ble Division Bench.

(j) The committee in his report has recorded the finding that if a decision for sending the category II, III and IV candidate for training is taken from the State Government for special B.T.C. course then the approval from N.C.T.E. is required but doing so further, committee has taken just opposite decision applying the Government Order dated 14.01.2004 and 20.02.2004, hence the report of the Committee is contradictory in nature itself and made the report perverse.

(k) The committee has relied on a Government Order dated 14.01.2004 and 20.02.2004 for considering the case of the applicants for being sent for training instead of considering the case of the applicants under the Rule of 1981 in utter violation of the judgment and order passed by Hon'ble Single Judge as well as by the Division Bench.

14. The learned counsel for the petitioners has submitted that from the facts stated hereinabove, it clear that the report of the committee is perverse in nature and on the basis of the such report, the opposite party no.5 has issued letter on 08.03.2017 and thereafter has filed the compliance report before this Hon'ble court, which is liable to be rejected. Learned counsel submits that from the facts and circumstances stated above, till today, the judgment and order dated 17.09.2004, 29.04.2008 have not been complied with and the action of the opposite parties is deliberate, intentional and therefore, amounts to contempt of this Hon'ble Court and they are liable to be punished under the Contempt of Courts Act, 1971.

15. Per contra, Learned Advocate General appearing on behalf of the State has submitted that prior to enactment of the U.P. Act No.34 of 1972, the U.P. Municipal Board Educational Establishment Service Rules, 1954 was made under sub-section (2) of the Section 73 of the United Provinces Municipalities Act, 1916; and under Part XI Rule 26 of the Rules 1954, the training qualifications for appointment as Basic Education Teacher were prescribed as H.T.C. (Hindustani Teachers' Certificate), J.T.C. (Junior Teachers' Certificate), P.T.C. (Primary Teacher's Certificate) and V.T.C. (Vernacular Teachers' Certificate). It has also been submitted that after constitution of Educational Code of Uttar Pradesh, the appointment of untrained as Basic Teacher was barred. Later on the U.P. Basic Education Act, 1972 was enacted and the Board of Basic Education, U.P. was constituted. Since statutory rules were not made, as such, in absence of statutory rules, the Board issued a Circular dated 25.04.1973 determining the conditions/procedure and qualifications for appointment as a teacher in the Basic institutions under Clause 4 of the said Circular, which were C.T., J.T.C., B.T.C. and H.T.C. On 03.01.1981 the U.P. Basic Education (Teachers) Service Rules, 1981 came into force and the Circular of the Board dated 25.04.1973 automatically became ineffective.

16. The learned Advocate General has submitted that an advertisement was issued on 22.01.1991 by the Additional Director (Basic Education), Faizabad against about 1200 vacancies prescribing training qualification of B.T.C., out of which 315 posts were for District Bahraich. Against the advertisement dated 22.01.1991, 258 applications were submitted by B.T.C. training holders and 53 by B.Ed./L.T. Training holders but no appointment of any training holder (even of B.T.C.) was made against the said advertisement, as such, the petitioners applications were not considered and after the expiry of one year i.e. on 21.01.1992, the said advertisement itself became ineffective. A Bunch of seven writ petitions against the advertisement dated 19/22.01.1992 was filed, which were partly allowed by this Hon'ble Court on 23.12.1992 and the opposite parties were directed that in case sufficient number of B.T.C. trained candidates are not available for appointment as Assistant Teachers in the Basic Schools, the petitioners who have qualified for appointment on the basis of advertisement dated 22.01.1991 be appointed as Assistant Teachers in the Basic Schools managed and run by the opposite parties, within a period of three weeks.

17. The learned Advocate General has further submitted that another advertisement was made by the B.S.A, Bahraich on 19.12.1995 prescribing B.T.C. training as eligibility qualification and against the said advertisement dated 19.12.1995, 416 applications of B.T.C. training holders and 325 applications of B.Ed./L.T. Training - holders were received.

Judgment dated 23.12.1992 was challenged in Special Appeal No.21 of 1993 filed by the Board, which was dismissed on 01.11.2001. Special Leave Petition of the Board bearing no.3267 (CC) of 2002 (Basic Shiksha Parishad vs. Triveni Prasad Pandey) was got dismissed as withdrawn.

18. In pursuance of the advertisement dated 19.12.1995, several

applications were wrongly made by the B.Ed./L.T. Training holders and on the event of their non-consideration, a Bunch of 112 writ petitions was filed which were decided by this Hon'ble Court on 30.11.2002 with direction to the opposite parties to consider the case of petitioners having B.Ed. or L.T. Qualifications for appointment as Assistant Teacher in Basic Schools, if sufficient number of B.T.C. qualification holders are not available for selection. It has been submitted that the B.S.A. of Bahraich District made 263 appointments in compliance to the judgment and order dated 23.11.1992 and 01.11.2001 and the State Government vide G.O. dated 07.08.2003 declared the said appointment as void ab-initio and in pursuance to aforesaid Government Order, Director, Basic Education, U.P. issued order dated 08.08.2003 and in pursuance thereto, all the appointments were cancelled by the then B.S.A.

19. The learned Advocate General has further submitted that against the Government Order dated 07.08.2003 as well as the order dated 08.08.2003 passed by the Director, Basic Education, 19 writ petitions were filed by the candidates of District Bahraich, which were commonly decided vide order dated 17.09.2004. Nineteen Special Appeals against the judgment dated 17.09.2004 and several Special Appeals against the judgment dated 30.11.2002 were filed before this Hon'ble Court and the same were decided on 29.04.2008 with direction that all such candidates be considered for being sent on training as per rules and it norms by giving them preference, but for that matter, age will not come in their way and their candidatures shall not be rejected merely on the ground of being over age. In another bunch of appeals, it has been observed that in view of the judgment of Apex Court in the case of ***Mohd. Sartaj vs. State of U.P.; (2006) 2 SCC 313,*** there hardly remains any controversy in this regard that the candidates who are not possessing B.T.C. training qualification are not entitled for being appointed as Assistant Teachers in Primary Schools and the orders passed by the learned Single Judge is liable to be set aside, which is hereby set aside.

20. It has been submitted by the learned Advocate General that Bunch of writ petitions filed at Allahabad assailing the decisions of the authorities dated 30.01.2008 and other dates was jointly decided on 12.04.2013 considering both the judgments of Hon'ble Lucknow Bench dated 17.09.2004 and 29.04.2008. The judgment dated 12.04.2013 was assailed in nine special appeals (leading no.1031 of 2013 - Sanjay Kumar Chaubey vs. State) and are pending at Allahabad but no interim orders have been passed even till date.

21. It has been submitted that in compliance to order dated 10.02.2017 passed in the present contempt petition, a three Member Committee (Director - S.C.E.R.T., Director - Basic and Secretary - Board) was constituted who submitted its detailed report on 10.02.2017 and in pursuance of the said report, the matter was reconsidered and decided by the State Government on 08.03.2017 that as per the judgment dated 29.04.2008, 27 candidates of first category who are appointed on untrained grade be reinstated and as per the direction of the Hon'ble Court, they should also be paid their salary for the period they have actually work and one candidate Miss Geeta Sonkar who could not be sent for Special B.T.C. training on

account of the non-availability of her application in Special B.T.C. 2004 be sent for training.

22. In support of his arguments, learned Advocate General has relied on the judgment of Hon'ble the Apex Court in the case of ***Secretary, A.P. Public Service Commission vs. Y. V.V.R. Srinivasulu and others reported at 2003 (5) SCC 341*** wherein in para 10 and 11 the following has been held :

"10. Both on account of the scheme of selection and the various stages disclosed as necessary to be undergone by every candidate and the manner of actual selection for the appointment in question, the candidates were required to be selected finally for appointment on the basis of the ranks obtained by them in terms of the inter se ranking based on the merit of their respective performance. There is no escape for anyone from this ordeal and claim for any en bloc favoured treatment merely because, anyone of them happened to possess an additional qualification than the relevant basic/general qualification essential for even applying to the post. The word "preference" in our view is capable of different shades of meaning taking colour from the context, purpose and object of its use under the scheme of things envisaged. Hence, it is to be construed not in an isolated or detached manner, ascribing a meaning of universal import, for all contingencies capable of an invariable application. The procedure for selection in the case involve, a qualifying test, a written examination and oral test or interview and the final list of selection has to be on the basis of the marks obtained in them. The suitability and all round merit, if had to be adjudged in that manner only what justification could there be for overriding all these merely because, a particular candidate is in possession of an additional qualification on the basis of which, a preference has also been envisaged. The rules do not provide for separate classification of those candidates or apply different norms of selection for them. The 'preference' envisaged in the rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their superiority, merit wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection.

11. Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification

or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered. If it is to be viewed they way the High Court and Tribunal have chosen to, it would amount to first exhausting in the matter of selection all those, dehors their inter se merit performance, only those in possession of additional qualification and take only thereafter separately those with ordinary degree and who does not possess the additional qualification. Assuming for consideration without even accepting the same to be right or correct view to be taken, at least among the class or category of those possessing the additional qualification, inter se merit performance should be the decisive factor for actual selection for appointment and relief could not have been granted to respondents for the mere asking only on the basis of the interpretation of the provision to some one who came to court, ignoring the fact that those before the court at any rate in spite of the view taken do not come up to the level of selection considered in the context of numerous others with higher ranks of merit performance, in addition to they being also in possession of the additional qualification, as those before the court. That apart, the old rule relating to the post of ACTO, which has become obsolete having been superseded, or even the advertisement if it has stated on the basis of the obslete rule, that preference will be given first to candidates who possess a degree in Commerce and degree in Law, secondly to those who possess a degree in Commerce and thirdly to those who possess a degree in Law, cannot either support the claim of the respondents No.1 to 3 nor in any manner lend credence to the interpretation placed by the High Court and the Tribunal. The word 'first' has to be construed in the context of even giving preference only in the order and manner indicated therein, inter se among more than one holding such different class of degrees in addition and not to be interpreted vis-a-vis others who do not possess such additional qualification, to completely exclude them, en bloc."

23. The learned Advocate General has lastly submitted that in compliance to the judgments dated 17.09.2004 and 29.04.2008 and also in compliance to order of Hon'ble Contempt Court dated 23.12.2006, the matter in dispute has been reconsidered and finally decided by the State Government vide order dated 08.03.2017, as such, the orders have been complied with and nothing is left in the present contempt petition and the present contempt petition is liable to be dismissed. However, if the petitioners are aggrieved with such compliance, they may approach in fresh proceedings.

24. I have heard learned counsel for both the parties at length and perused the materials available on record.

25. In order to decide whether the opposite parties are guilty of civil contempt, I would like to refer to Section 2(b) of the Contempt of Courts Act, 1971, which reads as under:-

"2. Definitions:

In this Act, unless the context otherwise requires-

XXXXX

(b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court;"

Referring to the aforesaid Section, the Supreme Court in ***Rama Narang versus Ramesh Narang and Another, (2006) 11 SCC 114*** had referred to the Contempt of Courts Act, 1952, which did not contain many of the provisions of the Act, for the Legislature had left formulation of the law of contempt to the Courts, which had resulted in conflicting views expressed by different High Courts. Reference was made to the conflicting view expressed by the Calcutta High Court in ***Nisha Kanto Roy Chowdhury versus Smt. Saroj Bashini Goho, AIR 1948 Calcutta 294*** and the Bombay High Court in ***Bajranglal Gangadhar Khemka and Another versus Messrs. Kapurchand Limited, AIR 1950 Bombay 336.***

26. According to section 2(b) of the Contempt of Courts Act, 1971 civil contempt means willful disobedience to any judgement, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court.

27. Thus, from the above, it can be ascertained that there are two important essentials to constitute civil contempt:

i. Disobedience of any judgement, decree, direction, order, writ or other process of a court or an undertaking given to the court. There should be disobedience of a valid order to constitute contempt of court. An order includes all kinds of judgements, orders-final, preliminary, ex-parte, contempt order. Disobedience of a decree, direction, writ or other process of a court, or an undertaking given to the court, will also amount to contempt of court.

ii. The Disobedience or breach must be willful, deliberate and intentional. It is well settled that mere disobedience or breach of the court's order by the person is not sufficient to constitute civil contempt. Such a disobedience or breach must be willful, deliberate and intentional.

28. In the case of ***Ashok Paper Kamgar Union And Ors. vs Dharam Godha And Ors. reported at AIR 2004 SC 105,*** Hon'ble the Apex Court has examined the provisions of section 2 (b) of the Contempt of Court Act 1971 that defines the terms of Civil Contempt and held that the term 'Wilful' means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose. Therefore, in order to constitute contempt, the order of the Court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extra ordinary effort nor should be dependent, either wholly or in part, upon any act or omission of a third party for its

compliance. This has to be judged having regard to the facts and circumstances of each case.

29. According to the Oxford Dictionary, contempt is the state of being despised or dishonored; disgrace. Any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties or their witness during litigation is considered to be contempt of Court. The contempt is defined by Halsbury, as consisting of words spoken or written which obstruct or tends to obstruct the administration of justice. The Indian legislature does not provide with a concrete definition of contempt, however section 2(a) of The Contempt of Courts, 1971 says "contempt of court means civil contempt or criminal contempt'. Section 2(b) & section 2(c) of The Contempt of Courts Act, 1971 defines civil and criminal contempt. Although the legislature has not defined what amounts to contempt, it has defined civil and criminal contempt. Thus contempt cannot be confined to four walls of a definition. Therefore, what would offend the court's dignity and what would lower the court's prestige is thus a matter which can be decided by the court itself and it's for the court to deal with each case of contempt under the facts and circumstances of that case.

30. If the order whose contempt is alleged involves more than one reasonable and rational interpretation and the respondent adopts one of them and acts in accordance with one such interpretation, he cannot be held liable for contempt of court. However, this defense is available only when a bonafide question of interpretation arises. In case of ***T.M.A. Pai Foundation vs. State of Karnataka (2002) 8 SCC 481,*** it was held that this defense would not be allowed if a doubt about the order has been deliberately created when actually there is no doubt at all. It is well settled that in proceedings for civil contempt, it would be a valid defence that the compliance of the order is impossible. However, the cases of impossibility must be distinguished from the cases of mere difficulty. In case of ***Amar Singh vs. K. P. Geetakrishnan,*** the court granted certain pensionary benefits to a large number of retired employees with effect from a particular back date. The plea of impossibility was taken on the ground that the implementation of the order would result in heavy financial burden on the exchequer. However, the plea of impossibility was rejected by the court with the observation that although it's difficult to comply with the order but it's not impossible to comply and therefore, it should be complied with.

31. In the case of the ***S. Balasubramaniyam vs P. Janakaraju and another reported at 2004 (5) Kar L.J. 338,*** the High Court of Karnatka observed that the orders of Courts have to be obeyed unless and until they are set aside in appeal/revision.

32. While elucidating on the principles relating to contempt law the Court remarked that the definition of Civil Contempt includes willful breach of an undertaking given to a Court. Public interest requires that solemn undertakings given to a Court with the intention of obtaining any benefit should not be breached willfully. No litigant can be allowed to wriggle away from a solemn undertaking given to the Court, as it will

open dangerous trends and defeat the very purpose of giving undertakings to Court. It was further observed that once litigants give an undertaking to a Court, they should comply with it in all circumstances, the only exceptions being fraud or statutory bar. They cannot break an undertaking with impunity and then attempt to justify it. The breach of solemn undertaking given to a Court is a serious matter and will have to be dealt with seriously.

33. The Bombay High Court, in ***Bajranglal Gangadhar Khemka and Another (supra)*** had drawn a distinction between execution proceedings and proceedings for contempt which arise from wilful default of an undertaking. The judgment referred to the long standing practice as per which the expression "undertaking" had come to acquire a technical and legal meaning and understanding. It was observed that the expression "when a party undertakes" is used to give an undertaking to the Court as distinct from when a counsel states that he undertakes on behalf of his client. When a person gives an undertaking to the Court, it is not given to the other side but to the Court itself, and that being said must carry sanctity. Therefore, when a Court passes a decree after an undertaking was embodied in the consent terms, it would show that the Court had sanctioned the particular course and put its imprimatur on the consent terms. The Supreme Court agreed with the view expressed in ***Bajranglal Gangadhar Khemka and Another (supra)*** in preference over the view expressed in by the Calcutta High Court in ***Nisha Kanto Roy Chowdhury (supra).*** Thereafter, reference was made to Sanyal Committee report, which had preceded framing of the enactment of the Act and thereupon interpreting Section 2(b) of the Act the Supreme Court in ***Rama Narang (supra)*** had observed:-

"18. The Act has been duly widened. It provides inter alia for definitions of the terms and lays down firmer bases for exercise of the court's jurisdiction in contempt. Section 2(b) of the Contempt of Courts Act, 1971 defines civil contempt as meaning "wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court". (emphasis supplied) Analysed, the definition provides for two categories of cases, namely, (1) wilful disobedience to a process of court, and (2) wilful breach of an undertaking given to a court. As far as the first category is concerned, the word "any" further indicates the wide nature of the power. No distinction is statutorily drawn between an order passed after an adjudication and an order passed by consent. This first category is separate from the second and cannot be treated as forming part of or taking colour from the second category. The legislative intention clearly was to distinguish between the two and create distinct classes of contumacious behaviour. Interestingly, the courts in England have held that the breach of a consent decree of specific performance by refusal to execute the agreement is punishable by way of proceedings in contempt (see C.H. Giles and Co. Ltd. v. Morris [(1972) 1 All ER 960 : (1972) 1 WLR 307 (Ch D)])..

34. It is to be, therefore, clearly understood that Section 2(b) of the Act, which defines civil contempt, consists of two different parts and categories,

namely, (i) wilful disobedience to any judgment, decree, direction, order, writ or other process of a court and (ii) wilful breach of an undertaking given to a Court. The expression "any" used with reference to the first category indicates the wide nature of power given to the Court and that the statute does not draw a difference between an order passed after adjudication or an order passed by consent. The first part or category is distinct and cannot be treated as a part or taking colour from the second category. The Supreme Court consciously observed that the Courts in England have held that breach of consent decree of performance by refusal to execute an agreement was punishable by way of contempt proceedings. With reference to the second part, in **Rama Narang (supra)** it was observed that giving of an undertaking is distinct from a consent order recording compromise. In the latter case of violation of compromise, no question of contempt arises, but the party can enforce the order of compromise either by execution or injunction from a Court. However, in the former case, when there is wilful disobedience, contempt application and proceedings would be maintainable.

35. In **Rama Narang (supra),** several suits inter se and legal proceedings between the second wife of the deceased and her step sons were compromised, with both the parties agreeing that the suits/proceedings be disposed of in terms of the settlement agreement by minutes of the consent order. Consent contained various terms agreed upon by the parties. Allegations were that the step sons had not complied with the consent terms consequent to which contempt proceedings were initiated for willful disobedience. In this case, the Supreme Court relied upon first part/category mentioned in Section 2(b), i.e., wilful violation of any order or decree that would amount to contempt. It was observed that a consent decree is a compromise by way of command or a contract and the Bombay High Court‟s view in **Bajranglal Gangadhar Khemka and Another (supra)** correctly holds that a consent decree is a contract with imprimatur of the Court, which means authorised and approved by the Court. Such decrees are executable under the Code of Civil Procedure, but merely because an order or decree is executable would not take away the Court‟s jurisdiction to deal with the matter under the Act, provided the Court is satisfied that the violation of the order or decree is such that if proved, it would warrant punishment under Section 13 of the Act on the ground that the contempt substantially interferes or tends to substantially interfere with the course of justice. Reference was made to Bank of Baroda versus **Sadruddin Hasan Daya and Another, (2004) 1 SCC 360** wherein the ratio in **Bajranglal Gangadhar Khemka and Another (supra)** that violation or breach of an undertaking, which becomes part of the court decree itself, amounts to contempt, irrespective of whether it is open to the decree holder to execute the decree, was upheld. This, it was observed was the law and it cannot be argued that if the party aggrieved can execute a decree per se, it can be a defence having bearing on the contempt proceedings.

36. In ***Kanwar Singh Saini versus High Court of Delhi, (2012) 4 SCC 307,*** the Supreme Court had cautioned that if there is non-compliance of a decree passed in a civil suit, the remedy available

to an aggrieved person in case of non-compliance of a decree passed in a civil suit is to institute execution proceedings under Order XXI Rule 32 of the Code, which provides for elaborate proceedings in which the parties can adduce evidence, examine and cross-examine witnesses. Proceedings under the Act are discretionary and, therefore, when the matter relates to infringement of a decree or decretal order that embodies rights, it may not be expedient to invoke and exercise contempt jurisdiction. The Supreme Court had referred to civil contempt as defined in Section 2(b) of the Act to mean wilful breach of an undertaking as distinct from criminal contempt. In civil contempt, disobedience of a civil action is a matter involving private rights of a party, albeit contempt jurisdiction is exercised when administration of justice is undermined if the order of the competent court is permitted to be disregarded with impunity. Criminal contempt, on the other hand, is predicated on public interest. In cases of civil contempt where the civil contempt jurisdiction is invoked, there should be violation of judgment, decree, direction or order and such disobedience should be wilful and intentional. In cases of execution, an executing court may not be bothered whether the disobedience was wilful or not, as the Court was bound to execute the decree irrespective of the consequences. In contempt proceedings, however, the Court may not direct execution if the disobedience has been under compelling circumstances and in that situation, no punishment need be awarded. In the said case, criminal contempt proceedings were quashed. Kanwar Singh Saini (supra), makes reference to Daroga Singh versus B.K. Pandey, (2004) 5 SCC 26 and other judgments and has observed:-

*In **Daroga Singh v. B.K. Pandey [(2004) 5 SCC 26 : 2004 SCC (Cri) 1521],** the Court rejected the plea of the contemnors that the High Court could not initiate the contempt proceedings in respect of the contempt of the courts subordinate to it placing reliance upon earlier judgments in Bathina Ramakrishna Reddy v. State of Madras [AIR 1952 SC 149 : 1952 Cri LJ 832] , Brahma Prakash Sharma v. State of U.P. [AIR 1954 SC 10 : 1954 Cri LJ 238] and State of M.P. v. Revashankar [AIR 1959 SC 102 : 1959 Cri LJ 251] . The Court further explained the scope of contempt proceedings observing: (Daroga Singh case [(2004) 5 SCC 26 : 2004 SCC (Cri) 1521] , SCC pp. 46-47, para 33) :*

"33. ... For the survival of the rule of law the orders of the courts have to be obeyed and continue to be obeyed unless overturned, modified or stayed by the appellate or revisional courts. The court does not have any agency of its own to enforce its orders. The executive authority of the State has to come to the aid of the party seeking implementation of the court orders. The might of the State must stand behind the court orders for the survival of the rule of the court in the country. Incidents which undermine the dignity of the courts should be condemned and dealt with swiftly. ... If the judiciary has to perform its duties and functions in a fair and free manner, the dignity and the authority of the courts has to be respected and maintained at all stages and by all concerned failing which the very constitutional scheme and public faith in the judiciary runs the risk of being lost."

37. It would be relevant and important to understand meaning of the term "wilful disobedience'. The word "wilful' as defined in dictionaries means Contempt purposely without reference to bona fides, deliberately, intentionally with evil intention, wantonly and causelessly. The Supreme Court in ***Niaz Mohammad and Others versus State of Haryana and Others, (1994) 6 SCC 332*** explaining the expression "wilful disobedience' had held:-

"9. Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act') defines "civil contempt" to mean "wilful disobedience to any judgment, decree, direction, order, writ or other process of a court ...". Where the contempt consists in failure to comply with or carry out an order of a court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order. The court while considering the issue as to whether the alleged contemner should be punished for not having complied with and carried out the direction of the court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemner is punished for non-compliance of the direction of a court, the court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was wilful and intentional. The civil court while executing a decree against the judgment-debtor is not concerned and bothered whether the disobedience to any judgment, or decree was wilful. Once a decree has been passed it is the duty of the court to execute the decree whatever may be consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the court has to record a finding that such disobedience was wilful and intentional. If from the circumstances of a particular case, brought to the notice of the court, the court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the court may not punish the alleged contemner."

38. In ***Ashok Paper Kamgar Union versus Dharam Godha and Others, (2003) 11 SCC 1,*** the expression 'wilful disobedience' in the context of Section 2(b) of the Act was read to mean an act or omission done voluntarily and intentionally with the specific intent to do something, which the law forbids or with the specific intention to fail to do something which the law requires to be done. Wilfulness signifies deliberate action done with evil intent and bad motive and purpose. It should not be an act, which requires and is dependent

upon, either wholly or partly, any act or omission by a third party for compliance.

39. In ***Ram Kishan versus Tarun Bajaj and Others, (2014) 16 SCC 204***, it was observed as under:-

*"**12.** Thus, in order to punish a contemnor, it has to be established that disobedience of the order is "wilful". The word "wilful" introduces a mental element and hence, requires looking into the mind of a person/contemnor by gauging his actions, which is an indication of one's state of mind. "Wilful" means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct." (Vide S. Sundaram Pillai v. V.R. Pattabiraman [S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591] , Rakapalli Raja Ram Gopala Rao v. Naragani Govinda Sehararao [Rakapalli Raja Ram Gopala Rao v. NaraganiGovindaSehararao, (1989) 4 SCC 255 : AIR 1989 SC 2185] , Niaz Mohammad v. State of Haryana [Niaz Mohammad v. State of Haryana, (1994) 6 SCC 332 : AIR 1995 SC 308] , Chordia Automobiles v. S. Moosa [Chordia Automobiles v. S. Moosa, (2000) 3 SCC 282] , Ashok Paper Kamgar Union v. Dharam Godha [Ashok Paper Kamgar Union v. Dharam Godha, (2003) 11 SCC 1] , State of Orissa v. Mohd. Illiyas [State of Orissa v. Mohd. Illiyas, (2006) 1 SCC 275 : 2006 SCC (L&S) 122 : AIR 2006 SC 258] and Uniworth Textiles Ltd. v. CCE [Uniworth Textiles Ltd. v. CCE, (2013) 9 SCC 753] .)"*

This decision also holds as under:-

*"**11.** The contempt jurisdiction conferred on to the law courts power to punish an offender for his wilful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizen that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither be fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to*

impose sentence for contempt on the authorities in exercise of the contempt jurisdiction on mere probabilities. (Vide V.G. Nigam v. Kedar Nath Gupta [V.G. Nigam v. KedarNath Gupta, (1992) 4 SCC 697 : 1993 SCC (L&S) 202 : (1993) 23 ATC 400], Chhotu Ram v. Urvashi Gulati [Chhotu Ram v. Urvashi Gulati, (2001) 7 SCC 530 : 2001 SCC (L&S) 1196] , Anil Ratan Sarkar v. Hirak Ghosh [Anil Ratan Sarkar v. Hirak Ghosh, (2002) 4 SCC 21] , Bank of Baroda v. Sadruddin Hasan Daya [Bank of Baroda v. Sadruddin Hasan Daya, (2004) 1 SCC 360] , Sahdeo v. State of U.P. [Sahdeo v. State of U.P., (2010) 3 SCC 705 : (2010) 2 SCC (Cri) 451] and National Fertilizers Ltd. v. Tuncay Alankus [National Fertilizers Ltd. v. Tuncay Alankus, (2013) 9 SCC 600 : (2013) 4 SCC (Civ) 481 : (2014) 1 SCC (Cri) 172] .)"

40. Thus, in case of a reasonable doubt, it is not fair and reasonable for the Courts to exercise jurisdiction under the Act for the proceedings are quasi-criminal in nature and the standard of proof required in these proceedings is beyond all reasonable doubt and not mere probabilities. Thus, in cases where two interpretations of an order are possible and if the action is not contumacious, contempt proceedings are not maintainable and for this purpose the order must be read in entirety. It may also be noted that there is a difference between "standard of proof" and "manner of proof" in contempt proceedings. Contempt proceedings are sui generis in the sense that strict law of evidence and Code of Criminal Procedure are not applicable. However, the procedure adopted in the contempt proceedings must be fair and just.

41. In compliance of the judgment and order of this Court dated 17.09.2004 as well as the undertaking given by the authorities before the Court, the entire matter has been reconsidered and decided by the opposite parties and passed an order dated 08.03.2017 by which twenty five candidates out of twenty seven were reinstated; the arrears in favour of twenty five candidates have also been paid; the arrears of seven candidates selected for Special B.T.C. Training - prior to judgment dated 17.09.2004 - have also been paid for their working period by the Basic Shiksha Adhikari on 17.08.2017; the current salary of the aforesaid twenty five candidates, as untrained grade, are being paid; the arrears of two dead persons namely Surendra Nath Mishra and Sri Mayaram Verma have been received by their legal heirs and as per the G.O. dated 14.01.2004 and letter of Director S.C.E.R.T. dated 24.07.2004, 24.08.2004 as well as G.O. dated 28.01.2005, Principal D.I.E.T. Bahraich has been requested to provide required training to all the twenty five reinstated teachers, so that they may get trained grade salary.

42. In view of the above discussions, it is clear that the opposite parties have complied with the directions issued by the Courts and if the contempt petitioners have found that the order is not in conformity with the directions passed by this court, they may avail of the opportunity to seek judicial review of the order passed by the authorities. The order passed by the authorities is on the basis of the directions issued by the Court. There arises a fresh cause of action to seek redressal in an appropriate forum. The order passed by the authorities concerned may be wrong or may not be in conformity with the direction, that would be a fresh cause of action for the aggrieved party to avail of the opportunity

in judicial review but that cannot be considered to be a willful violation of the order.

43. It is stated and observed in several cases that the contempt is between the Court and the contemnor and the aggrieved party cannot insist that the Court should exercise such jurisdiction. The discretion is exercised by the Court for maintenance of Court's dignity and majesty of law. However, it would not be entirely correct to state that punishment under the contempt jurisdiction is granted to uphold the dignity of the Court. Contempt jurisdiction is invoked and punishment is imposed to uphold the authority of Court to punish the contemnor and to act as a deterrent to others. This deterrent is motivated in the interest of the public in order to prevent future incidents of wilful disregard and disobedience of the Court orders by a party. Further, contempt jurisdiction may even invoke belated compliance, which is in public interest and when such compliance is made, the contemnor may seek reduction or discharge of the sentence in view of subsequent conduct to purge the contempt by complying with the order. Contempt jurisdiction is invoked when breaches are of the highest level of culpability in the sense that they are wilful. Further, persistence and continuous damage and disobedience could in a given case reflect no remorse from the person against whom action is taken.

44. In view of the aforesaid discussions, I do not find any merit in the present contempt petitions.

The contempt petitions are accordingly **dismissed.**

(2019)10ILR A 1374

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.10.2019

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Bail Application No. 8300 of 2019

Ankur Mishra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sushil Kumar Singh

Counsel for the Opposite Parties:
G.A., Jayshanker Shukla, Sri Laltaprasad Misra

A. Code of Criminal Procedure, 1973 - Section 438 - cancellation of anticipatory bail- power to grant anticipatory bail is an extra ordinary power and it should be exercised sparingly-an absconder or proclaimed offender should not be granted anticipatory bail-upon conclusion of investigation and filing of a charge sheet, the accused has to surrender to the custody of the court and pray for regular bail and an accused cannot avoid appearing before the trial court, on the strength of an anticipatory bail-Hence, the application is allowed.

B. In the present case, respondent no.3 has been able to avoid arrest since the date of the F.I.R. and despite having obtained non-bailable warrants against him and issuance of the proclamation under Section 82/83 Cr.P.C. he was not arrested. The Chief Judicial Magistrate, Lucknow wrote letters to the highest police authorities for instructions and direction to the Investigating Officer to complete the investigation and effect the arrest of the accused, but despite the aforesaid direction, the accused was not

arrested. Further, the Sessions Court has not considered these aspects regarding issuance of the non-bailable warrants and the process under Section 82/83 Cr.P.C. and without taking into consideration, it has granted the anticipatory bail in the manner which is not in consonance with the law laid down by the Supreme Court in several judgments. (Para 7,9,15,17 to 51)

Bail Application allowed (E-6)

Precedent followed: -

1. Sakiri Vasu Vs St. of U.P. & ors. 2008 (2) SCC 409

2. Hema Mishra Vs St. of U.P. & ors. (2014) 4 SC 453

3. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Punj. (1980) 2 SCC 565

4. Siddharam Satlingappa Mhetre Vs St. of Mah. & ors. (2011) 1 SCC 694

5. Bhadresh Bipinbhai Sheth Vs St. of Guj. & anr. (2016) 1 SCC 152

6. Salauddin Abdulsamad Shaikh Vs St. of Mah. (1996) 1 SCC 667

7. K.L. Verma Vs St. & anr. (1998) 9 SCC 348

8. Sunita Devi Vs St. of Bihar & anr. (2005) 1 SCC 608

9. Adri Dharan Das Vs St. of W.B. (2005)

10.Reshmi Rekha Thatoi & anr. Vs St. of Ori. & anr. (2012) 5 SCC 690

11. HDFC Bank Ltd. Vs J.J. Manan & anr. (2010) 1 SCC 679

12.Lavesh Vs St. (NCT of Delhi) (2012) 8 SCC 730

13. St. of M.P. Vs Pradeep Sharma (2014) 2 SCC 171

14.Jai Prakash Singh Vs St. of Bihar & anr. (2012) 4 SCC 379

15. P. Chidambaram Vs Directorate of Enforcement in Criminal Appeal No.1340 of 2019

16. St. of Mah. & anr. Vs Mohd. Sajid Husain Mohd. S. Husain & ors. (2208) 1 SCC 213

17.St. of U.P. through CBI Vs Amarmani Tripathi (2005) 8 SCC 21

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

1. This application has been filed for cancellation of anticipatory bail granted under Section 438 Cr.P.C. to accused-respondent no.3 (herein after referred to as 'respondent no.3') in F.I.R. No.1194 of 2018 registered under Section 304A IPC, however, later on converted under Sections 304 and 201 IPC, Police Station Chinhat, District Lucknow.

2. Allegations in the F.I.R. are that the complainant along with his family on 21.12.2018 at around 8.30 PM went to attend the birthday party of daughter of one of relatives at Hotel Grand Orion, in front of the High Court building, Faizabad Road, Lucknow. The party was organised on the third floor of the hotel. However, the railing of the balcony was not properly fixed and it was just put up by the side of the wall. The 11 years old son of the complainant as soon as went near the railing and touched it, he fell down along with railing on the ground. The son of the complainant was taken to the Lohiya Hospital, Lucknow. However, he was declared brought dead by the doctors.

It was alleged that without ensuring the safety of the guests coming to the hotel and in gross negligence, without taking due care to the lives and safety of the guests, the party was organised on third floor by the owner and the manager of the hotel and they played with the lives of guests.

3. On the basis of the aforesaid compliant of the father of the deceased, F.I.R. No.1194 of 2018 came to be registered on 22.12.2018 under Section 304A I.P.C. against the owner and the manager of the Hotel Grand Orion.

4. Despite the F.I.R., the accused were not arrested and, therefore, the complainant wrote to the Senior Superintendent of Police, Lucknow on 24.12.2018 and gave further information to be included in the investigation. It was said that after the incident, neither the management of the hotel rendered any assistance for taking the son of the complainant to the hospital nor information was given to the police nor ambulance was called for. The deceased was taken to the Lohiya Hospital in a private car by the complainant and other relatives, where he was declared brought dead.

5. It was further alleged that immediately after the incident, the workers of the hotel washed the blood at the place of the incident and they also removed the material of railing which fell down. During this period, two times the electricity of the hotel was disconnected by the hotel management for five minutes each.

6. It was also said that after receiving the information that son of the complainant had died, all the employees and management of the hotel fled away from the place of the incident of the hotel. The complainant further alleged that the hotel was illegally constructed and no inspection was made after it got constructed. There was no permission to run the hotel from the Lucknow Development Authority and, the Municipal Corporation, Lucknow and the hotel did not have any certificate from other relevant departments for running the hotel. The site plan of the hotel was not approved and the balcony was also not sanctioned. When the hotel was still under construction, it had been let out and the hotel was running without having got all the requirements completed without having completion certificate. It was said that the CCTV footage should be secured and incomplete hotel should be ordered to be closed down and, the owner and manager of the hotel, who were avoiding arrest, should be arrested.

7. The respondent no.3 instead of surrendering filed Writ Petition No.16 (MB) of 2019 before this Court seeking issuance of a writ in the nature of certiorari for quashing the F.I.R. No.1194 of 2018. It was contended that Section 304 I.P.C., in the facts and circumstances of the case, was not attracted inasmuch as the death of the son of the complainant was result of an accident. This Court dismissed the writ petition vide order dated 4.1.2019 with following observation :-

"We are dealing with a petition filed for issuance of a writ in the nature of certiorari for quashing the First Information Report. Prima facie it is evident that offence has been committed. Whether the offence is under Section 304-

A Indian Penal Code is made out or Section 304 Indian Penal Code, is a matter to be considered at this stage by the Investigating Agency and at subsequent stage by the charge court.

We find no ground to quash the impugned First Information Report at this inceptive stage of investigation."

8. Despite dismissal of the writ petition, respondent no.3 and the manager of the hotel were not apprehended and, therefore, the Investigating Officer secured non-bailable warrants against them on 10.1.2019. However, despite securing the non-bailable warrants, the accused could not be arrested.

9. The complainant, in the back drop of the aforesaid facts, approached this Court by filing Writ petition No.3334 (MB) of 2019 with prayer for a writ in the nature of mandamus/direction for effective investigation in F.I.R. No.1194 of 2018 (supra). A Division Bench of this Court was of the opinion that the Magistrate having jurisdiction, is empowered to ensure fair and effective investigation as held by the Supreme Court in th case of ***Sakiri Vasu Vs.State of Uttar Pradesh and others,*** 2008 (2) SCC 409. The complainant was relegated to file an appropriate application before the Magistrate concerned in respect of his grievance. A detailed reference to the contents of the judgment rendered by the Supreme Court in Sakiri Vasu (supra) in paragraphs 14, 15, 17, 18, 24, 25, 27, 28, 29, 30 and 31 was made, so that the Magistrate was sinsitize/made aware of his powers and the onerous duty cast upon him to ensure fair and effective investigation. In the light of the aforesaid observation, the writ petition was disposed of finally vide order dated 5.2.2019.

10. The complainant, thereafter, moved an application on 16.2.2019 in the Court of Chief Judicial Magistrate, Lucknow for monitoring and ensuring the effective investigation of F.I.R. No.1194 of 2018 (supra). It was alleged that despite non-bailable warrants having been issued to the Investigating Officer on 10.1.2019, the accused were not arrested till the date of filing of the application. It was further said that in pursuance to the order passed by the Lucknow Development Authority on 26.12.2018, the Hotel Grand Orion was sealed on 28.12.2018 and the notice was pasted on the main entrance of the building. On the same day, Smt. Kiran Dubey, wife of respondent no.3 made a visit to the house of the applicant in the evening and on 29.12.2018 Sri Dev Mani Dubey, MLA of Lambhua Constituency visited the house of the applicant and intimidated him from pursuing the case. On 31.12.2018, the applicant met the Additional Director General of Police, who instructed the Station House Officer, Police Station Kotwali Chinhat, Lucknow to do the needful, including arrest of the accused persons. On 1.1.2019 the Senior Superintendent of Police, Lucknow again instructed the Station House Officer, Police Station Kotwali Chinhat to do the needful and get the accused arrested. It was further said that despite having non-bailable arrest warrants dated 10.1.2019 issued by the learned Magistrate, the police did not arrest the accused nor pursued the proceedings under Section 82/83 Cr.P.C. It was further said that hard disk of the CCTV footage of the hotel dated 21.12.2018 was seized by the Investigating Officer, but he did not retrieve the incident image/clipping showing the time and place of the incident.

11. On 11.4.2019, learned Chief Judicial Magistrate, Lucknow wrote a letter to the Senior Superintendent of Police, Lucknow stating that in the investigation of F.I.R. No.1194 of 2018 (Supra), the Investigating Officer was not making efforts to get the accused arrested. Non-bailable warrants were obtained on 10.1.2019 from the Court, but despite two months having gone by, the Investigating Officer had not arrested the accused nor he had taken any proceedings for process under Section 82/83 Cr.P.C. It was further said that despite the matter being quite serious, the Investigating Officer had not been making enough efforts. It was said that on 18.3.2019 similar letter was written to the Senior Superintendent of Police, Lucknow, but the Investigation Officer had not taken any effective and satisfactory steps in the investigation. The Senior Superintendent of Police, Lucknow was requested to direct the Investigating Officer to complete the investigation of the offence on priority basis. Again similar letter was written by the Chief Judicial Magistrate, Lucknow to the Director General of Police on 27.4.2019 referring to his earlier letters dated 18.3.2019 and 11.4.2019 on the subject. Thereafter, on 15.5.2019 the process under Section 82/83 Cr.P.C. was issued against the accused, but the accused could not be arrested.

12. On 26.7.2019, respondent no.3 filed an application under Section 438 Cr.P.C. in the Court of District & Sessions Judge, Lucknow. The learned Sessions Judge, Lucknow on the same day granted an interim bail to him. The application was fixed for 5.8.2019 for final order. Thereafter, on 9.8.2019 the impugned order has been passed granting the respondent no.3 anticipatory bail.

13. Learned Sessions Judge, Court No.1, Lucknow in the impugned order has held that, prima facie, the incident was an accident. Whether the owner of the hotel and the manager were negligent or not, can be decided during the trial. Whether Section 304 I.P.C. is attracted or not in the facts and circumstances of the case, also can be decided only after trial. The accused has no criminal history and, there is no likelihood of him fleeing away during the course of trial. Considering these aspects, the respondent no.3 has been granted the anticipatory bail till completion of the investigation with the conditions mentioned in the order.

14. Heard Sri Jyotinjay Misra, learned Senior Advocate assisted by Sri Sushil Kumar Singh, learned counsel for the applicant and Sri L.P. Mishra for respondent no.3 and Sri Balram Singh, learned AGA for the State.

15. The question which falls for consideration in the present case is whether the learned Sessions Court should have granted anticipatory bail to the accused, who has been able to avoid his arrest for seven months despite non-bailable warrants against him as well as issuance of process under Section 82/83 Cr.P.C. and dismissal of his writ petition and learned Chief Judicial Magistrate writing to the police authorities.

16. The provisions of anticipatory bail have been reintroduced vide U.P. Act No.4 of 2019, which received assent of the President on 1.6.2019, w.e.f. 6.6.2019.

17. The law of anticipatory bail is well settled. The right to liberty is a natural, inalienable right and is enshrined as a fundamental right under Article 21 of

the Constitution of India. However, a person has to respect the rights of others recognized by law like the inviolability of their body and their property. When a person is reasonably suspected to have committed an offence the machinery of law is set in motion to arrest him and to bring him to trial and punish him if found guilty. The act of arrest deprives a person of his liberty. Bail sets him free on securing his promise to take trial at a future date and to undergo punishment if found guilty.

18. After Independence, by virtue of Article 372 of the Constitution of India the framers of the constitution had in their wisdom deemed that all laws in force in India, immediately before the commencement of the Constitution, were to be continued. By virtue of Article 372, the colonial Code of Criminal Procedure, which was drafted in 1898, was deemed to be the law in force even after commencement of the Constitution. Under the Code of 1898, there was no provision for the concept of an "Expectant/Anticipatory Bail' contained in the statute. Though, the concept of an expectant bail, even prior to the arrest of the individual was not alien to the British criminal regime, the same was never enshrined in the statutory code applicable in India. Hence, shortly after independence, there was a divergence of opinion amongst the various High Courts on the power(s) of the Court(s) to exercise and extend the protection of bail, even prior to the arrest of a person(s). The majority view was that the High Court did not possess the inherent power to extend the powers of bail prior to arrest, as there was no such statutory provision in the Code of 1898. When the Law Commission was tasked with the preparation of the 41st Report on the Code of 1898 in 1968, one of the recommendations made by the Commission after careful and deliberate consideration was the introduction of the concept of "Anticipatory Bail'.

19. The Law Commission was of the opinion that a necessity had arisen for grant of anticipatory bail primarily for the reason in the rise of the number of false criminal cases being filed by rivals to implicate influential persons and having them restrained for days in police custody, so as to disgrace or intimidate them and, as the political climate was growing ever more hostile & adversarial and the number of such false cases were likely to increase. The Commission also noted that even apart from the possibility of such false cases being filed, if there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there was no justification to require such a person to first submit to custody, then remain incarcerated for some days, and then apply for bail. Therefore, the Law Commission was of the view that the power of anticipatory bail should be conferred only on the High Court and the Court of Sessions and that the order should take effect at the time of arrest. The Commission proposed that a new Section being Section 497A of the Code of 1898 be introduced, granting the power to the High Court or Court of Session to direct that a person may be released on bail in the event of his arrest, if such person had approached the Court having a reasonable apprehension that he would be arrested on an accusation of committing a non-bailable offence. What conditions should be imposed while granting

anticipatory bail, the Commission though it proper to left it to the discretion of the High Court and the Court of Sessions for imposing such conditions.

20. The suggestions of the Law Commission were, in principle, accepted by the Central Government which introduced clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring an express power on the High Courts and the Court of Sessions. The Law Commission, in its 48th Report which was tabled in 1972, in order to prevent abuse, recommended that the final order should be made only after notice to the Public Prosecutor and an initial order should only be an interim one.

21. In light of the recommendations of the Committee requiring for a revamp of the Code, the Legislature repealed the Code of 1898 and enacted the Code of Criminal Procedure, 1973. The newly enacted CrPC contained the statutory provision empowering the High Court and the Sessions Court to grant anticipatory bail vide Section 438 of the CrPC.

22. Shortly, thereafter, an unprecedented Emergency was declared in the country. The State of Uttar Pradesh vide Section 9 of the U.P. Act 16 of 1976 omitted the application of Section 438 of the Cr.P.C. in the State of Uttar Pradesh, w.e.f. 01.05.1976. However, while the same was omitted by the State of Uttar Pradesh, the doctrine of anticipatory bail, as applicable to the rest of country, has evolved over the course of time. As mentioned earlier, the provisions of anticipatory bail by insertion of Section 438 Cr.P.C. in the State of Uttar Pradesh has been reintroduced w.e.f. 6.6.2019.

23. When the provisions of Section 438 Cr.P.C. were not applicable in the State of Uttar Pradesh, the accused used to approach the High Court under Article 226 of the Constitution of India for grant of relief of anticipatory bail.

24. The Supreme Court in the case of ***Hema Mishra Vs. State of Uttar Pradesh and others,*** (2014) 4 SC 453 has held that the accused under the normal circumstances would not be entitled to claim the relief against his arrest under Article 226 of the Constitution of India inasmuch as in absence of the provisions of Section 438 Cr.P.C., the second window for such a relief under Article 226 of the Constitution of India would not be available. However, the High Court in appropriate cases in exercise of its jurisdiction under Article 226 of the Constitution of India can grant such a relief, but such power is to be exercised with extreme caution and sparingly where arrest of a person would lead to total miscarriage of justice or where there may be cases where pre-arrest was entirely unwarranted and lead to disastrous consequences. It has also been held that on dismissal by the High Court under Article 226 of the Constitution of India, while examining the challenge for quashing the FIR or a charge-sheet, the High Court cannot grant further relief against arrest for specific period or till the completion of the trial. Paragrphas 21, 26, 27, 35 and 36 of the aforesaid judgement, which are relevant, are extracted herein below :-

*"**21.** I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar*

Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pinpoint what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India.

26. *I would like to remark that in the absence of any provisions like Section 438 CrPC applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court, to file a writ petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of the FIR, a writ petition under Article 226 is filed with the main prayer to quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge-sheet can be quashed are limited, once the writ petition challenging the validity of the FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out.*

27. *It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 CrPC are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such accused persons would not be entitled to claim such a relief under Article 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasised is that the High Court is not bereft of its powers to grant this relief under Article 226 of the Constitution.*

35. *It is pertinent to mention that though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well-established principles, so much so that*

while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

36. *Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a device to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438 CrPC proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as back door entry via Article 226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Article 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified."*

25. Thus, while there was no provision for anticipatory bail in State of Uttar Pradesh, in appropriate cases, the High Court under Article 226 of the Constitution of India has been granting relief from arrest to a person.

26. A constitution Bench of the Supreme Court in ***Shri Gurbaksh Singh Sibbia and others v State of Punjab*** reported in (1980) 2 SCC 565 upheld the constitutionality of Section 438 Cr.P.C. The aforesaid judgement laid down guidelines and consideration for grant of anticipatory bail.

27. An anticipatory bail is a pre-arrest legal process, which directs that if the person in whose favour it is issued is, thereafter, arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and, therefore, means release from the custody of the police, the latter is granted in anticipation of arrest and, is therefore effective at the very moment of arrest. A direction under Section 438 is, therefore, intended to confer conditional immunity from the tough or confinement contemplated by Section 46 of the Code.

28. The Supreme Court in the aforesaid judgment culled out the distinction between bail and anticipatory bail by noting that the expression "anticipatory bail' is a convenient mode of conveying that, it is possible to apply for bail in anticipation of arrest. The bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for

offence or offences in respect of which the order is issued. The filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if, an FIR is not yet filed. Thus, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

29. Paragraphs 7, 8, 35 and 41 of the judgement rendered in the case of ***Shri Gurbaksh Singh Sibbia and others (supra),*** which are relevant, are extracted herein below:-

*"**7.** The facility which Section 438 affords is generally referred to as "anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression "anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to "set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this "touch' or confinement.*

***8.** No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sang-frosd, insofar as the ordinary rut of criminal investigation is concerned. It is the normal day-to-day*

business of the police to investigate into charges brought before them and, broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants can occasionally possess extraordinary features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a Court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

35. *Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere "fear' is not "belief", for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.*

36. *Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.*

37. *Thirdly, the filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.*

38. *Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.*

39. *Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of*

"anticipatory bail" to an accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

40. *We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a "blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a "blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

41. *Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum."*

30. While the core principles of Anticipatory Bail are now well-defined and accepted by way of the Constitution

bench judgment, an interesting dichotomy has crept in over the years in the judgments of the Hon'ble Supreme Court, as to the period for which the protection from imprisonment can be granted by a court of competent jurisdiction under Section 438 of the Cr.P.C.

31. The Supreme Court in the case of ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others,*** (2011) 1 SCC 694 relying upon the Constitution Bench judgment in the case ***Shri Gurbaksh Singh Sibbia and others (supra)*** held that anticipatory bail granted by the competent court should ordinarily continue till the trial of the case. The said judgment was also followed recently by the Supreme Court in the case of ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat and another,*** (2016) 1 SCC 152.

32. However, there is another line of judgments, which takes strength from the law laid down by three Judges of the Hon'ble Supreme Court in ***Salauddin Abdulsamad Shaikh Vs. State of Maharashtra,*** (1996) 1 SCC 667, wherein the Supreme Court was dealing with a scenario where despite compliance of the conditions contained in the interim order of anticipatory bail by an applicant, the Sessions Judge rather than finalizing the same, directed the person to seek regular bail before the appropriate court. The three Judge Bench of the Hon'ble Supreme Court in those circumstances held as under :-

*"**2.** Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.*

***3.** It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."*

33. The aforesaid view has been followed by a number of decisions of the Hon'ble Supreme Court in the cases of ***K.L. Verma Vs. State and another,*** (1998) 9 SCC 348, ***Sunita Devi Vs. State of Bihar and another,*** (2005) 1 SCC 608, ***Adri Dharan Das Vs. State of West Bengal,*** (2005) 4 SCC 303. In all these cases, it has been categorically indicated that anticipatory bail had to be given for a limited duration, so as to enable the accused to move for regular bail under Section 437 CrPC.

34. However, this view has been held to be per incurium in the cases of ***Siddharam Satlingappa Mhetre (supra)*** and ***Reshmi Rekha Thatoi and another Vs. State of Orissa and others,*** (2012) 5 SCC 690.

35. The Supreme Court in the case of ***HDFC Bank Limited v J.J. Manan and another,*** (2010) 1 SCC 679, further elaborated on this line and held that purpose of Section 438 CrPC is to ensure that a person is not harassed or humiliated in a personal grudge/vendetta of a complainant. Provisions of Section 438 CrPC cannot be invoked to exempt an accused from surrendering to the court after investigation is complete and if charge-sheet is filed against him. It was held that upon conclusion of investigation and filing of a charge sheet, the accused has to surrender to the custody of the court and pray for regular bail and an accused cannot avoid appearing before the trial court, on the strength of an anticipatory bail.

36. In light of the conflicting views of the different Benches of varying strength, the legal position with regards to the duration of anticipatory bail is somewhat unsettled.

37. A three Judge Bench of the Hon'ble Supreme Court in ***Sushila Aggarwal v State (NCT of Delhi)*** (2018) 7 SCC 731 vide its order dated 15.05.2018, has found that the divergence of opinions is required to be authoritatively settled in clear and unambiguous terms. The Bench has framed two questions for reference for consideration by a Larger Bench:-

"1. Whether the protection granted to a person u/s 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail?

2. Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the Court?"

38. The said questions are pending adjudication by a Larger Bench before the Hon'ble Supreme Court.

39. Though there is a concurrent jurisdiction for grant of anticipatory bail under Section 438 Cr.P.C. inasmuch as it empowers both the High Court as well as the Curt of Sessions to grant anticipatory bail. Various High Courts of the country are of the opinion that propriety of the judicial hierarchy demands that unless there are some compelling reason; virtually and effectively depriving or disabling the accused to avail remedy before the Court below, the hierarchy of Courts has to be respected. In case of concurrent jurisdiction; if the High Court does not entertain the petition directly and on the contrary, ask the accused to go to the competent Court of jurisdiction of the first instance having the concurrent power, by doing so, it would not mean to deny his right to access to justice. In any case, he would be having his right to access to justice intact. It is well

established that unless there are some extraordinary or exceptional circumstances, forcing the accused to move directly in the High Court for seeking anticipatory bail, in normal course, he should approach the Court of Sessions Judge.

40. It is also not in dispute that a person apprehending arrest in a case, in which the court within whose jurisdiction he ordinarily resides does not have jurisdiction, can grant anticipatory bail for a limited duration with a direction to the applicant to approach the Court concerned. Thus, an application under Section 438 should be finally decided only by the court within whose jurisdiction the alleged offence has been committed.

41. After the brief survey of the law on anticipatory bail, now coming to the facts of the present case, this Court is required to answer whether the Court of Sessions was right in granting anticipatory bail to respondent no.3.

42. From the facts narrated, it is clear that respondent no.3 was not available for interrogation and investigation and he was declared as "absconder". It is well settled that normally when the accused is absconding and declared as 'proclaimed offender', he should not be granted the anticipatory bail.

43. The Supreme Court in the case of ***Lavesh Vs. State (NCT of Delhi),*** (2012) 8 SCC 730 in somewhat similar circumstances in paragraphs 12 to 15 held as under:-

*"**12.** From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.*

***13.** On reading the FIR, the statements of various persons including the father and the mother of the deceased, the neighbours and the supplementary statement of the mother of the deceased it is clearly seen that all the family members of the husband of the deceased including the appellant, who is the elder brother of the husband of the deceased, subjected her to cruelty by demanding sizeable amount in order to settle the payment of Rs 5 lakhs of the allotted DDA flat.*

***14.** Another circumstance against the appellant is that even though this Court on 23-1-2012 [Sangita v. State of Delhi, SLP (Cri) No. 331 of 2012, order dated 23-1-2012 (SC) wherein it was directed as follows:"Issue notice returnable in two weeks. Dasti service, in addition, is permitted. The counsel for the petitioner is permitted to serve notice on the Standing Counsel for the State of Delhi. The petitioner shall not be arrested in connection with FIR No. 259 of 2011 registered at Police Station Punjabi Bagh, New Delhi until further orders."] , while ordering notice, granted interim protection, namely, not to arrest the appellant in connection with FIR No. 259 of 2011 registered at Police Station Punjabi Bagh, New Delhi, it is the claim of the respondent State that the appellant did not cooperate and visit the said police*

station. Though Dr Sarbjit Sharma, learned counsel for the appellant, submitted that the appellant visited the police station on 23-3-2012, 20-7-2012, 24-7-2012 and 27-7-2012, it is brought to our notice that at the relevant period viz. 7-4-2012, 1-5-2012 and 18-6-2012, he neither visited the police station nor contacted Mr Narender Khatri, Inspector--Investigation, Punjabi Bagh Police Station. The last three dates are relevant since after getting the interim protection granted by this Court on 23-1-2012 [Sangita v. State of Delhi, SLP (Cri) No. 331 of 2012, order dated 23-1-2012 (SC) wherein it was directed as follows:"Issue notice returnable in two weeks. Dasti service, in addition, is permitted. The counsel for the petitioner is permitted to serve notice on the Standing Counsel for the State of Delhi. The petitioner shall not be arrested in connection with FIR No. 259 of 2011 registered at Police Station Punjabi Bagh, New Delhi until further orders."] , the appellant did not care either to visit the police station or to the investigating officer concerned. The claim of his visit on later dates, particularly, in the month of July 2012 have no relevance. Considering his conduct, not amenable for investigation and, moreover, declaring him as an absconder, there is no question of granting anticipatory bail. Thus, the conduct of the appellant does not entitle him to anticipatory bail as prescribed in Section 438 of the Code.

***15.** Taking note of all these aspects, in the light of the conditions prescribed in Section 438 of the Code and conduct of the appellant immediately after the incident as well as after the interim protection granted by this Court on 23-1-2012 [Sangita v. State of Delhi, SLP (Cri) No. 331 of 2012, order dated 23-1-2012 (SC) wherein it was directed as follows:"Issue notice returnable in two weeks. Dasti service, in addition, is permitted. The counsel for the petitioner is permitted to serve notice on the Standing Counsel for the State of Delhi. The petitioner shall not be arrested in connection with FIR No. 259 of 2011 registered at Police Station Punjabi Bagh, New Delhi until further orders."] , we are of the view that the appellant has not made out a case for anticipatory bail. Unless free hand is given to the investigating agency, particularly, in the light of the allegations made against the appellant and his family members, the truth will not surface."*

44. The aforesaid judgement has been followed in the case of ***State of Madhya Pradesh Vs. Pradeep Sharma,*** (2014) 2 SCC 171. In paragraphs 16 to 18, it has been held as under:-

*"**16.** Recently, in Lavesh v. State (NCT of Delhi) [(2012) 8 SCC 730 : (2012) 3 SCC (Cri) 1040] , this Court (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under: -*

*"**12.** From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder'. Normally, when the accused is "absconding' and declared as a "proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in*

terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

17. *In the case on hand, a perusal of the materials i.e. confessional statements of Sanjay Namdev, Pawan Kumar alias Ravi and Vijay alias Monu Brahambhatt reveals that the respondents administered poisonous substance to the deceased. Further, the statements of the witnesses that were recorded and the report of the Department of Forensic Medicine and Toxicology, Government Medical College and Hospital, Nagpur dated 21-3-2012 have confirmed the existence of poison in milk rabri. Further, it is brought to our notice that warrants were issued on 21-11-2012 for the arrest of the respondents herein. Since they were not available/traceable, a proclamation under Section 82 of the Code was issued on 29-11-2012. The documents (Annexure P-13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondent-accused under Section 82 of the Code to answer the complaint on 29-12-2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Sections 302 and 120-B read with Section 34 IPC. In such serious offences, particularly, the respondent-accused being proclaimed offenders, we are unable to sustain the impugned orders [Sudhir Sharma v. State of M.P., Misc. Criminal Case No. 9996 of 2012, order dated 10-1-2013 (MP)] , [Gudda v. State of M.P., Misc. Criminal Case No. 15283 of 2012, order dated 17-1-2013 (MP)] of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.*

18. *In the light of what is stated above, the impugned orders of the High Court dated 10-1-2013 and 17-1-2013 in Sudhir Sharma v. State of M.P. [Sudhir Sharma v. State of M.P., Misc. Criminal Case No. 9996 of 2012, order dated 10-1-2013 (MP)] and Gudda v. State of M.P. [Gudda v. State of M.P., Misc. Criminal Case No. 15283 of 2012, order dated 17-1-2013 (MP)] respectively are set aside. Consequently, the subsequent order of the CJM dated 20-2-2013 in Crime No. 1034 of 2011 releasing the accused on bail after taking them into custody in compliance with the impugned order of the High Court is also set aside. In view of the same, both the respondent-accused are directed to surrender before the court concerned within a period of two weeks failing which the trial court is directed to take them into custody and send them to jail. Both the appeals are allowed on the above terms."*

45. It is also well settled that parameters which have been laid down in numerous judgments, are required to be satisfied while granting such relief. The Court must record reasons therefor.

46. The Supreme Court in the case of ***Jai Prakash Singh Vs. The State of***

Bihar and another, (2012) 4 SCC 379 while dealing with the challenge to grant anticipatory bail to an accused under Section 438 Cr.P.C. by the High Court, in paragraphs 19 to 22 held as under :-

*"**19.** Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See D.K. Ganesh Babu v. P.T. Manokaran [(2007) 4 SCC 434 : (2007) 2 SCC (Cri) 345] , State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain [(2008) 1 SCC 213 : (2008) 1 SCC (Cri) 176] and Union of India v. Padam Narain Aggarwal [(2008) 13 SCC 305 : (2009) 1 SCC (Cri) 1] .)*

***20.** In the case at hand, if considered in the light of the aforesaid settled legal proposition, we reach an inescapable conclusion that the High Court did not apply any of the aforesaid parameters, rather dealt with a very serious matter in a most casual and cavalier manner and showed undeserving and unwarranted sympathy towards the accused. The High Court erred in not considering the case in the correct perspective and allowed the said applications on the grounds that in the FIR some old disputes had been referred to and the accused had fair antecedents.*

***21.** The relevant part of the High Court judgment impugned before us reads as under:-*

"Considering that the only allegation in the first information report is that there was previously some dispute between the deceased and the petitioner and they had quarrelled on account of the same, let the petitioner abovenamed, who has fair antecedents, be released on anticipatory bail...."

***22.** In the facts and circumstances of this case, we are of the considered opinion that it was not a fit case for grant of anticipatory bail. The High Court ought to have exercised its extraordinary jurisdiction following the parameters laid down by this Court in the abovereferred to judicial pronouncements, considering the nature and gravity of the offence and as the FIR had been lodged spontaneously, its veracity is reliable. The High Court has very lightly brushed aside the fact that the FIR had been lodged spontaneously and further did not record any reason as to how the prerequisite conditions incorporated in the statutory provision itself stood fulfilled. Nor did the court consider as to whether custodial interrogation was required. The court may not exercise its discretion in derogation of established principles of law, rather it has to be in strict adherence to them. Discretion has to be guided by law, duly governed by rule and cannot be arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in Section 438 CrPC itself suffers from non-application of mind and therefore, cannot be sustained in the eye of the law."*

47. The Supreme Court in a recent judgment in the case of ***P. Chidambaram Vs. Directorate of Enforcement*** in Criminal Appeal No.1340 of 2019, decided on 5.9.2019 has held that the power under Section 438 Cr.P.C. has to be exercised sparingly. The privilege of

the pre-arrest bail should be granted only in exceptional cases. Paragraphs 67, 68 and 72 of the aforesaid judgment, which are relevant, are extracted herein below:-

"67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

68. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under:-

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

48. Sri L.P. Mishra, learned counsel for respondent no.3, however, submits

that the parameters for cancellation of anticipatory bail are different than the grant of regular bail. He further submits that until and unless there is misuse of liberty granted to an accused, ordinarily the Court should not cancel the bail already granted. In support of his submission, he has placed reliance upon the judgement of the Supreme Court in the case of ***State of Maharashtra and another Vs. Mohd. Sajid Husain Mohd. S. Husain and others,*** (2208) 1 SCC 213. Paragraphs 20, 34 of the aforesaid judgement are extracted herein below:-

*"**20.** The four factors, which are relevant for considering the application for grant of anticipatory bail, are:*

"(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a court, previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice."

***34.** Reliance has been placed by Mr Patwalia on Amarmani Tripathi [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] . This Court therein opined that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But the court while considering an appeal against grant of anticipatory bail would keep in mind the parameters laid down therefor. The matter, however, may be different for deciding an appeal from an order granting bail, where the accused has been at large for a considerable time, in which event, the post-bail conduct and other supervening circumstances will also have to be taken note of."*

49. Another judgement which Sri Mishra has cited in support of his contention, is ***State of U.P. through CBI Vs. Amarmani Tripathi,*** (2005) 8 SCC 21. Paragraphs 16, 17 and 18 of the aforesaid judgement are extracted herein below:-

*"**16.** Reliance is next placed on Dolat Ram v. State of Haryana [(1995) 1 SCC 349 : 1995 SCC (Cri) 237] wherein the distinction between the factors relevant for rejecting bail in a non-bailable case and cancellation of bail already granted, was brought out: (SCC pp. 350-51, para 4)*

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner

without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

17. *They also relied on the decision in Samarendra Nath Bhattacharjee v. State of W.B. [(2004) 11 SCC 165 : 2004 SCC (Cri) Supp 7] where the above principle is reiterated. The decisions in Dolat Ram [(1995) 1 SCC 349 : 1995 SCC (Cri) 237] and Bhattacharjee [(2004) 11 SCC 165 : 2004 SCC (Cri) Supp 7] cases relate to applications for cancellation of bail and not appeals against orders granting bail. In an application for cancellation, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant under Section 439 read with Section 437, continue to be relevant. We, however, agree that while considering and deciding the appeals against grant of bail, where the accused has been at large for a considerable time, the post-bail conduct and supervening circumstances will also have to be taken note of. But they are not the only factors to be considered as in the case of applications for cancellation of bail.*

18. *It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)*

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

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

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

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)"

50. Both the judgments cited by Sri Misra are in respect of grant of regular bail and not the anticipatory bail.

51. It is well settled that power to grant anticipatory bail is an extra ordinary power and it should be exercised sparingly. The Supreme Court in two judgments cited above i.e. ***Lavesh Vs. State (NCT of Delhi) and State of Madhya Pradesh Vs. Pradeep Sharma (supra)*** held that an absconder or proclaimed offender should not be granted anticipatory bail. In the present case, respondent no.3 has been able to avoid arrest since the date of the F.I.R. and despite having obtained non-bailable warrants against him on 10.1.2019 and issuance of the proclamation under Section 82/83 Cr.P.C. he was not arrested. The Chief Judicial Magistrate, Lucknow wrote letters to the highest police authorities for instructions and direction to the Investigating Officer to complete the investigation and effect the arrest of the accused, but despite the aforesaid direction, the accused was not arrested. The role of the Investigating Officer and his complicity in not arresting the accused is not required to be commented upon, which is evident from his conduct. Further, the Sessions Court has not considered these aspects regarding issuance of the non-bailable warrants and the process under Section 82/83 Cr.P.C. and without taking into consideration, it has granted the anticipatory bail in the manner which is not in consonance with the law laid down by the Supreme Court in several judgements which have been referred to and relevant paragraphs have been extracted herein-above.

52. Thus, considering all these aspects of the matter, the impugned order dated 9.8.2019 is unsustainable and, therefore, set aside.

53. However, it has been informed at the Bar that charge sheet has been filed against the accused.

54. In view of the subsequent development of filing the charge sheet, it would be open to respondent no.3 to surrender before the trial court and apply for regular bail.

55. Subject to above observation and direction, the application is allowed.

(2019)10ILR A 1395

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.09.2019

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Misc. Single No. 3553 of 2002

Jai Prakash Singh ...Petitioner
Versus
Bachchu Lal & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.R. Acharya, Sri Rakesh Pratap Singh

Counsel for the Respondents:
Sri G.S. Nigam, Sri Abhisht Saran, Sri Alok Mehrotra, Sri Anurag Vikram, Sri Govind Saran Nigam, Sri Rahul Kumar Kashyap

A. Civil Procedure Code, 1908 - Section 9 and Order VII rule 1- U.P. Zamindari Abolition and Land Reforms Act- Section 331- Specific Relief Act - Section 31 - suit for cancellation of sale deed- by the non-executants of sale deed-seeking declaration of right/title/interest in the agricultural property- to be filed before Revenue Court-as it involves declaration of khatedari rights.

Held: - that jurisdiction to declare khatedari rights exclusively vests with the Revenue Court and only after declaration of rights by the Revenue Court the suit would be maintainable before the Civil Court. "Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or nonest, or illegal or that it is not binding on him." The executant of the deed was in possession of the property in suit (agricultural land)- the main relief sought in the suit is for cancellation of sale deed by the non-executants of sale deed and the persons, who at the time of execution of sale deed were not recorded tenure holder.

Writ Petition dismissed (E-8)

List of Cases Cited: -
1. Dr. Ajodhya Prasad v. Gangotri Prarsad reported in 1980 SCC OnLine All 551: 1981 All LJ 647: 1981 AWC 469

2. Chandrika Misir v. Bhaiya Lal (1973 RD 365)

3. Ramdhari v. Jodhan (AIR 1973 All 81)

4. Ram Padarath and others v. 2nd Addl. D.J 1988 SCC OnLine All 685: (1989) 1 AWC 290 (FB): 1989 RD 21 (FB)

5. Ram Awalamb v. Jata Shanker, 1968 AWR 731 (FB)

6. Ram Roop v. Smt. Budhiya, 1979 RD 212

7. Purshottam v. Narottam, 1970 AWR 312

8. Indra Deo v. Smt. Ram Piari, 1982 (8) ALR 517

9. Indrapal and others v. Jagannath and others 1992 SCC OnLine All 1092: 1993 All LJ 235: (1992) 2 AWC 1118: 1992 RD 231

10. Deokinandan and others v. Surajpal and others 1996 (27) ALR 71:1995 Supp (4) SCC 671: (1995) 6 Scale 213

11. Smt. Lakhpata and others v. IInd Additional District Judge and others (1998) 4 AWC 969

12. Shri Ram and another v. Ist Addl. District Judge and others (2001) 3 SCC 24

13. Smt. Kalindi and another v. IIIrd Additional District Judge and others 2001 SCC OnLine All 316: (2001) 45 ALR 265: (2001) 3 AWC 1978: 2001 All LJ 2054: 2001 AIHC 4964: (2001) 92 RD 546

14. Jai Singh v. IInd Addl. District Judge and others 2001 SCC OnLine All 607: (2001) 45 ALR 579: (2001) 4 AWC 2826: 2001 All LJ 2621: (2002) 1 ALT (DNC 2.2) 2: (2001) 92 RD 817: (2001) 4 CCC 322

15. Kishori Prasad v. IIIrd Addl. District Judge and others 2002 SCC OnLine All 937: AIR 2003 All 58: (2002) 5 AWC 4269: 2003 All LJ 393: (2003) 94 RD 36

16. Mohammad Khalil Khan v. Mahbub All Mian, AIR 1949 PC 78

17. Kamla Prasad v. Krishna Kant Pathak (2007) 4 SCC 213

18. Shri Ram v. Ist ADJ [(2001) 3 SCC 24]

19. Indraj (dead) @ Talewar and others v. Smt. Bharpai (dead) and others 2015 SCC OnLine All 8827: (2015) 113 ALR 904: (2016) 157 AIC 942: (2016) 130 RD 542

20. Chandrika v. Shivnath and others, reported as 2016 (132) R.D. 247

21. Kundan Singh v. Additional District Judge and others, 2009 RD 59

22. Church of North India v. Lavajibhai Ratanjibhai, MANU/SC/2531/2005: (2005) 10 SCC 760

23. Suraj Bhan v. Financial Commr., MANU/SC/7303/2007: (2007) 6 SCC 186

24. Banshi Dhar v. Sheela Devi and others in S.A. No. 279 of 2019, 2016 (132) R.D. 3:(2016) 3 AWC 3192: (2017) 4 ALJ 177

25. Azhar Hasan & others vs. District Judge, Saharanpur & others, 1998 (34) A. L.R. 152 (SC)

26. Pyarelal v. Shubhendra Pilania, (2019) 3 SCC 692: (2019) 2 SCC (Civ) 393: 2019 SCC OnLine SC 98

27. Suhrid Singh @ Sardool Singh Vs. Randhir Singh (2010) 12 SCC 112

28. J. Vasanthi Vs. N. Ramani Kanthammal, reported in (2017) 11 SCC 852

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri R.P. Singh, learned counsel for the petitioner and Sri Abhisht Saran along with Sri Rahul Kumar Kashyap, learned counsel for the opposite parties.

2. The petitioner-Jai Prakash Singh, now deceased and represented through legal heirs, being aggrieved by the order dated 05.03.2002, passed by District Judge, Unnao, in Misc. Civil Appeal No. 21 of 2001 and the order dated 15.03.2001, passed by Civil Judge (Junior Division), North, Unnao, in Civil Suit No. 176 of 1988 (Nirvikar Singh and others Vs. Smt. Ram Rani and others), has approached this Court by means of present writ petition.

3. In the Civil Suit No. 176 of 1988, the issue no. 1 related to the jurisdiction was framed. The issue no. 1, as appears from the order dated 15.03.2001, is reproduced as under:-

"क्या इस न्यायालय को श्रवणाधिकार प्राप्त नहीं है जैसा कि प्रतिवादी सं0 1 व 2 ने प्रतिवाद पत्र की धारा–23 में कहा है।"

4. Vide order dated 15.03.2001, the issue no. 1 was decided by the Civil Judge (Junior Division), North, Unnao, against the plaintiffs including Jai Prakash Singh (now deceased). The operative portion of the order dated 15.03.2001 is quoted below.

"वाद बिन्दु सं0 1 सकारात्मक निर्णीत किया जाता है वादी का वाद आदेश 7 नियम 1 दी0अ0स0 के अंतर्गत सक्षम न्यायालय में प्रस्तुत किये जाने हेतु वापस किया जाता है।"

5. Aggrieved by the order dated 15.03.2001, the petitioner-Jai Prakash Singh (now deceased) filed the Misc. Civil Appeal No. 21 of 2001, the same was dismissed by the District Judge, Unnao, by the order dated 05.03.2002. The operative portion of the order dated 05.03.2002 is quoted below.

6. Challenging the aforesaid orders, the present writ petition has been filed.

7. The issue in this case relates to jurisdiction of Civil Court and Revenue Court. The question, which can be formulated is to the effect that "In which Court, "Civil or Revenue", the suit would lie, if the prayer in the suit is for cancellation of sale deed of agricultural property." In another form, the question before this Court for consideration in this case is that "Under what circumstances, the suit for cancellation of "Sale Deed" of agricultural property would lie before the Civil Court or Revenue Court."

8. Before coming to the facts of the case, this court feels it appropriate to take

note of the judgments of this Court as well as of the Hon'ble Apex Court on the aforesaid issue.

9. In the case of ***Dr. Ajodhya Prasad v. Gangotri Prarsad reported in 1980 SCC OnLine All 551 : 1981 All LJ 647 : 1981 AWC 469,*** this Court observed as under:-

*"**5.** It makes clear that for purposes of cognizance of suit in the revenue court it is the cause of action and not the relief that is relevant. In Ramdhari's case (AIR 1973 All 81) (supra) learned single Judge had obviously overlooked the Explanation in Section 331 of the U.P. Zamindari Abolition and Land Reforms Act. As the cause of action in the present case was the interference or threatened invasion to the rights of the plaintiff over an agricultural holding, the relief could be claimed against that cause of action in the revenue court and the jurisdiction of the civil court was barred?*

***11.** In view of the Explanation to Section 331 even, if the relief for injunction was included in the plaint the suit would be cognizable by the revenue court because the revenue court could give an effective relief by way of declaration and, if necessary, by possession over the land in suit. In Chandrika Misir v. Bhaiya Lal (1973 RD 365) the suit had been filed for the relief of permanent injunction and in the alternative for possession. The suit was instituted in the civil court and decree was passed. Considering the effect of Sections 209 and 331 of the U.P. Zamindari Abolition and Land Reforms Act, the Supreme Court held that the civil court had no jurisdiction and the suit was liable to be dismissed. We, accordingly, hold that the case decided by the learned single Judge in Ramdhari v. Jodhan (AIR 1973 All 81) does not lay down the correct law."*

10. In the case of ***Ram Padarath and others v. 2nd Addl. D.J, and othersreported in 1988 SCC OnLine All 685 : (1989) 1 AWC 290 (FB) : 1989 RD 21 (FB),*** the Full Bench of this Court observed as under:-

*"**7.** So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without its cancellation. But a void document is not required to be cancelled necessarily. Its legal effect if any can be put to an end to by declaring it to be void and granting some other relief instead of cancelling it. Once it is held to be void it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority would be a void document. In case it is in excess of authority it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts mentioned in the same, but the said presumption is not conclusive and be dislodged.*

***8.** On the finding that a particular instrument or document was void because of any reason, it will be of no legal consequence and binding on any one without even its cancellation. But existence of such a document or instrument, more particularly for a*

substantial period may cause injury to the person whose rights are effected by it and place his right and title over any property in doubt and dispute and may create complications and give rise to unnecessary litigations. But for those who are aware of any judgment holding a particular document or instrument to be void or supposed to be aware of it, others can be misled by its existence if it does not contain any endorsement of its cancellation subsequent to its execution by any competent court of law. Reasonable apprehension of serious injury from a void document provides a cause of action to a person to approach the competent court of law, that is, civil court for its cancellation. But this entitlement goes into background or becomes restricted if because of certain statutory constraints, restraints and prescription some other relief can be claimed or is to be granted by adjudging the document or instrument void and thereby declaring it to be legally ineffective and of no consequence. Such a situation can arise if apart from cancellation, some other relief is claimed which is real relief and the claim for which provides the proximate ground or reason for approaching the court of law or when any other relief can be claimed or involved in the matter cropping up because of the evidence of void document or instrument. There can be other situation also, all of which Gan be created by statutory provisions as the jurisdiction of civil court can be ousted only by some specific provisions of law or by necessary implication sprouting out of statutory provisions. Such a situation arises when more than one reliefs are claimed in any action pertaining to agricultural land. If the relief claimed or the real and the main relief is one which is mentioned in Schedule II to U.P. Zamindari Abolition and Land Reforms Act, the same can be granted by the revenue court only and the jurisdiction of civil court to grant such a relief or reliefs is ousted by Section 331 of the said Act.

9. *The law relating to right, title and interest over the agricultural land is contained in the U.P. Zamindari Abolition and Land Reforms Act, hereinafter known as the ''Act', which is a complete Code by itself and is wider than the earlier Act, i.e., U.P. Tenancy Act which too was replaced by it. The said Act more particularly the Schedule to it enumerates the suits etc., the cognizance of which is to be taken of by the revenue court specified therein. The said Act being special Act, its provisions would prevail over the general law. The jurisdiction of Civil Court is ousted if the relief can be granted by the special court conferred with jurisdiction to grant such reliefs. In Section 331 of the Act which specifically ousts the jurisdiction of other courts in respect of all suits, applications etc., enumerated in Schedule II the main emphasis is on the words "cause of action and any relief'. The said section reads as under:*

"Section 331. Cognizance of suits etc., under this Act-- (1) Except as provided by or under this Act no court other than a court mentioned in column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application or proceedings mentioned in column 3 thereof, or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.

Provided that where a declaration has been made under Section

143 in respect of any holding or part thereof; the provisions of Schedule II in so far as they relate to suits, applications, or proceedings under Chapter VIII shall not apply to such holding or part thereof.

Explanation-If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

(1-A) Notwithstanding anything in sub-section (i) an objection that a court mentioned in column 4 of Schedule II, or, as the case may be, a civil court, which had no jurisdiction with respect to the suits, application or proceedings, exercised jurisdiction with respect thereto shall not be entertained by any appellate so revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been consequent failure of justice."

12. *It is the real "cause of action' which determines the jurisdiction of the court to entertain particular action notwithstanding the language used in the plaint or the relief claimed. The strength on which the plaintiff comes to the court does not depend upon the defence or relief claimed which could determine the forum for the entertainment of claim and grant of relief. It is the pith and substance which is to be seen and not the language used which may even have been so used to oust the jurisdiction of a particular court.*

16. *A revenue court may grant a relief in present, but so far as relief for future is concerned the revenue court may not be in a position to grant such a relief as the same may travel beyond the relief which could be granted by it mentioned in Schedule II to the U.P. Zamindari Abolition and Land Reforms Act.*

17. *It is the alleged injury or apprehended injury or cloud on the right and title of a person by some action on the part of any other person, or interference or attempt to interfere or encroach upon the right and title of a person over a particular property by any positive or negative act or declaration etc., which give a suitor came of action to approach a court of law for relief or reliefs against the same. The dispute as to jurisdiction arises when more than one reliefs are claimed in an action on the same cause of action one of which can be granted by a civil court. If the principal or real relief can be granted by the revenue court, then the ancillary relief or the relief which flows out from the principal relief can also be granted by the revenue court notwithstanding that all the reliefs can be granted by the civil court and if things are in reverse direction then all the reliefs can be granted by the civil court, but if the so-called main relief is redundant or mere surplusage then it is the real relief involved in the matter which may or may not have been claimed as ancillary relief will determine the jurisdiction of the court which is to entertain a particular action. Even if a plaint or application is couched in such a language so as to oust jurisdiction of a particular court then it is the cause of action and relief flowing out of such cause of action which would determine the forum for entertaining the said action and not the so-called relief claimed.*

18. *A Full Bench of this Court in the case of Ram Awalamb v. Jata Shanker, 1968 AWR 731 (FB) which was constituted in view of conflict between two Bench decisions of this Court observed that "where in a suit, from a perusal only*

of the relief claimed, one or more of them are ostensibly cognizable only by civil court and atleast one relief is cognizable by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and if so, (a) whether the main relief asked for on the basis of the cause of action is such as can be granted only by a revenue court or (b) whether any real or sub-stantial relief, though it may not be identical with that claimed by the plaintiff could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above, the jurisdiction shall vest in the revenue court and not in the civil court."

19. *If more than one reliefs are claimed by a particular person, no relief can granted to that person unless declaration of his tenancy rights is made and in that situation the suit will be cognizable by the revenue court as declaration can be granted by the revenue court. Similarly if a person claims relief of injunction and in the alternative for possession if he is found to be out of possession and his name is not on the record then without declaration that in fact he is the tenant or he is in possession of the tenancy rights no further relief can be granted and the suit is cognizable by the revenue court. In case the suit is for injunction and/or possession if he is out of possession then the suit will be cognizable by the revenue court notwithstanding the relief for injunction is to be granted by the civil court. In this connection reference may be made to the case of Chandrika Misir v. Bhaiya Lal, 1973 RD 498. The said case arose out of suit for injunction and in the alternative for possession in respect of agricultural land. It was held that in view of Schedule II to the Act, the relief for possession could be granted by the revenue court only and Section 331 of U.P. Zamindari Abolition and Land Reforms Act ousted the jurisdiction of civil court. In the said case though no observation in respect of relief for injunction has been specifically made out, but from the judgment the picture is very clear. The finding of the subordinate court was that the plaintiff was out of possession on the basis of allegations which were not true and which he failed to establish merely because relief for Injunction was claimed. The Civil Court would have no Jurisdiction as the case first involved declaration of right as tenure-holder which could be granted by the revenue court only and thereafter relief could have been granted only if he was held to be tenure-holder by succession.*

20. *The forum for action in relation to void documents or instrument regarding agricultural land depends on the real cause of action with reference to the facts averred. Void documents necessarily do not require cancellation like voidable documents. A simple suit for cancellation of a document or instrument if the same casts cloud on one's right and title or is likely to cast cloud over it or affects the same adversely in respect of agricultural property, that is, "land' poses no difficulty provided further it does not necessitate any declaration as to the claimant's right and title over the land i.e. tenancy rights under the existing law. The difficulty arises when more than one reliefs are involved or claimed. It may be that one may get effective relief in presenti without cancellation of the document, but if a document remains uncancelled for several years its existence may give rise to new trouble and litigation. The decree of a court in which a document is declared to be void and is*

avoided is obviously a decree in personam and the same undoubtedly binds a party but it will not be binding to each and every person as no note of such a decree can be made in the Sub-Registrar's register as provided in Section 31 of the Specific Relief Act. Such a document may mislead many and may give rise to various transactions and litigations.

28. *In Ram Roop v. Smt. Budhiya, 1979 RD 212, the character of the document itself was challenged and the suit was essentially not for cancellation of sale-deed. The court found that the suit involved declaration of status of a Sirdar as well as possession over land. The challenge to the document was on the ground of fraud and misrepresentation as her thumb-impressions were obtained by telling her that it was for rationcard. The court found that the suit essentially was not for adjudication of sale-deed to be void, but involved declaration of sale-deed to be void, and involved declaration of status as Sirdar as well as possession.*

33. *In Purshottam v. Narottam, 1970 AWR 312, which in fact was not a case for void or voidable document, it was held that if plaintiff had no grievance against record maintained by State Government and Gaon Sabha, suit for permanent injunction would lie in revenue court and any other person who disputes plaintiff's right he shall also be impleaded as a defendant. But if the village records support the claim of the plaintiff, suit would not lie under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, but would lie in civil court if plaintiff's right is disputed by a third person.*

41. *In the case of void document said to have been executed by a plaintiff during his disability or by some one impersonating him or said to have been executed by his predecessor whom he succeeds, the relief of cancellation of the document is more appropriate relief for clearing the deck of title and burying deep any dispute or controversy on its basis in presenti or which may take place in future. The document after its cancellation would bear such an endorsement in Sub-Registrar's register and would be the basis for correction of any paper and revenue record including record of register. Section 31 of the Specific Relief Act itself prescribes as to who can seek relief of cancellation. A third person cannot file a suit for cancellation of a void document. If in fact no decree for cancellation was needed and real and effective relief could be granted by the revenue court only, the civil court decree would even then be valid and not void if no objection to the same was taken before the trial court. If such an objection was taken before the trial court before framing of issues and objection continued to be taken before appellate and revisional court and there has been failure of justice because of change of forum then the civil court decree could be said to be without jurisdiction.*

46. *We are of the view that the case of Indra Deo v. Smt. Ram Piari, 1982 (8) ALR 517 has been correctly decided and the said decision requires no consideration, while the Division Bench case, Dr. Ayodhya Prasad v. Gangotri, 1981 AWC 469 is regarding the jurisdiction of consolidation authorities, but so far as it bolds that suit in respect of void document will lie in the revenue court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil*

court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status of a tenure-holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void document which made him to approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue court."

11. In the case of ***Indrapal and others v. Jagannath and others reported in 1992 SCC OnLine All 1092 : 1993 All LJ 235 : (1992) 2 AWC 1118 : 1992 RD 231,*** this Court observed as under:-

*"**4.** It is well established by several decisions that if the sale-deed is void and a declaration of right is claimed.the suit is triable by the revenue court, ohterwise it is triable by the civil court vide Ram Padarath v. IInd Addl. District Judge, 1989 AWC 290 (FB) and Smt. Bismillah v. Janeshwar Prasad, 1989 ALJ 1335 (SC).*

***9.** Thus, the essence of the matter in deciding whether the suit is cognizable by the civil Court or the revenue court is whether Section 331 of the U.P. Zamindari Abolition and Land Reforms Act is attracted to the facts of the case. If in substance, the main question involved relates to declaration of right or title, then the suit would lie in the revenue court and not in the civil Court."*

12. In the case of ***Deokinandan and others v. Surajpal and others, reported in 1996 (27) ALR 71:1995 Supp(4) SCC 671: (1995) 6 Scale 213***, the Hon'ble Apex Court observed as under:-

"3. The controversy is no longer res integra. Admittedly, the suit lands are governed by the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1951 [for short, 'the Act'). The appellant had raised the objection to the jurisdiction of the Civil Court in his defence in the Trial Court. He pleaded thus:

"The suit is barred under the provisions of Section 331 of U.P. Zamindari & Land Reforms Act. The sale is not barred under the provisions of Section 168-A of Z.A. Act. The plaintiffs suit is liable to be dismissed with costs."

4. In the appellate Court also the same point has been reiterated but negatived. The second appeal was dismissed by the High Court in limine. Thus this appeal by special leave.

5. This Court in Chandrika Misir and Anr. v. Bhaiya Lal MANU/SC/0328/1973: [1974]1SCR290 had to deal with the same question. It was held that:

"Sections 209 and 331 of U.P. Zaminadari Abolition and Land Reforms Act, 1951, when read together, showed that a suit, like the present one, had to be filed in a Special Court created under the Act within a period of limitation specially prescribed under the Rules made under the Act, and the jurisdiction of the ordinary Civil Courts to entertain the suit was absolutely barred.

Since the Civil Court which entertained the suit suffered from an inherent lack of jurisdiction because of special provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1951, the present appeal filed by the appellants had to be dismissed."

6. The above ratio applies to the facts in this case. As pointed out earlier, the lands are covered by the provisions of the Act and express objection as to the jurisdiction of the Civil Court was raised. The appellant had purchased 0.7 acres of land out of 2.17 acres. The abadi site comprises one Kachha Kotha and Ghar having boundary walls. Since the lands are admittedly covered by the provisions of the Act, the Civil Court inherently lacked jurisdiction to go into the question of title.

7. The appeal is accordingly allowed and the suit stands dismissed in so far as it relates to 0.7 acres of land purchased by the appellant. No costs."

13. In the case of ***Smt. Lakhpata and others v. IInd Additional District Judge and others, reported in (1998) 4 AWC 969,*** this Court observed as under:-

"8. After considering the averments of the parties made in the writ petition and in the counter-affidavit and hearing arguments of the learned counsel for the parties, I am of the view that the suit filed by the petitioner with respect to khata No. 306 measuring 10 Biswas which also included the house, 'sahan', 'ghera' and 'saria', well and trees of the petitioners as well cannot be thrown out by the civil court, as the revenue court, cannot grant the relief in respect of house 'sahan', 'ghera', 'saria', well and trees and such a relief can only be granted by the civil court. The fate of the case filed by the petitioner under Section 229B of U.P.Z.A. and L.R. Act before the revenue court is not known. The consolidation operations must have taken place during all these years and the counsel for the parties could not state as to whether in respect of properties in question, revenue court or the consolidation courts have passed any order or not. This aspect of the matter may be looked Into by the civil court where the matter will be heard and tried again, in view of the orders which are being passed by this Court.

9. There is another aspect of the matter which requires consideration. Ori was undoubtedly recorded as tenureholder. His name was expunged from the revenue court. The petitioners have asserted that an imposter was set up, who filed a compromise and on the basis of that compromise, the name of Ori was expunged. The petitioners, by leading evidence on that question, can prove that fact. That exercise can only be done by the civil court and not by the revenue court.

10. In view of what has been indicated heretnabove, I am of the view that the civil court had the jurisdiction to try the suit. The trial court as well as the revisional court have committed manifest error of law in returning the plaint for presentation to the revenue court. Accordingly, the writ petition succeeds and in view of the aforesaid observations, a writ in the nature of certiorari quashing the impugned orders dated 6.10.1982 and 5.5.1984 (constained in Annexures-2 and 3 to the writ petition) passed by opposite party Nos. 1 and 2 respectively, is issued. The trial court will register the case and decide the same on merits in accordance with law and the directions contained in this order. "

14. In the case of ***Shri Ram and another v. Ist Addl. District Judge and others reported in (2001) 3 SCC 24,*** the Hon'ble Apex Court observed as under:-

*"**7.** On analysis of the decisions cited above, we are of the opinion that*

where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

15. In the case of ***Smt. Kalindi and another v. IIIrd Additional District Judge and others reported in 2001 SCC OnLine All 316 : (2001) 45 ALR 265 : (2001) 3 AWC 1978 : 2001 All LJ 2054 : 2001 AIHC 4964 : (2001) 92 RD 546,*** this Court observed as under:-

*"**4.** The question is what is the main relief in the suit. In Ram Padarath v. Second Additional District Judge, Sultanpur, [1989 RD 21.] the Court held that the suit for cancellation of a sale-deed or other instruments and documents are essentially suits of civil nature and every suit of civil nature is cognizable by a civil court except cognizance of which is expressly or impliedly barred. In respect of the cancellation of the sale-deed, the suits are entertainable only by a civil court and no revenue court or any other court can entertain such a suit.*

Section 31 of the Specific Relief Act reads as under:

"(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books the facts of its cancellation."

In respect of voidable documents, it was observed as under:

"So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without its cancellation. But a void document is not required to be cancelled necessarily. Its legal effect if any can be put to an end to by declaring it to be void and granting some other relief instead of cancelling it. Once it is held to be void it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority would be a void document. In case it is in excess of authority it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts

mentioned in the same, but the said presumption is not conclusive and be dislodged."

8. *In the present case there are two main questions--one is whether the gift-deed and sale-deed are voidable on the basis of the allegations contained in the plaint, namely, fraud in obtaining the deeds. The documents were not duly executed by the vendor. They did not contain his signatures and was without jurisdiction and the second question is whether the plaintiff-respondent was born prior to the enforcement of the U.P. Zamindari Abolition and Land Reforms Act. If he was born prior to the enforcement of the Act, he will have right over the sir land in question.*

9. *In view of the allegations contained in the suit for the cancellation of the documents, the suit is maintainable in the civil court. There is no merit in the writ petition. It is, accordingly, dismissed."*

16. In the case of ***Jai Singh v. IInd Addl. District Judge and others, reported in 2001 SCC OnLine All 607 : (2001) 45 ALR 579 : (2001) 4 AWC 2826 : 2001 All LJ 2621 : (2002) 1 ALT (DNC 2.2) 2 : (2001) 92 RD 817 : (2001) 4 CCC 322,*** this Court observed as under:-

*"**20.** There is another reason for which the plaintiff should not be precluded from going to the civil court to get the deed cancelled even though, he is not recorded in the revenue papers as in the event of cancellation of deed, further action about correction of the revenue entry will be just a sheer formality which can be said to be a follow up action and it will be just a ministerial act to be performed by revenue authorities. If the plaintiff after getting declaration in his favour by civil court visits revenue authority and brings this fact to his notice then the revenue authority after finding it out that the name of the defendant came to be recorded only on the basis of the deed in question, which having been cancelled, will have no option but to restore the entry. In this view, no adjudication by revenue authorities of any kind will be required, if the main bone of contention between the parties i.e. deed goes away from the hands of the defendants on account of its cancellation by civil court. The decision as has been referred in support of the argument for abating the suit under the provisions of U.P. Consolidation of Holdings Act, reported in Smt. Sumitra Devi v. Addl. District Judge [2000 (91) RD 45.] , to my mind have not dealt the aspect that if there is no specific bar in maintaining the suit in the civil court for the relief for which the plaintiff has come i.e. cancellation of the deed, then irrespective of availability or the claim for another relief which might be available in the revenue court or consolidation court, why the civil court is not competent to grant the relief of cancellation of deed for which the plaintiffs have come to the civil court. As a deed, if remains in existence, it causes or may cause the mischief in various manners which may not be foreseen today but that may create a situation in future and therefore, why that be permitted to remain if its existence can be taken away by competent forum of the civil court.*

21. *To my mind the jurisdiction of the civil court as is provided under Section 9 of C.P.C. cannot be permitted to be curtailed indirectly unless it is expressly barred. The pretext of ousting the jurisdiction of the civil court, on the plea that the relief claimed by the plaintiff*

appears to be ancillary and the main relief is of declaration of right which is to be given by the revenue court and, therefore the civil court lacks jurisdiction, to my mind will not be laying down a correct law as the plaintiff has come to the civil court for a relief of cancellation, which can only be given by civil court and therefore, even for the sake of argument, it is accepted that the relief claimed is ancillary relief, why the civil court will lack jurisdiction to grant it, (i.e. relief of cancellation of deed) especially in view of the fact that by grant of that relief, no adjudication between the parties in respect to their rights will survive either before the Revenue Court or before Consolidation Court and the correction of entry will remain a ministerial act.

22. *In view of the aforesaid analysis, in respect to all the questions, (i), (ii), (iii) and (iv) posed above, it is being held that the suit will lie in the civil court. If a plaintiff comes to the civil court for seeking cancellation of deed which may be void or voidable whether the name of the plaintiff is recorded or not, the jurisdiction of the civil court not having been expressly barred to try such suits, the suit will be maintainable in the civil court."*

17. In the case of ***Kishori Prasad v. IIIrd Addl. District Judge and others reported in 2002 SCC OnLine All 937 : AIR 2003 All 58 : (2002) 5 AWC 4269 : 2003 All LJ 393 : (2003) 94 RD 36,*** this Court observed as under:-

*"**14.** The settled position is that where the plaintiff is neither executant of the Instrument nor successor and happens to be a third party, notwithstanding the fact that a deed is cancelled on the basis of a Civil Court, the name of the plaintiff cannot be entered in the revenue record unless the plaintiff files a suit for declaration of his Bhumidhari rights on the basis of so-called sale deed executed by the Bhumidhar and this necessarily entails declaration of rights by the Revenue Court and plaintiff cannot claim any relief unless declaration is made in his favour, of his rights as Bhumidhar. The whole matter thus pivots on the cause of action and in order to properly appreciate the controversy the Court will have to recense the plaint allegations to dig out the real cause of action. What is the intendment behind real cause of action has been considered and thrashed out by the Full Bench decision in Ram Awalamb v. Jata Shanker, AIR 1969 All 526. In paragraph 54 of the said decision, cause of action has been ex-patiated upon at prolix length. It has been observed in that decision taking cue from a decision in Mohammad Khalil Khan v. Mahbub All Mian, AIR 1949 PC 78 that cause of action determines the jurisdiction of a Court. The term "cause of action" though nowhere defined is now very well understood. It means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. The Court has to delve deep and scrutinise the pith and substance of the allegations in the plaint constituting cause of action in order to determine whether the plaintiff could avail of remedy in Revenue Court. In the facts of the present case, according to the plaint allegation, a sale deed is executed in favour of the plaintiff on 24-11-81. The sale deed in favour of defendant was, executed on 17-4-1981. The defendants are recorded tenure holders. Even if it be presumed that sale deed in favour of the defendant was cancelled, the plaintiff cannot appropriate it to his advantage by*

claiming any right unless a declaration comes to be made by Revenue Court that his sale deed is valid and he is the real and bona fide Bhumidhar. In this perspective, the pith and substance of the cause of action in the, present case is declaration of his rights as Bhumidhar. It is not a case where after obviating the hurdles by cancellation of the void document, the name of the original tenure holder will be automatically restored by ministerial act. It is thus, obvious that the plaintiff cannot derive any right unless declaration is made by Revenue Court. In the instant case, the plaintiff being third person, reliance on a subsequent sale deed dated 24-11-1981 i.e. about seven months, after the execution of the sale deed in favour of defendant, he cannot claim any relief unless rights of the plaintiffs come to be declared as Bhumidhari. Before entering into the question of cancellation of the void document, the Civil Court has to adjudicate upon, and make declaration whether the sale deed in favour of the plaintiff is valid one and this necessarily entails declaration of the title of s the plaintiff as Bhumidhari. It is not simply denial of the title of the defendant itself on the basis of the deed but it is declaration of title in favour of the plaintiff. In the above conspectus, it is only the Revenue Court which has jurisdiction to entertain the suit and the revisional Court rightly concluded that Civil Court has no jurisdiction. According to the own admission, the plaintiff has not been in possession of the portion of land covered by the sale deed and by this reckoning, his claim of possession could also be entertained by Revenue Courts and in case, his title is established and if law so permits, the decree of possession could also be given to him by the Revenue Court. From the perusal of the plaint allegation, it is amply borne out that the cause of action emerging from the aforesaid allegations is to seek declaration of his rights as Bhumidhar on the basis of sale deed dated 24-11-1981 and unless it is done no relief can be granted in his favour. It is not a case of removal of hurdle looming over the title of the original tenure holders by filing a suit for cancellation of void document but it is a case of third party who is neither executant nor successor."

18. In the case of ***Kamla Prasad v. Krishna Kant Pathak reported in (2007) 4 SCC 213,*** the Hon'ble Apex Court observed as under:-

*"**10.** The learned counsel for the appellant-defendants contended that the trial court as well as appellate court were right in holding that civil court had no jurisdiction to decide the question as to ownership of agricultural land and the only court which could decide such question is Revenue Court and the High Court had committed an error in reversing the said orders which deserve interference by this Court. It was submitted that so far as abadi land is concerned, the court was right that it could be decided by civil court but in respect of agricultural land, civil court has no jurisdiction. The plaintiff was bound to approach Revenue Court under the provisions of the Act. It was also submitted that the High Court had committed an error of law and of jurisdiction in not considering the fact that the case of the plaintiff in the plaint itself was that over and above the plaintiff, Defendants 10 to 12 had also right in the agricultural land. Such a question can be decided only by Revenue*

Court in a suit filed under Section 229-B of the Act. It was also submitted that when the name of the plaintiff was deleted and of the purchasers entered in revenue records, Revenue Court alone could consider the grievance of the plaintiff. It was, therefore, submitted that the appeal deserves to be allowed by setting aside the order passed by the High Court and restoring the orders of the courts below.

12. *Having heard the learned advocates for the parties, in our opinion, the submission of the learned counsel for the appellants deserves to be accepted. So far as abadi land is concerned, the trial court held that civil court had jurisdiction and the said decision has become final. But as far as agricultural land is concerned, in our opinion, the trial court as well as appellate court were right in coming to the conclusion that only Revenue Court could have entertained the suit on two grounds. Firstly, the case of the plaintiff himself in the plaint was that he was not the sole owner of the property and Defendants 10 to 12 who were pro forma defendants, had also right, title and interest therein. He had also stated in the plaint that though in the revenue record, only his name had appeared but Defendants 10 to 12 have also right in the property. In our opinion, both the courts below were right in holding that such a question can be decided by a Revenue Court in a suit instituted under Section 229-B of the Act. The said section reads thus:*

"229-B. Declaratory suit by person claiming to be an asami of a holding or part thereof.--(1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the landholder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be a bhumidhar with the amendment that for the word "landholder' the words "the State Government and the Gaon Sabha' are substituted therein."

13. *On second question also, in our view, courts below were right in coming to the conclusion that legality or otherwise of insertion of names of purchasers in record-of-rights and deletion of name of the plaintiff from such record can only be decided by Revenue Court since the names of the purchasers had already been entered into. Only Revenue Court can record a finding whether such an action was in accordance with law or not and it cannot be decided by a civil court.*

14. *In this connection, the learned counsel for the appellant rightly relied upon a decision of this Court in Shri Ram v. Ist ADJ [(2001) 3 SCC 24] . In Shri Ram [(2001) 3 SCC 24] A, the original owner of the land sold it to B by a registered sale deed and also delivered possession and the name of the purchaser was entered into revenue records after mutation. According to the plaintiff, sale deed was forged and was liable to be cancelled. In the light of the above fact, this Court held that it was only a civil court which could entertain, try and decide such suit. The Court, after considering relevant case-law on the point, held that where a recorded tenure-holder having a title and in possession of property files a suit in civil court for cancellation of sale deed obtained by fraud or impersonation could not be directed to institute such suit for declaration in Revenue Court, the reason*

being that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land.

15. *The Court, however, proceeded to observe: (Shri Ram case [(2001) 3 SCC 24] , SCC p. 28, para 7)*

"The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

16. *The instant case is covered by the above observations. The lower appellate court has expressly stated that the name of the plaintiff had been deleted from the record-of-rights and the names of purchasers had been entered. The said fact had been brought on record by the contesting defendants and it was stated that the plaintiff himself appeared as a witness before the mutation court, admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the property purchased by them. It was also stated that the records revealed that the names of contesting defendants had been mutated into record-of-rights and the name of the plaintiff was deleted.*

17. *In the light of the above facts, in our opinion, the courts below were wholly right in reaching the conclusion that such a suit could be entertained only by a Revenue Court and civil court had no jurisdiction. The High Court by reversing those orders had committed an error of law and of jurisdiction which deserves interference by this Court."*

19. In the case of ***Indraj (dead) @ Talewar and others v. Smt. Bharpai (dead) and others reported in 2015 SCC OnLine All 8827 : (2015) 113 ALR 904 : (2016) 157 AIC 942 : (2016) 130 RD 542,*** this Court observed as under:-

*"**6.** A perusal of the pleadings as well as two judgments make it clear that disputed property is agricultural land and admittedly only the Revenue Court had jurisdiction to decide its title and ownership. It is also admitted legal position that when consolidation proceedings initiate then only Consolidation Courts have right to determine rights and title of such agricultural land under consolidation proceedings; and Civil Court had no jurisdiction to determine or decide title of such agricultural land. The only point of disputed between the parties in Lower Court was regarding ownership of disputed agricultural land. Both the parties to dispute claimed there ownership on the basis of sale-deeds executed in their favour, but it is settled legal position that when dispute relating to title and ownership of agricultural property comes under consolidation proceedings then jurisdiction of other Courts seizes.*

7. *Pith and substance of the dispute between the parties is the ownership of agricultural land; and the point relating to authority to execute valid sale-deed becomes ancillary matter. Since main dispute relates to the title of agricultural land which is within jurisdiction of Consolidation Court, therefore the ancillary dispute relating to sale-deed regarding them or authority to execute the valid sale-deed or about the effectiveness of such sale-deed will also come within the jurisdiction of*

consolidation Court in present matter. The main dispute between the parties relating to ownership and title of disputed agricultural property has been finally decided in favour of Smt. Bharpai (plaintiff of original suit No. 423/1989 through successors), therefore the ancillary dispute regarding authenticity and cancellation etc. of sale-deed relating to such property will also be dependent on the judgment of such main dispute finally decided by consolidation Court; and after completion of consolidation proceedings by competent Revenue Court. In such circumstances, ancillary dispute relating to relief sought in original suit regarding sale-deed in question also comes within jurisdiction of competent consolidation/Revenue Court."

20. In the judgment and order dated 24.05.2016, passed in the case of ***Chandrika v. Shivnath and others,*** reported as ***2016 (132) R.D. 247,*** by this Court observed as under:-

"5. The counsel for the petitioner submitted that on the basis of sale-deed dated 5.5.1997, the name of the petitioner has been recorded over plots 488, 487 and 494, which are subject-matter of sale-deed and he is in possession over it. At present, the petitioner is a recorded tenure holder and in possession of agricultural land i.e. plots 488, 487 and 494, which are subject-matter of sale-deed as such the suit is essentially a suit for declaration of title and possession over agricultural land. Jurisdiction of Civil Court to try such suit is barred under Section 331 of U.P. Act No. 1 of 1951. He relied upon the judgments Supreme Court in Kamla Prasad v. Krishna Kant Path, MANU/SC/7086/2007 : (2007) 4 SCC 213 and judgment of this Court in Kundan Singh v. Additional District Judge and others, 2009 Rajaswa Nirnay Sangah 59.

6. I have considered the arguments of the counsel for the petitioner and examined the record. In order to appreciate the controversy, relevant provisions of Civil Procedure Code, 1908 and Specific Relief Act, 1963 are quoted below:

9. Courts to try all civil suits unless barred.--The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

31. When cancellation may be ordered.--(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

7. In view of Section 31 of Specific Relief Act, 1963, a suit for cancellation of sale-deed, void or voidable, is a suit of civil nature and can be filed before Civil Court and Civil Court has jurisdiction to try it under Section 9 C.P.C. A Full Bench of this Court in Ram Padarath v. Second. ADJ, Sultanpur and others, MANU/UP/0475/1988 : 1989 RD 21

(FB), held suit for cancellation of void and voidable sale-deed shall lie in Civil Court. This judgment has been approved by Supreme Court in Bismillah v. Janeshwar Prasad, MANU/SC/0759/1989 : AIR 1990 SC 540.

8. Now question arises that if a sale-deed is in respect of agricultural land, suit for its cancellation is barred under Section 331 of U.P. Act No. 1 of 1951, relevant part of which is quoted below:

Section 331. Cognizance of suits, etc. under this Act.--(1) Except as provided by or under this Act, no Court other than a Court mentioned in column 4 of Schedule II shall notwithstanding anything contained in the Civil Procedure Code, 1908 take cognizance of any suit, application or proceeding mentioned in column 3 thereof or a suit application or proceeding based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.

9. Under Section 331, jurisdiction of Civil Court is expressly barred for the suits mentioned in Column 3 of Schedule II of U.P. Act No. 1 of 1951 and impliedly barred for a suit based on a cause of action, in respect of which, relief could be obtained by revenue Court (mentioned in column 4 of Schedule II). Column 3 of Schedule II of U.P. Act No. 1 of 1951 does not provide for a suit for cancellation of sale-deed of agricultural land as such Section 331(1) does not expressly bar a suit for cancellation of sale-deeds.

10. Now it has to be examined as to whether suit for cancellation of a sale-deed is impliedly barred as the required relief based on the cause of action in the suit could be obtained from revenue Court. It is the cause of action, which determines jurisdiction of a Court. Cause of action means the facts which will be necessary for the plaintiff to prove, in order to obtain decree. Supreme Court in Bismillah v. Janeshwar Prasad, MANU/SC/0759/1989 : AIR 1990 SC 540, held that in order to determine the precise nature of the action, the pleadings should be taken as a whole. If as, indeed, is done by High Court the expression 'void' occurring in the plaint as descriptive of the legal status of the sales is made the constant and determinate and what is implicit, in the need for cancellation as the variable and as inappropriate to a plea of nullity, equally, converse could be the position. The real point is not the stray or loose expressions which abound in inartistically drafted plaints, but the real substance of the case gathered by construing pleadings as a whole. It is said "Parties do not have the farsight of prophets and their lawyers the draftsmanship of a Chalmers".

11. In Church of North India v. Lavajibhai Ratanjibhai, MANU/SC/2531/2005 : (2005) 10 SCC 760, held that a plea of bar to jurisdiction of a Civil Court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The Court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed de-hors the factual averments made in the plaint. The rules of pleadings postulate that a plaint must contain material facts.

With a view to determine the question as regards exclusion of jurisdiction of the Civil Court in terms of the provisions of the Act, the Court has to consider what, in substance, and not

merely in form, is the nature of the claim made in the suit and the underlying object in seeking the real relief therein. If for the purpose of grant of an appeal, the Court comes to the conclusion that the question is required to be determined or dealt with by an authority under the Act, the jurisdiction of the Civil Court must be held to have been ousted. The questions which are required to be determined are within the sole and exclusive jurisdiction of the authorities whether simple or complicated.

12. Full Bench of this Court in Ram Awalamb v. Jata Shankar, MANU/UP/0100/1969 : AIR 1969 All 526 (FB), held that (a) where on the basis of cause of actionument which made him to approach the Court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue Court.

15. So far as the arguments that on the basis of sale-deed dated 5.5.1997, the name of the petitioner has been recorded over plots 488, 487 and 494, which are subject-matter of sale-deed and he is in possession over it and the suit, is essentially a suit for declaration of title and possession over agricultural land, is concerned, title of the plaintiff is admitted on the date of sale-deed. In case sale-deed is canceled, there will be no requirement for declaration of the title of the plaintiff. Relief for ejectment of the petitioner and possession of the plaintiff being an ancillary relief can be granted by Civil Court also as held by this Court in Ram Awalamb's case (supra). The case law relied by the counsel for the petitioner, are applicable where declaration of title would be necessary for grant of relief to the plaintiff, while in this case, as stated above, title of the plaintiff on the date of sale-deed is admitted and cancellation of sale-deed is main relief. Supreme Court in Suraj Bhan v. Financial Commr., MANU/SC/7303/2007 : (2007) 6 SCC 186, held that it is well-settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court. In view of the aforesaid discussions, the impugned orders do not suffer from any illegality. The petition has no merit and is dismissed.", the main relief is cognizable by a revenue Court, the suit would be cognizable by revenue Court only. The ancillary relief would be immaterial for determination of proper forum for the suit. (b) Where on the basis of cause of action, main relief is cognizable by a Civil Court, the suit would be cognizable by Civil Court only. The ancillary relief which could be granted by revenue Court may also be granted by Civil Court.

(Paragraph-90) A document under which the plaintiffs share also purports to have been transferred by a person not authorized to do so, can be canceled through Court to the extent of the plaintiffs share and after a decree has been passed in his favour, information regarding the same has to be sent to the registration department for making a note in their register. To have the document adjudged void or voidable, the suit provided under Section 31 of Specific Relief Act, 1963 cannot be considered to be altogether unnecessary because after lapse of several years, the unchallenged existence of such document can cause serious difficulty to the plaintiff in establishing his title to the land. The

plaintiff is not bound to ask for mere declaration of his title in respect of the land when he could pray for cancellation of the entire sale-deed.

13. Thus cancellation of a registered sale-deed has been held to be main relief as cause of action for the suit, is the sale-deed. The present suit has been filed for cancellation of sale-deed dated 5.5.1997. Mutation order, on its basis, directing to record the name of the petitioner is a consequential action based on sale-deed. So long as a registered sale-deed is not cancelled by Civil Court, revenue Court will be bound to respect it and will not able to ignore it as held by Full Bench of this Court in Ram Nath v. Munna, 1976 RD 220 (FB).

14. Arguments of the counsel for the petitioner is on the allegations made in the plaint, sale-deed dated 5.5.1997 is a void document and can be ignored by revenue Court. Supreme Court in Bismillah v. Janeshwar Prasad, MANU/SC/0759/1989 : AIR 1990 SC 540, held that as suit or action for cancellation of void document will generally lie in the Civil Court and a party cannot be deprived of his right of getting this relief permissible under law except when a declaration of right or status and a tenure holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure holder having prima facie title in his favour can hardly be directed to approach the revenue Court in respect of seeking relief for cancellation of a void document which made him to approach the Court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue Court.

15. So far as the arguments that on the basis of sale-deed dated 5.5.1997, the name of the petitioner has been recorded over plots 488, 487 and 494, which are subject-matter of sale-deed and he is in possession over it and the suit, is essentially a suit for declaration of title and possession over agricultural land, is concerned, title of the plaintiff is admitted on the date of sale-deed. In case sale-deed is canceled, there will be no requirement for declaration of the title of the plaintiff. Relief for ejectment of the petitioner and possession of the plaintiff being an ancillary relief can be granted by Civil Court also as held by this Court in Ram Awalamb's case (supra). The case law relied by the counsel for the petitioner, are applicable where declaration of title would be necessary for grant of relief to the plaintiff, while in this case, as stated above, title of the plaintiff on the date of sale-deed is admitted and cancellation of sale-deed is main relief. Supreme Court in Suraj Bhan v. Financial Commr., MANU/SC/7303/2007 : (2007) 6 SCC 186, held that it is well-settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent Civil Court. In view of the aforesaid discussions, the impugned orders do not suffer from any illegality. The petition has no merit and is dismissed."

21. In the case of ***Banshi Dhar v. Sheela Devi and others in S.A. No. 279 of 2019, reported in 2016 (132) R.D. 3:(2016) 3 AWC 3192: (2017) 4 ALJ 177,*** this Court observed as under:-

"11. In Kamla Prasad v. Kishna Kant Pathak, (2007) 4 SCC 213 the Apex Court had held as under:

"16. The instant case is covered by the above observations. The lower appellate court has expressly stated that the name of the plaintiff had been deleted from the record-of-rights and the names of purchasers had been entered. The said fact had been brought on record by the contesting defendants and it was stated that the plaintiff himself appeared as a witness before the mutation court, admitted execution of the sale deed, receipt of sale consideration and the factum of putting vendees into possession of the property purchased by them. It was also stated that the records revealed that the names of contesting defendants had been mutated into record-of-rights and the name of the plaintiff was deleted.

17. In the light of the above facts, in our opinion, the courts below were wholly right in reaching the conclusion that such a suit could be entertained only by a Revenue Court and civil court had no jurisdiction. The High Court by reversing those orders had committed an error of law and of jurisdiction which deserves interference by this Court."

12. In Azhar Hasan & others vs. District Judge, Saharanpur & others, 1998 (34) A. L.R. 152 (SC) full bench of Apex Court has held:

"On reading the plaint and on understanding the controversy, we get to the view that whether those persons who succeeded the recorded tenants, were rightly recorded as tenants or not, was a question determinable by the Revenue Authorities. Besides that, the sale deed which has been questioned on the basis of fraud, was not executed by the plaintiffs but by others, and they were not parties thereto so as to allege the incidence of fraud, In these circumstances, we are of the view that the plaint was rightly returned to the plaintiffs. They are even now at liberty to approach the Revenue authorities and claim deduction of time spent in these proceedings, in computing limitation for the purposes of the suit."

13. In present case, admittedly, plaintiff/appellant is not a recorded tenure-holder of disputed agricultural land whereas earlier defendant no.-1 was recorded, and after execution of gift-deed in question the the proceedings of mutation of defendants no. 4 & 5 over the disputed property in revenue records is pending, in which plaintiff-appellant is participating. Therefore, granting of any relief in present matter would involve adjudication of an issue relating to co-parcenary right in agricultural land and jurisdiction of the Court as held in Sri Ram's case (Supra). Since declaration of title and right of share of disputed agricultural land is necessary pre-condition involved for grant of relief sought by plaintiff/appellant, therefore, as it is held by Apex Court in Sri Rams' case (supra), plaintiff cannot get any relief unless his rights are declared by the revenue court. Pith and substance of the present dispute involves the declaration of bhumidhari rights of plaintiff/appellant; therefore the relief sought by him even in the garb of relief of cancellation of gift-deed, cannot be granted by the civil court.

14. No relief of declaration of ownership of agricultural land specifically sought in plaint, but in essence the claim of plaintiff was based on his ownership right of the disputed land, while the plea of defendant was that plaintiff was not owner of the property. Then adjudication of title of land in substance was the main question involved in the suit, although, it was not expressly prayed for in plaint. Therefore, in substance, when the main question

involved for adjudication in this case relates to declaration of right or title then suit would lie in revenue court and not in civil court. Therefore, in such mattrt the jurisdiction of civil court is barred under Section 331 of UPZA & LR Act. This provision of Section 331 is attracted when in substance main question to be determined for resolving dispute between parties relates to declaration of rights or title of agricultural land.

15. In Ram Padarath vs. Second Addl. District Judge, Sultanpur, 1989 R.D. 21 the Full Bench of this Court had held as Under:

"It is the alleged injury or the apprehended injury or cloud on the right and title of a person by some action on the part of any other person, or interference or attempt to interfere or encroach upon the right and title of a person over a particular property by any positive or negative act or declaration etc., which give a suitor cause of action to approach a court of law for relief or reliefs against the same. The dispute as to jurisdiction arises when more than one reliefs are claimed in an action on the same cause of action one of which can be granted by a civil court. If the principle of real relief can be granted by the revenue court, then the ancillary relief or the relief which flows out from the principal relief can also be granted by the revenue court notwithstanding that --then all the reliefs can be granted by the civil court and if things are in reverse direction then all the relief can be granted by the civil court, but if the so-called main relief is redundant or mere suplusage then it is the real relief involved in the matter which may or may not have been claimed as ancillary relief will determine the jurisdiction of the court which is to entertain a particular action. Even if a plaint or application is couched in such a language so as to oust jurisdiction of a particular court then it is the cause of action which would determine the forum for entertaining the said action and not the so called relief claimed."

16. In fact for an adjudication of an issue relating to jurisdiction the averments contained in the plaint have to be taken in their entirety. The effort of the court has to be to gathered from the pith and substance of what is alleged in the plaint. The pith and substance of the plaint in the instant case necessarily involved the adjudication of the question as to whether the plaintiff was or not the co-bhumidhar of the land in dispute. The plaintiff was not recorded in the revenue papers and the entry stood in favour of the defendants. Obviously, therefore, the plaintiff had to seek a declaration in his favour. Moreover, the absence of the names of the plaintiff in the revenue record necessitates an action for declaration on the part of the plaintiff because the entries may not be set right without such declaration being asked for and given as contemplated under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act. There can be no escape therefore, from the conclusion that upon the cause of action set up in the plaint, the suit would lie for declaration in the revenue court under Section 229-B of the U.P. Act No.1 of 1951.

20. Apart from it, as discussed and held earlier, civil court had no jurisdiction to grant the main relief of declaration of title and coparcenary right of agricultural land. Therefore, suit is liable to be dismissed on this ground alone.

21. On examination of the reasoning recorded by the trial court, which are affirmed by the learned first

appellate court in first appeal, I am of the view that the judgments of the trial court as well as the first appellate court are well reasoned and are based upon proper appreciation of the entire evidences on record. No perversity or infirmity is found in the concurrent findings of fact recorded by the trial court that has been affirmed by the first appellate court to warrant interference in this appeal. No question of law, much less a substantial question of law, was involved in the case before the this Court. None of the contentions of the learned counsel for the appellant-plaintiffs can be sustained."

22. This Court has also taken note of the judgment passed by the Hon'ble Apex Court in the case of ***Pyarelal v. Shubhendra Pilania,*** **(2019) 3 SCC 692 : (2019) 2 SCC (Civ) 393 : 2019 SCC OnLine SC 98.** The Apex Court after considering Section 9 of the Code of Civil Procedure, Section 88, 207 and 256 of the Rajasthan Tenancy Act, 1955 and Section 331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, observed to the effect that jurisdiction to declare khatedari rights exclusively vests with the Revenue Court and only after declaration of rights by the Revenue Court the suit would be maintainable before the Civil Court. While holding/observing on the issue of jurisdiction of the Revenue Court and/or Civil Court the Hon'ble Apex Court also considered the judgment passed in the case of Ram Vs. Additional District Judge, (2001) 3 SCC 24. The relevant paragraphs on reproduction reads as under:-

22. *The appellant has prayed that the gift deed dated 10-2-2011 be declared void to the extent of the share claimed by the appellant and that Respondents 1 to 5 be restrained from alienating the share of the appellant. The civil court may decree the relief prayed only if it is first determined that the appellant is entitled to khatedari rights in the suit property. Under the provisions of the Tenancy Act, the jurisdiction to declare khatedari rights vests exclusively with the Revenue Court. Only after such determination may the civil court proceed to decree the relief as prayed. The Explanation to Section 207 clarifies that if the cause of action in respect of which relief is sought can be granted only by the Revenue Court, then it is immaterial that the relief asked from the civil court is greater than, or in addition to or not identical with the relief which the Revenue Court would have granted. In view of this matter, the civil court may not grant relief until the khatedari rights of the appellant have been decreed by a Revenue Court.*

23. *A claimant whose khatedari rights have been decreed by a Revenue Court is however on a different footing from a claimant whose khatedari rights are pending adjudication by a Revenue Court. Where the khatedari rights are yet to be decreed, a claimant must first approach the Revenue Court. The relief to declare the gift deed void and to restrain Respondents 1 to 5 from interfering with or alienating the property vesting in a civil court may be sought for in a suit by a claimant in whom khatedari rights have been decreed by a Revenue Court.*

24. *In Ramv.Addl. District Judge[Ramv.Addl. District Judge, (2001) 3 SCC 24] , a suit was filed before the civil court for the cancellation of a sale deed of an agricultural land on the grounds of fraud and impersonation. The defendant contended that the suit is*

barred by Section 331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 which reads thus:

"331.Cognizance of suits, etc. under this Act.--*(1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof, or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:*

Explanation.--If the cause of action is one in respect of which relief may be granted by the Revenue Court, it is immaterial that the relief asked for from the civil court may not be identical to that which the Revenue Court would have granted."

25. *The question before this Court was whether a recorded tenure-holder having prima facie title in his favour and in possession was required to file a suit in the Revenue Court, or where the civil court had jurisdiction to entertain and decide the suit seeking relief of cancellation of a void document. Upholding the jurisdiction of the civil court to try the suit, a two-Judge Bench of this Court differentiated between a recorded tenure-holder, and an unrecorded tenure-holder with the following observations: (Ram case[Ramv.Addl. District Judge, (2001) 3 SCC 24] , SCC p. 28, para 7)*

"7. ... we are of the opinion that where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure-holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

26. *Though the above principles emerge in the context of the bar under Section 331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, the logic of the judgment extends to the bar under Section 207 read with Section 256 of the Tenancy Act. A recorded khatedar stands on a different footing compared to a claimant seeking a decree of their khatedari rights. A claimant seeking a decree of khatedari rights is barred from filing a suit in the civil court prior to their khatedari right being decreed by a Revenue Court when the relief sought for by the civil court includes a determination of khatedari rights."*

23. From the various authorities/judgments referred hereinabove, the position which culled out in regard to the questions framed by this Court is as under:-

24. If a person who questions sale deed executed or purported to be executed by him in respect of agricultural land can file the suit for its cancellation before

Civil Court, if it is alleged by him that the sale deed is void or voidable on the ground of fraud, coercion, undue influence, misrepresentation or impersonation. Similarly sale deed executed or purported to be executed by predecessor-in-interest of a plaintiff can also be challenged by him before civil court on the same grounds. However, in such a situation, it is necessary that immediately before the execution of the sale deed, the plaintiff or his predecessor-in-interest must undisputedly be recorded in the revenue records.

25. If sale deed executed by a person is challenged by another person on the ground that even though immediately before the sale deed only the name of vendor/vendors was undisputedly recorded in the revenue records, still plaintiff had a right in the revenue records, still plaintiff had a right in the said land, then such suit is not maintainable before Civil Court, as it primarily involves question of declaration of right in the agricultural land. In such a situation, it is not actually the sale deed and state of affairs coming in existence by execution of the sale deed which is being challenged. The challenge in such a situation in real sense is to the position and affairs in existence immediately before the execution of the sale deed. If a person asserts that apart from the recorded tenure-holder he also has got a right in the agricultural land then his only remedy lies in filing a suit for declaration before the Revenue Court.

26. Now coming to the facts of the case, from the pleading on record, it appears that Original Suit No. 176 of 1998 was initially filed for permanent injunction restraining the defendants from interfering in the possession of the plaintiffs and also for restraining the defendants from alienating the property in issue in suit. Subsequently, the suit/plaint was amended and the relief for cancellation of sale deed dated 09.02.1988 executed by defendant no. 1/Smt. Ram Rani in favour of defendant no. 2/Bachchu Lal/opposite party no. 1 was added/incorporated. Relevant to state here that the property in suit is agricultural land/property, of which the sale deed dated 09.02.1988 was executed.

27. Initially the suit was filed by Nirvikar Singh and Arjun Singh. During the pendency of the suit both the plaintiffs, who filed the suit, expired and in place of them the legal representative/heirs were substituted.

28. One legal heir of Late Nirvikar Singh, who filed the present writ petition, namely Jai Prakash Singh expired during the pendency of the present writ petition and pursuant to the order of this Court dated 14.05.2018, the name of legal heirs of Jai Prakash Singh, were substituted on 16.05.2018.

29. In the suit for the reliefs sought for permanent injunction and cancellation of sale deed dated 09.02.1988, it has been stated that the defendant no. 1 Smt. Ram Rani wife of Durga Prasad was the maternal aunt of the Banchchu Lal/opposite party no. 1 and on account of poor financial condition of Durga Prasad the defendant no. 1/Smt. Ram Rani started living with the mother of Bachchu Lal, who is the real sister of defendant no. 1/Smt. Ram Rani. Subsequently, the defendant no. 1/Smt. Ram Rani started living with Mewa Lal, who was neighbor of Banchchu Lal, for the purposes of her

maintenance. It has also been stated in plaint that the defendant no. 1 was caring/looking after Mewa Lal. Wife of Mewa Lal was expired prior to his death. Mewa Lal expired issueless. After the death of Mewa Lal the name of defendant no. 1 was mutated in the revenue record with respect to the property in suit. The plaintiffs, who were the successors of the Mewa Lal, as per plaint averments, never objected with respect to mutation of name of defendant no. 1 in revenue record in place of Mewa Lal keeping in view the fact that the defendant no. 1 served Mewa Lal, the predecessor of the plaintiffs, as well as considering that the mutation is only for the purposes of social and finance security and defendant no. 1 would possess the property in suit till her death with permission of defendant no. 3 to 13. The defendant sold the property in suit by executing a sale deed dated 09.02.1988 in favour of Bachchu Lal/defendant no. 2/opposite party no. 1 without any right, title or interest in the property of Mewa Lal.

30. From the averments made in the plaint, it is evident that at the time of execution of sale deed dated 09.02.1988, the property in suit was in the name of Smt. Ram Rani in the revenue records and plaintiffs were not recorded tenure holder, at that point of time, nor they were in.

31. From the record, it appears that in the Written Statement, a plea to the effect that the suit involves declaration of title and therefore it should have been filed before the Revenue Court and not in the Civil Court thus Civil Suit is not maintainable. This plea has been taken in paragraph 24 of Written Statement of defendant no. 2, which is on record as Annexure No. 4 to the writ petition. It has also been stated in the Written Statement that the plaintiffs have no right/title/interest in the property in suit and they are not in possession of the same.

32. In view of the plea of maintainability of the suit taken in the Written Statement, the issue no. 1, as mentioned hereinabove, was framed by the Trial Court i.e. Civil Judge (Junior Division), North, Unnao, which was to the effect that "whether this Court has no jurisdiction to try and hear the suit".

33. The Trial Court vide order dated 15.03.2001 decided the issue no. 1 against the plaintiffs and in favour of the defendants and directed to return the plaint, under Order 7 Rule 1, for presenting it before competent Court. The Trial Court while deciding the issue no. 1 considered the facts and reliefs sought in the plaint and on due consideration came to conclusion that the suit is in fact is for declaration of title/rights and possession over the agricultural land/property in suit.

34. Aggrieved by the order dated 15.03.2001, the Misc. Civil Appeal No. 21 of 2001 was filed by Jai Prakash Singh (now deceased), original petitioner, and by the detailed judgment and order dated 05.03.2002, the District Judge, Unnao dismissed the appeal with costs. The said order was passed after considering the allegations/averments made in the plaint. The learned District Judge held that the suit involves the declaration of title of the agricultural land under the garb of relief of permanent injunction. The learned District Judge while dismissing the appeal also recorded a finding that the recorded tenure holder has executed the sale deed and the relief of cancellation of sale deed

has been sought by way of amendment. The learned District Judge while dismissing the appeal also considered the judgment passed by this Court in the case of Indra Pal(Supra).

35. Assailing the impugned orders dated 15.03.2001 and 05.03.2002, the learned counsel for the petitioner submitted that the impugned orders are liable to be interfered by this Court as both the Courts below have failed to consider the scope/jurisdiction of the Civil Court keeping in view the provisions as envisaged in Section 9 of the CPC and Section 31 of the Specific Relief Act, 1963 as well as the reliefs sought in the suit i.e. for permanent injunction and cancellation of sale deed. In support of his submissions the counsel for petitioner Sri R.P. Singh placed reliance on the judgments, which have already referred hereinabove.

36. Per contra, learned counsel Sri Abhisht Saran and Sri Rahul Kumar Kashyap, who appears for opposite party no. 1, submitted that there is no illegality in the impugned orders dated 05.03.2001 and 15.03.2002, passed by both the Courts below as the same have been passed after considering the averments made in the plaint to the effect that the sale deed has been executed by the recorded tenure holder and the plaintiffs are not recorded tenure holders of the suit property and accordingly the Courts below came to the conclusion that in fact relief of declaration of right/title/interest over the property in issue is involved, which is agricultural property. The reliance has been placed on the judgments, already referred hereinabove. In addition, it has also been submitted declaration to the effect that the transfer is void amounts to cancellation of transfer deed and as such the declaration of right/title/interest by the Revenue Court would suffice. In this regard reliance has been placed on the judgment of ***Suhrid Singh @ Sardool Singh Vs. Randhir Singh, reported in (2010) 12 SCC 112 and J. Vasanthi Vs. N. Ramani Kanthammal, reported in (2017) 11 SCC 852,*** wherein the Hon'ble Apex Court has observed that "Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him."

37. Considered the submissions made by the counsel for the respective parities and perused the record.

38. From the record particularly the averments made in the plaint, it is evident that at the time of execution of sale deed dated 09.02.1988, the property in suit was in the name of Smt. Ram Rani in the revenue records and plaintiffs were not recorded tenure holder. The executant of the deed was in possession of the property in suit (agricultural land). It also appears from the averments made in the plaint that in fact the main relief sought in the suit is for cancellation of sale deed by the non executants of sale deed and the persons, who at the time of execution of sale deed were not recorded tenure holder. Thus, this Court is of the view that in fact the declaration of right/title/interest is involved in the present case.

39. In view of the above, the finding given by this Court as well as the conclusion given with respect to jurisdiction of Revenue/Civil Court and

the recent judgment of the Hon'ble Apex Court in the case of Pyarelal (supra) this Court is of the view that in the instant case the suit would lie before the Revenue Court.

40. For the forgoing reasons, the impugned orders dated 15.03.2001 and 05.03.2002 are not liable to be interfered with.

41. Accordingly, this Court finds that the writ petition lacks merit.

42. Hence, the writ petition is ***dismissed*** with no order as to costs.

(2019)10ILR A 1422

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

FAFO No. 465 of 2012

Abhishek Jain ...Appellant
Versus
Chhedi Lal & Ors. ...Respondents

Counsel for the Appellant:
Sri Nilesh Anand, Sri Virendra Mishra

Counsel for the Respondents:
Sri Akhter Abbas

A. Motor Vehicles Act, 1966 - Section 166, Section 173 - Enhancement of compensation - Claimant/son though legal heir of the deceased - not entitled for getting compensation as he was not "dependent" upon the income of the deceased.

B. Motor Vehicles Act, 1966 - Section 166, Section 173 - Legal heir of the deceased who is not "dependent" upon the income of the deceased - entitled to general damages, as provided in the Second Schedule of the Act of 1988.

Held:-Only dependent(s) are entitled to compensation or for enhancement of compensation – Appeal filed by the claimant for enhancement is liable to be rejected as the claimant were not dependent upon the deceased – Appellant/claimant and his sister is entitled to get General Damages, as provided in the Second Schedule of the Act of 1988 – Appellant/claimant is entitled to get amount towards conventional heads, such as funeral expenses, loss of consortium, loss of estates, medical expenses – Appellant is entitled for compensation towards Loss of Estate, towards Loss of Consortium towards Funeral Expenses and would be entitled to the interest @ 12% per annum from the date of filing of the Claim Petition. (Para 29, 30 & 32)

Appeal Partly allowed (E-5)

List of cases cited: -

1.U. P. St. Road Transport Corporation & ors. Vs Trilok Chandra & ors. (1996) 4 SCC 362

2.Ravinder Kumar Sharma Vs St. of Assam 7 ors. (1999) 7 SCC 435.

3.Banarsi & ors. Vs Ram Pal, JT (2003) 5 SC 224

4.Khenyei Vs New India Assurance Com. Ltd. & ors. (2015) 9 SCC 273

5.Machindranath Kernath Kasar Vs D. S. Mylarappa & ors. 2008 AIR SCW 3546

6.U.P. St. Road Transport Corporation Vs Krishna Gopal Agarwal & anr. 2019 (37) LCD 1322

7.Manjuri Bera Vs Oriental Insurance Company Ltd. & ors. AIR 2007 SC 1474

8.Sarla Verma & ors. Vs Delhi Transport Corporation & anr. (2009) 2 T.A.C. 677 (SC)

9.National Insurance Company Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

10. Magma General Insurance Co. Ltd. Vs Nanu Ram & ors. 2018 SCC Online 1546 = (2018) 11 SCALE 247

(Delivered by Hon'ble Anil Kumar, J.)

1. Heard Shri Virendra Mishra, learned counsel for the appellant and Shri Akhter Abbas, learned counsel for the respondent.

2. Facts in brief of the present case are that when father of the claimant, late Achit Kumar Jain, aged about 52 years, s/o late Pratap Chand Jain and mother of the complainant, Smt. Vidha Jain, w/o late Achit Kumar Jain, r/o Jail Road, Aara, District-Bhojpur, Bihar were coming from Lucknow by Indica Car bearing No.B.R. 3 B-1011, which was driven by a driver/Lallan Rajak, they met with an accident which took place at about 9:15 a.m. on 22.07.2003 at Village-Hauj, within the jurisdiction of P.S.-Jafrabad, District-Jaunpur (U.P.) due to rash and negligent driving of driver of Roadways Bus having Registration No.U.P. 65 R-2789, as a result of which, the driver of Indica Car/Lallan Rajak and Achit Kumar Jain sustained grievous injuries and died on the spot whereas Smt. Vidha Jain, while taking her to hospital, also died on the way. In this regard, F.I.R. was lodged and was registered as Case Crime No.432 of 2003 under Sections-279, 304A, 227, 338 I.P.C. at P.S.-Jafarabad, District-Jaunpur.

3. The deceased/late Anchit Kumar Jain and Vidha Jain were businessman and their monthly income was of Rs.15,000/- and 10,000/- respectively from the different sources. The claimant is legal heir of the deceased and is entitled for compensation.

4. In view of the above said facts, a Claim Petition No.02 of 2004 (Abhishek Jain vs. Chedilal) under Section 166 of Motor Vehicles Act, 1966 was filed before the Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Lucknow.

5. U.P. State Road Transport Corporation/opposite party no.2 in the claim petition, had filed written statement in which plea was taken that the accident did not take place due to rash and negligent driving of the driver of the Roadways Bus, rather the same took place due to rash and negligent driving of driver of Indica Car.

6. The Tribunal, in order to decide the controversy involved in the claim petition, framed the following issues :-

"क्या दिनांक २२-०७-२००३ को समय करीब ९:१५ बजे सुबह स्थान ग्राम हौज, मुख्य मार्ग थाना - जफराबाद, जिला-जौनपुर पर बस संख्या -यू. पी. ६५ आर - २७८९ रोडवेज बस के चालक द्वारा बस को तेजी व लापरवाही से चलाते हुए अचित कुमार जैन व श्रीमती विधा जैन की इण्डिका कार में जोरदार टक्कर मार दिया जिसके परिणाम स्वरुप इण्डिका कार में बैठे अचित कुमार जैन व श्रीमती विधा जैन की मृत्यु हो गयी? यदि हां तो प्रभाव?

क्या याचिका इण्डिका कार व अन्य ट्रक सं.-डी. एल. बी. ओ. मालिक तथा बीमा कंपनी को पक्षकार न बनाये जाने के कारण दोषपूर्ण है, यदि हाँ तो प्रभाव ?

क्या उपरोक्त दुर्घटना इण्डिका कार चालक की योगदायी उपेक्षा के कारण हुई, यदि हाँ तो प्रभाव ?

क्या विपक्षी संख्या -३ श्रीमती सी. पी. जैन मृतकगण की पुत्री होने के कारण प्रतिकर की धनराशि पाने की अधिकारी है, यदि हाँ तो प्रभाव ?

क्या याची प्रतिकर की धनराशि पाने का अधिकारी है, यदि हाँ तो कितनी एवं किस विपक्षी से ?"

7. On the basis of the evidence and material on record, the Tribunal by means of the judgment dated 09.02.2012, allowed the claim petition. The operative portion reads as under :-

"याची की याचिका विपक्षीगण के विरुद्ध २,७३,०००/- रूपये (दो लाख तिहत्तर हजार रूपये मात्र) प्रतिकर हेतु पृथक - पृथक एवं संयुक्त रूप से स्वीकार की जाती है। याची एवं विपक्षी संख्या -३ इस धन राशि पर ६ प्रतिशत साधारण वार्षिक ब्याज याचिका प्रस्तुत करने के दिनांक से अदायगी के दिनांक तक प्राप्त करेंगे। विपक्षीगण द्वारा उक्त प्रतिकर की धनराशि मय ब्याज आज से दो माह के अंदर अदा की जाय।

प्राप्त धनराशि में से याची अभिषेक कुमार जैन को १,३६,५००/- रूपये तथा विपक्षी संख्या-३ श्रीमती सी. पी. जैन को १,३६,५००/- रूपये प्राप्त होगा जिसमे से याची अभिषेक कुमार जैन व विपक्षी संख्या-३ श्रीमती सी. पी. जैन प्रत्येक द्वारा ८२,०००/- रूपये किसी राष्ट्रीयकृत बैंक के पाँच वर्षीय सावधि जमा योजना में जमा किया जायेगा तथा शेष धनराशि का भुगतान उन्हें नकद चेक द्वारा किया जायेगा।

विपक्षीगण द्वारा प्रतिकर की धनराशि मय ब्याज, अध्यक्ष, मोटर दुर्घटना दावा अधिकरण/जिला जज, लखनऊ के खाते में रेखांकित चेक द्वारा जमा की जाय।

8. For enhancement of compensation awarded by the Tribunal, Shri Abhishek Jain/appellant has filed the present appeal under Section 173 of Motor Vehicles Act, 1988, against the judgment dated 09.02.2012 and the award dated 25.02.2012 passed by Motor Accident Claims Tribunal, Lucknow/Additional District Judge, Court No.1, Lucknow in Claim Petition No.02 of 2004 before this Court.

9. Shri Akhter Abbas, learned counsel for the opposite party no.2 has raised a preliminary objection that the appellant/claimant, Shri Abhishek Jain, who has filed the present appeal, comes within the ambit of definition of legal heir of the deceased but he is not entitled for getting compensation as claimed by him because he was not "dependent" upon the income of the deceased and also Smt. Ceipi Jain, daughter of the deceased, who was also impleaded as opposite party no.3 in the claim petition, was not dependent upon the income of the deceased as she is married daughter. So the Tribunal had wrongly awarded the compensation to Shri Abhishek Jain as well as to the opposite party no.3/Smt. Ceipi Jain.

10. Accordingly, it is submitted by him that the appeal for enhancement of compensation is neither entertainable nor maintainable, as such, the same is liable to be dismissed.

11. In support of his argument, he has placed reliance on the following judgments :-

(a) U. P. State Road Transport Corporation and others vs.Trilok Chandra and others, (1996) 4 SCC 362 ;

(b) Ravinder Kumar Sharma vs. State of Assam and others, (1999) 7 SCC 435.

12. Shri Virendra Mishra, learned counsel for the appellant submitted that the preliminary objection raised by Shri Akhter Abbas, learned counsel for the opposite party no.2 has got no force because neither any plea related to dependency was taken before the Tribunal by the U.P.S.R.T.C. nor in this regard any issue was framed. So, the plea regarding dependency taken by Shri Akhter Abbas at the appellate stage in the arguments cannot be entertained coupled with the fact that U.P.S.R.T.C. neither challenged the judgment by filing an appeal nor filed any cross objection in the present appeal.

13. In support of his argument, he has placed reliance on the judgment given by the Hon'ble Apex Court in the case of ***Banarsi & Ors. vs. Ram Pal, JT 2003 (5) SC 224.***

14. Shri Virendra Mishra, learned counsel for the appellant also submitted that U.P.S.R.T.C. had already complied with the award passed by the Tribunal, so the preliminary objection taken by learned counsel for the opposite party no.2 is liable to be rejected.

15. Further, Shri Virendra Mishra, learned counsel for the appellant has pressed the present appeal for the purpose of enhancement of compensation on the following points :-

(a) There is a composite negligence on the part of the drivers of two vehicles and the Tribunal had awarded compensation to the appellant/claimant after making 50% deduction. The said action on the part of the Tribunal is totally contrary to the material on record as well as settled law on the issue of awarding compensation in the cases of composite negligence. Late Lallan Razak, who was driving Indica Car having Registration No. B.R.-38-1011 met with an accident with the Bus of U.P.S.R.T.C. having Registration No.U.P. 65-R-2783, of which Sri Chhedi Lal was driver and the deceased were passengers of Indica Car and the Tribunal has held that on account of rash and negligent driving of both the drivers, the accident took place and thus in these facts : the deduction of 50% by the Tribunal is contrary to law on the issue.

In support of his argument, he has placed reliance on the following judgments :-

"(i) Khenyei vs. New India Assurance Company Limited and others, (2015) 9 SCC 273 ;

(ii) Machindranath Kernath Kasar vs. D. S. Mylarappa & Ors., 2008 AIR SCW 3546 ;

(iii) U.P. State Road Transport Corporation vs. Krishna Gopal Agarwal and another, 2019 (37) LCD 1322.

(b) The Tribunal while passing the judgment and award had not given any amount towards future prospect.

(c) The Tribunal has erred in awarding the correct amount under conventional heads, the amount awarded is not as per law.

16. Accordingly, it is submitted by learned counsel for the appellant that the present appeal may be allowed and the compensation awarded by the Tribunal be enhanced and given to the appellant/claimant.

17. We have heard learned counsel for the parties and gone through the records.

18. In order to decide the controversy, we feel appropriate to consider the following certain paragraphs of the claim petition filed by Sri Abhishek Jain under Section 166 of Motor Vehicles Act, 1988 :

7. Name and age of each of the dependents of the deceased indicating relationship with him, and also monthly average income of the deceased and source of such income.	As both the aforesaid deceased Anchit Kumar Jain and Smt. Vidya Jain were husband and wife and as such the following persons are the only dependents and legal representatives of the deceased : 1. Abhishek Kumar Jain, aged about 24 years of the deceased persons. 2. Smt. Ceipi Jain, aged about 27 years daughter of the deceased persons. The deceased no.1/Achit Kumar Jain was a businessman and was engaged in various business i.e. the business of petrol pump, lubricant, investments, land & shares etc. and was earning a monthly income of approximately Rs.15000/- per month. The deceased no.2/Smt. Vidhya Jain was engaged in business of investments, rental income & income by interest and was earning approximately Rs.10,000/- per month.
8. Does the deceased in respect of whom compensation is claimed pay income tax ? If so state the amount of income tax (to be supported by documentary evidence)	Yes, both were income tax assessee income tax paid by Achit Kumar Jain deceased no.1 in the year 2002-2003 was Rs.7832/-. Income tax paid by Vidya Jain, deceased no.2 in the year 2002-03 was Rs.10136/-.
23. Any other information that may be necessary or helpful in the disposal of the claim.	(a) (i) That the deceased no.1/Anchit Kumar Jain was a businessman and was earning approximately Rs.15000/- per month and was taking care of his accidental death, the deceased/Achit Kumar, aged about 52 years of age and he was completely hail and hearty and would have survived up to the age of 75 years if he would have not died in the accident. As he used to earn Rs.15,000/- per month, he would have earned in 12 month i.e. in one year Rs.15000/- x 12 = 1,80,000/- and thus in remaining 23 years, he would have earned Rs.1,80,000 x 23 = 41,40,000/-. (ii) That the deceased no.2/Vidhya Jain was doing her own business and was earning about Rs.10,000/- per month and was looking after her family. At the time of her accidental death, Vidhya Jain was about 52 years of age and she was hale and hearty lady and she would have survived upto the age of 75 years, if she would have not died in the aforesaid accident and as such the deceased Vidhya Jain would have earned in one year Rs.10,000/- x 12 = 1,20,000/- and thus in remaining 23 years, she would have earned Rs.1,20,000 x 23= 27,60,000/-. (iii) That besides this, the deceased no.1/Anchit Kumar Jain was a man of high social status and a man of repute holding the following prestigious posts :- 1. President- Bihar Petroleum Dealers Association, Bihar. 2. Founder Member & Treasurer - Bhojpur Chamber of Commerce & Industry, Arrah. 3. Joint Secretary - All India Digamber Jain Parishad, Bihar State Branch. 4. Trustee - Sri Digamber Jain Panchayati Mandir, Arrah. 5. Trustee - Sri 1008 Bhagwan Shreyansh Nath Trust, Arrah. 6. Pattern & Executive Member - Sri Arrah Goshala, Arrah. 7. Life & Executive Member - Indian Red Cross Society, Bhojpur Distt. Unit, Arrah. 8. Executive Member- Bihar Chamber of Commerce, Patna. 9. Representative Member- Arrah Railway Station, Advisory Samiti, Arrah. 10. Representative Member- Internal Trade Samiti, FICCI, New Delhi. (b) That the Roadways Bus No.- U.P.-65 R-2789 of Kashi Depot owned by Uttar Pradesh State

	Road Transport Corporation Tehri Kothi, P.S.-Wazirganj, Lucknow was rashly and negligently in high speed in utter violation of the traffic rules was being driven by opp. Party no.1 its driver, as a result of which, the aforesaid roadways bus collided with the Indica Car No.BR-3 B-1011 on 22.07.03 at about 9:15 A.M. on the main road from Lucknow to Varanasi near Village- Hauj, P.S.-Jafrabad, District-Jaunpur, as a result of which, deceased/Achit Kumar Jain died on the spot and deceased/Vidya Jain died immediately after reaching the hospital and in this accident, the driver of the Indica Car Lallan Razak also died on the spot. The F.I.R. of this accident was lodged on 22.07.03 in P.S.-Jafrabad, District-Jaunpur and was registered at Case Crime No.432/3 under Sections-279/304A/427/338 I.P.C. The postmortem of the aforesaid persons was conducted in the Government Hospital, Jaunpur. (c) That both the aforesaid deceased persons have left the petitioner and opposite party no.3 as their legal representatives, legal heirs, successors and dependents that both the petitioner and opposite party no.3, the sister of the petitioner were being financially supported looked after and patronized by the aforesaid deceased persons, in spite of this, the petitioner was being supported and guided by the deceased persons in multifarious ways and patterns, after the death of the parents of the petitioner, the petitioner is suffering and facing a lot of hardy hoods and has been forced to take the patronage of his near relative at Lucknow at his present address. (d) That as the opp. Party no.3 is also the legal representative, legal heir, successor & dependent of both the aforesaid deceased and could not join the petition as a petitioner and as such opposite party no.3 is being arrayed as proforma opp. Party no.3 in this claim petition. (e) That as such in the present circumstances and hardy hoods, the petitioner is entitled for a		compensation of Rs.1,34,10,000/- to reprimand the irreparable injuries and mental and financial injuries. (f) That if the driver of the aforesaid roadways bus the opp. Party no.1 would have been cautious and careful in driving the aforesaid bus or if the driver of bus would have been instructed by opp. Party no.2 the owner of the roadways bus about the appropriate rules and regulations of the traffic and road driving and also about the penal consequences of rash and negligent driving then this hazardous accident would have not occurred, the aforesaid accident has occurred because of the rash and negligent driving and the fatal accident has gutted up the above mentioned parents of the petitioner and the employers of the driver have yet not taken any pains to enquire about the well being of the family of the deceased. (g) That the aforesaid accident took place in P.S.-Jafrabad, Distt.-Jaunpur, U.P. and the opp. Party no.2 the owner of the roadways bus have got their Head Office at Lucknow and thus this Hon'ble Court has got each and every jurisdiction for entertaining and adjudicating the present Motor Accident Claim Petition. (h) That the description of the injuries is as under :- 1. (a) Injuries in the income of the deceased no.1/Achit Kumar Jain for remaining 23 years - 15000 x 12 x 23 =Rs.41,40,000/- (b) Loss of income of deceased/Vidya Jain for remaining 23 years - 10000 x 12 x 23 = Rs.27,60,000/- Total loss of income of both the deceased = Rs.69,00,000/- 2. Mental in bearable injuries - Rs.15,00,000/- 3. Loss of happiness of life - Rs.15,00,000/- 4. Loss of Love & affection - Rs.5,00,000/- 5. Funeral Expenses - Rs. 10,000/- 6. Loss of future enhancement of income of both the deceased persons in view of their flourshing and developing business prospects in remaining 23 years of their life - Rs.30,00,000/-.

	Total = Rs.1,34,10,000/- (I) That the petitioner has not filed any other claim petition in context to the aforesaid accident in any other court nor any suit or claim petition in relation to the aforesaid accident is pending elsewhere in any other or Tribunal.

19. In response to the pleadings taken by the appellant in paras 7, 8, 23 in the written statement filed by U.P.S.R.T.C., opposite party no.2 pleaded as under :

7. याचिका के प्रस्तर संख्या १८ के सम्बन्ध में इतना कहना है कि याची की तरफ से परिवहन निगम में कोई क्लेम नहीं किया गया है यदि कोई क्लेम किया जाता तो सहानुभूति पूर्ण ढंग से विचार करते हुये क्लेम को निस्तारण अवश्य किया जाता।

8. याचिका के प्रस्तर संख्या १९ लगायत २१ तथ्यों की जानकारी के आभाव में अस्वीकार है।

23. यह कि, याची के द्वारा प्रस्तर संख्या -६ में मृतकगणों की आय क्रमशः रूपये १५०००/- एवं रूपये १०,०००/- प्रतिमाह अंकित की है, वह मनगढंत व बिना किसी उचित आधार के है।

20. In order to prove his claim, the appellant, Sri Abhishek Jain, himself appeared as witness and stated that :

"मैंने दुर्घटना नही देखी है मै बी. कॉम पास हूँ। दुर्घटना के समय में 24 वर्ष का था। मैंने बी. कॉम, 2002-03 में पास किया था। मै शादी शुदा हूँ। इस समय मेरे दो बच्चे है। मेरी बहन उम्र मे मेरे से बड़ी है। बहन की शादी 1996 में हुई थी। एक बहन के आलावा मेरे और कोई भाई बहन नहीं है। मेरे दादा -दादी भी जीवित नहीं है। मैं बिज़नेस करता हूँ। मै पेट्रोल पम्प का बिज़नेस करता हूँ। मैं 15,000-20,000/- रु. महीना कमाता हूँ। यह दुर्घटना 22.07.2003 को हुई थी। उस समय भी मैं पेट्रोल पम्प का कार्य करता था।"

and in his cross-examination, the appellant has stated that :

"यह सही है कि मेरे माता -पिता की जिस स्रोत से आमदनी होती थी वह सारे स्रोत मौजूद है लेकिन उनके न होने से उनकी कमी महसूस होती है तथा बिज़नेस में कमी आयी है।"

21. In this appeal for enhancement of compensation first we are dealing with the objection taken by Shri Akhter Abbas, learned counsel for the opposite party no.2, which is to the effect that the appellant/claimant as well as opposite party no.3/Smt. Ceipi Jain were/are not dependent upon the income of the deceased, so they were/are neither entitled for getting any compensation nor entitled for enhancement of the compensation.

22. In order to decide the controversy raised by Shri Akhter Abbas, learned counsel for U.P.S.R.T.C. in the present appeal, we feel appropriate to reproduce the relevant portion of the judgments connected therewith :-

23. Hon'ble the Apex Court in the case of ***Ravinder Kumar Sharma vs. State of Assam and others, (1999) 7 SCC 435*** has held as under :-

"14. That means that under Order 41 Rule 22 CPC, before the 1976 Amendment, it was open to the defendant-respondent who had not taken any cross-objection to the partial decree passed against him, to urge, in opposition to the appeal of the plaintiff, a contention which if accepted by the trial court would have resulted in the total dismissal of the suit. This was the legal position under the unamended Order 41 Rule 22 as accepted by the Madras Full Bench in Venkata Rao's case and as accepted by this Court in Chandre Prabhuji's case.

15. The next question is as to whether, the law as stated above has been

modified by the 1976 Amendment of Order 41 Rule 22. It will be noticed that the Amendment has firstly deleted the words "on any of the grounds decided against him in the Court below, but take any cross-objections" in the main part of Order 41 Rule 22 CPC and added the words "but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour" in the main part.

16. The main part of Order 41 Rule 22(1) CPC, (after the 1976 Amendment) reads as follows:

Order 41 Rule 22(1): Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

17. The 1976 Amendment has also added an Explanation below Order 41 Rule 22, as follows:

Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent.

18. In connection with Order 41 Rule 22, CPC after the 1976 Amendment, we may first refer to the judgment of the Calcutta High Court in Nishambhu Jana v. Sova Guha (1982) 89 CWN 685. In that case, Mookerjee, J. referred to the 54th report of the Law Commission (at p.295) (para 41.70) to the effect that Order 41 Rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case the finding can be questioned by the respondent without filing cross-objections. The Law Commission had accepted the correctness of the Full Bench of the Madras High Court in Venkata Rao's case. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad Rakshit v. The Commissioners of Bhadreswar Municipality that a cross-objection was wholly unnecessary in case the adverse finding was to be attacked. The Commission observed that the words "support the decree..." appeared to be strange and "what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear". That is why the main part of Order 41 Rule 22 was amended to reflect the principle in Venkata Rao's case as accepted in Chandre Prabhuji's case.

19. So far as the Explanation was concerned, the Law Commission stated (page 298) that it was necessary to "empower" the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file cross-objections. That was why the word 'may' was used. That meant that the provision for filing cross-

objections against a finding was only an enabling provision.

20. These recommendations of the Law Commission are reflected in the Statement of Objections and Reasons for the Amendment. They read as follows:

"Rule 22 (i.e., as it stood before 1976) gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the Court of first instance on any of the grounds on which that court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case, the respondent supports the decree and in the second case, he attacks the decree. The language of the rule, however, requires some modifications because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear. An Explanation is also being added to Rule 22 empowering the respondent to file cross- objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour."

Mookerjee, J. observed in Nishambhu Jana's case (see p.689) that "the "amended Rule 22 of Order 41 of the Code has not brought any substantial change in the settled principles of law" (i.e., as accepted in Venkata Rao 's case) and clarified (p.691) that "it would be incorrect to hold that the Explanation now inserted by Act 104 of 1976 has made it obligatory to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour.

21. A similar view was expressed by U.N. Bachawat, J. in Tej Kumar v. Purshottam, AIR 1981 MP 55 that after the 1976 Amendment, it was not obligatory to file cross- objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections.

22. In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena's case and the view expressed by U.N. Bachawat, J. in Tej Kumar's case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao's case by the Madras Full Bench and Chandre Prabhuji's case by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment.

23. The respondents before us are, therefore, entitled to contend that the finding of the High Court in regard to absence of reasonable and probable cause or malice - (upon which the decree for pecuniary damages in B and C schedules was based) can be attacked by the respondents for the purpose of sustaining the decree of the High Court refusing to pass a decree for non-

pecuniary damages as per the A schedule. The filing of cross-objections against the adverse finding was not obligatory. There is no res judicata. Point 1 is decided accordingly in favour of respondents-defendants.

24. Hon'ble the Apex Court in the case of ***Banarsi & Ors. vs. Ram Phal, JT 2003 (5) SC 224*** has held as under :-

"17. In Rameshwar Prasad and Ors. v. Shambehari Lal Jagannath and Anr., [1964] 3 SCR 549, the three-Judge Bench speaking through Raghubar Dayal, J. observed that Rule 33 really provides as to what the Appellate Court can find the appellant entitled to and empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. If further empowers the Appellate Court to pass or make such further or other, decree or order, as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties."

18. In Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors., [1975] 2 SCR 932, the following statement of law made by Venkatarama Aiyar, J. (as His Lordship then was) in the Division Bench decision in Krishna Reddy v. Ramireddi, AIR 1954 Mad 848 was cited with approval which clearly brings out the wide scope of power contained in Rule 33 and the illustration appended thereto, as also the limitations on such power:

"Though Order 41, Rule 33 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.

But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decree and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory.

This, however, is not an exhaustive enumeration of the class of cases in which courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable."

19. In the words of J.C. Shah, J. speaking for a three-Judge Bench of this Court in Nirmala Bala Ghose and Anr. v.

Balai Chand Ghose and Anr., [1965] 3 SCR 550, the limitation on discretion operating as bounds of the width of power conferred by Rule 33 can be so formulated --

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from."

20. A Division Bench decision of Calcutta High Court in Jadunath Basak v. Mritunjoy Sett and Ors., AIR 1986 Cal 416 may be cited as an illustration. The plaintiff filed a suit for declaration that the defendant had no right or authority to run the workshop with machines in the suit premises and for permanent injunction restraining the defendant from running the workshop. The Trial Court granted a decree consisting of two reliefs: (i) the declaration as prayed for, and (ii) an injunction permanently restraining the defendant from running the workshop except with the terms of a valid permission and licence under Section 436 and 437 of Calcutta Municipal Act, 1951 from the Municipal Corporation. The defendant filed an appeal. The Division Bench held that in an appeal filed by the defendant, the plaintiff cannot challenge that part of the decree which granted conditional injunction without filing the cross-objection. The Division Bench drew a distinction between the respondent's right to challenge an adverse finding without filing any appeal or cross-objection and the respondent seeking to challenge a part of the decree itself without filing the cross-objection. The Division Bench held that the latter was not permissible. We find ourselves in agreement with the view taken by the High Court of Calcutta.

21. In the case before us, the Trial Court found the defendant not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straightaway a decree for specific performance in his favour based on the finding of

comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41. It was not a case of interference with decree having been so interfered with as to call for adjustment of equities between respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the Trial Court's decree to achieve a finality which was adverse to him.

22. For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court.

23. During the course of hearing, the learned counsel for the appellants made a statement under instructions, that the appellants have a large family to support which is entirely dependent on the suit land for maintaining itself and they have no other means of livelihood. (This statement finds support from the finding arrived at by the Trial Court). He further stated that, in any case, to get rid of the onerous part of the decree, the appellants volunteer to pay a further amount of Rs. 1,20,000/- by way of compensation to the respondent over and above the amount of Rs. 2,40,000/- already deposited by them in the Court pursuant to interim orders alongwith the bank interest accrued thereon. That statement is taken on record and being a very fair voluntary offer deserves to be accepted and incorporated in the decree.

24. The appeals are allowed. The judgment and decree of the first Appellate Court are set aside and instead those of the Trial Court restored. In view of the appellants having deposited the money due and payable under the money part of the decree, it is held that they are relieved from specifically performing the agreement and executing sale deed in pursuance thereof. The delay in deposit, if any, deserves to be condoned in view of the interim orders passed by the High court and is hereby condoned. The time for deposit, as appointed by the Trial Court, shall be deemed to have been extended upto the dates of actual deposits made by the appellants. The amount of Rs. 2,40,000/- lying deposited in the Court and invested in fixed deposits shall, along with the interest earned, be released to the respondents. In addition the appellants shall, as offered by them, deposit with the executing court for payment to the respondent another amount of Rs. 1,20,000/- within a period of eight weeks from today. On that being done, the decree passed by the Trial Court shall be deemed to have been fully satisfied. The respondent shall deliver the agreements dated 30.11.1988 and 15.7.1991 to the appellants endorsing upon the agreements the amount of money received and that the agreements stand discharged and need not be performed. The costs shall be borne by the parties as incurred throughout."

25. Hon'ble the Apex Court in the case of ***U. P. State Road Transport Corporation and others vs. Trilok Chandra and others, (1996) 4 SCC 362*** has held as under :-

"India is one of the countries with the highest number of road accidents. Motor accidents are every day affairs. A large number of claims for compensation for injury caused by road accidents are pending in various Motor Accident Claims Tribunal. In a fatal accident the dependents of the deceased are entitled to compensation for the loss suffered by them on account of the death. The most commonly practised method of assessing the loss suffered is to calculate the loss for a year and then to capitalise the amount by a suitable multiplier. To that is added the loss suffered on account of loss of expectation of life and the like, the Tribunals and High Courts have adopted divergent methods to determine the suitable multiplier. Even this Court has not been uniform; maybe because the principle on which this method came to be evolved has been forgotten. It has, therefore, become necessary to examine the law and to state the correct principles to be adopted."

26. In the case of ***Manjuri Bera vs. The Oriental Insurance Company Ltd. and Ors., AIR 2007 SC 1474,*** Hon'ble the Apex Court has held as under :-

"8. The Tribunal has a duty to make an award, determine the amount of compensation which is just and proper and specify the person or persons to whom such compensation would be paid. The latter part relates to the entitlement of compensation by a person who claims for the same.

9. According to Section 2(11) of CPC, "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Almost in similar terms is the definition of legal representative under the Arbitration and Conciliation Act, 1996, i.e. under Section 2(1)(g).

10. As observed by this Court in Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique, [1989] 2 SCR 810 the definition contained in Section 2(11) CPC is inclusive in character and its scope is wide, it is not confined to legal heirs only. Instead it stipulates that a person who may or may not be legal heir competent to inherit the property of the deceased can represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression 'legal representative'. As observed in Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai and Anr., [1987] 3 SCR 404 a legal representative is one who suffers on account of death of a person due to a motor vehicle accident and need not necessarily be a wife, husband, parent and child.

11. There are several factors which have to be noted. The liability under Section 140 of the Act does not cease because there is absence of dependency. The right to file a claim application has to be considered in the background of right to entitlement. While assessing the quantum, the multiplier system is applied because of deprivation of dependency. In other words, multiplier is a measure. There are three stages while assessing the question of entitlement. Firstly, the liability of the person who is

liable and the person who is to indemnify the liability, if any. Next is the quantification and Section 166 is primarily in the nature of recovery proceedings. As noted above, liability in terms of Section 140 of the Act does not cease because of absence of dependency. Section 165 of the Act also throws some light on the controversy. The explanation includes the liability under Sections 140 and 163A.

12. Judged in that background where a legal representative who is not dependant files an application for compensation, the quantum cannot be less than the liability referable to Section 140 of the Act. Therefore, even if there is no loss of dependency the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the liability flowing from Section 140 of the Act. The appeal is allowed to the aforesaid extent. There will be no order as to costs. We record our appreciation for the able assistance rendered by Shri Jayant Bhushan, the learned Amicus Curiae.

13. Although I agree with the operative part of the judgment proposed to be delivered by my esteemed brother Dr. Arijit Pasayat, J, I would like to give my own reasons.

14. In the present case the married daughter of the victim (deceased) filed the claim under Section 140(2) of the Motor Vehicles Act, 1988 praying for statutory compensation on account of the death of her father. As stated, the application was made under Section 140 of the said Act. That Section makes it clear that "No Fault Liability is cast on the owner of the vehicle and not directly on the insurer. Before an order is passed under Section 140, the Tribunal must be satisfied that the accident arose out of a motor vehicle which resulted in permanent disablement or death and that the claim is made against the owner and the insurer of the offending motor vehicle.

15. In the present case, as stated above, the victim's married daughter has made her claim under Section 140 of the said Act saying that she has five children; that they are minors; that she was brought up by her uncle; that after her mother's death the deceased lived in the same house in which the claimant was living with her uncle before her marriage; that the deceased was a mason that after her marriage she lived with her husband and, therefore, she was entitled to get statutory compensation under Section 140 of the said Act.

16. In the impugned judgment the High Court has correctly drawn a distinction between "right to apply for compensation" and "entitlement to compensation". The High Court has rightly held that even a married daughter is a legal representative and she is certainly entitled to claim compensation. It was further held, on the facts of the present case, that the married daughter was not dependent on her father. She was living with her husband in her husband's house. Therefore, she was not entitled to claim statutory compensation. According to the High Court, the claimant was not dependent on her father's income. Hence, she was not entitled to claim compensation based on "No Fault Liability".

17. In my opinion, "No Fault Liability", envisaged in Section 140 of the said Act, is distinguishable from the rule of "Strict Liability". In the former, the compensation amount is fixed. It is Rs. 50,000/- in cases of death [Section 140(2)]. It is a statutory liability. It is an amount which can be deducted from the

final amount awarded by the Tribunal. Since, the amount is a fixed amount/crystallized amount, the same has to be considered as part of the estate of the deceased. In the present case, the deceased was an earning member. The statutory compensation could constitute part of his estate. His legal representative, namely, his daughter has inherited his estate. She was entitled to inherit his estate. In the circumstances, she was entitled to receive compensation under "No fault Liability" in terms of Section 140 of the said Act. My opinion is confined only to the "No Fault Liability" under Section 140 of the said Act. That section is a Code by itself within the Motor Vehicles Act, 1988."

27. In the case of ***Sarla Verma and others vs. Delhi Transport Corporation and another, 2009 (2) T.A.C. 677 (SC)***, Hon'ble the Apex Court held that *"Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependent on the father. Thus, even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependent."*

28. Further, on the basis of the pleadings and evidence led by the appellant/claimant as well as Sections 140, 163A and 166 of the Motor Vehicles Act, 1988 (in short "Act of 1988") and judgments of the Hon'ble Apex Court in the case of ***Ravinder Kumar Sharma (Supra), Banarsi (Supra), U.P. State Road Transport Corporation (Supra), Manju Beri (Supra)*** and ***Sarla Verma (Supra),*** we are taking note of objection taken by the learned counsel for U.P.S.R.T.C. to the effect that only dependent(s) are entitled to compensation or for enhancement of compensation and accordingly we are of the view that :

(i) Legal heir(s) can file an application for getting compensation under the Act of 1988,

(ii) Legal heir(s) or dependent (s) are entitled to get compensation under the Act of 1988,

(iii) Legal heir(s) is/are entitled to get compensation which would not be less than as provided under Section 140 of the Act of 1988,

(iv) Legal heir(s) is/are entitled to get amount towards General Damages, as provided under the Second Schedule of the Act of 1998,

(v) Dependent(s) is/are entitled to get compensation as per Second Schedule of the Act of 1988, which includes Multiplier System Formula provided under the Act, which cannot be taken note of in the case of legal heir(s) not dependent on the concerned deceased.

29. Thus, in view of the above, the claim petition filed by the claimant under Section 166 of Motor Vehicle Act, 1988 was maintainable as he being son of the deceased, falls within the ambit of legal representative but the compensation awarded by the Tribunal to the claimant as well as to the opposite party no.3 is not in consonance with the judgment passed by Hon'ble the Apex Court in the case of ***Manju Beri (Supra)*** and ***Sarla Verma (Supra).***

30. Further, The appellant/claimant and his sister Smt. Ceipi Jain is entitled to

get General Damages, as provided in the Second Schedule of the Act of 1988. In other words the appellant/claimant and Smt. Ceipi Jain are entitled to get amount towards conventional heads, such as funeral expenses, loss of consortium, loss of estates, medical expenses. The amount towards conventional heads is liable to be provided in the light of principles settled by the Apex Court in the case of ***National Insurance Company Limited vs. Pranay Sethi and Ors., (2017) 16 SCC 680*** and ***Magma General Insurance Co. Ltd. vs. Nanu Ram and Ors., 2018 SCC Online 1546 = 2018 (11) SCALE 247.*** The relevant part of the judgment in the case of ***Magma General Insurance Co. Ltd. (Supra)*** is quoted below for ready reference :

"8.4. The Insurance Company has submitted that the father and the sister of the deceased could not be treated as dependents, and it is only a mother who can be dependent of her son. This contention deserves to be repelled. The deceased was a bachelor, whose mother had pre-deceased him. The deceased's father was about 65 years old, and an unmarried sister. The deceased was contributing a part of his meagre income to the family for their sustenance and survival. Hence, they would be entitled to compensation as his dependents.

8.5. The Insurance Company has contended that the High Court had wrongly awarded Rs. 1,00,000 towards loss of love and affection, and Rs. 25,000 towards funeral expenses.

The judgment of this Court in Pranay Sethi (supra) has set out the various amounts to be awarded as compensation under the conventional heads in case of death. The relevant extract of the judgment is reproduced herein below:

Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years.

As per the afore-said judgment, the compensation of Rs. 25,000 towards funeral expenses is decreased to Rs. 15,000.

The amount awarded by the High Court towards loss of love and affection is, however, maintained.

8.6 The MACT as well as the High Court have not awarded any compensation with respect to Loss of Consortium and Loss of Estate, which are the other conventional heads under which compensation is awarded in the event of death, as recognized by the Constitution Bench in Pranay Sethi (supra).

The Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty-bound and entitled to award "just compensation", irrespective of whether any plea in that behalf was raised by the Claimant.

In exercise of our power Under Article 142 and in the interests of justice, we deem it appropriate to award an amount of Rs. 15,000 towards Loss of Estate to Respondent Nos. 1 and 2.

8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death

case. One of these heads is Loss of Consortium.

In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.1

Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."2

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count3. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra).

31. In the instant case, as appears from the operative portion of the judgment dated 09.02.2012 and the award dated 25.02.2012, the amount awarded towards conventional heads is not as per the law laid down by the Hon'ble Apex Court in the case of ***Pranay Sethi (Supra)*** and ***Magma General Insurance Co. Ltd. (Supra).***

32. Thus, in view of the above said facts, the prayer in the appeal filed by the appellant/claimant for enhancement of compensation on the ground of composite negligence and future prospect is liable to be rejected as the appellant/claimant as well as Smt. Ceipi Jain/opposite party no.3 were not dependent upon the deceased.

33. Needless to mention herein that U.P.S.R.T.C. neither challenged the

judgment dated 09.02.2012 and award dated 25.02.2012 nor filed any cross objection by which the compensation was awarded to the appellant/claimant, as such, due to the above said facts, the amount already paid to the appellant/claimant and opposite party no.3 as compensation cannot be recovered by the U.P.S.R.T.C.

34. Before parting, we would like to point out that the findings and observations, given herein above, would not affect the claims/compensation claimed by the legal heirs in relation to death of a minor, as in this case we have only dealt with claim made by Claimant-Appellant, who was major and he has own source of income and as per the case, he was not dependent upon the deceased.

35. However, we modify the judgment dated 09.02.2012 in view of the principles settled by the Hon'ble Apex Court as stated herein above. In addition to the amount of compensation i.e. 2,64,000/-, awarded by Tribunal and already paid by the U.P.S.R.T.C, the appellant is also entitled for the following amount by way of compensation :

(a) Towards Loss of Estate - Rs.15,000/-

(b) Towards Loss of Consortium - Rs.80,000/- (Rs.40,000/- for legal heir)

(c) Towards Funeral Expenses - Rs.15,000/-

Total = 1,10,000/-

36. On the total amount aforesaid Rs.1,10,000/-, the appellant would be entitled to the interest @ 12% per annum from the date of filing of the Claim Petition, as awarded in the case of ***Magma General Insurance Co. Ltd. (Supra).***

37. For the foregoing reasons, the present appeal filed by the appellant against the judgment dated 09.02.2012 and the award dated 25.02.2012, passed by Motor Accident Claims Tribunal, Lucknow/Additional District Judge, Court No.1, Lucknow in Claim Petition No.02 of 2004, is ***partly allowed*** and the award given by the Motor Accident Claims Tribunal, Lucknow against the Loss of Estate, Funeral Expenses, Loss of Consortium is modified and the same is awarded to the appellant as stated herein above.

38. No order as to costs.

(2019)10ILR A1439

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

PIL No. 1215 of 2019
&
Other PIL Cases No. 1216 of 2019, 1218 of 2019, 1219 of 2019, 1224 of 2019, 1226 of 2019, 1256 of 2019,1265 of 2019, 1268 of 2019, 1270 of 2019, 1292 of 2019,1324 of 2019 & 1329 of 2019

Rahul Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamlesh Sharma

Counsel for the Respondents:

C.S.C., Sri Dharmaveer Singh

A. Public Interest Litigation - Petty matters of encroachment & illegal construction on public utility land - Efficacious Statutory remedy available under relevant Acts - Hence PIL ordinarily not to be entertained-PIL filed with the grievances that private respondents have made encroachment on public utility land, *chak* road (pathway), *chak* nali in villages as well as in Nagar Panchayats, municipalities and in Nagar Nigams

Held:- In the matter of removal of encroachment of pathways, drains etc., statutory remedy is available to the persons under section 133 of the Criminal Procedure Code, u/s 26 of the U.P. Revenue Code, 2006, and under the Acts which govern the local bodies, Nagar Nigams, Municipal Corporations, Nagar Panchayats, Municipalities etc – Hence Public Interest Litigation (PIL) ordinarily should not be entertained – If there is inaction on the part of statutory authorities, the aggrieved person can approach to High Court for appropriate direction but not by way of PIL. (Para 43)

Public Interest Litigations dismissed (E-5)

List of cases cited: -

1. Bhagalpur Blinding case Kharti & ors. (II) Vs St. of Bihar & Ors (1981) 1 SCC 627

2. Kharti & ors. (IV) Vs St. of Bihar & ors. (1981) 2 SCC 493

3.Bandhua Mukti Morcha Vs Union of India & ors. (1997) 10 SCC 549

4.People's Union for Democratic Rights & ors. Vs Union of India & ors. (1982) 3 SCC 235

5.Delhi Jal Board Vs National Campaign for Dignity & Rights of Sewerage & Allied Workers (2011) 8 SCC 568

6. State of Uttaranchal Vs Balwant Singh Chaufal & ors. (2010) 3 SCC 402;

7.Shivajirao Nilangekar Patil Vs Dr. Mahesh Madhav Gosavi & ors. (1987) 1 SCC 227

8.Indian Council for Enviro-Legal Action Vs Union of India & ors. (1996) 5 SCC 281

9.Vineet Narain & ors. Vs Union of India & anr. (1998) 1 SCC 226

10.Intellectuals Forum, Tirupathi Vs St. of A.P. & ors. (2006) 3 SCC 549

11.Delhi Airtech Services Private Limited & anr. Vs St. of U.P.& ors. (2011) 9 SCC 354

12.M.C. Mehta Vs Kamal Nath & ors. (1997) 1 SCC 388

13. Joshi Vs St. of Mah. & ors. (2012) 3 SCC 619

14.Bangalore Medical Trust Vs B.S. Muddappa & ors. (1991) 4 SCC 54

15.M.I. Builders Pvt. Ltd. Vs Radhey Shyam Sahu & ors. (1999) 6 SCC 464

16.BALCO Employees' Union (Regd.) Vs Union of India & ors. (2002) 2 SCC 333

17.Union of India & ors Vs J.D. Suryavanshi (2011) 13 SCC 167

18.The Directorate of Film Festivals & ors. Vs Gaurav Ashwin Jain & ors (2007) 4 SCC 737

19.Dr. Duryodhan Sahu & Ors. Vs Jitendra Kumar Mishra & ors. (1998) 7 SCC 273

20.Gurpal Singh Vs St. of Punj. & ors. (2005) 5 SCC 136

21.Phool Chandra & anr. Vs St. of U.P. (2014) 13 SCC 112

22.Subrata Roy Sahara Vs Union of India & ors. (2014) 8 SCC 470

(Delivered by Hon'ble.Pradeep Kumar Singh Baghel, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Since common question of law is involved in this batch of petitions thus they are being decided by this common judgment. However, for convenience the facts of the lead petition being Public Interest Litigation No. 1215 of 2019 are taken for consideration.

2. The petitioner in the said petition1 has claimed that he is a public spirited person of Mohalla Bhiti Chowk, District Mau. He has espoused the cause of general public of the aforesaid mohalla for protecting public utility land. Relief sought in the petition reads as under:

"i) Issue a writ, order or direction in the nature of Mandamus directing the respondent no. 2 to 4 to remove the illegal encroachment / construction made by respondent no. 5 over the Arazi No. 985 area about 0.36 hectare situated at Mohalla Bhiti Chowk, District Mau recorded as 'Nala (Nali Nalkoop) and road' in the revenue record."

3. It is stated that Mohalla Bhiti Chowk was brought under the consolidation operation. Arazi No. 985 area 0.36 hectare which is situated in the said mohalla, was recorded as **'Nala (*Nali* Nalkoop) and road'** in the revenue papers. The aforesaid land is covered under the provisions of Section 132 of the U.P. Zamindari Abolition and Land Reforms Act, 1952 and the U.P. Land Revenue Code, 2006.

4. It is alleged that the fifth respondent, who is a private person, has made illegal encroachment upon Arazi No. 985 area about 0.36 hectare, however the revenue authorities have not taken any action against the fifth respondent who has made illegal encroachment upon the public utility land. The petitioner has made an application dated 12.3.2019 regarding the said illegal encroachment, a copy of the application addressed to the Sub-Divisional Magistrate, Mau is on the record, however, the petitioner has not filed any receipt that the said representation has been received by the authority concerned. It is stated that in spite of the aforesaid application the respondents are not taking action to remove the illegal encroachment.

5. We have heard learned counsel for the petitioner and the learned Standing Counsel.

6. Learned counsel for the petitioner submits that since the authorities concerned have failed to remove the illegal encroachment hence the petitioner who is a public spirited person, has no other option but to approach this Court by the instant public interest litigation.

7. We find that a large number of public interest litigation are filed in this Court for similar relief where the grievances are raised that private respondents have made encroachment on public utility land, *chakroad* (pathway), *nali* in villages as well as in Nagar Panchayats, municipalities and in Nagar Nigams. To illustrate the said fact we refer some of the reliefs of following public interest litigations filed in this Court:

PIL No. 1216 of 2019 (Sarvjeet Verma v. State of U.P. & others):

"(i) issue a writ, order or direction in the nature of Mandamus directing the respondent authority to enquire into the matter and remove

immediately the encroachment of respondent no.4 from the well (Kuwa), water pipeline (Nal) and the place of religious and other social work place, situated at Araji No. 677K, Village Jalauji Chak Rajman, P.S. & Tehsil Sikandarpur, District Ballia.

(ii) issue a writ, order or direction in the nature of Mandamus directing the respondent no.3 to decide the representation of the petitioner dated 19.3.2019 (Annexure No. 4 to the writ petition), within the period so fixed by this Hon'ble Court.

PIL No. 1329 of 2019 (Mustaq Ahmad v. State of U.P. & others):

(a) Issue a writ, order or direction in the nature of mandamus directing to the authorities concerned to restrain the trace passers as like respondent No. 8 and 9 for raising constructions over public utility land and to evict them from Araji No. 117(M), 124(M), 123(M), 125(M) Mauja Jhunsi Kohna, Tahsil Phoolpur, District Prayagraj.

PIL No. 1324 of 2019 (Bhoora @ Farookh and others v. State of U.P. & others):

(i) Issue a writ, order or direction in the nature of mandamus commanding/directing the respondents to construct the Nali from the house of Munnu Fakir to house of Idrish Pradhan in pursuance of proposal of the Gaon Sabha and sanction of the deep Nali by the Government.

PIL No. 1292 of 2019 (Paras Nath Kushwaha v. State of U.P. & others):

(I) Issue a writ, order or direction in the nature of mandamus directing to the respondent No. 2 to implement the order dated 31/08/2017 passed in Case No. 3/2010 (State Versus Sant Lal and others) U/s 133 Cr.P.C. P.S.-Baresar, District-Ghazipur and remove the encroachment from drainage in question within stipulated time period.

PIL No. 1268 of 2019 (Safeek Khan v. State of U.P. & others):

(a) issue a writ, order or direction in the nature of MANDAMUS directing the respondents authorities to restrain the illegal construction in Gata No. 160 which is public Rasta in view of the representation dated 10.3.2019.

PIL No. 1270 of 2019 (Girish Chandra Tripathi v. State of U.P. & others):

A. To issue a writ, order or direction in the nature of Mandamus commanding the respondent no. 2 to 4 to take legal action against the encroachers/ private respondent nos. 6 to 28 for removal of their illegal encroachment nuisance and obstruction over the Plots of "Charagaah/ Lea" being Plot nos. 30, 117, 118-Kha, 162, 164, 177, 441, 442, 471, 473, 475, 533 (12 Plots) total area as 2.1120 hectare situated at village Fareedpur Post Bandighat, Police Station and Tehsil Muhammadabad Gohna, district Mau expeditiously within a period so stipulated by this Hon'ble Court.

PIL No. 1265 of 2019 (Afroz Tabassum v. State of U.P. & others):

a) Issue a writ, order or direction in the nature of mandamus directing to the respondent no. 2 to 3 to release the public hand pumps from the illegal possession of the respondent no. 4 to 11 to meet the ends of justice.

PIL No. 1256 of 2019 (Ram Ashray @ Ram Asre v. State of U.P. & others):

I. issue a writ, order or direction in the nature of mandamus commanding and directing the respondent No. 2 i.e. District Magistrate, Prayagraj

to take necessary action against the Gram Pradhan to make a construction of the Panchayat Bhawan and install the Hand Pump on the allotted Plot No. 163 Kha M, situated in the aforesaid village from his own money.

PIL No. 1218 of 2019 (Ranveer Singh v. State of U.P. & others):

1. To issue a writ, order or direction in the nature of Mandamus directing the respondent no. 2 to remove the encroachment & illegal possession of Res. No. 4 to 18 on Government Estate land being Gata No. 66/2 area 0.701 Hectare & Gata No. 67/2 area 0.440 Hectare situated in Mauja Araji Imlak, Tehsil-Kirawali, District-Agra.

2. To issue a writ, order or direction in the nature of Mandamus directing the respondent no. 2 to conduct high level inquiry against guilty persons who have facilitated in encroachment & illegal possession of Res. No. 4 to 18 on Government Estate land being Gata No. 66/2 area 0.701 Hectare & Gata No. 67/2 area 0.440 Hectare situated in Mauja Araji Imlak, Tehsil-Kirawali, District-Agra and take appropriate action against them so that the action of land grabbers may be discouraged.

PIL No. 1226 of 2019 (Ram Chandra v. State of U.P. & others):

1-Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to consider and decide the representation/ complaint dated 23-4-2019 and take effective action for removal of encroachment on the land of the P.W.D. situate in Arabpur Tehsil and District Fatehpur and ensure ejectment of encroachers forthwith.

2- Issue a writ, order or direction in the nature of mandamus directing the respondent no. 2 to take strict legal action against the respondent no. 4 and 5 and other encroachers of P.W.D. Land situate in Arabpur Tehsil and District Fatehpur.

PIL No. 1219 of 2019 (Rajendra Pathak v. State of U.P. & others):

i) issue a writ, order or direction in the nature of Mandamus directing the respondent to remove the encroachment from the Khasara No. 373 situated in village and post Gaura Tehsil Bhadohi District Bhadohi which is a state land.

PIL No. 1224 of 2019 (Shiv Charan alias Prahalad v. State of U.P. & others):

A- To issue a Writ, Order or Direction in the nature of Mandamus Commanding the Respondents to perform their duties under the law and procedure and get vacated the Auction Platform (Nilami Chabutara) made in Mandi Esthal Etawah for the purpose of loading/ unloading by the farmers bringing their product for sale and purchase.

B- To issue a Writ, Order or Direction in the nature of Mandamus Commanding the Respondents to perform their duties for vacating the auction platform (nilami chabutara) situated in Mandi Esthal Etawah within stipulated period as may be fixed by this Hon'ble Court and to take punitive action against the encraochers.

C- To issue a Writ, Order or Direction in the nature of Mandamus Commanding the Respondents to decide the petitioner's Application dated 12.04.2019 (Annexure No. 13 to the Writ Petition) within stipulated period as may be fixed by this Hon'ble Court."

8. Before adverting to the issue raised in the aforementioned public

interest litigations, it would be advantageous to have a look at the law laid down by the Supreme Court in respect of the scope of public interest litigation. The nature of public interest litigation is not adversarial litigation. One of the important cases entertained by the Supreme Court as a public interest litigation was way back in 1980 in **Bhagalpur Blinding case**, where the Supreme Court has treated a letter as a public interest litigation. In the case of **Bandhua Mukti Morcha v. Union of India and others**, a new dimension was given by the Supreme Court. The PIL was used as a new tool to the superior courts to protect fundamental rights of poor masses who have no access to the courts for redressal of their grievance. To meet that object, the principle of locus standi was relaxed.

9. The object of public interest litigation is to bring improvement for poor masses. The poor too have civil and political rights and the rule of law is meant for them also. The Court has noticed that if the fundamental right of the poor and helpless victim of injustice is sought to be enforced by public interest litigation, it is criticized by some champions of human rights as waste of time by the highest court in law. The Court has extracted paragraph nos. 2 & 3 of the judgment in **People's Union for Democratic Rights and others v. Union of India and others** in its judgment in the case of **Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers and others**:

"26. ... ...

2. ...We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the rule of law which forms one of the essential elements of public interest in any democratic form of Government. The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the fundamental right to carry on their business and to fatten their purses by exploiting the consuming public, have the chamars belonging to the lowest strata of society no fundamental right to earn an honest living through

their sweat and toil? The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their right to exploit is upheld against the Government under the label of fundamental right, the courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. But, if the fundamental right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so-called champions of human rights frown upon it as waste of time of the highest court in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub- human existence in conditions of abject poverty; utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court. The State or public authority which is arrayed as a respondent in public interest litigation should, in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or the public authority.

3. There is a misconception in the minds of some lawyers, journalists and men in public life that public interest litigation is unnecessarily cluttering up the files of the court and adding to the already staggering arrears of cases which are pending for long years and it should not therefore be encouraged by the court. This is, to our mind, a totally perverse view smacking of elitist and status quoist approach. Those who are decrying public interest litigation do not seem to realise that courts are not meant only for the rich and the well-to-do, for the landlord and the gentry, for the business magnate and the industrial tycoon, but they exist also for the poor and the down-trodden, the have-nots and the handicapped and the half-hungry millions of our countrymen. So far the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice. .....No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has

now come when the courts must become the courts for the poor and struggling masses of this country. They must shed their character as upholders of the established order and the status quo. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realisation must come to them that social justice is the signature tune of our Constitution and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realization of the constitutional goals."

(Emphasis supplied)

10. In the case of **State of Uttaranchal v. Balwant Singh Chaufal and others** the Supreme Court went elaborately into all the aspects including the origin and history of the Public Interest Litigation and has categorized the public interest litigation in three phases from origin to its current trend. The Court also considered various facets of public interest litigation, the backdrop of criticism from within and outside of the system. The Court has categorized the concept and development of public interest litigation in three phases in the following terms:

"43. In this judgment, we would like to deal with the origin and development of public interest litigation. We deem it appropriate to broadly divide the public interest litigation in three phases:

Phase I.- It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this court or the High Courts.

Phase II.- It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.

Phase III.- It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."

11. In the cases, under Phase-I the Court has observed that "in order to preserve and protect the fundamental rights of marginalized, deprived and poor section of society, the Court relaxed the traditional rule of *locus standi* and broaden the definition of aggrieved person and gave directions and orders". The Court has further observed that "the Supreme Court and high Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to poor and marginalized section of society.

12. One of the essential aspects of the procedure laid down by the Court is that the person who approaches the Court has to show that he has no personal interest in the outcome of the proceedings. A large number of judgments and the directions of the Supreme Court in public interest litigation have benefited the downtrodden and marginalized section of the society.

13. In the matter of Phase-II deals with the protection, preservation of

ecology, environment, forest, wildlife, rivers etc. Now there is a large number of judgments of the Supreme Court, where several important directions have been issued for protection of the environment. These judgments have gone long away to protect the environment and to deal with the problem of pollution and also to preserve the natural resources of the country. In the matter of environment, the Court has applied the doctrine of trust. This doctrine was enunciated in the present form by the U.S. Courts. It says that when the State holds a resource that is available for the use of public, the Court can exercise its power under the judicial review to scrutinize the fairness of the State's action while dealing with the natural resources.

14. In the third phase the Supreme Court has widen the horizon of public interest litigation for maintaining the probity, transparency and good governance. In a large number of petitions the Supreme Court has entertained petitions in respect of governance of the State. In the case of **Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi and others**, the Court has taken a judicial note about falling standard of public morality. It was observed that "this Court cannot be oblivious that there has been a steady decline of public standard or public morals and public morale. It is necessary to cleanse public life in the country along with or even before cleaning the physical atmosphere. The pollution in our values and standard is an equally grave menace as the pollution of environment, where such situations cry out, the Court should not and cannot remain mute and dumb.

15. After summarizing the law on all the three phases of the public interest litigation in nicety of detail the Supreme Court in the case of Balwant Singh Chaufal (supra), has observed as under:

"31. According to our opinion, the public interest litigation is an extremely important jurisdiction exercised by the Supreme Court and the High Courts. The Courts in a number of cases have given important directions and passed orders which have brought positive changes in the country. The Courts' directions have immensely benefited marginalized sections of the society in a number of cases. It has also helped in protection and preservation of ecology, environment, forests, marine life, wildlife, etc. etc. The Court's directions to some extent have helped in maintaining probity and transparency in the public life.

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87. ...The court in that case gave emphasis that the directions of the court should meet the requirements of public interest, environmental protection, elimination of pollution and sustainable development. While ensuring sustainable development, it must be kept in view that there is no danger to the environment or to the ecology.

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143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bonafide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to

protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions issued by the courts.

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148. The first category of cases is that where the Court on the filing of frivolous public interest litigation petitions, dismissed the petitions with exemplary costs. In Neetu v. State of Pubjab, AIR 2007 SC 758, the Court concluded that it is necessary to impose exemplary costs to ensure that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts.

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157. In Holicow Pictures (P) Ltd. v. Prem Chandra Mishra, (2007) 14 SCC 281, this Court observed as under:

"10. '... 12. It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted, which time otherwise could have been spent for the disposal cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders, etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffing their faces by wearing the mask of public interest litigation and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts and as a result of which the queue standing outside the doors of the courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system.' "

158. The Court cautioned by observing that [Holicow case, (2007) 14 SCC 281]:

"10. '... 13. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity - seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens.

The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. ...

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172. In M/s Holicow Pictures (P) Ltd., (2007) 14 SCC 281, this Court observed that the Judges who exercise the jurisdiction should be extremely careful to see that behind the beautiful veil of PIL, an ugly private malice, vested interest and/or publicity - seeking is not lurking. The court should ensure that there is no abuse of the process of the court.

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181. We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

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(3) The Courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The Court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The Court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

16. The Courts must encourage genuine and bonafide PIL, which has been filed for redressal of genuine public harm or public injury in the following matters:

(i) Lack of probity in public life leading to degree of corruption; good governance, judicial review of administrative action;

(ii) Environmental matters dealing with air pollution, water pollution, illegal mining, felling of trees, pollution of rivers etc.; the encroachment of public utility land such as Park and open space reserved in the town planning, forest land, illegal exploitation natural resources.

(iii) Power of superior courts to make investigation into the issue of public importance.

(iv) Those PILs which involve larger public interest should be heard on priority basis.

17. However, the Court has also opined that the frivolous petition must be dealt with firm hand and should be discouraged by imposing heavy cost.

18. Bearing in mind the principles and the directions issued by the Supreme Court in the above noted cases, we find that this Court can broadly classify the following categories of public interest litigation which are generally filed in this Court:

(i) for the removal of encroachments on public path mostly in villages or small towns;

(ii) for compliance of the provisions of the Corporation Act, 1959; Municipalities Act, 1916, Town Area Act; Nagar Panchayat Act; RBO Act, 1958. In this category of public interest litigation, generally the reliefs are sought for the removal of encroachment; for the demolition of buildings which have been raised without proper sanction under the relevant Act and Byelaws.

(iii) for the compliance of directions issued by the Supreme Court in the matter of removal of encroachment from the ponds.

(iv) Environmental matters regarding illegal running of Brick kilns. felling of trees, water related problems.

19. Firstly, we will advert to the matters relating to the environment. As discussed above in the second phase of the PIL, the Supreme Court has issued a large number of directions in its various judgement. In the case of **Indian Council for Enviro-Legal Action v. Union of India and others**, the Court has observed that High Courts should shoulder responsibility to ensure that directions issued by the Supreme Court in the matters of protection of the environment are complied with by the authorities. The Court has further observed that High Courts are better placed to appreciate the problems of their geographical area. It is constitutional obligation of the Courts to protect the fundamental rights of the people. The Supreme Court has reminded the High Courts that it is their responsibility that in the cases where the directions of Supreme court have ramification all over country, High Courts should ensure for compliance of those directions. Following discussion and conclusion are apt and relevant for our purpose:

*"**41.** With rapid industrialisation taking place, there is an increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. With the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard of the mandatory provisions of law, some public-spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the courts for preventing environmental degradation and thereby, seeking to protect the fundamental rights of the citizens, is now well settled by various decisions of this Court. The primary effort of the court, while dealing with the environmental-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the*

laws. The courts, in a way, act as the guardian of the people's fundamental rights but in regard to many technical matters, the courts may not be fully equipped. Perforce, it has to rely on outside agencies for reports and recommendations whereupon orders have been passed from time to time. Even though, it is not the function of the court to see the day-to-day enforcement of the law, that being the function of the Executive, but because of the non-functioning of the enforcement agencies, the courts as of necessity have had to pass orders directing the enforcement agencies to implement the law.

42.** As far as this Court is concerned, being conscious of its constitutional obligation to protect the fundamental rights of the people, it has issued directions in various types of cases relating to the protection of environment and preventing pollution.* ***For effective orders to be passed, so as to ensure that there can be protection of environment along with development, it becomes necessary for the court dealing with such issues to know about the local conditions. Such conditions in different parts of the country are supposed to be better known to the High Courts. The High Courts would be in a better position to ascertain facts and to ensure and examine the implementation of the anti-pollution laws where the allegations relate to the spreading of pollution or non-compliance of other legal provisions leading to the infringement of the anti-pollution laws. For a more effective control and monitoring of such laws, the High Courts have to shoulder greater responsibilities in tackling such issues which arise or pertain to the geographical areas within their respective States. Even in cases which have ramifications all over India, where general directions are issued by this Court, more effective implementation of the same can, in a number of cases, be effected, if the High Courts concerned assume the responsibility of seeing to the enforcement of the laws and examine the complaints, mostly made by the local inhabitants, about the infringement of the laws and spreading of pollution or degradation of ecology."
(Emphasis supplied)

20. A perusal of the above judgement would lead to conclusion that the High Courts should ensure strict compliance of the orders of Supreme Court where there is inaction on the part of law enforcing authorities to implement the orders of Supreme Court.

21. Now we will deal with only those matters in respect of which a large numbers of PILs are filed in this Court.

(i) Public probity in governance:

22. The principle of public accountability and performance of the public duty and public obligation are bedrock of good administration. The principles of public accountability and transparency in State action was considered by a Three Judge Bench in the case of **Vineet Narain and others v. Union of India and another**. The Court observed that holders of public offices are entrusted the powers for the public interest alone. If the conduct of public official amounts to an offence, it must be promptly investigated and appropriate action should be taken to uphold the rule of law. Paragraph nos. 55 & 56 are apposite for our purposes.

"55. These principles of public life are of general application in every democracy and one is expected to bear them in mind while scrutinising the conduct of every holder of a public office. It is trite that the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to a breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.

56. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. It also has adverse effect on foreign investment and funding from the International Monetary Fund and the World Bank who have warned that future aid to underdeveloped countries may be subject to the requisite steps being taken to eradicate corruption, which prevents international aid from reaching those for whom it is meant. Increasing corruption has led to investigative journalism which is of value to a free society. The need to highlight corruption in public life through the medium of public interest litigation invoking judicial review may be frequent in India but is not unknown in other countries: R. v. Secy. of State for Foreign and Commonwealth Affairs, (1995) 1 WLR 386."

23. In the case of **Intellectuals Forum, Tirupathi v. State of A.P. and others**, the Court has categorized three types of restrictions by the public trust doctrine: (1) the property must be available for the use of general public and it must not only be used for public purpose; (2) the property may not be sold, even for fair cash equivalent; (3) the property must be maintained for particular types of use; (i) either traditional uses, or (ii) some uses particular to that form of resources.

24. In **Delhi Airtech Services Private Limited and another v. State of Uttar Pradesh and another**, the Supreme Court considered at length the doctrine of "full faith and credit" which applies to the act done by the officer in the hierarchy of the State. The Court observed "the principle of public accountability and transparency in such action are applicable to the cases of executive or statutory exercise of power, besides requires that such action does not lack bonafides. All these principles enunciated by the Court over a passage of time clearly mandate that the public officers are answerable for both their inaction and irresponsible action.

Emphasis supplied

25. If what ought to have been done, is not done, responsibility should be fixed on the erring officers, the real public purpose of an answerable administration would be satisfied. The Court in **Delhi Airtech Services (P) Ltd. (supra)** has further observed:

"216. The doctrine of "full faith and credit"applies to the acts done by the officers. There is a presumptive evidence

of regularity in official acts, done or performed, and there should be faithful discharge of duties to elongate public purpose in accordance with the procedure prescribed. Avoidance and delay in decision making process in government hierarchy is a matter of growing concern. Sometimes delayed decisions can cause prejudice to the rights of the parties besides there being violation of the statutory rule.

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218. ...The adverse impact of lack of probity in discharge of public duties can result in varied defects, not only in the decision-making process but in the final decision as well. Every officer in the hierarchy of the State, by virtue of his being "public officer" or "public servant", is accountable for his decisions to the public as well as to the State. This concept of dual responsibility should be applied with its rigours in the larger public interest and for proper governance."

26. The Supreme Court in the case of **Shivajirao Nilangekar Patil (supra)** has taken a judicial note. Relevant part of the said judgement reads as under:

"51. This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards in (sic is) an equally grave menace as the pollution of the environment. Where such situations cry out the courts should not and cannot remain mute and dumb."

(ii) Environmental Matters in respect of air and noise pollution, felling of trees, production of natural resources, water, minor and minerals:

27. In the matter of environment also the public interest litigation should be encouraged. In the case of **M.C. Mehta v. Kamal Nath and others**, the Supreme Court has held as under:

*"**23.** The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled An ecological perspective on property : A call for judicial protection of the public's interest in environmentally critical resources published in Harvard Environmental Law Review, Vol. 12 1988, p. 311 is in the following words:*

"Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.

"[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the

scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the capacity of the environment to service ... growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable.'

Professor Barbara Ward has written of this ecological imperative in particularly vivid language:

"We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death".'

There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources -- for example, wetlands and riparian forests -- can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions."

(iii) Public amenities:

28. The public interest litigation should also be encouraged in the matter concerning the public amenities due to growing population of the country. The open land/ spaces reserved for public amenities are being encroached by unscrupulous persons in connivance with the authorities who look the other way at such encroachment.

29. In some cases, the statutory offices deviate from the master plan and tries to convert open / public spaces for the benefit of private builders, rich and influential persons, who put pressure on the law enforcing authorities and statutory authorities to bend the law in their favor. The Supreme Court in the case of **Manohar Joshi v. State of Maharashtra and others**, has taken note of the present trend. The Supreme Court has observed as under:

"209. Yet, as we have seen from the earlier judgments concerning the

public amenities in Bangalore (Bangalore Medical Trust14) and Lucknow [M.I Builders (P) Ltd.15], and now as is seen in this case in Pune, the spaces for the public amenities are under a systematic attack and are shrinking all over the cities in India, only for the benefit of the landowners and the builders. Time has therefore come to take a serious stock of the situation. Undoubtedly, the competing interest of the landowner is also to be taken into account, but that is already done when the plan is finalized, and the landowner is compensated as per the law. Ultimately when the land is reserved for a public purpose after following the due process of law, the interest of the individual must yield to the public interest. "

30. We are constrained to observe that in this state, there appears to be an unholy nexus between administration and builders to convert the land use contrary to Master plan and Zonal plan. For illustration, in Prayagraj (Allahabad) the Master plan was notified in the year 2005 but even after 19 years zonal plans for the entire city have not been notified by the State Government. Taking advantage of this situation, most of the residential areas of city have been converted in commercial area. If the space is reserved for public amenities it cannot be allowed to be allotted to the builders or powerful persons against the alleged development plan. The land, open spaces or parks cannot be converted or encroached. The Supreme Court in the case **Bangalore Medical Trust v. B.S. Muddappa and others16, and M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu And Others** has taken a strict view in the matter of violation of Master Plan / Zonal Plan.

31. We also find that a large number of PILs are filed in service matters and against policy decision of the State. It is trite that in service matters, PILs are not entertainable. Similarly, in policy matter also Court can interfere on very limited grounds.

(iv) Policy Matters:

32. In respect of policy matters, the Supreme Court in the case of **BALCO Employees' Union (Regd.) v. Union of India and others**, has held that "in the sphere of economic policy or reform, the Court is not appropriate forum. Every matter of the public interest or curiosity cannot be subject matter of PIL. The Courts are not intended to and nor should they conduct the administration of country. The Courts will interfere only if there is clear violation of constitutional or statutory provisions or non-compliance by the States with its constitutional or its statutory duties".

33. In the case of **Union of India and others v. J.D. Suryavanshi**, the Supreme Court has quoted with approval its earlier view in the case of **The Directorate of Film Festivals and others v. Gaurav Ashwin Jain and others** in the following terms:

"9. In Directorate of Film Festivals v. Gaurav Ashwin Jain21 this Court held: (SCC p. 746, para 16)

"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the

citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review....".

(v) Service Matters:

34. The Supreme Court in the case of **Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and others**, has held that in service matters a public interest litigation should not be entertained.

35. The Supreme Court in the case of **Gurpal Singh v. State of Punjab and others**, has observed that though the Supreme Court has laid down the law in **Dr. Duryodhan Sahu (supra)** that "so called Public Interest Litigations should not be entertained but the PILs involving service matters continue unabated in the courts and strangely are entertained". The Court has held that "the least the High Court could do is to throw them out on the basis of said decision. Relevant part of the judgment in **Gurpal Singh (supra)** is extracted below:

"7. ...Though in Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra24 this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the courts."

36. Now coming back to the cases on hand, we find that in this batch of public interest litigations, the only relief is in respect of removal of encroachment from public utility land, illegal construction etc. We have extracted the prayer of all the public interest litigations in the earlier part of this judgment.

37. A perusal of the reliefs sought by the petitioners it is evident that the grievances are raised against the private respondents who have made encroachment over the public utility land, pathways (*chakroad*s), encroachment of drains (*nali*) etc. etc.

38. Section 133 of the Code of Criminal Procedure, 1973 deals with public nuisance. Relevant part of Section 133 reads as under:

"133. Conditional order for removal of nuisance.---(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive

Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers---

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) ... ...

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) ... ...

(f) ... ...

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order---

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) ... ...

(v) ... ...

(vi) ... ...

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court."

39. A perusal of Section 133 shows the jurisdiction which is exercised by the Magistrate to deal with public nuisance. This power can be exercised by the Magistrate on the police report or other information. The Magistrate can issue the order for removal of nuisance and if he finds that the dispute is of the civil nature, the Magistrate has to refer the matter to the civil court. The word 'other information' can be entertained by the Magistrate of an individual or any person who is aggrieved from the public nuisance. The power under Section 133 can be used for removal of obstruction raised on municipal drain and from the public pathway of the village.

40. Similarly, under the U.P. Land Revenue Code, 2006 also the Tehsildar has power for removal of obstacle for free use of a public road, path or common land of a village or obstruction or water-course or source of water. Section 26 of the Act reads as under:

*"**26. Removal of obstacle.**---If the Tahsildar finds that any obstacle impedes the free use of a public road, path or common land of a village or obstructs the road or water course or source of water, he may direct the*

removal of such obstacle and may, for that purpose, use or cause to be used such force as may be necessary and may recover the cost of such removal from the person concerned in the manner prescribed."

41. The aforesaid two provisions clearly demonstrate that for the removal of encroachment of pathways, streets, a citizen has efficacious alternative remedy by approaching the competent authority under the aforesaid two Acts. In most of such cases, we find that the petitioners without pursuing remedy under abovementioned Acts approach this Court by way of public interest litigation for a direction against a person individual. These huge number of public interest litigations waste valuable judicial time of this Court.

42. Accordingly, we are of the view that in the matter of removal of encroachment of pathways, drains etc., statutory remedy is available to the persons under the Criminal Procedure Code, the U.P. Revenue Code, 2006, and under the Acts which govern the local bodies, Nagar Nigams, Municipal Corporations, Nagar Panchayats, Municipalities etc. etc. hence the public interest litigation ordinarily should not be entertained. If there is inaction on the part of statutory authorities, the aggrieved person can approach to this Court for appropriate direction but not by way of PIL.

43. The Supreme Court has time and again emphasized the view that in the matter of frivolous petitions a heavy cost should be imposed. In the case of **Phool Chandra and another v. State of Uttar Pradesh**, and in **Subrata Roy Sahara v. Union of India and others**, the Supreme Court has held that "the judicial system is grossly afflicted by frivolous litigation". Some solution has to be evolved to deter the litigant to approach this Court in respect of ill-considered and senseless litigation. It has to be born in mind that in every such litigation, there is an innocent sufferer. The Court has castigated the State agencies also who litigate endlessly up to the Supreme Court. The attitude of the State functionaries is due to lack of responsibility to take decisions. The Supreme Court has held that such frivolous and petty matters should be dealt with iron hands and heavy costs should be imposed as encouraging such type of litigation is hampering the cause of justice. We may in this regard gainfully refer to the decision of the Supreme Court in **Phool Chandra (supra):**

"12. All these are aberrations in the functioning of the Apex Court of any country. Of late, there has been an increase in the trend of litigants rushing to the courts, including this Court, for all kinds of trivial and silly matters which results in wastage of public money and time. A closer scrutiny of all such matters would disclose that there was not even a remote justification for filing the case. It is a pity that the time of the court which is becoming acutely precious because of the piling arrears has to be wasted on hearing such matters. There is an urgent need to put a check on such frivolous litigation. Perhaps many such cases can be avoided if the learned counsel who are officers of the court and who are expected to assist the court tender proper advice to their clients. The Bar has to realise that the great burden upon the Bench of dispensing justice imposes a simultaneous duty upon them to share this burden and it

is their duty to see that the burden should not needlessly be made unbearable. The Judges of this Nation are struggling bravely against the odds to tackle the problem of dispensing quick justice. But, without the cooperation of the gentlemen of the Bar, nothing can be done.

13. It is high time that the courts should come down heavily upon such frivolous litigation and unless we ensure that the wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigation. In order to curb such kind of litigation, the courts have to ensure that there is no incentive or motive which can be ensured by imposing exemplary costs upon the parties as well as on the learned counsel who act in an irresponsible manner. {Vide Varinderpal Singh v. M.R. Sharma, 1986 Supp SCC 719, Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249 : (2011) 4 SCC (Civ) 1, and Gurgaon Gramin Bank v. Khazani, (2012) 8 SCC 781 : AIR 2012 SC 2881.}"

44. Recently, the Supreme Court in the case of **Tehseen Poonawalla v. Union of India and another**, has considered the misuse of PIL jurisdiction. The Court observed thus:

"98. The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this court and the High Courts are flooded with litigation and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the resolution of appeals against orders of conviction have a legitimate expectation of early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office. Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space."

45. On careful consideration of the arguments advanced by learned counsel for the parties, the abovementioned case laws and for the reasons mentioned above, we are of the view that all the above mentioned public interest litigations lack merit. As discussed above,

the petitioners have approached this Court in petty matters or in some cases they have efficacious alternative remedy. Entertaining these petitions shall be wastage of precious judicial time. There are large number of pending PILs relating to protection of environment, in the matter of cleansing the public life, breach of public trust doctrine, converting the public utility services for private use of builders etc., those genuine PILs are pending for years together and some of them are becoming infructuous as most of the judicial time is wasted in dealing with a large number of fresh PILs raising the issues on small matters which do not raise the issues of public importance. Hence, time has come when this Court should discourage frivolous and petty matters.

46. Accordingly, the public interest litigations are dismissed. However, we make it clear that dismissal of these public interest litigations shall not cause any prejudice to the cause espoused therein. It is left open to the petitioners to work out other remedy available under the law.

47. No order as to costs.

(2019)10ILR A 1460

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.10.2019
BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal (u/s 378(4) of Cr.P.C.) No. 167 of 2019

State of U.P. ...Applicant
Versus
Ram Shringar Pandey @ Bhaiyan ...Opposite Party

Counsel for the Applicant:
Government Advocate

Counsel for the Opposite Party:

A. Indian Penal Code, 1860 - Sections 302/34,201/34 and Indian Evidence Act, 1872 - Circumstantial evidence - Principle - it was the duty of the prosecution to prove all the circumstances from which an inference of guilt may have been drawn and also it was the duty of prosecution to show and establish that the proved circumstances are of a definite tendency and they unerringly point towards the guilt of the accused persons and these circumstances, if taken cumulatively are forming a chain, so complete that there is no escape from the conclusion that in all probability the crime has been committed by the respondent only and by none else.

B. Motive - the admitted case of the prosecution is that the deceased and accused persons were very close friends. It is also admitted that there was no enmity of the deceased with respondent. No motive of the crime has been assigned to the respondent, which may persuade him to commit crime.

C. A criminal trial proceeds with the presumption of innocence of the accused persons and this presumption of innocence stands fortified with the acquittal of the accused persons. So, very strong and cogent reasons must exist for interfering in the judgment of acquittal. The view taken by the trial court was a probable and logical view and the judgment of the trial court cannot be said to be not based on material on record or illegal or illogical or improbable. Therefore, the application to grant leave to file appeal is dismissed. (Para 15,16,17,18,19,20 & 21)

Criminal Appeal dismissed (E-6)

Precedent followed: -

1. Ajmer Singh Vs St. of Punj. 1953 SCR 418

2. Sanwat Singh & ors. Vs St. of Raj. AIR 1961 SC 715

3. Sheo Swarup & ors. Vs King Emperor AIR 1934 PC 227 (2)

4. Sadhu Saran Singh Vs St. of U.P.& ors.2016 CrL. J. 1908

5. St. of Mah. Vs Sujay Mangesh Poyarekar MANU/SC/8073/2008

6. Hanumant Vs St. of M.P. MANU/SC/0037/1952

7. Sharad Birdhichand Sarda Vs St. of Mah. AIR 1984 SC 1622

8. Jaharlal Das Vs St. of Ori. MANU/SC/0586/1991: (1991) 3 SCC 27

9. Varkey Joseph Vs St. of Kerala MANU/SC/0295/1993

10. Arjun Marik & ors. Vs St. of Bihar MANU/SC/1037/1994: 1994 Supp (2) SCC 372

11. St. of Goa Vs Sanjay Thakran & anr. MANU/SC/7187/2007 (2007) 3 SCC 755

12. Bodhraj alias Bodha & ors. Vs St. of J&K MANU/SC/0723/2002

13. Jaswant Gir Vs St. of Punj. MANU/SC/2585/2005

14. Mohibur Rahman & anr. Vs St. of Assam MANU/SC/0690/2002

15. Rishi Pal Vs St. of Uk. MANU/SC/0081/2013

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

1. Heard Shri Chandra Shekhar Pandey, learned AGA for the State and perused the record.

2. By means of instant application moved under Section 378(3) Cr.P.C. the State has requested to grant leave to appeal against impugned judgment and order dated 6.7.2019, passed by Additional District and Sessions Judge (FTC), Pratapgarh, in Sessions Trial No. 44/2013, 'State Versus Ram Shringar Pandey @ Bhaiyan son of Rama Shankar @ Bablu Pandey', arising out of Case Crime No. 215 of 2012, under Sections 302/34, 201/34 IPC, Police Station Fatanpur, District Pratapgarh, whereby the respondent/ accused Ram Shringar Pandey @ Bhaiyan has been acquitted from the charges under Sections 302/34, 201/34 IPC.

3. The prosecution story as emerges out of the record is that on 24.9.2012 the informant, namely, Shobhnath Srivastava son of Mahadev Srivastava, R/o Village Ramapur Kundaha, Police Station Sujanganj, District Jaunpur submitted a written application to S.H.O., Police Station Fatanpur alleging that on 16.09.2012 at about 4 P.M. accused persons Imtiyaz Ahmad @ Guddu and Ram Shringar Pandey @ Bhaiyan (respondent) came to his house and took his maternal grand-son, Suraj Kumar Srivastava with them. When his wife inquired from Suraj Kumar Srivastava as to where he was going, he replied that he would be back within 10 minutes and he accompanied the accused persons. It was further alleged in the application that since his departure with the above accused persons, Suraj Kumar Srivastava never returned back and when he went to the houses of the accused persons on

16.9.2012, he got information that they were also absconding since 16.09.2012. On 22.09.2012, he got information that near Jagnipur Nala a dead body has been found which was buried and photo of the same has been kept in Police Station Fatanpur. He went to the Police Station Fatanpur along with other villagers and identified the deceased as his maternal grand-son (Suraj Kumar Srivastava) by the photograph of the dead body and other material and thereafter they identified the dead body at the mortuary. His maternal grand-son, Suraj Kumar Srivastava has been murdered and buried by the accused persons.

4. On the basis of the aforesaid application a First Information Report was registered against the respondent Ram Shringar Pandey @ Bhaiyan and Imtiyaz Ahmad @ Guddu, under Sections 302, 201 IPC at case Crime No. 215/ 2012 and after entering the the substance of the FIR in G.D. the investigation was entrusted to Sri Sabhajit Mishra S.O. Fatanpur.

5. The postmortem on the body of the deceased, Suraj Kumar Srivastava was performed by P.W.5- Dr. Arvind Kumar Verma on 23.09.2012, who found following ante-mortem injuries on the body of the deceased.

(i) Ligature mark 31cm. x 2cm. all around the neck below, thyroid cartilage. Ecchymosis was found beneath the ligature mark.

(ii) contusion 5 cm. x 5 cm. on the left side of chest. 6 cm. below left nipple.

(iii) Contusion 9 cm. x 7 cm. on the right side of the chest. 4 cm. below the right nipple.

(iv) Contusion 15 cm. x 12 cm. on scapular region towards the left side.

(v) Contusion 12 cm. x 22 cm. on scapular region towards the back of right side.

(vi) The right ring finger was amputated and its upper and middle part was missing.

The possible time of death of the deceased was determined as 3 to 5 days before the postmortem and the death was stated to have occurred due to asphyxia due to ante-mortem strangulation.

6. The Investigating Officer after taking down the disclosure statement of the respondent recovered a Phawra, on the pointing of respondent and after completion of investigation filed charge sheet against the above mentioned accused persons Imtiyaz Ahmad @ Guddu and Ram Shringar Pandey @ Bhaiyan.

7. The case being exclusively triable by the court of sessions was committed to the sessions court and charges under Sections 302 read with 34 and 201 read with 34 IPC were framed against the respondent and another accused person.In response to the charges framed against the respondent accused- respondent pleaded not guilty and claimed trial.

The other accused person, namely, Imtiyaz Ahmad @ Guddu absconded during the course of trial and his file was separated from the file of the instant respondent and vide impugned judgment and order, the judgment was passed only with regard to the respondent Ram Shringar Pandey @ Bhaiyan (respondent).

8. The prosecution in order to bring home the charges against the respondent

relied on following documentary evidence:-

(i) Application of information (Ex. Ka-1)
(ii) Postmortem report (Ex. Ka-2)
(iii) Chick FIR (Ex. Ka-3)
(iv) G.D. FIR (Ex. Ka-4)
(v) G.D. pertaining to information of dead body, (Ex. Ka-5)
(vi) Site Plan (Ex. Ka-5-A)
(vii) Seizure memo pertaining to recovery of spade (Favda) (Ex. Ka-6)
(viii) Charge-sheet (Ex. Ka-7)
(ix) Site Plan of recovery site (Ex. Ka-8)
(x) Inquest report (Ex. Ka-9)
(xi) Report Police Station (Ex. Ka-10)
(xii) Letter to C.M.O (Ex. Ka-11)
(xiii) Letter to R.I. (Ex. Ka-12)
(xiv) Letter to C.M.O. (Ex. Ka-13)
(xv) Police form-13 (Ex. Ka-14)
(xv) Photo lash (Ex. Ka-15)
(xvi) Sample of seal (Ex. Ka-16)

Apart from the above mentioned documentary evidence the prosecution also produced following witnesses in support of its case:-

(i) P.W.1- Shobhanath Srivastava (Informant)
(ii) P.W.2- Smt. Reena Srivastava, (wife of the deceased/ eye witness)
(iii) P.W.3- Smt. Sarswati (grand-mother of the deceased)
(iv) P.W.4- Shri Vinod Kumar Srivastava (brother of the deceased)
(v) P.W.5- Dr. Arvind Kumar Verma (who conducted the postmortem)
(vi) P.W.6- Constable Chhedi lal Yadv (Scribe Chick FIR and G.D.)
(vii) P.W.7- S.H.O. Sabhajit Mishra (Investigating Officer)

9. After closing of the evidence of the prosecution statement of the respondent- Ram Shringar Pandey @ Bhaiyan was recorded under Section 313 of the Cr.P.C., who declined to have committed any offence. He further stated that P.Ws.1 to 4 have given false evidence and that he has been falsely roped in by the police only on the basis of doubt. However, no evidence was produced by the respondent in his defence.

The trial court after taking into consideration the oral and documentary evidence produced by the prosecution found that the prosecution has failed to prove its case beyond reasonable doubt against the respondent and acquitted the respondent- accused of the charges framed against him. Aggrieved by the judgment and order of the trial court the instant appeal along with an application to grant leave has been preferred by the State.

10. Learned AGA while pressing the application for grant of leave to file instant appeal submits that the court below has committed material illegality in appreciating the evidence available on

record. The court below has failed to take into consideration that the respondent along with other co-accusedperson took the deceased- Suraj Kumar Srivastava with them on 16.09.2012 at 4 P.M. from the house of the deceased. It was proved on record that the deceased as well as two accused persons were last seen together by the grand-mother of the deceased i.e. Smt. Saraswati Srivastava and when she inquired as to where he was going, the deceased, Suraj Kumar Srivastava replied that he will come back within ten minutes and he departed with the accused persons on a motorcycle.

He further submits that P.W.1- Shobhanath Srivastava on 16.09.2012 at 5 P.M. had also seen the deceased with respondent and other accused person on a motorcycle, when he was returning from the market. He further submits that P.W.4- Vinod Kumar Srivastava who is also the brother of the informant has also testified that on 16.09.2012 at about 4 P.M. respondent- Ram Shringar Pandey @ Bhaiyan and Imtiyaz Ahmad @ Guddu came to the house of Suraj Kumar Srivastava and took him with them on a motorcycle and his dead body was recovered on 22.9.2012.

Highlighting the above factual matrix, learned AGA submits that the evidence of the above mentioned eye witnesses clearly establishes the fact that the respondent and another accused person Imtiyaz Ahmad @ Guddu took the deceased Suraj Kumar Srivastava on 16.09.2012 at about 4 P.M. with them and since then the whereabouts of the deceased was not known and his dead body was recovered on 22.09.2012 near a Nala and by virtue of Section 106 of Evidence Act burden is on the accused persons to show as to what happened to the deceased and if they failed to give any reasonable explanation than they will be held liable for the offence.He further submits that a Favda (spade) whereby the body of the deceased was buried has also been recovered on the pointing out of the respondent.

He further submits that the court below has committed illegality in acquitting the respondent in terms of the theory of 'last seen together' it was for the respondent to show as to where and in what manner they departed from the deceased or what happened to the deceased after respondent and Guddu took him with them on motorcycle.

He further submits that the court below has not considered the proved circumstances available against the accused persons and disbelieved the evidence of prosecution in a cursory manner while it was proved on record that the crime has been committed only and only by the respondent and another accused person and in the facts and circumstances of the case, the State be granted leave to file instant appeal in order to challenge the order of the court below.

11. Having heard learned AGA for the State, we find that the instant case is based purely on circumstantial evidence as there is no witness or evidence who claims to have seen the commission of the offence. An FIR of the incident has been lodged by Shri Shobhanath Srivastva on 24.09.2012 at Police Station Fatanpur, with regard to the fact that the respondent- Ram Shringar Pandey @ Bhaiyan as well as Guddu @ Imtiyaz Ahmad took the deceased, Suraj Kumar Srivastava with them on 16.09.2012 at 4 P.M. and he along with other villagers identified the dead body of the deceased

in the postmortem house after the same was recovered on 22.09.2012, from near Nala and was kept in mortuary on 23.09.2012.

12. Before proceeding further, it appears in the interest of justice that a survey of the testimony of the prosecution witness be made so that the evidence on record may be appreciated in a better way in the back ground of the submissions made by the learned AGA.

P.W.1- Shobhanath Srivastava, is the informant of the FIR. He in his statement has stated that on 16.09.2012 at about 3 P.M. he went to Jagnipur Market and when he was returning from there he saw a motorcycle where on Bhaiyan Pandey, his maternal grand-son, Suraj Kumar Srivastava and Guddu were sitting together. When he arrived at home, he asked his wife as to where Suraj Kumar Srivastava had gone, to which she replied that Suraj Kumar Srivastva had gone with Guddu and Ram Shringar Pandey @ Bhaiyan and will return in 10 minutes.This witness further stated that when Suraj Kumar Srivastava did not return in the night he started inquiring from the next morning and went to the houses of the accused persons and he was told by ladies of their houses that Guddu and Ram Shringar Pandey @ Bhaiyan had also not returned in the night. He presumed that these three persons together might have gone somewhere in order to earn bread for their families. One Ram Chandra of his villageis doing some construction work in bombay and these three persons were employed with him in Mumbai.

He further stated that on 22.09.2012, he got information that a dead body has been found buried in the land and the same has been taken by the police of PS Fatanpur. He, on 23.9.2012 went to Fatanpur Police Station and identified the deceased by a photograph of the body as well as the clothes and other belongings of the deceased. He also identified the body of Suraj Kumar Srivastava at mortuary at District Hospital, Pratapgarh. He further stated that he has every reason to believe that his 'Nati' has been done to death by the aforesaid accused persons. Suraj Kumar Srivastava was not having any enmity with accused persons. Wife of Suraj Kumar Srivastava was not in the village at the time of the death of the deceased. When she came, she informed that the deceased was having enmity with Ram Chandra due to monetory transaction and deceased had also left employment of Ram Chandra on this basis.

P.W.2- Smt. Reena Srivastava is the wife of the deceased, Suraj Kumar Srivastava, who admitted in her statement that on 16.09.2012 when her husband was taken by the accused persons she was not present at her house and she was in Mumbai.She returned from Mumbai on 25.09.2012 and was informed by his father and mother-in-law about the incident. She further stated that on 22.09.2012 she was informed by her father-in-law about the death of the deceased and also that her father-in-law identified the body of the deceased at mortuary of Pratapgarh. She has further stated that there was some dispute over monetory transaction between her husband and Ram Chandra of her village and due to this her husband had left the employment of Ram Chandra. She further stated that Ram Chandra also intimidated her husband to join his employment or he will be done to death. The incident has been committed on the basis of enmity with Ram Chandra.

P.W.3- Smt. Sarswati has testified pertaining to the fact that on 16.09.2012 at about 4 P.M., when she was at home, deceased Suraj Kumar Srivastava was taken by Guddu and Ram Shringar Pandey @ Bhaiyan. On being asked by her, Suraj Kumar Srivastava informed that he will be back within ten minutes. She further stated that after some time her husband returned from the market and inquired as to where Suraj Kumar Srivastava had gone along with Guddu and Ram Shringar Pandey @ Bhaiyan, she informed her husband that Suraj Kumar Srivastava had gone with the accused persons and will come back within ten minutes. However, he did not return there after and the body of the deceased, Suraj Kumar Srivastava was found on 22.0-9.2012 in a buried condition. She further stated that when the accused persons were taking Suraj Kumar Srivastava with them. She did not know as to who has murdered Suraj Kumar Srivastava but he was tkaen by Guddu and Ram Shringar Pandey @ Bhaiyan.

P.W.4- Vinod Kumar Srivastava has stated in his statement that Guudu and Ram Shringar Pandey @ Bhaiyan were close friends and they visited each other houses frequently and were generally seen together. He corroborated the incident of going of Suraj Kumar Srivastava with accused persons on 16.09.2012 at 4 P.M. and claimed that he was present at the main door of the house. He also stated that on being asked by the wife of the informant as to where they were going, Suraj Kumar Srivastava replied that he will be back within ten minutes. He also stated that on 22.09.2012 they got information about a dead body found buried near Jagnipur Nala and they identified the same as of Suraj Kumar Srivastava in Pratapgarh mortuary.

P.W.5- Dr. Arvind Kumar Verma, who conducted post mortem on the body deceased,in his statement has found six injuries on the body of the deceased and all those injuries have been elaborately discussed herein before at para no. 5 of this judgment. He also stated to have found that the death of deceased has been caused due to asphyxia occurred on account of strangulation. He proved postmortem report in his hand writing and signatures.

P.W.6- Constable Chhedi Lal Yadav has stated to have prepared the chick FIR on 24.09.2012 and also to have written an entry in general diary at Rapat No. 31 time 17 hours on 24.09.2012 and has proved the chick FIR, G.D. and information of the recovery of the dead body as Ex. Ka-3, 4, and 5, respectively.

P.W.7- S.H.O. Sabhajit Mishra is the Investigating Officer in the instant matter, who has proved to have prepared the site plan and other necessary papers for the purpose of the postmortem from Ex. Ka-5A to Ka-8. He also proved to have prepared the inquest report and other necessary papers from Ex. Ka-10 to Ka-16. He further stated to have recovered Favda (spade) on the pointing out of the deceased Ram Shringar Pandey @ Bhaiyan.

13. Perusal of the judgment of the subordinate court reveals that the trial Court found that the case of the prosecution has not been proved beyond reasonable doubts on following points:-

(i) The case of prosecution is based on circumstantial evidence as no body has seen the crime being committed by the accused persons.

(ii) The FIR has been lodged after delay of 08 days i.e. on 24.09.2012 and no explanation of such delay has been given. Even no missing report pertaining to the deceased was lodged and also that no sincere efforts were made to search the deceased.

(iii) Allegation of taking deceased by accused persons has been imputed with regard to 16.09.2012 at 4 P.M. and dead body of the deceased has been found on 22.09.2012 and there is no evidence that the deceased, in between this duration, has been seen by any one in the company of the accused persons.

(iv) P.W.5- Dr. Arvind Kumar Verma, who conducted the postmortem on the body of the deceased has opined that the deceased was done to death about 03 to 05 days before the postmortem and not beyond that and according to him the death of the deceased might have occurred from 18.09.2012 to 20.09.2012, while the deceased was allegedly taken by accused persons on 16.09.2012. Therefore there is no close proximity between the point of time when deceased was last seen with respondent and time of death of the deceased.

(v) The Investigating Officer has admitted in his cross examination that the deceased was a criminal.

(vi) All proved circumstance do not form a complete chain and there is possibility that the crime might have been committed by any other person.

(vii) No motive of crime has been alleged. Per contra it is admitted to the prosecution that the accused persons and deceased were very closed friends and were usually seen together.Enmity of deceased with accused persons is neither alleged nor proved. All prosecution witnesses admitted that the accused persons and deceased frequently visited each other houses and they were childhood friends.

(viii) The recovery of spade (Favda) at the instance of accused-respondent is highly doubtful for the following reasons:-

(a) Favda was not presented before any Magistrate.

(b) No signature either of the accused or witnesses were found on the level affixed on Favda.

(c) The evidence of P.W.7-Sabhajit Mishra, Investigating Officer is not believable on the point of recovery of the Favda when he stated that this will only be known to the accused- respondent from where he has recovered Favda. He admitted in his statement that he did not have any idea as to at what distance he was standing when accused was recovering Favda. He admitted that he even can not say whether Favda was recovered from inside the water of Nala or from land .

(ix) Suspicion howsoever strong could not take place of proof.

(x) It is not proved by the prosecution that it is only and only the accused who has committed the crime.

14. The question as to how the application for grant of leave to appeal made under Section 378(3) of the Code should be decided by the High Court and what are the parameters which this Court should keep in mind remains no more 'res integra '. This Issue was examined by the Hon'ble the Apex Court in the case of **Ajmer Singh v. State of Punjab, 1953 SCR 418** wherein the accused was acquitted by the trial Court but was convicted by the High Court in an appeal against acquittal filed by the State. The aggrieved accused approached Apex Court. It was contended by him that there were 'no compelling reasons' for setting aside the order of acquittal and due and proper weight had not been given by the High Court to the opinion of the trial Court as regards the credibility of witnesses seen and examined by him. It was also contended that the High Court committed an error of law and the Hon'ble

Supreme Court found substance in the argument that when a strong 'prima facie' case is made out against an accused person it is his duty to explain the circumstances appearing in evidence against him and he cannot take shelter behind the presumption of innocence and cannot state that the law entitles him to keep his lips sealed. It was further held that in an appeal, the High Court had full power to review the evidence upon which the order of acquittal was founded ...

Upholding the contention, it has also been held in para 6 as under ;

"We think this criticism is well-founded. After an order of acquittal has been made, the presumption of innocence is further reinforced by that order, and that being so, the trial court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons."

In the case of ***Sanwat Singh and others v. State of Rajasthan,*** AIR 1961 SC 715 after placing the reliance on the judgment given by Privy Council in ***Sheo Swarup and others vs. The King Emperor*** AIR 1934 PC 227 (2) and many other authroities Hon'ble the Apex Court on the point in issue held as under :-

" Para 16- The foregoing discussion yields the following results :

(1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified".

Hon'ble the Apex Court in the case of ***Sadhu Saran Singh Vs. State of Uttar Pradesh and Others*** *reported in 2016 CrL. J. 1908 has considered this difference and has observed as under:*

"18 Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in Sambasiva V. State of Kerala 1998 SCC (Cri) 1320 has held:

"The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate

court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

19. This Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

In ***State of Maharashtra vs. Sujay Mangesh Poyarekar MANU/SC/8073/2008 Hon'ble Supreme Court*** *has held as under:-*

"21. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

22. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

23. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial Court must be allowed by the appellate Court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial Court could not be said to be `perverse' and, hence, no leave should be granted.

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate Court against an order of acquittal recorded by the trial Court. We only state that in such cases, the appellate Court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial Court should not be disturbed. Where there is application of mind by the appellate Court and reasons (may be in brief) in support of such view are recorded, the order of the Court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review or reconsideration of evidence, the

appellate Court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave."

15. From the above decisions some general principles which may emerge are that the appellate court is having full power to review or re-appreciate or reconsider the evidence upon which the order/ judgment of acquittal has been based and there is no limitation, restriction in exercise of such power by the appellate court and the appellate court may reach at it is own conclusion on the same set of evidence, both on question of facts as well as on law. However, it is to be kept in mind that in case of acquittal, the presumption of innocence which was initially with the accused persons has been fortified, reaffirmed, strengthened and also the golden principle which runs through the Web of criminal jurisprudence is that if two reasonable and logical conclusions can be derived on the basis of evidence on record, the appellate court should not normally disturb the finding of the trial court. But simultaneously it is also to be kept in mind that the benefit of only a reasonable doubt can be given to accused persons in a criminal trial. The accused persons cannot claim the benefit of each and every doubt. To get the benefit of a doubt the same has to pass the test of reasonableness and a reasonable doubt is a doubt which emerges out of the evidence itself.

16. The law with regard to appreciation of circumstantial evidence has been clearly enunciated in the case of ***Hanumant v. State of Madhya Pradesh*** MANU/SC/0037/1952 wherein Hon'ble Supreme Court held as follows:

"12 ...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused"

Hon'ble Apex Court in the case ***Sharad Birdhichand Sarda Vs. State of Maharashtra,*** AIR, 1984 SC 1622 laid down that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

"1. the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature and tendency;

4. they should exclude every possible hypothesis except the one to be proved, and

5.there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

In ***Jaharlal Das v. State of Orissa,*** MANU/SC/0586/1991 : (1991) 3 SCC 27, it was held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to Rule out a reasonable likelihood of the innocence of the Accused. It is further held that in Para 8, in order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

In ***Varkey Joseph v. State of Kerala,*** MANU/SC/0295/1993, it was held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

Therefore, keeping in view the above settled legal position the law pertaining to cases based on circumstantial evidence can be summarized in following terms:

1. The circumstances relied upon by the prosecution which lead to an inference to the guilt of the accused must be proved beyond doubt;

2. The circumstances should unerringly point towards the guilt of the accused;

3. The circumstances should be linked together in such a manner that the cumulative effect of the chain formed by joining the links is so complete that it leads to only one conclusion i.e. the guilt of the accused;

4. That there should be no probability of the crime having been committed by a person other than the Accused.

It is in the light of the aforesaid law that we have to consider the evidence and the circumstances relied upon by the prosecution before the court below. In a case based on circumstantial evidence it is always better for the courts to deal with each circumstance separately and then link the circumstances which have been proved to arrive at a conclusion. Therefore it is incumbent for this Court to see whether the Court Below has committed any error in coming to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt or whether the view of the Court below is a probable view.

17. At this juncture it is also in the interest of things to have a look about the legal position pertaining to law related to "last seen together'.

In **Arjun Marik and Ors. v. State of Bihar MANU/SC/1037/1994 : 1994 Supp (2) SCC 372,** Hon'ble Supreme Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded.

We may also refer to **State of Goa v. Sanjay Thakran and Anr. MANU/SC/7187/2007,(2007) 3 SCC 755** wherein the Ho'nble Supreme Court held that in the absence of any other corroborative piece of evidence to complete the chain of circumstances it is not possible to fasten the guilt on the accused on the solitary circumstance of the two being seen together. Reference may also be made to **Bodhraj alias Bodha and Ors. v. State of Jammu and Kashmir MANU/SC/0723/2002,** wherein the Ho'nble Supreme Court held:

"The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases..."

In **Jaswant Gir v. State of Punjab MANU/SC/2585/2005,** Hon'ble Supreme Court held that it is not possible to convict appellant solely on basis of 'last seen' evidence in the absence of any other links in the chain of circumstantial evidence, the Court extended benefit of doubt to accused persons.

In **Mohibur Rahman and Anr. v. State of Assam MANU/SC/0690/2002,** Hon'ble Supreme Court held that the circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

Hon'ble Supreme Court in **Rishi Pal V State of Uttarakhand, MANU/SC/0081/2013** held that requirement in a case based on circumstantial evidence is that not only should all the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged.

18. Keeping in view the aforesaid legal position with regard to the disposal of application to grant leave to file appeal

against acquittal as also pertaining to the appreciation of evidence with regard to the cases based on circumstantial evidence particularly on last seen together theory, perusal of the evidence available on record would reveal that the admitted case of the prosecution is that the deceased and accused persons were very close friends. It is also admitted that there was no enmity of the deceased with respondent. No motive of the crime has been assigned to the respondent, which may persuade him to commit crime. Need not to emphasize that in a case purely based on circumstantial evidence, motive assumed significance. In the peculiar facts and circumstances of the case, keeping in view the fact that the deceased and respondent are childhood friends, the motive assumes more significance and in absence of any motive or enmity, the case of the prosecution is adversely affected.

It is also an admitted case of the prosecution that one Ram Chandra of the same village, with whom Suraj Kumar Srivastava was working in Mumbai was having enmity with the deceased on the basis of some dispute pertaining to payment of money.

There is no close proximity in the time when the deceased went with the respondent and other accused person and the probable time of his death as determined by P.W.5- Dr. Arvind Kumar Srivastava. There is either no close proximity between the place i.e. where from the deceased accompanied the respondent and other accused person and the place where his dead body has been found. In absence of any close proximity in the time and place, no conclusive inference can be drawn that the death of the deceased has been caused only and only by the respondent.

Ocular evidence produced by the prosecution, in the facts and circumstances of the case, is also not corroborated by the medical evidence as P.W.5- Dr. Arvind Kumar Verma has stated that the deceased died between 18th to 20th September, 2012. Admittedly the case of the prosecution is that the deceased accompanied the respondent in the evening of 16th September, 2012 and from 16th September, 2012 to 18th September, 2012 no body has seen the deceased with the accused person and there is ample time and opportunity for any one to commit the crime. The circumstances admitted to be proved by the prosecution are not such whereby the only hypothesis which may be drawn is that in any case the crime has been committed by the respondent as there is sufficient time from 15 to 18 September, 2012 for any other person to come into play and commit the crime. It is also relevant that the deceased was stated to be of a criminal background and keeping in view the criminal background of the deceased, the possibility of any other person committing the crime could not be ruled out.

19. We have very carefully perused the evidence of prosecution witnesses in the back ground of settled principles for appreciation of circumstantial evidence and have found that cumulative effect of the evidence given by all these factual witnesses before the trial Court would certainly not attract the satisfaction, which may be termed as proof beyond reasonable doubt. Needless to say that the instant case was purely based on circumstantial evidence as nobody had seen the respondents committing murder of deceased Suraj and it was the duty of the prosecution to prove all the circumstances from which an inference of guilt may be drawn and also it was the

duty of prosecution to show and establish that the proved circumstances are of a definite tendency and they unerringly point towards the guilt of the accused persons and these circumstances, if taken cumulatively are forming a chain, so complete that there is no escape from the conclusion that in all probability the crime has been committed by the respondent only and by none else and it is also incapable of explanation of any other hypothesis then that of the guilt of the respondents.

Therefore keeping in view the aforesaid facts and circumstances, the trial court was justified in recording a finding of acquittal as the prosecution failed to prove its case beyond all reasonable doubts specifically on the touchstone of the settled principles pertaining to appreciation of evidence with regard to circumstantial evidence specially the "last seen theory'.The circumstances attempted to be proved are not such whereby any other hypothesis is not possible as there is sufficient time from 16 to 18 for any other person(s) to come into play and commit the murder in the back ground that deceased was stated to be of criminal back ground. The judgment of the court below can not be termed either perverse or not based on evidence.

20. In view the above factual and legal position, we are of considered opinion that the prosecution has miserably failed to prove its case beyond reasonable doubt and it cannot be said that the view taken by the Trial Judge is perverse or unreasonable. Per contra the view taken by the trial Court is a possible view and the judgment is well reasoned and well discussed.

21. A criminal trial proceeds with the presumption of innocence of the accused persons and this presumption of innocence stands fortified with the acquittal of the accused persons. So, very strong and cogent reasons must exist for interfering in the judgment of acquittal. Keeping in view the aforesaid inherent weaknesses of the prosecution case, we are of the considered view that the view taken by the trial court was a probable and logical view and the judgment of the trial court cannot be said to be not based on material on record or illegal or illogical or improbable. Therefore, we are satisfied that there is absolutely no hope of success in this appeal and accordingly, no interference in the judgment of the trial Court is called for. Hence, the prayer for grant of leave to appeal is hereby ***rejected*** and the application to grant leave to file appeal is ***dismissed.***

22. Since application for grant of leave to appeal has been rejected, the memorandum of appeal also does not survive. Consequently, the appeal is also ***dismissed.***

(2019)10ILR A 1474

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 47311 of 2000

Dr. Vishwanath Mishra ...Petitioner
Versus
XIIIth Additional District Judge Varanasi & Ors. ... Respondents

Counsel for the Petitioner:
Sri A.K. Rai, Sri Anil Kumar Rai, Sri S.N. Singh, Sri Vishnu Singh, Sri Vimlendra Rai

Counsel for the Respondents:
C.S.C., Sri Hem Pratap Singh, Sri Vipin Sinha

A. U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972 - Section 16(1) B, Section 21- application for release of the accommodation which was in occupation of the tenant - Rent Revision under Section 18 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972 - Section 182 in The Indian Contract Act, 1872 - Agent is the extended hand of principal. (Para 5,6,19 & 23)

Held:- An agent who receives property or money from or for his principal obtains no interest for himself in the property. An agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor he can convert it into any other kind or use. His possession is the possession of the principal for all purposes. The agent has no possession of his own. Caretaker's possession is the possession of the principal. The possession of the agent is the possession of the principal and in view of the fiduciary relationship he cannot be permitted to claim his own possession. Thus, agent is the extended hand of principal. Therefore, father of the petitioner as agent and even assuming the petitioner also to be an agent, has acquired no interest in the disputed property of the Principal and in view of his fiduciary relationship, he cannot be permitted to claim his own possession**.** (Para 33)

Writ petition dismissed (E-7)

List of Cases Cited: -

1. Dr. Sita Ram Gandhi Vs IVth Addl. Distt. Judge & anr. 1983 ARC 782

2. Brij Bhushan Sharma vs. Kamla Prasad (2011) 3 ARC 381

3. M.M. Quasim Vs Manohar Lal sharma & ors. (1981) 3 SCC 36

4. Purqan Ahmad alias Mana & anr. Vs VIIth A.D.J. & ors. (2005) All LJ 119

5. Mam Chand Vs Pramodini Srivastava (2014) 5 ADJ 231

6. Southern Roadways Ltd. Madurai represented by its Secretary Vs S.M. Krishnan (1989) 4 SCC 603

7. Smt. Chandrakantaben Vs Vadilal Bapalal Modi & anr. (1989) 2 SCC 630

8. Ichchapur Industrial Cooperative Society Ltd. Vs Competent Authority Oil and Natural Gas Commission & anr. (1997)2 SCC 42

9. K.V. Muthu Vs Angamuthu Ammal (1997) 2 SCC 53

10. Damadilal & Ors. VS Parashram & ors. (1976) 4 SCC 855

11. Munnu Yadav Vs Ram Kumar Yadav & Anr S.C.C. Revision No.86 of 2019

12. Raj Mohan Krishna Vs Second Addl. Distt. Judge AIR 1993 All. 40

13. Khem Chand Vs IV A.D.J. (1989) 2 ARC 344

14. Vinod Kumar Agrawal Vs XVIIth Addl. Distt. Judge Ald. (2013) 6 ALJ 110

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Vishnu Singh, learned counsel for the petitioner and Sri Hem Pratap Singh, learned counsel for the respondent Nos.3/1, 3/2 and 4.

Facts:-

2. Briefly stated facts of the present case are that one "Divan Vidyawati Badrinath of Shrinagar (State of Jammu and Kashmir)" was the original owner and landlady of House No.CK-19/8, Mohalla Thatheri Bazar, City Varanasi, which is a

four storeyed building. The aforesaid original owner and landlady appointed one Sri Raghunath Mishra as her Agent to look after and collect rent of the aforesaid house and for that purpose, permitted him to use one room of the house at the first floor. The petitioner is the son of the Agent Raghunath Mishra.

3. The aforesaid original owner and landlady bequeathed the house in question to "Sri Vikramajeet Singh, Sanatan Dharm College, Kanpur" which She mentioned in para (e) of her registered will deed dated 11.02.1960, which was approved by Hon'ble Jammu and Kashmir High Court in case No.51 of 1964. In the said document, it was also mentioned that Raghunath Mishra son of Jawahar Lal Mishra was occupying a portion in the house in question as her Agent. When the agent Raghunath Mishra did not furnish account and rent, the original owner and landlady terminated the agent and his licence vide notice dated 29.05.1958. Thereafter, she filed a suit being O.S. No.35 of 1961 (Smt. Vidyawati Devi vs. Raghunath Mishra) in the court of Civil Judge, Varanasi for eviction of Raghunath Mishra, which was decreed by judgment and decree dated 17.05.1988 and she was declared to be the owner of the house in question and Raghunath Mishra to be her Agent and Caretaker and the defendants were directed not to interfere in realisation of rent. Against the judgment dated 17.05.1988, the petitioner filed Civil Appeal No.600 of 1988 (Vishwanath Mishra vs. Narendra Jeet Singh) which was dismissed by judgment dated 30.05.1998 passed by the A.D.J. Vth Varanasi. Against this judgment, the petitioner filed Second Appeal No.1196 of 1998 (Vishwanath Misra vs. Ratan Shankar Chaurasia) in which an interim order dated 03.09.1998 staying the decree subject to depositing Rs.2,500/- per month was passed. The said Second Appeal is stated to be pending.

4. The aforesaid Sri Vikramajeet Singh Sanatan Dharm College, Kanpur passed a resolution dated 02.02.1983 authorising its President Narendra Jeet Singh to execute sale deed of the house in question in favour of Ratan Shankar Chaurasiya and others (respondent Nos.3 and 4 herein) and accordingly a registered sale deed of the house in question dated 25.03.1983 was executed in favour of the aforesaid Ratan Shankar Chaurasiya and others. The aforesaid purchasers got their names mutated in records of Nagar Mahapalika, Varanasi under the order of the Tax Superintendent dated 06.07.1985. As per order of the Additional Commissioner, Nagar Mahapalika, Varanasi dated 05.11.1960, the name of Raghunath Mishra (father of the petitioner) was recorded as Agent of Smt. Vidyawati Badrinath. As per copies of assessments passed by Nagar Mahapalika, Varanasi, the name of Raghunath Mishra is mentioned as Agent of the original owner and landlady Smt. Vidyawati Badrinath.

5. In the house in question, one Smt. Satyabhama Devi was a tenant of some portion on the first floor who died on 02.01.1985. She was having no son but only three daughters, who were married. The petitioner Vishwnath Mishra filed release application dated 10.01.1985 under Section 16(1)(b) of the U.P. Act 13 of 1972 for release of the accommodation which was in occupation of the tenant late Smt. Satyabhama Devi. **In his release application, the petitioner stated that he is in bona fide need of the tenanted**

premises of the first floor for his personal use. A release application was also filed by the respondent Nos.3 and 4 (purchasers of the house by registered sale deed dated 25.03.1983). The release applications were registered as Case No.3 of 1985. By the impugned order dated 22.07.1988, **the Rent Control and Eviction Officer/ City Magistrate, Varanasi allowed the release application of the respondent Nos.3 and 4** and rejected the release application of the petitioner recording the conclusion as under:-

"मैंने समस्त पत्रावली का सम्यक आवलोकन किया। प्रश्नगत भवन सं0 सी0 के0 19/8 ठठेरी बाजार शहर वाराणसी के भवन स्वामी के निर्धारण को कोई अधिकार इस न्यायालय को नहीं है परन्तु प्रथम अति0 सिविल जज, वाराणसी

महोदय के आदेश दिनांक 17.5.1988 के अन्तर्गत वाद सं0–35 सन् 1961 द्वारा यह तथ्य निर्विवाद रूप से सिद्ध किया जा चुका है कि प्रश्नगत भवन के भवन स्वामी प्रार्थी श्री विश्वनाथ मिश्र नही ं है बल्कि उन्ह ें उससे बेदखल करने का आदेश पारित किया गया है इस प्रकार प्रार्थी श्री विश्वनाथ मिश्र के निर्मुक्ति प्रार्थना पत्र दिना ंक 10.1.85 का ` स्वीकार करने का ` कोई औचित्य ही नही ं है। दीवानी अदालत के आदेश दिनांक 17.5.1988 में वाद बिन्दु सं0–20, 21 व 22 के निर्णय में न्यायालय द्वारा यह निर्णित किया गया है कि वादी सं0–1 श्रीमती दिवानिनी बद्रीनाथ साहिबा द्वारा श्री नरेन्द्रजीत सिंह का ` भवन सं0–सी0के0 19/08 ठठेरी बाजार, वाराणसी का एक्जीक्यूटर उचित ढंग से नियुक्त किया गया। इस प्रकार श्री नरेन्द्रजीत सिंह को आपत्तिकर्तागण श्री रतनशंकर चौरसिया आदि के पक्ष में बयनामा दिनांक 25.3.1983 को करने का (श्री नरेन्द्रजीत सिंह को) पूर्ण अधिकार था और इसके आधार पर प्रश्नगत भवन के वर्तमान भवन स्वामी आपत्तिकर्तागण श्री रतनश ंकर चौरिसिया आदि सिद्ध होते हैं अतः प्रश्नगत भवन का वह भाग जो स्व0 श्रीमती सत्यभामा देवी के किरायेदारी में था तथा जो अब रिक्त है को आपत्तिकर्तागण श्री रतन शकंर चौरसिया आदि के पक्ष में ही निर्मुक्त किया जाना न्यायोचित है। इस प्रश्नगत भवन भाग के सम्बन्ध में अन्य आवेदकों का आवंटन प्रार्थना पत्र निरस्त होने योग्य है।

स्व0 श्रीमती सत्यभामा देवी द्वारा प्रश्नगत भवन संख्या– सी0के 19/8, ठठेरी बाजार शहर वाराणसी के प्रथम तल का एक दो दरी कमरा, एक कोठरी मय दालान व अन्य भाग जो उनके किरायेदारी में था, आपत्तिकर्तागण श्री रजन शंकर चौरसिया आदि के पक्ष में निर्मुक्त किया जाता है। आपैचारिक आदेश निर्गत हा। "

6. Aggrieved with the aforesaid order dated 22.07.1988 passed by the Rent Control and Eviction Officer/ City Magistrate, Varanasi, the petitioner filed Rent Revision No.150 of 1988 (Dr. Vishwanath Mishra vs. Rent Control and Eviction Officer/ City Magistrate, Varanasi and another) under Section 18 of the U.P. Act 13 of 1972 in which he claimed himself to be the landlord of the house in question on the ground that his grandfather Jawahar Lal Mishra and thereafter his father Raghunath Mishra and now he is in possession of the house in question. The aforesaid Rent Revision No.150 of 1988 (Dr. Vishwanath Mishra vs. Rent Control and Eviction Officer/ City Magistrate, Varanasi and another), was dismissed by the impugned judgment dated 24.10.2000 passed by the XIIIth Additional District Judge, Varanasi. The revisional court recorded its findings as under:

"मैंने एक पक्षीय प्रार्थी को सुना एवं पत्रावली का अध्ययन किया।
विवादित मकान सी.के. 19/8 ठठेरी बाजार, शहर वाराणसी में स्थित है, इस पर विवाद नहीं है। प्रश्नगत भवन के जिस अंश के बारे में, जिसका विवरण प्रार्थी के निर्मुक्ति प्रार्थना–पत्र के अन्त में दिया गया है, निर्मुक्ति आदेश चाहा गया है उसमें श्रीमती सत्यभामा किरायेदार रहीं, जिनकी मृत्यु हो गई, इस पर भी विवाद नहीं है। प्रार्थी निगरानीकर्ता की ओर से यह कहा गया कि अवर न्यायालय ने पत्रावली पर उपलब्ध साक्ष्य को नजरन्दाज करते हुए मनमाने तरीके से निर्णय दिया है, जबकि विवादित मकान का वाकई मालिक तरीक प्रार्थी विश्वनाथ मिश्र हैं। अब देखना है कि क्या विवादित मकान का स्वामी पत्रावली पर उपलब्ध साक्ष्य से प्रार्थी सिद्ध होता है। यह सत्य है कि अधिनियम संख्या–13/72 की धारा–16 (1)(बी) में निर्मुक्ति आदेश पारित करते समय केवल लैण्डलार्ड

देखा जाना आवश्यक है, स्वामित्व देखना आवश्यक नहीं। लेकिन चूंकि इस मामले में विपक्षीगण रतनशंकर चोरसिया आदि ने प्रार्थी को मकान मालिक का केयर टेकर (एजेन्ट) बताया है, इसलिए निर्मुक्ति प्रार्थना–पत्र के निरस्तारण में पत्रावली पर उपलब्ध साक्ष्य से स्वामित्व पर विचार करना आवश्यक है, क्योंकि एजेन्ट धारा 3 (जे) एक्ट नं0–13/1972 के अनुसार लैण्डलार्ड तो हो सकता है, लेकिन इसी धारा–3 (जी) के अनुसार एजेन्ट लैण्डलार्ड धारा– 16 (अ) अथवा धारा–21 के अन्तर्गत अपनी आवश्यकता व उपयोग के लिए निर्मुक्ति का प्रार्थना –पत्र नहीं दे सकता है। प्रार्थी ने यह कहा है कि विवादित मकान के मालिक पहले उसके बाबा जवाहर मिश्र थे उसके बाद उसके पिता रघुनाथ मिश्र हुए और अब वह मालिक है। स्वामित्व वादी के बाबा को कैसे प्राप्त हुआ, इसके बारे में कहीं कुछ वादी ने नहीं कहा। जब कि विपक्षीगण ने सूची 149 से 19 अदद कागजात दाखिल किया है जिसमें प्रथम कागज प्रार्थना पत्र रघुनाथ सम्वत 1986 का है, जिसमें रघुनाथ मिश्र ने जो प्रार्थी के पिता है यह साफ स्वीकार किया है कि विवादित मकान की मिलकियत से उन्हें कोई ताल्लुकात व वास्ता सरोकार नहीं है। कागज संख्या–156 हुकुमनामा असाढ़ 15 सम्वत 1986 बाबत नियुक्ति रघुनाथ मिश्र एजेन्ट/केयर टेकर है। कागज संख्या–159 नकल वसीयतनामा है, जिसे विद्यावती देवी ने बी.एस.एस.डी. कालेज कानपुर के पक्ष में विवादित मकान का निष्पादित किया है। 35 सन् 1961 मूल वाद की प्रति कागज संख्या–162 है, जिसे विद्यावती देवी ने वादी व उसके पिता के विरूद्ध दाखिल किया है। इसके अलावा कागज संख्या–168 लगायत 188 हिसाब एवं पत्र हैं, जिसे रघुनाथ मिश्र ने दीवानिनी विद्यावती देवी व स्टेट जम्मू कश्मीर को भेजा है। कागज संख्या–194 कर निर्धारण अधिकारी को सन् 1959 में भेजा गया पत्र है। इसमें रघुनाथ मिश्र ने अपने को एजेन्ट आफ अमरनाथ विवादित मकान के सम्बन्ध में बताया है। इन तमाम अभिलेखीय साक्ष्य, जिसका विवरण अवर न्यायालय ने नहीं किया है, से स्पष्ट हो जाता है कि विवादित मकान दीवान स्टेट जम्मू कश्मीर का रहा, बाद में श्रीमती विद्यावती देवी दीवानिनी को प्राप्त हुआ और दिवानिनी ने इस मकान की वसीयत बी0एस0एस0डी0 कालेज कानपुर के पक्ष में कर दी। यह सभी अभिलेख व तथ्य 147 ग शपथ पत्र तो रतन शंकर चौरसिया द्वारा किया गया है से समर्थित है। प्रार्थी की ओर से अपर आयुक्त के निर्णय दिनांकि 5. 11.60 का हवाला देते हुए कहा गया कि विवादित मकान पर नगर महापालिका के कागजात में उसका नाम दर्ज है। मेरे विचार से यह निर्णय जो कागज संख्या 207 है प्रार्थी को लाभ नहीं देता, क्योंकि इसमें प्रार्थी के पिता रघुनाथ मिश्र का नाम बतौर एजेन्ट श्रीमती विद्यावती देवी अंकित है। द्वितीय दाखिल खारिज अपील का निर्णय दिनांकित 24.4.91 जो द्वितीय अपर जिला जज, वाराणसी द्वारा रतन शंकर चौरसिया बनाम नगर महापालिका आदि में पारित किया गया है तथा लघुवाद न्यायाधीश द्वारा विश्वनाथ मिश्र बनाम जगत किशोर मिश्र लघुवाद संख्या–495/79 में जो निर्णय दिनांक 24.8.91 को दिया गया है, इनके आधार पर भी विवादित मकान का स्वामी प्रार्थी नहीं कहा जा सकता, बल्कि मात्र वह एजेन्ट रहा। नगर पालिका, वाराणसी के कर निर्धारण पंजिका की नकल प्रार्थी ने दाखिल किया है, जिसमें भी रघुनाथ मिश्र एजेन्ट बद्रीनाथ अंकित है। इस तरह पत्रावली पर उपलब्ध साक्ष्य जिनका विचारण अवर न्यायालय में नहीं किया है, से भी इस स्तर पर यह स्पष्ट है कि वादी अपने पिता के समय से मात्र विवादित मकान का एजेन्ट है। धारा 3 (जे) अधिनियम संख्या–13/72 में वह एजेन्ट के नाते लैण्डलार्ड है, लेकिन उसे अपनी आवश्यकता व जरूरत के लिए मकान को निर्मुक्त कराने का अधिकार नहीं है। प्रार्थी का यह कथन कि अवर न्यायालय का निर्णय स्वामित्व के सन्दर्भ में साक्ष्य के विपरीत है, ऐसा नहीं कहा जा सकता। अवर न्यायालय ने मूल वाद संख्या–35/61 में पारित निर्णय के आधार पर अपना आदेश पारित किया है। उक्त निर्णय में श्रीमती विद्यावती देवी को विवादित मकान का मालिक घोषित किया गया है। प्रार्थी की ओर से यह कहा कि उक्त निर्णय की डिक्री का कियान्वयन माननीय उच्च न्यायालय के अपील संख्या–600/88 विश्वनाथ बनाम नरेन्द्रजीत में पारित आदेश से स्टे है, इसलिए उक्त मूल वाद 35/61 के आधार पर पारित अवर न्यायालय का निर्णय अवैधानिक है। मेरे विचार से प्रार्थी की यह बहस भी उचित नहीं है, क्योंकि मूल वाद संख्या 35/61 में उपरोक्त डिक्री अपास्त नहीं हुई है, इसका कियान्वयन भी स्थगित नहीं है, बल्कि इस डिक्री के आधार पर कराये जाने वाले निष्पादन को माननीय उच्च न्यायालय ने अपने आदेश दिनांकित 19.12.88 से स्थागित किया है। अतः ऐसा नहीं माना जा सकता कि मामला संख्या 35/61 में विद्वान सिविल जज द्वारा पारित निर्णय समाप्त हो चुका है। प्रार्थी की ओर से निर्णीत विधि ए.आर.सी. 1980 पृष्ट 388 श्रीमती केलसाश्वासी बनाम चतुर्थ अपर जिला जज आदि, ए.आर.सी. 1981 पृष्ट–43 कुवंर गुलाब बनाम जिला आपूर्ति अधिकारी आदि ए.आर.सी. 1980 पृष्ट–502 तेजभान मदन बनाम द्वितीय अपर जिला जज इलाहाबाद आदि, ए.आर.सी. 1982 पृष्ट–120 रघुनाथ प्रसाद बनाम प्रथम अपर जिला जज, नैनीताल का हवाला दिया गया। इन सभी निर्णीत विलियों में माननीय उच्च न्यायालय ने मूलतः यह सिद्धान्त प्रतिपादित किया है कि जहां स्वत्व सम्बन्धी मूढ़ प्रश्न बाद में उठता है वहां स्वत्व सम्बन्धी

ऐसे प्रश्न को निर्णीत करना निर्मुक्ति प्रार्थना–पत्र के निस्तारण के दौरान उचित नहीं है क्योंकि यह संक्षिप्त कार्यवाही है। मेरे विचार से उक्त निर्णीत विधियों का लाभ वर्तमान मामले में प्रार्थी को नहीं दिया जा सकता, क्योंकि यहां पत्रावली पर उपलब्ध साक्ष्य से प्रार्थना–पत्र के निस्तारण के लिए स्वामित्व का निर्धारण करना पूरी तरह सम्भव है। इस स्तर पर यह प्रश्न निर्णीत किया जा सकता है कि प्रार्थी एजेन्ट है या मालिक। वास्तव में स्वतव का निर्धारण मूल वाद संख्या–35/61 की डिक्री से हो चुका है, जिसका निर्णय भी पत्रावली पर उपलब्ध है। अतः ऐसा नहीं कहा जा सकता कि अवर न्यायालय ने स्वत्व के बारे में अपने क्षेत्राधिकार का अतिक्रमण करते हुए निर्णय दिया है।

अगला बिन्दु अवधारण हेतु यह है कि क्या स्व0 सत्यभामा व प्रार्थी का रिश्ता किरायेदार व लैण्डलार्ड का रहा तथा रतनशंकर चौरसिया अजनगी व्यक्ति हैं और उनसे इस मकाान से कोई मतलब नहीं है। जहां तक सत्यभामा व प्रार्थी के बीच किरायेदार व लैण्डलार्ड के रिश्ते का प्रश्न है, यह पत्रावली पर उपलब्ध साक्ष्य से साबित है, लेकिन प्रार्थी लैण्डलार्ड किराया वसूलने के लिए एजेन्ट की हैसियत से था, वास्तविक स्वामी की हैसियत से नहीं। प्रारम्भ में सत्यभामा की दो लड़कियों ने आपत्ति दाखिल करके प्रार्थी के प्रार्थना–पत्र का विरोध किया था। दिनेश कुमार विमला अग्रवाल के पुत्र ने कागज संख्या–40 ग अपना शपथ–पत्र देकर विपक्षी रतनशंकर चौरसिया के केस को स्वीकार किया है और यह कहा है कि विवादित मकान दीवान स्टेट जम्मू कश्मीर की सम्पत्ति है और प्रार्थी मात्र उसका केयरटेकर व एजेन्ट है। बाद में दिनेश कुमार अग्रवाल ने अपना एक शपथ पत्र देकर प्रार्थी के केस को स्वीकार किया है, लेकिन इस स्वीकारोक्ति से कोई असर नहीं पड़ता है और इससे प्रार्थी विवादित मकान का वास्तविक स्वामी नहीं बन जायेगा। अधिक से अधिक व एजेन्ट/केयरटेकर होगा। जैसा कि मैंने बताया है कि एजेन्ट अपने उपयोग व आवश्यकता के लिए धारा–16(2)(बी) के अन्तर्गत भवन को निर्मुक्त नहीं करा सकता। रतन शंकर चौरसिया के सम्बन्ध में वादी की ओर से यह कहा गया कि यह मकान व किरायेदार के लिए अजनबी व्यक्ति है। इस सन्दर्भ में जो प्रार्थी का कथन है यह भी मानने योग्य नहीं है। श्रीमती विद्यावती देवी दीवानिनी ने एक वसीयतनामा दिनांक 3.10.60 को निष्पादित करके विवादित मकान का स्वामित्व बी.एस. एस.डी. कालेज कानपुर को दे दिया। उनकी मृत्यु के बाद मकान मालिक बी.एस.एस.डी. कालेज हुआ और बी.एस.एस.डी. कालेज के सचिव तथा अध्यक्ष नरेन्द्र जीत सिंह ने एक बैनामा दिनांक 25.3.83 को निष्पादित करके विवादित भवन रतनशंकर चौरसिया व उनके पुत्रों को बेच दिया। बैनामा की छाया प्रति कागज संख्या–113 पत्रावली में दाखिल है। इस तरह विवादित मकान के सन्दर्भ में रतन शंकर चौरसिया को अजनबी व्यक्ति नहीं कहा जा सकता। प्रार्थी की ओर से यह कहा गया कि रतनशंकर चौरसिया आदिने मूल वाद संख्या–35/61 में पक्ष बनने का प्रार्थना पत्र दिया था, जिसे विद्वान सिविल जज द्वारा स्वीकार कर लिया गया था, जिसके विरूद्ध निगरानी माननीय उच्च न्यायालय में प्रार्थी ने दाखिल की और रतनशंकर चौरसिया आदि पक्ष नहीं बन पाये। मेरे विचार से इससे कोई अन्तर नहीं पड़ता है। यदि मूल वाद संख्या–35/61 के वाद बिन्दुओं का निस्तारण रतन शंकर चौरसिया को बिना पक्ष बनाये किया जा सकता था तो उन्हें पक्ष नहीं बनाया गया, लेकिन उनके पक्ष न बनाये जाने से उनका बैनामा एवं विवादित भवन के सन्दर्भ में दिया गया अधिकार समाप्त नहीं हो जायेगा। प्रार्थी की ओर से एक तथ्य यह रखा गया कि बैनामा निष्पादित करने से रोकने के लिए मूल वाद संख्या 223/79 विश्वनाथ मिश्र बनाम नरेन्द्र जीत सिंह दाखिल किया गया था, जिसमें बैनामा निष्पादन से प्रतिवादी को रोका गया था। इसके बावजूद प्रतिवादी ने निष्पादन किया, अतः बैनामा शून्य है, मेरे विचार से ऐसा नहीं है। दौरान वाद कोई बैनामा जहां निष्पादित हुआ है वहां वाद के अन्तिम निर्णय पर उसका अस्तित्व निर्भर करता है, मूलतः बैनामा शून्य नहीं है। इस तरह मेरे विचार से विवादित सम्पत्ति का स्वामित्व बैनामे के बाद से रतनशंकर चौरसिया आदि के पास व प्रार्थी की ओर से एक बहस यह की गई कि रतनशंकर चौरसिया द्वारा निर्मुक्ति का कोई प्रार्थना पत्र नहीं दिया गया था, इसके बावजूद भी अवर न्यायालय ने उसके पक्ष में निर्मुक्ति आदेश दिया। मेरे विचार से अवर न्यायालय का आदेश इस आधार पर अवैधानिक नहीं है क्योंकि धारा 16 (2)(बी) की कार्यवाही संक्षिप्त कार्यवाही होती है। इसमें आपत्ति व प्रार्थना पत्र पर विचार करने के उपरान्त यदि न्यायालय आपत्ति कर्ता के तथ्य को सही मानता है तो निर्मुक्ति आदेश आपत्तिकर्ता के पक्ष में किया जा सकता है तथा इस आधार पर अवर न्यायालय का आदेश अवैधानिक नहीं है।

प्रार्थी पक्ष की ओर से एक तथ्य यह रखा गया है कि अवर न्यायालय के विरूद्ध उन्होंने स्थानान्तरण प्रार्थना पत्र जिलाधिकारी महोदय के यहां प्रस्तुत किया था। जिलाधिकारी ने पत्रावली तलब की थी, लेकिन इस स्थानान्तरण के तथ्य को नजरअन्दाज करते हुए अवर न्यायालय द्वारा निर्णय पारित किया गया है जिससे प्रार्थी का हित प्रभावित हुआ है। मेरे विचार से प्रार्थी का यह भी कथन मानने योग्य नहीं है क्योंकि स्थानान्तरण प्रार्थना पत्र पर फाइल तलब होने से

अथवा स्थानान्तरण प्रार्थना–पत्र दिये जाने से न्यायालय कोई निर्णय देने से वंचित नहीं हो जाता, जब तक कि मुकदमे की कार्यवाही को प्रवर न्यायालय स्थगित न कर दे। वैसे भी जो निर्णय अवर न्यायालय द्वारा दिया गया है, उससे ऐसा नहीं लगता कि नाराज होकर अथवा साक्ष्य व विधि के सिद्धान्तों की तिलांजली देकर आदेश पारित किया गया है। ऐसा भी नहीं है कि स्थानान्तरण प्रार्थना–पत्र दिये जाने के बावजूद अवर न्यायालय द्वारा निर्णय पारित करने से अवैधानिक तरीके से प्रार्थी का हित प्रभावित हुआ है।

उपरोक्त विवेचना से मेरे विचार से विद्वान किराया नियंत्रण एवं निष्कासन अधिकारी द्वारा दिया गया निर्णय पूर्णतया तथ्य व विधि के अनुसार है। निर्णय पारित करने में किराया नियंत्रण एवं निष्कासन अधिकारी ने अपने क्षेत्राधिकार के परे कार्य नहीं किया है और न क्षेत्राधिकार का प्रयोग करने में असफल हुए हैं।

निष्कर्षतः यह निगरानी बलहीन है और निरस्त किये जाने योग्य है।

आदेश

निगरानीकर्ता की यह निगरानी सव्यय निरस्त की जाती है। निर्मुक्ति वाद संख्या–3/85 विश्वनाथ मिश्र बनाम सरकार में किराया नियंत्रण व निष्कासन अधिकारी द्वारा दिनांक 22.7.88 को पारित निर्णय पुष्ट किया जाता है।"

7. Aggrieved with the order of the Rent Control and Eviction Officer/ City Magistrate, Varanasi dated 22.07.1988 under Section 16(1)(b) of the U.P. Act XIII of 1972 in Case No.3 of 1985 rejecting the release application of the petitioner dated 08.01.1985 and the impugned judgment dated 24.10.2000 in Rent Revision No.150 of 1988 passed by the XIIIth Additional District Judge, Varanasi, the petitioner had filed the present writ petition under Article 226 of the Constitution of India which has been subsequently amended as a petition under Article 227.

8. By order dated 30.11.2012 passed by this court, the petition was dismissed, which was challenged by the petitioner in Civil Appeal No.1328 of 2017. By order dated 01.02.2017 passed by Hon'ble Supreme Court, the aforesaid order of this court dated 30.11.2012 was quashed and the matter was remanded with the following observations:

"Having regard to the circumstances of the case, we are satisfied that the impugned order of the High Court suffers from a misdirection in law. What was necessary for the High Court was to determine as to who is the landlord of the premises in question that is to say to whom the rent of the building was payable. It was not necessary to determine the question of title in such a situation which is secondary. Thus, it would have been appropriate in the interest of justice if the High Court has determined this question.

In the facts and circumstances of the case, we consider it appropriate to set aside the impugned judgment and order passed by the High court and remand the case back to the High court for a decision on the question as to who is the landlord of the premises in question. We order accordingly. The High Court shall also decide the application afresh for release of the premises in question in accordance with such finding. The High Court is requested to decide the matter as expeditiously as possible on its own merits and in accordance with law.

With the aforesaid directions, the appeal is disposed of. "

9. A counter affidavit on behalf of respondent Nos. 3/1, 3/2 and 3/4 dated 3011.2017 has been filed which has been replied by the petitioner by rejoinder affidavit dated 4.2.2018. Paragraph Nos. 6

and 7 of the counter affidavit and its reply in paragraph no.7 of the aforesaid rejoinder affidavit are reproduced below:

Counter Affidavit	Rejoinder Affidavit
Para-6.That when agent Raghu Nath Mishra did not furnish account and rent, the land lady, vide notice dated 29/05/1958 terminated thelicense and filed a suit no.35 of 1961 (Smt. Vidyawati Devi v/s Raghu Nath Mishra) for ejectment and arrear of rent, before Civil Judge, Varanasi. During pendency of suit Smt. Diwan Vidyawati Badi Nath died on 14/06/1964, substituted by Narendra Jeet Singh and Sushil Devi and later on answering respondents were also substituted after purchase of the premises through registered sale deed dated 06.04.1983. Para-7. That during pendency of above noted suit before trial court, Sri Narendra Jit Singh, Secretary of the B.S.S.D College, on 06/04/1983 executed a registered sale deed in favour of answering respondent namely Sri Ratanshankar Chaurasia (respondent no.3, now deceased) and his three sons namely, Bhola Nath Chaurasia, Jawahar Lal Chaurasia, Gopal Ji Chaurasia, jointly. A true copy of the registered sale deed dated 06/04/1983 is being filed as Annexure No.CA-1 to this Counter affidavit.	Para-7. That the contents of paragraph nos. 6 and 7 of the counter affidavit are matter of record which may verified therefrom. However it is further submitted that there is no transfer deed/alleged will deed alleged to be executed by Smt. Diwan Vidyawati Badri Nath, Srinagar (Jammu & Kashmir) in favour of B.S.S.D. College, Kanpur, hence the sale deed dated 06.04.1983 executed in favour of answering respondent by the said college/Sri Narendra Jeet Singh is without any basis and is void document and confirms no right, titled and interest in favour of the answering respondent.

Submission on behalf of the Petitioner:-

10. Learned counsel for the petitioner submits as under:

(i) The petitioner being an agent of the owner of the house in question namely, Smt. Vidyawati Badrinath, is the landlord of the disputed house and,

therefore his release application under Section 16(1)(b) of the Act, should have been allowed by the Rent Control and Eviction Officer, Varanasi. Reliance is placed upon a judgment of this Court in Ram Prakash Gupta v. District Judge, Kanpur, 2004 (1) ARC 409 (Paragraph No.5) in which it has been held that under Section 3(j) of the Act, a person authorised to manage the tenanted property and to collect its rent on behalf of the landlord is also landlord under Section 3(j) of the Act.

(ii) In the impugned judgment dated 24.10.2000 in Rent Revision No.150 of 1988, the revisional court has held the petitioner to be landlord as evident from the finding recorded at running page-120 of the petition. Therefore, there was no occasion for the court below to uphold the order passed under Section 16(1)(b) of the U.P. Act 13 of 1972 dated 22.07.1988 in Case No.3 of 1985 passed by the Rent Control and Eviction Officer/ City Magistrate, Varanasi.

(iii) In another S.C.C. Suit No.495 of 1979 (Dr. Vishwanath Mishra vs. Jagat Kishore Mishra) decided on 24.08.1991 the petitioner was held to be the landlord. Therefore, while passing the impugned judgment dated 24.10.2000, the revisional court should have accepted the petitioner as landlord of the disputed house No.CK-19/8, Thatheri Bazar, City Varanasi.

(iv) The release application under Section 16(1)(b) of U.P. Act 13 of 1972 was filed by the petitioner on 10.01.1985 for release of the disputed accommodation in occupation of the tenant Late Smt. Satyabhama Devi, for the self need. Therefore, it was liable to be allowed.

(v) The release applications under Section 16(1)(b) were filed by the petitioner as well as by the respondent Nos.3 and 4. The petitioner has shown his bona fide need but the respondent Nos.3 and 4 have not shown their bona fide need in their release application for the disputed accommodation. Consequently, the release application of the petitioner was liable to be allowed and the release application of the respondent Nos.3 and 4 was liable to be rejected. But the court below has committed manifest error of law to uphold the order of the Rent Control and Eviction Officer allowing the release application of the respondent Nos.3 and 4.

(vi) No finding on the point of bonafide need of the respondent Nos.3 and 4 was recorded by the Rent Control and Eviction Officer or the court below in the impugned judgments. Therefore, the release order in favour of the respondent Nos.3 and 4, itself was bad.

11. In support of his submission that the petitioner is the landlord of the disputed house, learned counsel for the petitioner has relied upon a judgment of this court in ***Dr. Sita Ram Gandhi vs. IVth Additional District Judge and another, 1983 ARC 782 (Para-10) and Brij Bhushan Sharma vs. Kamla Prasad, 2011 (3) ARC 381 (Paras- 8, 9 and 10)***.

12. Neither any other point has been argued nor any other judgment has been cited before me by learned counsel for the petitioner except those afore-noted.

Submission on behalf of the owner-respondents:-

13. Learned counsel for the respondents submits as under:

(i) Smt. Diwan Vidyawati Badri Nath was undisputedly owner and landlady of the house in question. Raghunath Mishra (father of the petitioner) was the agent of the aforesaid owner and landlady. Due to non furnishing the account and rent, the aforesaid **landlady vide notice dated 29.5.1958 terminated the agent Raghunath Mishra and his licence** and filed a suit No.35 of 1961 for ejectment and recovery before the Civil Judge, Varanasi.

(ii) During pendency of the suit, Smt. Diwan Vidyawati Badri Nath died on 14.6.1964. She was substituted by Sri Narendra Jeet Singh, Secretary of B.N.S.D. College, Kanpur after the house was purchased by the respondents by registered sale deed dated 6.4.1983, their name was substituted. Averments made paragraph Nos. 6 and 7 of the counter affidavit dated 30.11.2017, have been admitted by the petitioner in paragraph no.7 of his rejoinder affidavit. **Thus, undisputedly, Sri Raghunath Mishra was the agent and his agentship terminated by the owner and landlady Smt. Diwanani Vidyawati Badri Nath.** Therefore, the petitioner is not landlord and his release application was lawfully rejected by the court below.

(iii) The findings recorded by the Rent Control and Eviction Officer/City Magistrate, Varanasi and the revisional court, are the findings of fact based on consideration of relevant evidences on record, whereby it has been held that the respondent purchaser of the property, are the owner and landlord and not the petitioner. These findings of facts are based on consideration of relevant evidences on record, which cannot be interfered with in jurisdiction under Article 227 of the Constitution of India.

(iv) In the judgment dated 17.5.1988 in Suit No.35 of 1961 (Smt. Vidyawati Devi v. Raghu Nath Mishra), the Civil Judge, Varanasi also declared the aforesaid original owner and landlady to be the owner of the disputed house.

(v) Aggrieved with the judgment in O.S. No.35 of 1961, the petitioner herein filed a Civil Appeal No.600 of 1988 (Vishwanath Mishra v. Narendra Jeet Singh), which was dismissed by juddgment dated 30.05.1998 passed by the Vth Additional District Judge, Varanasi and it was concluded that Smt. Diwan Vidyawati Badri Nath was the owner of the disputed house and Sri Jawahar Mishra and Raghunath Mishra were her agent and care-taker of the property who used to submit account to her. It was also found that the petitioner herein admitted the fact that the account of rental income was being submitted to the aforesaid original owner and landlady. In this regard learned counsel for the respondents has specifically referred to findings of the appellate court at internal page 22 of the jdugment dated 30.05.1998 in Civil Appeal No.600 of 1988.

(vi) Merely because the agent Raghunath Mishra was collecting rent of the disputed house for and on behalf of the original owner and landlady, he or his son i.e. the present petitioner shall not become landlord within the meaning of Section 3(j) of U.P. Act 13 of 1972.

14. Reliance is placed on the judgment of Hon'ble Supreme Court in **M.M. Quasim v. Manohar Lal sharma and others, (1981) 3 SCC 36 (Paragraph nos. 15,16,17 and 18) and judgments of this Court in Purqan Ahmad alias Mana and another v.**

VIIth A.D.J. and others (2005) All LJ 119 (Paragraph Nos. 8 and 9) and Mam Chand v. Pramodini Srivastava, (2014) 5 ADJ 231.

DISCUSSION AND FINDINGS

15. I have carefully considered the submissions of the learned counsels for the parties and perused the record.

16. It has been admitted before this Court, as also reflected from the submission of the learned counsel for the petitioner noted in paragraph 9(i) above, that Diwanani Smt. Vidyawati Badri Nath of Jammu & Kashmir, was the owner and landlady of the disputed house. She had appointed Grandfather of the petitioner and thereafter father of the petitioner as her agent and care-taker of the disputed house. These agents were looking after the house and used to collect rent and submit account to the original owner and landlady. In paragraph-6 of the counter affidavit, the respondents have stated that when agent Raghunath Mishra (father of the petitioner) did not furnish account and rent, the landlady Smt. Diwan Vidyawati Badri Nath terminated his licence. This fact has been admitted by the petitioner in para 7 of the rejoinder affidavit. The petitioner has claimed that he being an agent is the landlord and, therefore his release application dated 10.1.1985 filed for personal need of the portion falling vacant on account of the death of the tenant Smt. Satyabhama Devi on 02.01.1985, should have been allowed. **Thus, on the afore-noted admitted facts of the case, the question to be determined in this petition in terms of the direction of Hon'ble Supreme Court in the order dated 1.2.2017, is as under :**

Question:-

"Whether the petitioner being an agent of the original owner and landlady of the house in question, is landlord within the meaning of Section 3(j) of U.P. Act 13 of 1972 ?"

17. The aforesaid question has been framed with the consent of the learned counsels for the parties for determination in this petition.

Status of Agent/ the petitioner:-

18. Chapter X of the Act,1872 contains detail provision with regard to agent and agency.

19. The word 'agent' has not been defined in U.P. Act 13 of 1972. It has been defined in Section 182 of the Indian Contract Act, as under:

Section 182 in The Indian Contract Act, 1872

182. "An "agent' is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the "principal'."

20. Since, in the present petition the dispute is limited to the question of an agent to be landlord in terms of Section 3(j) of the Act, therefore, it would be appropriate to examine as to whether an agent or caretaker may interfere in Principal's property and what would be the nature of his possession. These questions have been considered exhaustively by Hon'ble Supreme Court.

21. In **Southern Roadways Ltd., Madurai, represented by its Secretary**

v. S.M. Krishnan, (1989) 4 SCC 603 (Paragraph Nos. 11,12,14,18 and 22), Hon'ble Supreme Court held as under :

"11. At the outset, we may state that we are not so much concerned with the rival claims relating to actual possession of the suit premises. Indeed, that is quite irrelevant for the purpose of determining the rights of the company to carry on its business. Mr. Venugopal, learned counsel for the appellant also discreetly did not advert to that controversy. He, however, rested his case on certain facts which are proved or agreed. They may be stated as follows:

The company was and is the tenant of the suit premises and has been paying rent to the owner. The lease in respect of the premises has been renewed up to November 22, 1993. it was the company which has executed the lease and not the respondent. The respondent as agent was allowed to remain in possession of the premises. It was only for the purpose of carrying on company,s business. His agency has been terminated and his authority to act for the company has been put an end to. These facts are indeed not disputed. On these facts the contention of counsel is that when the agency has been terminated, the respondent has no right to remain in premises or to interfere with the business activities of the company.

12. The force of this argument cannot be gainsaid. Counsel, in our opinion, appears to be on terra firma. The principal has right to carry on business as usual after the removal of his agent. The Courts are rarely willing to imply a term fettering such freedom of the principal unless there is some agreement to the contrary. The agreement between the parties in this case does not confer right on the respondent to continue in possession of the suit premises even after termination of agency. Nor does it preserve right for him to interfere with the company's business. On the contrary, it provides that the respondent could be removed at any time without notice and after removal the company could carry on its business as usual. The company under the terms of the agreement is, therefore, entitled to assert and exercise its right which cannot be disputed or denied by the respondent.

14. There is yet another significant factor to be borne in mind when we deal with the rights of an agent. An agent who receives property or money from or for his principal obtains no interest for himself in the property. When he receives any such property he is bound to keep it separate from his own and that of others. Long ago, Lord Cottenham, L.C. (Foley v. Hill, 2 HLC 28:1843-60 All E.R. (Reprint) 16,19 said:

"... So it is with regard to an agent dealing with property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is quasi a trustee for that particular transaction for which he is engaged."

18. The crux of the mater is that an agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor he can convert it into any other kind or use. His possession is the possession of the principal for all purposes. As the Kerala High Court in Narayani Amma v. Bhaskaran Pillai, AIR 1969 Kerala 214, observed: (AIR p. 217, para 6)

“The agent has no possession of his own. What is called a caretaker's

possession is the possession of the principal."

22. In this case, the respondent's possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file suit for recovery of possession. The respondent has no right to remain in possession of the suit premises after termination of his agency. He has also no right to interfere with the company's business. The case, therefore, deserves the grant of temporary injunction. The learned Single Judge of the High Court in our judgment, was justified in issuing the injunction. The Division Bench of the High Court was clearly in error in vacating it."

22. In **Smt. Chandrakantaben v. Vadilal Bapalal Modi and others, (1989) 2 SCC 630 (Paragraph -19), Hon'ble Supreme Court has held that the possession of the agent is the possession of the principal and in view of the fiduciary relationship he cannot be permitted to claim his own possession. Thus, the agent is an extended hand of principal.**

23. **Thus, an agent who receives property or money from or for his principal obtains no interest for himself in the property. An agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor he can convert it into any other kind or use. His possession is the possession of the principal for all purposes. The agent has no possession of his own. Caretaker's possession is the possession of the principal. The possession of the agent is the possession of the principal and in view of the fiduciary relationship he cannot be permitted to claim his own possession. Thus, agent is the extended hand of principal. Therefore, father of the petitioner as agent and even assuming the petitioner also to be an agent, has acquired no interest in the disputed property of the Principal Late Divan Vidyawati Badrinath and in view of his fiduciary relationship, he cannot be permitted to claim his own possession. His possession is possession of the principal for all purposes.**

Whether an agent-qua-tenant is landlord under Section 3(j) and his status against owner/ principal:-

24. Section 3(j) of the U.P. Act XIII of 1972 defines the word "Landlord" as under:

"Unless the context otherwise requires-

"Landlord", in relation to a building, means a person to whom its rent is or if the building were let, would be, payable, and includes, except in clause (g) the agent or attorney, or such person;"

25. Section 3(g) of the U.P. Act XIII of 1972, reads as under:-

"Unless the context otherwise requires-

"Family", in relation to a landlord or tenant of a building, means his or her-

(i) spouse;

(ii) male lineal descendants;

(iii) such parents, grandparents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her,

and includes, in relation to a landlord, any female having a legal right of residence in that building;"

26. Section 3(j) of the Act, defines the word 'landlord'. This definition includes an agent or attorney to the landlord except the word in clause (g) which defines the word 'Family'. It is also relevant to mention here that the definition clauses of Section 3 proceeded with the word 'Unless the context is otherwise required'. Hon'ble Supreme Court interpreted these words in the case of Ichchapur Industrial Cooperative Society LTD. v. Competent Authority, Oil and Natural Gas Commission and another, **(1997)2 SCC 42** (Paragraph No.27), K.V. Muthu v. Angamuthu Ammal, **(1997) 2 SCC 53** (Paragraph Nos. 10, 11, 12 and 13) and in Damadilal and others v. Parashram and others, (1976) 4 SCC 855 (Paragraph No. 12). Relying upon these judgments, this Court in judgment dated 9.9.2019 in S.C.C. Revision No.86 of 2019 (Munnu Yadav v. Ram Kumar Yadav and another) (Paragraph Nos. 13 and 14) held that the phrase '**Unless the contest otherwise requires' indicates that while construing, interpreting and applying the definition clause, the court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise. Where the definition is preceded with the phrase 'unless the context otherwise requires' the connotation is that normally the definition as given in Section should be applied and given effect to but it may be departed from if the context requires.**

27. The definition of "landlord" is inclusive in the sense that it is extended to "agent" or "attorney" also. Therefore, a landlord (owner) to whom rent is payable, if has authorized an agent or attorney for the aforesaid purpose of collection of rent, **such agent or attorney qua tenant, would also satisfy the definition of landlord under Section 3(j) of Act, 1972**. The context in which the term "landlord" has been used can be classified in more than one. The first is in the context of collection of rent. A rent would be payable in respect to a building to owner of building and he would undoubtedly qualify and satisfy the term "landlord". Secondly a lessee having right to further lease out the building and qua the person to whom he let out the premise, such sub-lessee would be 'landlord'. Thirdly if owner of building has authorized an agent to collect rent, vis a vis tenant, such agent of owner of building would also be a landlord within Section 3(j) of Act, 1972. Similar is the position of an attorney.

28. Therefore, vis a vis tenant, the agent or attorney, who satisfies definition of "landlord" under Section 3(j), would be a person who holds authority as agent or attorney, to represent the true owner of property, to do or not to do, or to act or not to act, in a particular manner, as authorized by owner. The attorney and agent by himself cannot claim to be the owner of property and simultaneously to claim that they satisfy definition of "landlord".

29. In Raj Mohan Krishna vs. Second Additional District Judge, AIR 1993 All. 40 (Para-8), this court held that the Prescribed Authority is a Tribunal of limited jurisdiction which has been constituted under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, for deciding applications under Section 21 or other provisions enumerated under the Act. It has no jurisdiction at all to examine the

correctness or otherwise of a decree passed by a competent Civil Court. The Tribunal has to proceed on the basis that the decree of a Civil Court is a valid decree and has to recognise the rights of the parties on its basis. It has been held in Khem Chand v. IV A.D.J. {1989 (2) ARC 344} that it is not open to any party to challenge the genuineness of a decree of a Civil Court before the Prescribed Authority and so long as the decree is not set aside it has to be accepted as genuine. In the present set of facts, there is a judgment and decree dated 17.05.1988 in O.S. No.35 of 1961 (Smt. Vidyawati Devi vs. Raghunath Mishra) passed by the Civil Judge, Varanasi for eviction of Raghunath Mishra (father of the petitioner) and the Civil Appeal No.600 of 1988 (Vishwanath Mishra vs. Narendra Jeet Singh) filed by the petitioner herein was dismissed by judgment dated 30.05.1998 passed by the court of Additional District Judge Vth Varanasi, against which the petitioner herein filed Second Appeal No.1196 of 1998 (Vishwanath Misra vs. Ratan Shankar Chaurasia), which is stated to be pending. The judgment and decree dated 17.05.1988 passed by the court of Civil Judge, Varanasi in O.S. No.35 of 1961, has admittedly been neither set aside nor modified.

30. In **Vinod Kumar Agrawal v. XVIIth Additional District Judge, Allahabad, 2013 (6) ALJ 110**, a bench of this court considered Section 3(j) of the U.P. Act XIII of 1972 and after referring to several judgments of this court and of Hon'ble Supreme Court, held as under:

"45. In the context of the words "occupation by himself or any members of family" there is a divergence in the opinion; whether these words would apply to anyone and not confined to only owner of property.

46. One of the earliest decision in this regard is Sri Laxkshmi Shanker Misra Vs. The 1st Additional District Judge, Allahabad and others, 1977 ARC 7. Hon'ble N.D. Ojha, J. (as His Lordship then was) observed:

"'Landlord' as defined in Section 3(j) of the Act in relation to a building, means a person to whom its rent is or if the building, were let would be payable and includes, except in clause (g) the agent or attorney, of such person. In cases where there is a privity of contract between two persons in pursuance of which rent is payable by one person to the other in respect of a building occupied by him in the capacity of a tenant, the person to whom rent is payable, in view of the agreement, would be the landlord of the person by whom the rent would be payable irrespective of the fact as to who was the actual owner of the property. It would be a case covered by the first part of the definition viz, the landlord would be such person to whom the rent of the building is payable. The position in law would, however, be different of an accommodation falls vacant and the question arises as to who is the landlord to whom notices as contemplated by rules 8 and 9 of the rules aforesaid are to be given before passing an order of allotment. At this stage the second part of the definition would be attracted, viz., the landlord would be the person to whom rent, if the building were let, would be payable. It may be emphasised that in either event landlord would be such person to whom rent is or would be payable as the case may be and not the person by whom rent is physically collected on behalf of the landlord would

himself become the landlord. Who would be the person to whom rent, if the building were let, would be payable is the crucial question. It would be the person authorised to let out the building and to recover rent from the tenants. Normally such person would be the owner of the building. However, if the owner has entered into a contract with some other person authorising him to let out the vacant building and to recover rent from the tenants either as his agent or attorney it may be that person who would be called landlord with in the definition of the said term under the Act. Similar may be the case when for the time being either by an order of the court or by operation of some law the right to let out the building and recover rent from the tenants vests in some person other than the owner."

(emphasis added)

47. Then in E.E. Dayal Vs. Smt. Phool Mani Dayal and others, 1977 ARC (SN 5) 4 Hon'ble R.M. Sahai, J. (as His Lordship then was) held that it is difficult to agree that merely because the respondent was permitted by the trust to collect rent, and, the petitioner started paying rent in view of this communication received from the Principal Officer of the Trust, the respondent become landlord of the premises. The mere fact that he was paying rent which was being collected by the respondent on behalf of the Trust, does not mean that she was admitted to be the owner of premises in dispute. The Court further said that for the purpose of Section 21 it cannot be accepted that an attorney or agent who becomes a landlord by virtue of definition clause can file an application for eviction of tenant on the ground that need of attorney or agent is genuine. What is to be seen under Section 21 is the need of the landlord-owner. It may be that the landlord may need the premises for his agent or attorney but that would be different in saying that the Act confers any right on the attorney or agent, himself, to file an application for release of accommodation on the ground that the premises are needed by them for their own personal use.

48. The next decision is Prem Chandra Pachit Vs. Second Additional District Judge, Saharanpur and others, 1978 ARC 394, a decision by Hon'ble K.C. Agrawal, J. Therein Prem Chandra Pachit was not owner of building. He claimed to have obtained a Theka of building so as to use the same as lodging house. He filed an application under Section 21(1)(a) of Act, 1972 for eviction of one, Ram Lal, a tenant in the building. An objection was raised that Prem Chandra Pachit being not an owner of building, was not a landlord so as to get a right to file application under Section 21(1)(a) of Act, 1972. The Court held that Sri Prem Chandra Pachit being only manager, did not satisfy requirement of Section 21(1)(a) which contemplates that an application can be filed only by a landlord, who needs the accommodation for himself or a member of his family. He (Prem Chandra Pachit) was not member of family of landlord, i.e., the owner of building.

49. The comes a decision of Apex Court in M.M. Quasim Vs. Manohar Lal Sharma and others, 1981(3) SCC 36, a judgment rendered by a three Judges Bench. The matter had arisen from Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. There, the definition of expression "landlord" contained in Section 2(d) of Bihar Statute is a bit

similar to Section 3(j) of Act, 1972. A provision somewhat similar to Section 21 was in Section 11 thereof. The marked distinction in Bihar and U.P. Rent Statute is one explanation in Section 11(1)(c), which says that in this clause the word "landlord" would not include an agent referred to in clause (d) of Section 2. Despite referring to aforesaid explanation, the stress of Apex Court was that word "occupation" would mean that a person as a matter of right must have the capacity to occupy the building and that must be a person who is owner of building. The relevant observations may be quoted as under:

"Therefore, while taking advantage of the enabling provision enacted in Section 11 (1) (c), the person claiming possession on the ground of his reasonable requirement of the leased building must show that he is a landlord in the sense that he is owner of the building and has a right to occupy the same in his own right. A mere rent collector, though may be included in the expression landlord in its wide amplitude cannot be treated as a landlord for the purposes of Section 11 (1) (c). This becomes manifestly clear from the explanation appended to the sub-section. By restricting the meaning of expression landlord for the purpose of Section 11(1)(c), the legislature manifested its intention namely that landlord alone can seek eviction on the ground of his personal requirement if he is one who has a right against the whole world to occupy the building himself and exclude any one holding a title lesser than his own. Such landlord who is an owner and who would have a right to occupy the building in his own right, can seek possession for his own use. The latter part of the section envisages a situation where the landlord is holding the buildings for the benefit of some other person but in that case landlord can seek to evict tenant not for his personal use but for the personal requirement of that person for whose benefit he holds the building. The second clause contemplates a situation of trustees and cesti que trust but when the case is governed by the first part of sub clause (c) of sub-section (1) of Section 11, the person claiming possession for personal requirement must be such a landlord who wants possession for his own occupation and this would imply that he must be a person who has a right to remain in occupation against the whole world and not someone who has no subsisting interest in the property and is merely a rent collector such as an agent, executor, administrator or a receiver of the property. For the purposes of Section 11(1)(c) the expression landlord could, therefore, mean a person who is the owner of the building and who has a right to remain in occupation and actual possession of the building to the exclusion of everyone else. It is such a person who can seek to evict the tenant on the ground that he requires possession in good faith for his own occupation. A rent collector or an agent is not entitled to occupy the house in his own right. Even if such a person be a lessor and, therefore, a landlord within the expanded inclusive definition of the expression landlord, nonetheless he cannot seek to evict the tenant on the ground that he wants to personally occupy the house. He cannot claim such a right against the real owner and as a necessary corollary he cannot seek to evict the tenant on the ground that he wants possession of the premises for his own occupation. That can be the only reasonable interpretation one can put on

the ingredients of sub-clause (c) of Section 11(1) which reads: "Where building is reasonably and in good faith required by the landlord for his own occupation..." Assuming that the expression 'landlord' has to be understood with the same connotation as is spelt out by the definition clause, even a rent collector or a receiver of the property appointed by the Court in bankruptcy proceedings would be able to evict the tenant alleging that wants the building for his own occupation, a right which he could not have claimed against the real owner. Therefore, the explanation to clause (d) which cuts down the wide amplitude of the expression 'landlord' would unmistakably show that for the purposes of clause (c) such landlord who in the sense in which the word 'owner' is understood can claim as of right to the exclusion of everyone, to occupy the house, would be entitled to evict the tenant for his own occupation."

(Emphasis added)

50. Here in the above case, the Court read the explanation to be only clarificatory but on principle held that eviction proceeding must be initiated by a landlord, who is the owner of property.

51. Then comes a decision of learned Single Judge (Hon'ble K.C. Agrawal, J.) in Smt. Sughra Begum Vs. Sri Ram and others, 1983(2) ARC 143. Following Apex Court's decision in M.M. Quasim (supra), the Court in paras 8 and 10 said:

"8. . . . . Under Section 21 a landlord can move an application for occupation by himself or any member of his family. The fact that only a person who is entitled to occupy can alone move an application indicates that one who is not entitled to occupy or has no right to occupy in his own right cannot apply for release under Section 21. An agent or attorney of an owner of the house may realize the rent of the house in respect of which power is conferred upon him by the owner to do so and for that purpose he may be considered to be landlord within the meaning of that expression defined in Section 3, but such a person would not be entitled to move an application under Section 21."

"10. . . . . For being entitled to apply under Section 21(1), that person must be entitled to occupy the premises in his own right. The expression "occupation for himself or for family members" has been deliberately used by the legislature to manifest its intention that the landlord alone can seek eviction on the ground of his personal requirement if he is one who has a right against the whole world to occupy the building."

(emphasis added)

52. In Naseeruddin and others Vs. Prescribed Authority, Meerut and others, 1988(1) ARC 517, Hon'ble R.P. Singh, J. in para 5 of the judgment Jalso took the view, "thus an agent or attorney of an owner of a house may realise the rent of house but such a person would not be entitled to make an application under Section 21(1)."

53. The above phrase in Section 21(1)(a), in the context of bona fide need of persons, for whose benefit such application can be filed, the definition of family was given an expansion, in some authorities, namely, Misri Lal Vs. Special Judge (Additional District Judge), Gorakhpur and others, 1988(2) ARC 430. Hon'ble R.K. Gulati, J. extended it to the domestic servants of landlord. The Court said, though technically, he may not

satisfy the definition of family, under Section 3(g) of the Act yet it may be included in spirit. Similarly it was extended to mother-in-law, daughter-in-law, grandchildren etc.; but in the context of the meaning of the word "landlord", who can initiate the proceedings, the position remains slightly complex.

54. In Smt. Ved Rani Diwan and another Vs. VIIIth Additional District Judge, Ghaziabad and others, 1996(2) ARC 14 Hon'ble Sudhir Narain, J. in para 7 of the judgment observed:

"7. . . . . The word ' landlord' in the context of Section 21(1)(a) will mean only such person who is not only entitled to realise the rent but also has a right under law to occupy for his personal use and such person alone can file application under Section 21(1)(a) of the Act. Respondent no.4 is owner and landlord of the premises in question and if she has authorized her husband to realise the rent, he cannot file an application for release under Section 21(1-A) of the Act in his own right."

(Emphasis added)

55. In Fakaruddin Khan [(Dead) through Lrs Salma Khan, widow and Salman Khan, son] Vs. Xth Additional District Judge, Kanpur and others, 1998(1) ARC 449 Hon'ble S.R. Singh, J. following Apex Court's decision in M.M. Quasim (supra), in para 8, said:

"The term "landlord" in Section 21(1-A) of the Act connotes landlord in the sense of being the owner of the building."

56. In Furqan Ahmad Alias Mana and another Vs. VIIth A.D.J. and others, 2005(2) AWC 1161 Hon'ble Tarun Agarwala, J. following decisions in Sri Laxkshmi Shanker Misra (supra); Smt. Sughra Begum (supra); and, Naseeruddin (supra) in para 10 of the judgment, said:

"10. There is no quarrel with the aforesaid proposition as submitted by the learned counsel for the petitioner. A person who has been authorised to realize the rent on behalf of the landlord becomes the landlord as contemplated under Section 3 (f) of the Act. But the said agent cannot file a release application for his own need or for his family members under Section 21 (1) (a) of the Act inasmuch as he is not the owner of the premises in question. The expression "occupation for himself or for family members" as provided under Section 21 (1) of the Act means that the person must be entitled to occupy the premises in his own right. Obviously, the agent is not authorized to occupy the premises in his own right. Therefore, the agent could not file an application for release of the premises for his own personal need."

(Emphasis added)

57. A discordant note, I find in Udai Singh Bhanuvanshi Vs. Kunj Behari Tewari, 2002(1) AWC 647, wherein Hon'ble A.K. Yog, J. observed that there is no reason to read the word "ownership" in the context of expression "landlord" when legislature itself in Section 3(j) has not confined itself to the owner. However, His Lordship further clarified the position by observing that there was a finding in the judgment of court below in the case before the Court that Kunj Behari Tewari was authorised to realise rent as "landlord". In respect to this finding that he was authorised to realise rent as landlord, there was no challenge. The Court observed that his status as landlord of accommodation was not challenged earlier and thus cannot be allowed to be assailed for the first time before this Court. That is how the Court distinguished earlier decisions in Smt. Sughra Begum (supra); Smt. Ved Rani

Diwan (supra); and M.M. Quasim (supra). Para 20 of the judgment clarifying above observations, reads as under:

"20. In the cases of Smt. Sughra Begum, Smt. Ved Rani Diwan and M.M. Quasim (supra), this Court held that an 'agent' or such other person cannot maintain release application under Section 21(1)(a) of the Act. The facts of the above cases are clearly distinguishable from the facts of the case in hand. In the present case in hand. 'Kunj Behari Tewari', who filed release application, was authorised to realise rent as 'landlord' and thus his status as the owner/ landlord of the accommodation as already discussed above, cannot be questioned or assailed in the present proceedings."
(Emphasis added)

58. For the purpose of Section 20 also this Court finds that who can institute suit is not specifically mentioned but from a careful reading of scheme it does not appear that a suit for ejectment can be filed by a mere agent or attorney even though the real owner/landlord has not joined the proceedings. If a tenant has been inducted by the owner, it is difficult to accept that his tenancy can be terminated by an agent or attorney, unless so permitted by the owner.

59. Further when there are more than one person satisfying the definition of "landlord", it is the landlord who has better rights or title over property who would exclude others. In order to attract Section 3(f) the plaintiff seeking ejectment of tenant has to show that there is denial of title of landlord. The word "title" here goes not to the authority of landlord to collect mere rent but here the title is something more than that. It is for this reason, and knowing it well that without possessing status of landlord, having semblance of ownership over property in dispute the petitioner would not succeed, learned counsel for the petitioner sought to rest his claim with respect to his status as owner. His status as owner and landlord of tenanted building, is basically founded on the agreement for sale, power of attorney, and free hold deed executed by Collector, Allahabad in 1999 in his favour.

60. Learned counsel for the petitioner sought to argue that concept of "ownership" is not to be imported here, as definition of "landlord" itself is an extended one so as to take within its ambit an agent or attorney also.

61. The submission, in the manner it is sought to be advanced, I find difficult to accept. The definition of "landlord" contained in definition clause has to be read in the context as discussed above. When somebody is authorised to collect rent, he is merely a collector of rent. The rent though is payable to him, in view of instructions issued by landlord-owner, to the tenant, that the rent should be paid to such an agent or attorney, and, in that sense, the agent or attorney may also be included or covered within the definition of "landlord", but his status is fortuitous and with the change of instructions of landlord-owner to tenant, he may/can loose such status at any point of time.

67. The above decisions fortify the view now being taken that a person when would satisfy the term "landlord", has to be looked into, in the light of statutory provisions, and in the context of other provisions of the Act concerned and the relevant facts of the case in hand. No universal principle can be applied in this regard."

31. Section 16(1)(b) of the Act 1972 provides that subject to the provisions of the Act, the District Magistrate may by order, release the whole or any part of such building or any land appurtenant thereto in favour of the landlord. Sub-Section (2) of Section 16, as relevant for the purpose of the present case; provides that no release order under Clause (b) of Sub-Section (1) shall be made unless the District Magistrate is satisfied that the building or any part thereof or any land appurtenant thereto, is bona fide required, by the landlord for occupation by himself or any member of his family or any person for whose benefit it is held by him either for residential purposes or for purposes of any profession, trade or calling. The petitioner alleging himself to be an agent or caretaker of the owner of the disputed house, filed the release application under Section 16(1)(b) of the Act 1972 for his personal need, whereas sub-Section (2) of Section 16 provides for a release order when the building or any part thereof or any land appurtenant thereto **is bona fide required by the landlord for occupation by himself or by any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for the purpose of any profession, trade or calling.** Thus, for the purposes of Section 16(1)(b), the petitioner having filed application for release of the disputed accommodation for his personal need as agent is not landlord under Section 3(j) of the Act 1972. The owner-respondents have also filed release application which was allowed by the impugned order. The petitioner at best being only a caretaker or agent of the owners, cannot claim himself to be landlord against the owners-landlords of the building. He is not entitled to occupy the disputed house in his own right and get the accommodation released in his favour as against the owners of the house. The definition of landlord in Section 3(j) of the Act 1972 has to be read in the context as discussed above.

32. Therefore, the Rent Control and Eviction Officer/ City Magistrate, Varanasi has not committed any error of law to reject the release application of the petitioner by the impugned order dated 22.07.1988 passed in Case No.3 of 1985 and to release the accommodation in favour of the respondents-owners and landlords. The court of 13th Additional District Judge, Varanasi has also not committed any error of law to dismiss the Rent Revision No.150 of 1988 (Dr. Vishwanth Sharma vs. Rent Control and Eviction Officer/ City Magistrate, Varanasi and another) filed by the petitioner. The impugned order and the judgment are based on consideration of relevant evidences on record which cannot be interfered with in jurisdiction under Article 227 of the Constitution of India.

Conclusion:-

33. The conclusions reached by me in foregoing paragraphs of this judgment, are briefly summarized as under:

(i) An agent who receives property or money from or for his principal obtains no interest for himself in the property. An agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property. Nor he can convert it into any other kind or use. His possession is the possession of the principal for all purposes. The agent

has no possession of his own. Caretaker's possession is the possession of the principal. The possession of the agent is the possession of the principal and in view of the fiduciary relationship he cannot be permitted to claim his own possession. An agent is the extended hand of principal. Therefore, father of the petitioner as agent and even assuming the petitioner also to be an agent or caretaker, has acquired no interest in the disputed property of the Principal Divanani Late Vidyawati Badrinath and in view of his fiduciary relationship, he cannot be permitted to claim his own possession. His possession is possession of the principal for all purposes.

(ii) The phrase 'Unless the contest otherwise requires' proceeded with the definition clauses of Section 3 indicates that while construing, interpreting and applying the definition clause, the court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise. Where the definition is preceded with the phrase 'unless the context otherwise requires' the connotation is that normally the definition as given in Section should be applied and given effect to but it may be departed from if the context requires.

(iii) The definition of "landlord" is inclusive in the sense that it is extended to "agent" or "attorney" also. Therefore, a landlord (owner) to whom rent is payable, if has authorized an agent or attorney for the purpose of collection of rent, such agent or attorney qua tenant, would also satisfy the definition of landlord under Section 3(j) of Act, 1972. Therefore, vis a vis tenant, the agent or attorney, who satisfies definition of "landlord" under Section 3(j), would be a person who holds authority as agent or attorney, to represent the true owner of property, to do or not to do, or to act or not to act, in a particular manner, as authorized by owner. The attorney or agent by himself cannot claim to be the owner of property and simultaneously to claim that they satisfy definition of "landlord".

(iv) Prescribed Authority is a Tribunal of limited jurisdiction which has been constituted under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, for deciding applications under Section 21 or other provisions enumerated under the Act. It has no jurisdiction at all to examine the correctness or otherwise of a decree passed by a competent Civil Court. The Tribunal has to proceed on the basis that the decree of a Civil Court is a valid decree and has to recognise the rights of the parties on its basis. It has been held in Khem Chand v. IV A.D.J. {1989 (2) ARC 344} that it is not open to any party to challenge the genuineness of a decree of a Civil Court before the Prescribed Authority and so long as the decree is not set aside it has to be accepted as genuine. In the present set of facts, there is a judgment and decree dated 17.05.1988 in O.S. No.35 of 1961 (Smt. Vidyawati Devi vs. Raghunath Mishra) passed by the Civil Judge, Varanasi for eviction of Raghunath Mishra (father of the petitioner) and against it the Civil Appeal No.600 of 1988 (Vishwanath Mishra vs. Narendra Jeet Singh) filed by the petitioner herein was dismissed by judgment dated 30.05.1998 passed by the court of Additional District Judge Vth Varanasi, against which the petitioner herein filed Second Appeal No.1196 of 1998 (Vishwanath Misra vs. Ratan Shankar Chaurasia), which is stated to be pending. The judgment and decree dated

17.05.1988 passed by the court of Civil Judge, Varanasi in O.S. No.35 of 1961, has admittedly been neither set aside nor modified.

(v) Section 16(1)(b) of the Act 1972 provides that subject to the provisions of the Act, the District Magistrate may by order, release the whole or any part of such building or any land appurtenant thereto in favour of the landlord. Sub-Section (2) of Section 16, as relevant for the purpose of the present case; provides that no release order under Clause (b) of Sub-Section (1) shall be made unless the District Magistrate is satisfied that the building or any part thereof or any land appurtenant thereto, is bona fide required, by the landlord for occupation by himself or any member of his family or any person for whose benefit it is held by him either for residential purposes or for purposes of any profession, trade or calling. The petitioner alleging himself to be an agent or caretaker of the owner of the disputed house, filed the release application under Section 16(1)(b) of the Act 1972 for his personal need, whereas sub-Section (2) of Section 16 provides for a release order when the building or any part thereof or any land appurtenant thereto is bona fide required by the landlord for occupation by himself or by any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for the purpose of any profession, trade or calling. Thus, for the purposes of Section 16(1)(b), the petitioner having filed application for release of the disputed accommodation for his personal need as agent is not landlord under Section 3(j) of the Act 1972. The owner-respondents have also filed release application which was allowed by the impugned order. The petitioner at best being only a caretaker or agent of the owners, cannot claim himself to be landlord against the owners-landlords of the building. He is not entitled to occupy the disputed house in his own right and get the accommodation released in his favour as against the owners of the house. He is not landlord. The definition of landlord in Section 3(j) of the Act 1972 has to be read in the context as discussed above.

(vi) Therefore, the Rent Control and Eviction Officer/ City Magistrate, Varanasi has not committed any error of law to reject the release application of the petitioner by the impugned order dated 22.07.1988 passed in Case No.3 of 1985 and to release the accommodation in favour of the respondents-owners and landlords. The court of 13th Additional District Judge, Varanasi has also not committed any error of law to dismiss the Rent Revision No.150 of 1988 (Dr. Vishwanth Sharma vs. Rent Control and Eviction Officer/ City Magistrate, Varanasi and another) filed by the petitioner.

34. The impugned order and the judgment are based on consideration of relevant evidences on record which cannot be interfered with in jurisdiction under Article 227 of the Constitution of India.

35. For all the reasons afore-stated, I do not find any merit in this petition. Therefore, the petition fails and is hereby dismissed with costs.

(2019)10ILR A 1497

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Mattes Under Article. 227 No. 4057 of 2019

Sixth Sense Astro Gurukul
...Applicant-Petitioner
Versus
M/s Avantika Agro Services Pvt. Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Counsel for the Respondents:
Sri Girish Kumar Gupta, Sri Rahul Sahai

A. Code of Civil Procedure,1908- O - XXI, R - 97 - petitioner filed an application u/o XXI r 97 –on the basis of unregistered agreement to sell –found to be frivolous - is rejected- as he could not adduce any evidence-showing himself to be in possession of the disputed property-it does not even reflect transfer of possession-cannot entitle the petitioner for the benefit of order Order XXI Rule 97 C.P.C.

Held: - in matters of obstructing execution of decree in a rent case, there was sheer abuse of the process of court resulting in thwarting execution of a valid decree during its subsistence.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal, AIR 1997 SC 856

2. Shreenath and another Vs. Rajesh and others, 1998 (33) ALR 273

3. Sameer Singh and another Vs. Abdul Rab and others, 2015 (128) RD 412

4. Tanzeem-e-Sufia Vs. Bibi Haliman, AIR 2002 SC 3083

5. Asgar and Others Vs. Mohan Varma and others, 2019 (133) ALR 736

6. Mst. Hashmi @ Batul Vs. Ali Ahmad and others, 2015 (109) ALR 284

7. Raghu Nath Saran Vs. VIIIth Addl. District and Sessions Judge, 2011 (84) ALR 381

8. Jahid Khan and another Vs. Suresh Chand Jain and others, 2014 (4) AWC 4158

9. Smt. Firdaus Begum and others Vs. Smt. Sheela @ Susheela Devi Sharma Advocate and others, 2013 (6) ADJ 18

10. Bool Chand (dead) thru Lrs. and others Vs. Rabia and others, (2016) 14 SCC 270

11. Bate Krishna Damani (dead) by Lrs. Vs. Kailash Chand Srivastava and another, 1995 supp. (1) SCC 477

12. Mani Nariman Daruwala @ Bharucha (D) through Lrs. Vs. Phiroz N. Bhatena and others, (1991) 3 SCC 141

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ajay Kumar Singh, learned counsel for the applicant-revisionist-petitioner and Sri Rahul Sahai, learned counsel for the plaintiff-decree holder-respondent no.1.

2. Briefly stated facts of the present case are that House No.C.K. 1/13, Patni Tola, Bhosale Mandir, Ward Chowk, City Varanasi (hereinafter referred to as 'the disputed property'), was owned by Raje Raghuji Rao A. Bhosale son of Late Raja Ajit Singh A. Bhosale, Mahal Nagpur

(Maharashtra). The petitioner claims that one Vishwanath Pandey (Power of Attorney of the aforesaid Raje Raghuji A. Bhosale) executed an unregistered agreement to sell dated 15.05.2013 in favour of the petitioner to sell the aforesaid disputed property. However, a registered lease deed dated 25.06.2014 was executed by the aforesaid Raje Raghuji Bhosale through his power of attorney Vishwanath Pandey in favour of the plaintiff-decree holder-respondent no. 1 on accepting a premium of Rs. 24,00,000/- and monthly rent of Rs. 200/-. Lease rent Rs. 6,00,000/- was received in advance to be adjustable towards the monthly rent. As per clause 5 of the lease deed, the aforesaid owner of the disputed building/lessor put in actual physical possession to the plaintiff-decree holder-respondent no. 1. Thereafter, the plaintiff-decree holder-respondent no. 1 filed SCC Suit No. 18 of 2015 for eviction of the defendant-judgment debtor/respondent nos. 2 and 3.

3. In the aforesaid SCC Suit No. 18 of 2015, petitioner herein filed an impleadment application under Order I Rule 10 C.P.C. on the ground that he has an unregistered agreement to sell in his favour with respect to the disputed property, and therefore, he is a necessary party. This application being paper no. 22-Ga was rejected by the Judge Small Cause Court by order dated 23.12.2015. This order has attained finality. In the meantime, the petitioner **herein also filed Suit No. 1190 of 2015 seeking various reliefs including injunction and declaratory relief.** The plaint was rejected by the Civil Judge (S.D.), Varanasi by order dated 18.02.2016 due to non-payment of appropriate court fees and not amending the valuation. Thereafter, the petitioner herein filed First Appeal no. 170 of 2016 praying to set aside the aforesaid judgment and order of the Civil Judge (S.D.), Varanasi, dated 18.02.2016. The first appeal was disposed of by a Division Bench of this Court by order dated 20.04.2016 and the judgment and order dated 18.02.2016 passed by Civil Judge (S.D.), Varanasi, rejecting the plaint, was upheld. But liberty was granted to the petitioner herein to file a fresh suit. **This Court specifically asked learned counsel for the petitioner herein as to whether any suit has been filed pursuant to the liberty granted by the Division Bench? In reply, learned counsel for the petitioner herein stated that no suit has been filed by the petitioner.**

4. The aforesaid **SCC Suit No. 18 of 2015** (M/s. Avantika Agro Services Pvt. Ltd. Vs. Chandrabhan and Padma Devi) filed by the respondent no. 1 for eviction of tenants (respondent nos. 2 and 3) was decreed by judgment dated 19.05.2016. The defendant-respondent nos. 2 and 3 herein, were directed to be evicted. **Therefore, the plaintiff-decree holder-respondent no. 1 filed Execution Case No. 8 of 2016. In the aforesaid execution case, the petitioner herein filed an application under Order XXI Rule 97 C.P.C. claiming himself to be in possession of the disputed property** on the basis of the aforesaid unregistered agreement to sell dated 15.05.2013. The aforesaid application being paper no. 4-Ga was registered as Misc. Case No. 96 of 2018. It was rejected by the Judge Small Cause Court, Varanasi by the impugned order dated 10.12.2018 on the ground that no evidence could be produced by the petitioner to show that he is in possession of the disputed room of the disputed

property on the basis of unregistered agreement to sell and that unregistered agreement to sell is not even admissible in evidence in view of Section 17 of the Registration Act. Aggrieved with this order, the petitioner herein filed Civil Revision No. 02 of 2019 (Sixth Sense Astro Gurukulam (registered trust) Vs. M/s. Avantika Agro Services Pvt. Ltd. and 2 others) which has been dismissed by the impugned judgment dated 15.02.2019 passed by the District Judge, Varanasi. In paragraphs 5 and 9 of the impugned judgment, the revisional court observed/held as under:-

"5. Revisionist claims his possession over the premises in question on the basis of an agreement to sale alleged to be executed by the real owner in his favour on 15.05.2013. Copy of this agreement to sale has been filed by the revisionist in lower Court as paper no. 11C. It is an unregistered agreement to sale and value of the subject matter in this agreement to sale is mentioned at Rs. 2.60 crores. The revisionist has not filed any document of title or the sale-deed executed in his favour by the real owner. Perusal of agreement to sale, paper no. 11C, further reveals that in this paper too, it has not been mentioned that possession over the premises in question was ever transferred to the revisionist. In his application filed under Order 21 Rule 97 and Section 151 of C.P.C. in the lower Court revisionist has also stated that possession was delivered by the real owner to the revisionist after execution of the agreement to sale dated 15.05.2013. In para 5 of his application it is mentioned that revisionist is in possession over the premises in question since 16.05.2013. Above facts also make it clear that revisionist was not given possession at the time of execution of said agreement to sale. In lower Court no evidence showing his possession over the premises in question has been adduced by the revisionist. It is not disputed that a decree is in favour of M/s. Avantika Agro Services Pvt. Ltd. with respect to premises in question and by the said decree M/s. Avantika Agro Services Pvt. Ltd had been given possession over the premises in question. Possession of a third party is the main point for consideration in an application filed under Order 21 Rule 97 of C.P.C.

9. Since the executing Court has no right to adjudicate upon validity or legality of the decree, objection raised by the revisionist with regard to non compliance of conditions set forth by the Court while giving permission to sale the disputed property to the real owner can not be considered in a proceeding before the executing Court. A third party can only resist the execution of the decree on the basis of his possession over the premises in question under Order 21 Rule 97 of C.P.C. Revisionist has failed to establish his possession over the premises in question. By mere giving a statement on affidavit it can not be assumed that revisionist was in possession of the disputed property. It is also not necessary to make a detailed enquiry or to take evidence of the parties while deciding an application under Order 21 Rule 1997 of C.P.C. Therefore, impugned order can not be assailed on these points too. The learned lower Court has observed in the impugned order that the applicant revisionist had failed to establish his possession over the disputed premises. This observation of the learned Lower Court is not against the record of the case and it can not be termed as perverse. There is no illegality in the impugned

order and this S.C.C. Revision is accordingly not liable to be allowed."

5. Aggrieved with the aforesaid order of the Judge Small Cause Court dated 10.12.2018 rejecting the 4-C application under Order XXI Rule 97 C.P.C. and judgment of the revisional court dated 15.2.2019 in Civil Revision No.02 of 2019 passed by the District Judge, Varanasi, the petitioner herein has filed the present petition under Article 227 of the Constitution of India.

Submissions:-

6. Learned counsel for the petitioner submits as under:-

(i) The petitioner is in possession of the disputed room of the disputed property pursuant to agreement to sell dated 15.5.2013.

(ii) The application of the petitioner under Order XXI Rule 97 C.P.C. could be decided by the court below only after taking evidences and after recording a finding with regard to right, title and interest of the parties in the disputed property. Since, this has not been done therefore, the impugned orders and judgments are liable to be set aside.

7. In support of his submissions, he referred to paragraphs 21, 22, 24 and 26 of the petition which are reproduced below:

"21. That accommodation in question situate in House No. 1/13, Patni tola, Varanasi, is owned by Raje Raghuji Rao Bhosale who file Misc. Case No. 17 of 2010 Raje Raghuji Rao Bhosale Vs. collector, Varanasi, for grant of permission for sale of said house and Special Judge (Anti Corruption), Varanasi granted permission for sale of said house, vide order dated 31.01.2014 subject to conditions that purchaser must be follower of Vaishno Smpraday who shall maintain the temple existing in the premises, perform Rag-Bhag and Pooja-path; further the sale consideration must be according to market value, must be deposited in treasury and maintenance of temple and premises be done out of interest received therefrom but decree-holder / respondent no.1 got a Lease Deed dated 25/26.06.2014 executed in its favour in lieu of a premium of Rs. 24,00,000.00 only which was totally in contravention of the aforesaid order granting permission dated 31.01.2014, as such alleged Lease Deed is nullity, void ab-initio and on that basis decree-holder is neither owner nor can be Landlord of the aforesaid premises.

22. That any act done or any deed executed not in conformity of the order of the court is against public policy and the very basis of claim of respondent no. 1, is the lease deed got executed by it against order dated 31.01.2014 in Misc. Case no. 217 of 2010 but both the courts below kept mum and advert to record any finding which goes to the root of the matter, for the reasons best known to the courts below.

24. That in proceeding under Order 21 Rule 97 C.P.C., it was incumbent upon the Executing Court to adjudicate right, title and interest of parties in respect of property in suit, but failed to do so and similarly revisional court also dismissed revision without adverting itself to ingredients of Order 21 Rule 97 C.P.C.

26. That both the courts below failed to consider that when an application has been made under Order XXI Rule 97 C.P.C., court is enjoined to adjudicate

upon right/title and interest claimed in the property arising between the parties to a proceeding or between a decree holder or the person claiming independent right, titile, interest or possession in that behalf and such determination shall be conclusive and not a matter to be agitated by a separate suit."

8. In support of his submissions, learned counsel for the petitioner relied upon the judgments of Hon'ble Supreme Court in **Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal, AIR 1997 SC 856, Shreenath and another Vs. Rajesh and others, 1998 (33) ALR 273, Sameer Singh and another Vs. Abdul Rab and others, 2015 (128) RD 412, Tanzeem-e-Sufia Vs. Bibi Haliman, AIR 2002 SC 3083 and Asgar and Others Vs. Mohan Varma and others, 2019 (133) ALR 736 and judgments of this Court in Mst. Hashmi @ Batul Vs. Ali Ahmad and others, 2015 (109) ALR 284, Raghu Nath Saran Vs. VIIIth Addl. District and Sessions Judge, 2011 (84) ALR 381, Jahid Khan and another Vs. Suresh Chand Jain and others, 2014 (4) AWC 4158 and Smt. Firdaus Begum and others Vs. Smt. Sheela @ Susheela Devi Sharma Advocate and others, 2013 (6) ADJ 18.**

9. Sri Rahul Sahai, learned counsel for the plaintiff-decree holder-respondent no.1 submits as under:-

(i) This petition has been filed without bringing on record certain relevant orders and judgments including the order dated 23.12.2015 in SCC Case No.18 of 2015 whereby the application being paper no.22-Ga filed by the petitioner under Order I Rule 10 C.P.C., was rejected by the Judge Small Cause Court and the order has attained finality. A copy of the order dated 18.2.2016 passed in Suit No.1190 of 2015 rejecting the plaint of the petitioner under Order VII Rule 11 C.P.C. has also not been filed alongwith this petition. Paragraph 11 of the objection (copy of which filed as Annexure 10) to the application of the petitioner under Order XXI Rule 97 C.P.C. indicates that the petitioner herein filed three suits being O.S. No.1188 of 2015, 1189 of 2015 and 1190 of 2015. The disclosure has been made in the present petition only with regard to O.S. No.1188 of 2015 and the dismissal of First Appeal No.170 of 2016 arising from O.S. No.1190 of 2015. Thus, material facts have been concealed by the petitioner.

(ii) The entire case of the petitioner is based on the alleged unregistered agreement to sell dated 15.5.2013 which was neither admissible in evidence nor it establishes possession of the petitioner over the disputed room of the disputed property. No evidence could be produced by the petitioner to indicate his possession over the disputed room. The petitioner's case is not a case of part performance of contract under Section 53-A of the Transfer of Property Act, 1882.

(iii) The impleadment application of the petitioner in SCC Suit No.18 of 2015 was rejected by the Judge Small Cause Court by order dated 23.12.2015 which has attained finality. The plaint of the suit of the petitioner being O.S. No.1190 of 2015 for declaration and injunction etc., was rejected and despite grant of liberty in first appeal by this Court, no suit has been filed. Therefore, that matter has also attained finality.

(iv) After the aforesaid SCC Suit No.18 of 2015 was decreed by judgment dated 19.5.2016, the tenant (judgment

debtor/respondent nos.2 and 3) filed a recall application under Order IX Rule 13 C.P.C. which was rejected by the court below by order dated 20.4.2018. Thereafter, the petitioner herein filed an application under Order XXI Rule 97 C.P.C. on 24.5.2018 which is apparently in collusion with the judgment debtor/tenant.

Discussion and Findings:-

10. I have carefully considered the submissions of learned counsel for the parties.

Concealment of facts :-

11. Undisputedly, the petitioner is neither a tenant nor owner of the disputed property. He had claimed his right on the basis of an alleged unregistered agreement to sell dated 15.05.2013. There is nothing on record to show that he has filed any suit for specific performance and got any favorable order. The disputed property was leased out by its true owner to the plaintiff-decree holder/respondent no. 1 by a registered lease deed dated 25.06.2014. The plaintiff-landlord-decree holder/respondent no. 1 had filed SCC Suit No. 18 of 2015 for eviction of the defendant-tenant-judgment debtor/respondent nos. 2 and 3 in which the petitioner herein filed an impleadment application (paper no. 22 Ga) under Order I Rule 10 C.P.C. which was rejected by the Judge Small Cause Court by order dated 23.12.2015. This order has attained finality. Thereafter, the petitioner filed O.S. No. 1190 of 2015 seeking various reliefs including injunction and declaratory relief. The plaint was rejected by Civil Judge (S.D.), Varanasi by order dated 18.02.2016 and the First Appeal No. 170 of 2016 filed against this order, was disposed of by a Division Bench of this Court by order dated 20.04.2016 whereby the order of the Civil Judge (S.D.), Varanasi dated 18.02.2016 was upheld but a liberty was granted to the petitioner to file a fresh suit. No suit has been filed by the petitioner. These relevant facts have been concealed by the petitioner in the present petition.

Applicability of Order XXI Rule 97 C.P.C. :-

12. After the SCC Suit No. 18 of 2015 filed by the plaintiff-landlord-decree holder/respondent no. 1, was decreed by the court below by judgment dated 19.05.2016 against defendant-tenant/respondent nos. 2 and 3, the plaintiff-landlord/decree holder filed Execution Case No. 08 of 2016. In the aforesaid execution case, the petitioner had filed an application being paper no. 4 Ga (registered as Misc. Case No. 96 of 2018) under Order XXI Rule 97 C.P.C. which was rejected by the impugned order dated 10.12.2018 against which he filed Civil Revision No. 02 of 2019 which was dismissed by the impugned judgment dated 15.02.2019. The application under Order XXI Rule 97 C.P.C. was filed by the petitioner after the plaintiff-landlord-decree holder/respondent no. 1 filed Execution Case No. 8 of 2016 against the defendant-tenant/respondent nos. 2 and 3 for execution of the judgment and decree dated 19.05.2016. Despite order dated 20.04.2016 in First Appeal No. 170 of 2016 passed by a Division Bench of this Court giving liberty to the petitioner to file a fresh suit, no suit was filed by the petitioner. Thus, apparently, filing of the application being paper no. 4 Ga (registered as Misc. Case No. 96 of 2018)

is in collusion with the defendant-tenant/respondent nos. 2 and 3 to delay the execution of the decree.

13. A finding of fact has been recorded in paragraphs 5 and 9 of the impugned judgment dated 15.02.2019 that neither before the execution court nor before the appellate court, the petitioner could adduce any evidence to show his possession over the disputed property. The alleged unregistered agreement to sell does not provide that possession of the disputed property was transferred to the petitioner. Admittedly, the tenants have been evicted and possession of the disputed property has been given to the decree-holder/respondent no. 1.

14. It is settled law that under Order XXI Rule 97 C.P.C., a third party can resist the execution of a decree on the basis of his possession over the suit property. The courts below have found that the petitioner has completely failed to establish his possession over the disputed property. His suit for declaration and injunction being O.S. No. 1190 of 2015 was dismissed by the Civil Judge (S.D.), Varanasi by order dated 18.02.2016 and the said judgment has attained finality on dismissal of the petitioner's First Appeal No. 170 of 2016 by judgment dated 18.02.2016. Thus, there is no evidence that the petitioner has either any right or title to the disputed property or that possession of the disputed property was given to the petitioner by the erstwhile owner. Therefore, both the impugned orders passed by the courts below rejecting the application 4-C of the petitioner under Order XXI Rule 97 C.P.C. and dismissing the revision, do not suffer from any error of law.

15. In **Bool Chand (dead) thru Lrs. and others Vs. Rabia and others, (2016) 14 SCC 270** (paragraph 12), Hon'ble Supreme Court held as under :-

"12. While a genuine petition for execution of a decree can certainly be considered, the court cannot be oblivious of frivolous objections being filed after a decree is passed in long-drawn contested proceedings. Attempt to deprive the decree-holder of benefit of such decree should be discouraged by the court where such objection is raised. The impugned order is thus, clearly erroneous and unsustainable and not a result of sound judicial approach."

16. There cannot be any quarrel that an application under Order XXI Rule 97 C.P.C. may be filed even by a stranger and executing court has power to adjudicate upon all questions relating to right, title and interest in property arising between the parties including the stranger. But where the application (objection) is frivolous then it deserves to be rejected. In the present set of facts, the petitioner has completely failed to adduce any evidence that on the basis of alleged unregistered agreement to sell, the possession of the disputed property was transferred to him or that the alleged unregistered agreement to sell contains any clause of transfer of possession. Both the courts below have found that the petitioner could not adduce any evidence that he is in possession of the disputed property. On the contrary in execution of the decree, the defendant-tenant/ respondent nos. 2 and 3 have been evicted and the decree holder/respondent no. 1 has been given possession of the disputed property/tenanted property. This court asked the learned counsel for the petitioner to show even prima facie from any evidence that the petitioner is in

possession of the disputed property but the learned counsel for the petitioner has failed even to point out any such evidence or document. The only basis of the claim of the petitioner or objection under Order XXI Rule 97 C.P.C. is the alleged unregistered agreement to sell allegedly executed by the power of attorney holder of the erstwhile owner. Thus, an agreement which does not even reflect transfer of possession of the disputed property, cannot entitle the petitioner for the benefit of order Order XXI Rule 97 C.P.C.

17. In **Bate Krishna Damani (dead) by Lrs. Vs. Kailash Chand Srivastava and another, 1995 supp. (1) SCC 477** (para 4 and 5), in matters of obstructing execution of decree in a rent case, Hon'ble Supreme Court observed on the facts of that case that there was sheer abuse of the process of court resulting in thwarting execution of a valid decree during its subsistence. In **Mani Nariman Daruwala @ Bharucha (D) through Lrs. Vs. Phiroz N. Bhatena and others, (1991) 3 SCC 141** (paragraph 18), Hon'ble Supreme Court laid down the law with regard to scope of interference under Article 227 of the Constitution of India and held as under :-

"18. Was the High Court justified in taking this view and in upsetting the finding recorded by the Appellate Bench? While considering this question it has to be borne in mind that the High Court was exercising its jurisdiction under Article 227 of the Constitution of India. In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact (See: Chandavarkar Sita Ratna Rao v. Ashalata S. Guram). Applying these test we are unable to persuade ourselves to hold that the findings recorded by the Appellate Bench suffer from such an infirmity so as to justify interference with the said finding under Article 227 of the Constitution."

18. The judgments relied by the learned counsel for the petitioner are clearly distinguishable on facts of the present case and do not support the case of the petitioner.

19. For all the reasons aforestated, I do not find any merit in this petition. Consequently, the petition fails and is hereby dismissed with cost.

(2019)10ILR A 1504

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Mattes Under Article 227 No. 5594 of 2019

Jai Prakash ...Petitioner
Versus
Kumari Anjali & Anr. ...Respondents

Counsel for the Petitioner:
Sri Paras Nath Singh

Counsel for the Respondents:

A. Indian Evidence Act, 1872 - Section 112 - presumption u/s. 112 -attracted unless shown parties to marriage had no access to each other when child was born. DNA test to determine paternity-not to be directed as a matter of cause.

Held: - A DNA test to determine paternity of child should not be directed as a matter of course. The court has to consider various diverse aspects including presumption under Section 112 of the Evidence Act. At this juncture applying the test of 'eminent need' laid down by the Supreme Court in Bhabani Prasad Jena (supra), this court finds no illegality in the view taken by the court below to warrant interference in exercise of supervisory power under Article 227 of the Constitution.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Goutam Kundu vs State of West Bengal, 1993 ACC 416

2. Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, 2010 8 SCC 633

3. Dipanwita Roy vs Ronobroto Roy, 2015 (1) SCC 365

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

1. By impugned order dated 30.4.2019 the Additional Principal Judge, Family Court, Basti has rejected an application made by the petitioner for getting DNA test of Km. Anjali (opposite party No.1) conducted by a team of medical experts.

2. The opposite parties brought suit for maintenance against the petitioner being Original Suit No.519 of 2011. According to the opposite parties, they are daughter-in-law and grand daughter respectively of the petitioner herein. Opposite party No.2 was married to Santosh Kumar, son of the petitioner on 17.5.2006 and vidai ceremony took place on 18.5.2006. She was brought to her in-laws house at Mauza Hariharpur and she started living with her husband. Out of the said wedlock, opposite party No.1 was born. She is stated to be of four years of age in the year 2011 when the suit was instituted. Santosh Kumar, husband of opposite party no.2 and father of opposite party no.1 died on 29.12.2007. Since the opposite parties do not have any source of livelihood, they filed the suit in question.

3. The petitioner filed an application dated 25.4.2017 alleging that opposite party no.2 had before entering into matrimonial alliance with his son Santosh Kumar married different persons and even after death of Santosh Kumar, she had remarried. It was alleged that opposite party No.1 was not born out of the wedlock between opposite party No.2 and his son Santosh Kumar. Therefore prayer was made for getting DNA test of opposite party no.1 conducted by a team of medical experts.

4. The application was opposed by the opposite parties. They brought on record extract from family register wherein opposite party No.1 is shown as daughter of Santosh Kumar.

5. The trial court, placing reliance on the judgement of the Supreme Court in **Goutam Kundu vs State of West Bengal, 1993 ACC 416** held that the presumption under Section 112 of the Indian Evidence Act, 1872 is attracted in such matters and unless it is shown that the parties to the marriage had no access to each other at any time when the

daughter was born, there is no need of getting conducted DNA test. The court has also observed that prima facie the documentary evidence also establishes that opposite party No.1 is daughter of Late Santosh Kumar and has accordingly rejected the application.

6. Learned counsel for the petitioner submitted that in extract of family register, date of birth of opposite party No.1 is shown as 24.4.2004 i.e., a date before the marriage between opposite party No.2 and Santosh Kumar was solemnized. In other words, the submission is that since opposite party No.1 was born before marriage between opposite party No.2 and Santosh Kumar, therefore she was not born out of wedlock between them.

7. Section 112 of the Evidence Act, 1872 reads thus :-

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

8. The Supreme Court in **Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, 2010 8 SCC 633** has held as follows :-

"22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

9. Again, in **Dipanwita Roy vs Ronobroto Roy, 2015 (1) SCC 365**, the Supreme Court, while reiterating the test of 'eminent need', held as follows :-

"It is borne from the decisions rendered by this Court in Bhabani Prasad Jena and Nandlal Wasudeo Badwaik that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds on which the concerned party would either succeed or lose. There can be no dispute that if the direction to hold such a test can be avoided it should be so avoided. The reason, as already recorded in various judgments by this Court is that the legitimacy of a child should not be be put to peril."

10. I have gone through the pleadings made in the written statement and I do not find any categorical plea to the effect that the parties had no access to each other during the marriage. The only

assertion in the written statement is that after some time, opposite party No.2 left the matrimonial house alongwith her goods. The exact date on which she left the matrimonial house has not been disclosed. There is also no assertion in the written statement that during the period they were living together in the matrimonial house, they had no access to each other. The specific case of the opposite parties as per assertions made in the plaint is that opposite party No.1 was four years of age at the time of filing of the plaint. It would mean that opposite party No.1 was born in the year 2007. Santosh Kumar is alleged to have died on 29.12.2007 while the presumption under Section 112 of the Evidence Act would stand attracted even where any person was born within 280 days after the marriage had come to an end (in the instant case on account of death of Santosh Kumar). The alleged entry relating to date of birth of opposite party No.1 in the family register is in serious dispute and the said aspect is yet to be examined during trial on basis of evidence to be led by the parties.

11. A DNA test to determine paternity of child should not be directed as a matter of course. The court has to consider various diverse aspects including presumption under Section 112 of the Evidence Act. At this juncture applying the test of 'eminent need' laid down by the Supreme Court in **Bhabani Prasad Jena (supra),** this court finds no illegality in the view taken by the court below to warrant interference in exercise of supervisory power under Article 227 of the Constitution.

12. The petition lacks merit and is accordingly dismissed.

(2019)10ILR A 1507

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

Mattes Under Article. 227 No. 5026 of 2019

Gaya Prasad Tiwari ...Petitioner
Versus
Allahabad Development Authority ...Respondent

Counsel for the Petitioner:
Sri B.S. Pandey

Counsel for the Respondent:
Sri Devi Prasad Mishra, Sri Brijendra Kumar

A. Code of Civil Precedure - despite order to proceed exparte against the defendant-respondent-if evidence not concluded-defendant can always appear and cross examine witness and can recall proceedings-if shown good cause to the court.

Held: - that even though where the evidence of the plaintiff had not concluded, the defendant against whom exparte proceedings are being held, can always appear before the trial court and pray for cross-examining the plaintiff's witnesses. The said right of the defendant is not taken away merely for the reason that an order was passed on a previous date for holding exparte proceedings against him.

Writ Petition dismissed (E-8)

List of Cases Cited: -

1. Arjun Singh Vs. Mohindra Kumar and others, AIR 1964 SC 993

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

1. The instant petition is directed against the order dated 18.1.2018 passed by the trial court allowing application 50-C filed by the defendant-respondent seeking permission of the court to cross-examine plaintiff's witnesses. It is noteworthy that the suit is proceeding exparte against the defendant-respondent and its right to file written statement stands forfeited. It has been held by the trial court that even then it would not be debarred from cross-examining the witnesses of the plaintiff-petitioner. Aggrieved by the said order, the petitioner filed a revision, which has also been dismissed by the impugned order dated 29.4.2019.

2. Learned counsel for the petitioner submitted that once the suit was proceeding exparte against the defendant-respondent, the trial court erred in allowing the application for cross-examination of the plaintiff's witnesses.

3. In **Arjun Singh Vs. Mohindra Kumar and others, AIR 1964 SC 993**, the Supreme Court has explained the scheme of Order 9 CPC. It has held that where the court passes an order to proceed exparte against the defendant, it may take evidence of the plaintiff then and there and also pronounce the judgement. In other type of cases, the evidence of the plaintiff might not be concluded on the hearing day on which defendant is absent and something might remain so far as the trial of the suit is concerned for which purpose there might be a hearing on an adjourned date. Consequently, if the defendant appears on such adjourned date and satisfies the Court by showing good cause for his non- appearance on the previous day or days, he might have the earlier proceedings recalled-"set the clock back" and have the suit heard in his presence. On the other hand, he might fail in showing good cause. In such a case, he is not precluded from taking part in the remaining proceedings of the suit or whatever might still remain. The only impediment is that he cannot claim to be relegated to the position he occupied at the commencement of the trial.

4. It would thus mean that where the evidence of the plaintiff had not concluded, the defendant against whom exparte proceedings are being held, can always appear before the trial court and pray for cross-examining the plaintiff's witnesses. The said right of the defendant is not taken away merely for the reason that an order was passed on a previous date for holding exparte proceedings against him.

5. Consequently, this Court finds no illegality in the view taken by the courts below in allowing the application of the defendant-respondent to cross-examine the plaintiff's witnesses.

6. The petition lacks merit and is dismissed.

(2019)10ILR A 1508

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON’BLE PANKAJ BHATIA, J.

Writ-C No. 37797 of 2018

Shiv Vatika Basrat Ghar & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arpan Srivastava, Sri Anil Bhushan

Counsel for the Respondents:
C.S.C., Sri Devi Prasad Mishra, Sri A.K. Mishra, Sri Arun Kumar

A. Noise Pollution (Regulation and Control) Rules, 2000 - Directions issued in Sushil Chandra Srivastava and another v. State of U.P. and others, Writ-C No. 1216 of 2019 to be strictly followed-no loudspeaker to be used beyond the permissible limit under the schedule of the Rules, 2000.

Writ Petition pending (E-9)

List of Cases Cited: -

1. George of Church of God (Full Gospel) Vs K.K.R. Majestic Colony Welfare Association & ors., (2000) 7 SCC 282

2. Sri K. Ramdas Shenoy Vs The Chief Officers, Town Municipal Council, Udipi & ors.,(1974) 2 SCC 506

3. Machavarapu Srinivasa Rao Vs Vijaywada, Guntur, Tenli Mangal Giri Urban Development Authority, (2011) 12 SCC 154

4. R.K. Mittal Vs St. of U.P., (2012) 2 SCC 323

5. Dipak Kumar Mukherjee Vs Kolkata Municipal Corporation & ors., (2013) 5 SCC 336

6. Friends Colony Development Committee Vs St. of Orissa,(2004) 8 SCC 733

7. Shanti Sports Club & anr. Vs U. of I. & ors.(2009) 15 SCC 705

8. M.C. Mehta Vs U. of I. & ors., (2004) 6 SCC 588

9. Virender Gaur & ors. Vs St. of Hr. & ors., (1995) 2 SCC 577

10. Sushil Chandra Srivastava & anr. Vs St. of U.P. & ors., Writ-C No. 1216 of (2019)

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J. & Hon'ble Pankaj Bhatia, J.)

1. The petitioners have preferred this writ petition for issuance of a writ of Certiorari to quash the order dated 11.10.2018 passed by Allahabad Development Authority (now Prayagraj Development Authority)1.

2. Briefly stated the facts are; the petitioner no. 1 claims to be the owner of the property - 1, Panna Lal Road, Allahabad. The area of the aforesaid property is more than 10000 square meters. The property is said to be ancestral property and several families are residing in the aforesaid property. The petitioner no. 2 has constructed a Marriage Hall (Banquet Hall) (for short, "marriage hall") in an area about 3975.67 square meters which is a part of the aforesaid property. The petitioner no. 2 runs a Marriage Hall in the name and style of Shiv Vatika and it is using the open space of the property for the said purpose and has raised temporary construction for running the guest house.

3. The petitioner made an application to the District Magistrate for registration of the marriage hall. On 30.3.2012 the District Magistrate registered the Guest House/ Marriage Hall under the provisions of the Sarais Act, 1867 subject to certain conditions

mentioned in the registration certificate. It is stated that since there is temporary construction of tin-shade, therefore, there is no requirement to take any permission from the Development Authority.

4. The present dispute arose when the Development Authority issued a show cause notice dated 9.1.2015 to the petitioners, wherein it is recorded that the petitioner is running the marriage hall contrary to the provisions of Section 16 of the U.P. Urban Planning and Development Act, 19732. It is further recorded in the show cause notice that on inspection it was found that the said property is earmarked for residential purposes whereas it is being used for commercial purposes which is punishable under Section 26 of the Act, 1973. It is also mentioned in the said notice that earlier on 29.9.2014 a show cause notice was issued to the petitioner but he failed to submit any reply. Thereafter, an order under Section 26 of the Act, 1973 was passed on 20.11.2014 and despite this order the petitioner continued to use the property for commercial purposes. It is further mentioned in the notice that in Public Interest Litigation No. 51055 of 20143 a restrain order has been passed for using the premises for marriage. The petitioner has submitted a reply wherein it is stated that the petitioner is running the marriage hall in an open area in which there is no permanent construction and the approval has also been obtained from the District Magistrate, Allahabad under the Sarais Act, 1867. The petitioner has not brought on the record his reply submitted to the show cause notice. He has brought on record a report submitted by the Lekhpal and the Sub-Divisional Magistrate, Sadar dated 31.1.2015 that the petitioner's marriage hall is not on the land of Chandra Shekhar Azar Park. Both the reports are on the record. The petitioner relying on those reports has averred in the writ petition that from the said report it is clear that marriage hall is not situated within the premises of Chandra Shekhar Azad Park (Company Garden).

5. The Development Authority again issued a notice on 28.4.2015 that the use of property in question for commercial purposes is contrary to the provisions of the Section 16 of the Act, 1973. It appears that in the meantime the petitioner submitted an application for sanction of the map on 12.1.2015. After examining his proposal, his application was rejected by the Development Authority on the ground that the land is a park only hence it cannot be used for running marriage hall and a direction was also issued that if the petitioner continues to use the property for commercial purposes, it shall be sealed.

6. It appears that the petitioner continued to use the property for commercial purposes. The Development Authority passed an order on 11.10.2018 under Section 28-A of the Act, 1973 and sealed the premises.

7. By way of a supplementary affidavit the petitioner has brought on record a list of marriage halls in the city. The said list shows that as many as 190 marriage halls are running in the city. The said fact is unrebutted by the Development Authority.

8. A counter affidavit has been filed by the Development Authority. The stand taken in the counter affidavit is that the petitioner cannot use any land or building

owned by him for a purpose which is not in conformity with the Master Plan prepared by the Development Authority. Under the Master Plan, the land on which the petitioner was running a marriage hall, has been earmarked as park and open space as such its use as a marriage hall is illegal. Insofar as the permission granted to the petitioner under the Sarais Act, 1967, it is stated, does not authorize the petitioner to run the marriage hall in contravention with the provisions of the Act, 1973, Master Plan and the bye-laws framed under it. The Sarais Act, 1867 does not authorize him to change the use of land in development area contrary to its approved Master Plan. The petitioner no. 2 had submitted a compounding map for regularization of the construction raised in the property in question for running the marriage hall in the name of 'Shiv Vatika'. The compounding map submitted by the petitioner was rejected by the Development Authority by its order dated 7.7.2015 on the ground that the said map was contrary to the Master Plan as it is earmarked for park and open space, hence it cannot be used as marriage hall or banquet hall.

9. It is further averred in the counter affidavit that even temporary construction over the land in question amounts to development in terms of Section 2(e) of the Act, 1973. For any development work to be carried out in the developed area, the permission of the Development Authority under Section 15 of the Act, 1973 is necessary. Since the permission has been rejected by the Development Authority raising temporary construction is illegal and unauthorized.

10 It is further submitted that the petitioner has submitted a fresh map on 21.8.2017 after rejection of his compounding map on 7.7.2015. The said map has again been rejected by the Development Authority on 22.11.2017. The Sarais Act, 1867 only grants licence to the petitioner to run marriage hall. It does not exempt him from complying with the provisions of the Act, 1973. In view of the said facts it is stated that action under Section 28-A of the Act, 1973 has been taken after furnishing sufficient opportunity to the petitioner.

11. In regard to the averments made in the writ petition the petitioner is paying Municipal taxes for the property to Nagar Nigam, Allahabad, it is stated that paying the tax to Nagar nigam does not mean that the petitioner has got a commercial map/sanction from the Development Authority.

12. Learned counsel for the Development Authority has not disputed the list submitted by the petitioner which shows that at present about 200 marriage halls are running in the city. He has produced bye-laws which regulate the banquet hall/ marriage hall. Relevant part of the bye-laws is extracted below:

अध्याय – 16

'बारात घर'/ 'उत्सव भवन' के निर्माण हेतु अपेक्षाएं

16.1 अनुमन्यता बारात घर/ 'उत्सव भवन' के निर्माण की अनुमन्यता महायोजना जोनिंग रेगुलेशन्स के अनुसार होगी।

16.2 भूखण्ड का न्यूनतम क्षेत्रफल 1500 वर्गमीटर

16.3 भूखण्ड का न्यूनतम फ्रन्टेज 24 मीटर

16.4 सडक की न्यूनतम विमान चौडाई 24 मीटर

16.5 भू–आच्छादन (क) निर्मित/ विकसित क्षेत्र 30 प्रतिशत

(ख) नए/ अविकसित क्षेत्र 40 प्रतिशत

16.6 एफ.ए.आर. (क) निर्मित/ विकसित क्षेत्र 1.00

(ख) नए/ विकसित क्षेत्र 1.50

16.7 भवन की उंचाई 30 मीटर से कम चौडे मार्ग पर स्थित भवनों की अधिकतम उंचाई सडक की विमान चौडाई तथा फ्रन्ट सेट – बैक के योग के डेढ गुना से अधिक नही होगी, परन्तु 30 मीटर एवं उससे अधिक चौड़े मार्गों पर स्थित भवनों हेतु यह प्रतिबन्ध लागू नही होगा। भवन की अधिकतम उंचाई संरक्षित स्मारक/ हैरीटेज स्थल से दूरी, एयरपोर्ट फनल जोन तथा अन्य स्टेट्युटरी प्रतिबन्धों से भी नियन्त्रित होगी।

16.8 सैट बैक ' बारात घर'/ 'उत्सव भवन' पृथकीकृत (डिटेच्ड) भवन के रुप मे होगा तथा भूखण्ड के क्षेत्रफल के आधार पर न्यूनतम सैट–बैक निम्नानुसार होंगे :–

भूखण्ड का क्षेत्रफल (वर्गमीटर)	**न्यूनतम सैट – बैक (मीटर)**			
	अग्र	पृष्ठ	पार्श्व – 1	पार्श्व – 2
2000 तक	12.0	4.5	4.5	3.0
2000 से अधिक	12.	5.0	5.0	5.0

16.9 पार्किंग मानक प्रत्येक 100 वर्गमीटर तल क्षेत्रफल पर 2.0 'सामान कार स्थल' की व्यवस्था भूखण्ड के अन्दर करनी होगी। पार्किंग की गणना भूखण्ड में अधिकतम अनुमन्य तल क्षेत्रफल पर की जाएगी।

16.10 बेसमेन्ट बेसमेन्ट की अनुमन्यता भवन उपविधि के प्रस्तर– 3.9 के अनुसार होगी।

16.11 अनुज्ञा की प्रकिया नई योजनाओं/ अनुमोदित होने वाले ले– आउट प्लान्स में बारात घर/ उत्सव भवन हेतु निर्धारित मानकों के अनुसार पहले ही अपेक्षित संख्या में भूखण्डो का चिन्हीकरण किया जाएगा और बारात घर के निर्माण की अनुज्ञा केवल इस प्रयोजन हेतु चिन्हित/ आरक्षित भूखण्डों पर ही दी जाएगी। विमान विकसित कालोनियों/क्षेत्रों में अनुज्ञा प्रदान करने हेतु प्रस्तावित स्थल के सम्बन्ध में न्यूनतम एक माह की समयावधि प्रदान करते हुए जनता से आपत्ति/ सुझाव उचित माध्यम से आमन्त्रित किए जाएंगे एवं उनके निस्तारण के उपरान्त मानचित्र स्वीकृति/निरस्तीकरण की कार्यवाही की जाएगी तथा बारात घर/ उत्सव भवन अनुमन्य किए जाने पर आवेदक से जोनिंग रेगुलेशन्स के आधार पर प्रभाव शुल्क भी लिया जाएगा।

13. As can be seen, one of the requirements for marriage hall is the parking area in 1/3 of the total covered area of marriage hall. We asked the learned counsel for the Development Authority that whether all the marriage halls at present are running in conformity with the bye-laws framed by the Development Authority. We have pointedly asked him to name at least few marriage halls who have parking in terms of requirement under the bye-laws. It is a common experience in this city that during wedding seasons, in the evening there is traffic clogging on all the roads where these Barat Bhars are running.

14. Learned counsel for the Development Authority has very fairly conceded that there is no marriage hall which has its parking in terms of the bye-laws.

15. Learned counsel for the petitioner has laid emphasis on the provisions of the Sarais Act, 1867 to buttress his submission that since the petitioner's marriage hall is registered under the Act, 1867 the Development Authority does not have any power to take action against the marriage hall.

16. Since we are not adverting to various issues raised by the petitioners at this stage, we are referring only relevant provisions of the Act, 1867. The definition of 'Sarai' is as under:

"2. Interpretation-clause.--In this Act, unless there be something repugnant in the subject or context,--

"Sarai".

"Sarai" means any building used for the shelter and accommodation of travellers, and includes, in any case in which only part of a building is used as a sarai, the part so used of such building. It also includes a purao so far as the provisions of this Act are applicable thereto.

"Keeper of a Sarai".

"Keeper of a Sarai" includes the owner and any person having or acting in the care or management thereof.

4. Registers of Sarais to be kept.--The Magistrate of the District shall keep a register in which shall be entered by such Magistrate or such other person as he shall appoint in this behalf, the names and residences of the keepers of all Sarais within his jurisdiction, and the situation of every such Sarai. No charge shall be made for making any such entry.

7. Duties of keepers of Sarais.--The keeper of a Sarai shall be bound---

(1) when any person in such Sarai is ill of any infectious or contagious disease, or dies of such disease, to give immediate notice thereof to the nearest police-station;

(2) at all times when required by any Magistrate or any other person duly authorized by the Magistrate of the District in this behalf, to give him free access to the Sarai and allow him to inspect the same or any part thereof;

(3) to thoroughly cleanse the rooms and verandahs, and drains of the Sarai and the wells, tanks, or other sources from which water is obtained for the persons or animals using it to the satisfaction of and so often as shall be required by, the Magistrate of the District, or such person as he shall appoint in this behalf;

(4) to remove all noxious vegetation on or near the Sarai, and all trees and branches of tree capable of affording to thieves means of entering or leaving the Sarai;

(5) to keep the gates, walls, fences, roofs and drains of the Sarai in repair;

(6) to provide such number of watchmen as may, in the opinion of the Magistrate of the District, subject to such rules as the State Government may prescribe in this behalf, be necessary for the safety and protection of persons and animals or vehicles lodging in, halting at or placed in the Sarai; and

(7) to exhibit a list of charges for the use of the sarai at such place and in such form and languages as the Magistrate of the District shall from time to time direct."

17. Section 9 of the Act, 1867 provides that if Sarai is not used according to the provisions of the Act or become in a filthy or unwholesome state and if two or more of the neighbours complaint the District Magistrate regarding the nuisance at sarai the District Magistrate after the enquiry may cause notice in writing to the owner of the sarai for taking appropriate remedial actions. Section-14 provides penalty for infringing the Act or regulations. It shall be treated as an offence and the owner of the sarai will be liable for conviction or penalty. Section 15 provides conviction for third offence to disqualify a person from keeping sarai.

18. We are amazed that in spite of the fact that none of the Marriage Halls are running in conformity with the bye-laws, the Development Authority has turned blind eyes to gross violation of law and has left the city at the mercy of the owners of marriage halls who have caused immense inconvenience to the residents of this city.

19. As discussed above, the Development Authority itself has

admitted that haphazard running of a large number of marriage halls in the city is causing serious inconvenience to the residents and clogging of traffic. Learned counsel for the Development Authority has produced before us two different sets of proposed bye-laws one is titled "Proposed Bye-laws" and the second "Temporarily Proposed Bye-laws".

20. The salient feature of the proposed bye-laws are that to avoid the noise pollution, the directions of the Supreme Court in the case of George of **Church of God (Full Gospel) v. K.K.R. Majestic Colony Welfare Association and others**4, dated 30.8.2000 shall be complied with. The minimum area for sanctioning the map for construction of marriage halls shall be 1500 square meters. The minimum frontage shall be 18 meters. Marriage hall shall be at minimum 18 meters wide road. The covered area 30% in the developed area and in the new/ undeveloped area 40%, FAR in the developed area 1.00, undeveloped 1.50, 2.0 equal car space on every 100 square meter covered area. The salient features of the byelaws read as under:

Proposed Byelaws

दूरस्थ क्षेत्रों (नगर निगम की सीमा से बाहर) में 'बारात

घर'/'उत्सव भवन' के निर्माण/संचालन हेतु अपेक्षाएं–

बारात घर के संचालन हेतु बड़े भूखण्ड की अपेक्षा होती है एवं वाहन पार्किंग, सड़क जाम इत्यादि की समस्या भी उत्पन्न होती है। नगर के अन्दर स्थित बारात घरों से प्रायः जन–सामान्य को एवं बारात घर के निकट के निवासियों को असुविधा भी होती है। उक्त के दृष्टिगत बारात घर संचालन की अनुमति नगर निगम सीमा क्षेत्र के बाहर स्थित क्षेत्रों में प्रदान किया जाय। उक्त दूरस्थ क्षेत्रों में भूमि की उपलब्धता भी अधिक है एवं सड़को पर जाम इत्यादि की समस्या भी कम है। अतएव बारात घरों/उत्सव भवनों की अनुमति नगर निगम सीमा क्षेत्र के बाहर स्थित क्षेत्रों में निम्नलिखित प्रतिबन्धों के साथ प्रदान किया जाय–

1. **अनुमन्यता** 'बारात घर'/उत्सव भवन' के निर्माण की अनुमन्यता महायोजना जोनिंग रेगुलेशन्स के अनुसार होगी।

2. मा0 सर्वोच्च न्यायालय द्वारा चर्च आफ गॉड (फुल गासपिल) बनाम के.के.आर. मेजिस्टिक कालोनी वेलफेयर एशोसिएशन में पारित आदेश दिनांक 30.08. 2000 में स्पष्ट किया जा चुका है कि ध्वनी प्रदूषण के मानकों का अनुपालन किया जाना बाध्यकारी है एवं रात्री 10:00 बजे से लेकर प्रातः 06:00 बजे तक लाउडस्पीकर का प्रयोग पूर्णतः वर्जित है। अतएव बारात घर संचालकों को प्रदूषण नियंत्रण विभाग द्वारा निर्धारित ध्वनी प्रदूषण के मानकों का अनिवार्य रूप से अनुपालन करना होगा एवं रात्री के 10:00 बजे से प्रातः 06:00 बजे तक लाउडस्पीकर/डी.जे. इत्यादि का उपयोग पूर्णतः वर्जित रहेगा।

3. बारात घर के संचालकों को बुकिंग कराने वाले व्यक्तियों से बुकिंग से पूर्व इस आशय का शपथ पत्र प्राप्त करना होगा कि बारात घर में 100 मी0 अधिक दूर से बारात नहीं आयेगी एवं बारात विमान सड़क की चौड़ाई के अधिकतम एक चौथाई भाग में व्यवस्थित रूप से निकाली जायेगी, जिससे कि जन–सामान्य को आवागमन में कोई असुविधा न हो, इसका उल्लंघन करने की स्थिति में बुकिंग कराने वाले व्यक्ति एवं अन्य सम्बन्धित व्यक्तियों के विरूद्ध वैधानिक कार्यवाही की जायेगी।

4. भूखण्ड का क्षेत्रफल न्यूनतम 1500 वर्गमीटर

5. भूखण्ड का फ्रन्टेज न्यूनतम 18 मीटर

6. सड़क की विमान न्यूनतम 18 मीटर चौड़ाई

7. भू–आच्छादन

(क) निर्मित/विकसित क्षेत्र 30 प्रतिशत

(ख) नए/अविकसित क्षेत्र 40 प्रतिशत

8. एफ.ए.आर.

(क) निर्मित/विकसित क्षेत्र 1.00

(ख) नए/अविकसित क्षेत्र 1.50

9. भवन की ऊँचाई 30 मीटर से कम चौड़े मार्ग पर स्थित भवनों की अधिकतम ऊँचाई सड़क की विमान चौड़ाई तथा फ्रन्ट सेट–बैक के योग के डेढ़ गुना से अधिक नही होगी, परन्तु 30 मीटर एवं उससे

अधिक चौड़े मार्गों पर स्थित भवनों हेतु यह प्रतिबन्ध लागू नहीं होगा। भवन की अधिकतम ऊँचाई संरक्षित स्मारक/हैरिटेज स्थल से दूरी, एयरपोर्ट फनल जोन तथा अन्य स्टेट्युटरी प्रतिबन्धों से भी नियन्त्रित होगी।

10. सैट बैक 'बारात घर'/'उत्सव भवन' पृथकीकृत (डिटेच्ड) भवन के रूप में होगा तथा भूखण्ड के क्षेत्रफल के आधार पर न्यूनतम सैट–बैक नियमानुसार होगें:–

भूखण्ड का क्षेत्रफल (वर्गमीटर)	न्यूनतम सैट–बैक (मीटर)			
	अग्र	पृष्ठ	पार्श्व–1	पार्श्व–2
2000 तक	12.0	4.5	4.5	3.0
2000 से अधिक	12.0	5.0	5.0	5.0

11. पार्किंग मानक प्रत्येक 100 वर्गमीटर तल क्षेत्रफल पर 2.0 'समान कार स्थल' की व्यवस्था भूखण्ड के अन्दर करनी होगी । पार्किंग की गणना भूखण्ड में अधिकतम अनुमन्य तल क्षेत्रफल पर की जाएगी। उक्त के अतिरिक्त यह भी प्रतिबन्ध होगा कि भूखण्ड के सम्पूर्ण क्षेत्रफल का न्यूनतम एक–चौथाई भाग वाहन पार्किंग हेतु आरक्षित रहेगा, जिस पर कोई अन्य गतिविधि अनुमन्य नहीं होगी

12. बेसमेंट बेसमेन्ट की अनुमान्यता भवन उपविधि के प्रस्तर–3.9 के अनुसार होगी।

13. अनुज्ञा की प्रक्रिया नई योजनाओं/अनुमोदित होने वाले ले–आउट प्लान्स में बारात घर/उत्सव भवन हेतु निर्धारित मानकों के अनुसार पहले ही अपेक्षित संख्या में भूखण्डों का चिन्हीकरण किया जाएगा और बारात घर के निर्माण की अनुज्ञा केवल इस प्रयोजन हेतु चिन्हित/आरक्षित भूखण्डों पर ही दी जाएगी। विमान विकसित कालोनियों/क्षेत्रों में अनुज्ञा प्रदान करने हेतु प्रस्तावित स्थल के सम्बन्ध में न्यूनतम एक माह की समयाविधि प्रदान करते हुए जनता से आपत्ति/सुझाव उचित माध्यम से आमन्त्रित किये जांएगे एवं उनके निस्तारण के उपरान्त मानचित्र स्वीकृति/निरस्तीकरण की कार्यवाही की जाएगी तथा बारात घर/उत्सव भवन अनुमन्य किये जाने पर आवेदक से जोनिंग रेगुलेशन्स के आधार पर प्रभाव शुल्क भी लिया जाएगा।

Temporarily Proposed Byelaws

उपविधि लागू होने की तिथि से अस्थायी रूप से मात्र दो वर्षों की अवधि तक नगर निगम की सीमान्तर्गत 'बारात घर'/'उत्सव भवन' के निर्माण/संचालन हेतु अपेक्षाएं–

बारात घर के संचालन हेतु बड़े भूखण्ड की अपेक्षा होती है एवं वाहन पार्किंग, सड़क जाम इत्यादि की समस्या भी उत्पन्न होती है। नगर के अन्दर स्थित बारात घरों से प्रायः जन–सामान्य को एवं बारात घर के निकट के निवासियों को असुविधा भी होती है। उक्त के दृष्टिगत बारात घर संचालन की अनुमति नगर निगम सीमा क्षेत्र के बाहर स्थित क्षेत्रों में प्रदान की जायेगी। वर्तमान में अधिकांश बारात घर नगर निगम सीमा के अन्तर्गत स्थित है अतएव इस उपविधि के लागू होने से 2 वर्षों का समय बारात घरों को नगर निगम सीमा क्षेत्र के बाहर स्थानान्तरित होने के लिये प्रदान किया जायेगा। उपविधि लागू होने से, अस्थायी रूप से, मात्र 2 वर्षों की अवधि तक नगर निगम सीमान्तर्गत स्थित बारात घरों को निम्न प्रतिबन्धों के साथ संचालन की अनुमति प्रदान की जायेगी।

1. अनुमन्यता 'बारात घर'/उत्सव भवन के निर्माण की अनुमन्यता महायोजना जोनिंग रेगुलेशन्स के अनुसार होगी।

2. मा0 सर्वोच्च न्यायालय द्वारा चर्च आफ गॉड (फुल गासपिल) बनाम के.के.आर.मेजिस्टिक कालोनी वेलफेयर एशोसिएशन में पारित आदेश दिनांक 30.08.2000 में स्पष्ट किया जा चुका है कि ध्वनी प्रदूषण के मानकों का अनुपालन किया जाना बाध्यकारी है एवं रात्री 10.00 बजे से लेकर प्रातः 06:00 बजे तक लाउडस्पीकर का प्रयोग पूर्णतः वर्जित है। अतएव बारात घर संचालाकों को प्रदूषण नियंत्रण विभाग द्वारा निर्धारित ध्वनी प्रदूषण के मानकों का अनिवार्य रूप से अनुपालन करना होगा एवं रात्री के 10:00 बजे से प्रातः 06.00 बजे तक लाउडस्पीकर/डी.जे. इत्यादि का उपयोग पूर्णतः वर्जित रहेगा।

3. बारात घर के संचालाकों को बुकिंग कराने वाले व्यक्तियों से बुकिंग से पूर्व इस आशय का शपथ पत्र प्राप्त करना होगा कि बारात घर में 100 मी0 अधिक दूर से बारात नहीं आयेगी एवं बारात विमान सड़क की चौड़ाई के अधिकतम एक चौथाई भाग में व्यवस्थित रूप से निकाली जायेगी, जिससे कि जन–सामान्य को आवागमन में कोई असुविधा न हो, इसका उल्लंघन करने की स्थिति में बुकिंग कराने वाले व्यक्ति एवं अन्य सम्बन्धित व्यक्तियों के विरूद्ध वैधानिक कार्यवाही की जायेगी।

4. भूखण्ड का क्षेत्रफल न्यूनतम 600 वर्गमीटर

5. भूखण्ड का फ्रन्टेज न्यूनतम 10 मीटर

6. सड़क की विमान चौड़ाई न्यूनतम 12 मीटर

7. भू–आच्छादन

(क) निर्मित/विकसित क्षेत्र 30 प्रतिशत

(ख) नए/अविकसित क्षेत्र 40 प्रतिशत
.8 एफ.ए.आर.
(क) निर्मित/विकसित क्षेत्र 1.00

(ख) नए/अविकसित क्षेत्र 1.50

9. भवन की ऊँचाई 30 मीटर से कम चौड़े मार्ग पर स्थित भवनों की अधिकतम ऊँचाई सड़क की विमान चौड़ाई तथा फ्रन्ट सेट–बैक के योग के डेढ़ गुना से अधिक नहीं होगी, परन्तु 30 मीटर एवं उससे अधिक चौड़े मार्गों पर स्थित भवनों हेतु यह प्रतिबन्ध लागू नहीं होगा। भवन की अधिकतम ऊँचाई संरक्षित स्मारक/हैरीटेड स्थल से दूरी, एयरपोर्ट फनल जोन तथा अन्य स्टेट्युटरी प्रतिबन्धों से भी नियन्त्रित होगी।

10. सैट बैक 'बारात घर'/'उत्सव भवन' पृथकीकृत (डिटेच्ड) भवन के रूप में होगा तथा भूखण्ड के क्षेत्रफल के आधार पर न्यूनतम सैट–बैक नियमानुसार होंगेः–

भूखण्ड का क्षेत्रफल (वर्गमीटर)	न्यूनतम सैट–बैक (मीटर)			
	अग्र	पृष्ठ	पर्श्व –1	पर्श्व–2
2000 तक	04.0	1.5	1.5	1.0
2000 से अधिक	12.0	5.0	5.0	5.0

11. पार्किंग मानक प्रत्येक 100 वर्गमीटर तल क्षेत्रफल पर 2.0 'समान कार स्थल' की व्यवस्था भूखण्ड के अन्दर करनी होगी। पार्किंग की गणना भूखण्ड में अधिकतम अनुमन्य तल क्षेत्रफल पर की जाएगी। उक्त के अतिरिक्त यह भी प्रतिबन्ध होगा कि भूखण्ड के सम्पूर्ण क्षेत्रफल का न्यूनतम एक–चौथाई भाग वाहन पार्किंग हेतु आरक्षित रहेगा, जिस पर कोई अन्य गतिविधि अनुमन्य नहीं होगी।

12. बेसमेंट बेसमेन्ट की अनुमान्यता भवन उपविधि के प्रस्तर–3.9 के अनुसार होगी।

13. अनुज्ञा की प्रक्रिया नई योजनाओं/अनुमोदित होने वाले ले–आउट प्लान्स में बारात घर/उत्सव भवन हेतु निर्धारित मानको के अनुसार पहले ही अपेक्षित संख्या में भूखण्डों का चिन्हीकरण किया जाएगा और बारात घर के निर्माण की अनुज्ञा केवल इस प्रयोजन हेतु चिन्हित/आरक्षित भूखण्डों पर ही दी जाएगी। विमान विकसित कालोनियों/क्षेत्रों में अनुज्ञा प्रदान करने हेतु प्रस्तावित स्थल के सम्बन्ध में न्यूनतम एक माह की समयाविधि प्रदान करते हुए जनता से आपत्ति/सुझाव उचित माध्यम से आमन्त्रित किये जाएंगे एवं उनके निस्तारण के उपरान्त मानचित्र स्वीकृति/निरस्तीकरण की कार्यवाही की जाएगी तथा बारात घर/ उत्सव भवन अनुमन्य किये जाने पर आवेदक से जोनिंग रेगुलेशन्स के आधार पर प्रभाव शुल्क भी लिया जाएगा।

21. During the course of hearing, learned counsel for the Development Authority has produced the Master Plan before us. In respect of the zonal plan of the city, learned counsel has made a statement that so far only one zonal plan has been prepared for Civil Lines and the adjoining area.

22. Regard being had to the fact that the Master Plan of the city was published on 13.7.2006 and the zonal development plan could be prepared of only one sub-zone i.e. B-4 on 7.3.2011 which was enforced from 18.3.2011. It is amazing that after 19 years of enforcement of Master Plan the zonal plan for entire city is yet to be made except one area.

23. It is apposite to refer the statutory provisions which regulate development of the area. The State Government enacted the U.P. Urban Planning and Development Act, 1973 with the object of planned development of the developed area.

24. Chapter-II of the Act, 1973 deals with the Development Authority and its objects. Section-3 deals with declaration of the development areas; Section-4 provides that the State Government may constitute a Development Authority for any development area. Chapter-III deals with the Master Plan and Zonal Development Plan. A Master Plan is prepared by the experts keeping future

needs in the view. Section-8 of the Act, 1973 reads as under:

"8. Civil survey of, and master plan for the development area.--(1) The Authority shall as soon as may be, prepare a master plan for the development area.

(2) The master plan shall

(a) define the various zones into which the development area may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development shall be carried out; and

(b) serve as a basic pattern of framework within which the zonal development plans of the various zones may be prepared.

(3) The master plan may provide for any other matter which may be necessary for the proper development of the development area."

25. Section-9 deals with Zonal Development Plans. As the Master Plan requires that the developed area be divided in various zones. Relevant provision of Section-9 reads as under:

"9. Zonal Development Plans.-

(1) Simultaneously with the preparation of the master plan or as soon as may be thereafter, the Authority shall proceed with the preparation of a zonal development plan for each of the zones into which the development area may be divided.

(2) A zonal development plan may---

(a) contain a site-plan and use-plan for the development of the zone and show the approximate locations and extents of land uses proposed in the zone for such things as public buildings and other public works and utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces and other categories of public and private uses;

(b) specify the standards of population density and building density;

(c) ... ...

(d) In particular, contain provisions regarding all or any of the following matters, namely-

(i) ... ...

(ii) the allotment or reservation of land for roads, open spaces, gardens, recreation-grounds, schools, markets and other public purposes;

(iii) the development of any area into a township or colony and the restrictions and conditions subject to which such development may be undertaken or carried out;

(iv) the erection of buildings on any site and the restrictions and conditions in regard to the open spaces to be maintained in or around buildings and height and character of buildings:

(v) ... ...

(vi) ... ...

(vii) ... ...

(viii) ... ...

(ix) the prohibitions or restrictions regarding erection of shops, work-shops, warehouses of factories or buildings of a specified architectural feature or buildings designed for particular purposes in the locality,

(x) ... ...

(xi) the restrictions regarding the use of any site for purposes other than erection of buildings;

(xii) any other matter which is necessary for the proper development of the zone or any area thereof according to

plan and for preventing buildings being erected haphazardly, in such zone or area."

26. Chapter-IV of the Act, 1973 deals with the amendment of Master Plan and the Zonal Plan. Sub-sections (1) and (2) of Section-13 of the Act, 1973 provide that the Authority can make the amendment which does not affect the character of plan and the extent of land use or the standard of population density. Sub-section (2) of Section-13 empowers the State Government to make the amendment in the Master Plan. Sub-sections (3), (4), (5), (6) and (7) of Section 13 of the Act, 1973 lays down the procedure for the amendment in the Master Plan. Chapter-V of the Act, 1973 deals with the development of lands. Section 14 requires that in the area which has been declared as development area under Section 3, no development shall be undertaken or carried out without permission in writing from the Vice Chairman. Section 15 of the Act, 1973 deals with the application for permission. Sub-section 5 of Section 15 of the Act, 1973 provide that if the permission is refused, the aggrieved person may appeal to the Chairman against the said order. Section 16 of the Act, 1973 prohibits use of land and building in contravention with the plan. Section 26 lays down the penalties and development is undertaken or carries out in contravention of the Master Plan or Zonal Development Plan or without the permission, approval or sanction under Section 14 of the Act, 1973. Sub-section (2) of Section 26 provides that if any person contravenes the provisions of Section 16 or the condition prescribed by the Regulations shall be punishable with the fine which may extend to Rs. 25000/- and in case of continuing offence Rs. 1250/- for everyday. Sub-section (3) of Section 26 further provides that the said act shall be punishable with the imprisonment for a term which may extend to six months or with fine.

27. Section 28-A of the Act, 1973 has been inserted by U.P. Act No. 3 of 1997 which reads as under:

"28-A. Power to seal unauthorised development: ---(1) It shall be lawful for the Vice-Chairman or an officer empowered by him in the behalf, as the case may be, at any time before or after making an order for the removal or discontinuance of any development under Section 27 or Section 28 to make any order directing the sealing of such development in a development area in such manner as may be prescribed for the purposes of carrying out the provisions of this Act.

(2) Where any development has been scaled, the Vice-Chairman or the officer empowered by him in this behalf, as the case may be, for purpose of removing or discontinuing such development order the seal be removed.

(3) No person shall remove such seal except under an order made under sub-section (2) by the Vice-Chairman, or the officer empowered by him in this behalf.

(4) Any person aggrieved by an order made under sub-section (1) or sub-section (2) may appeal to the Chairman against that order within thirty days from the date thereof and the Chairman may after hearing the parties to the appeal, either allow or dismiss the appeal.

(5) The decision of the Chairman shall be final."

28. The aforesaid statutory provisions clearly demonstrate that the

Development Authority has ample power to get its bye-laws implemented effectively but no action has been taken by the Development Authority for compliance of its bye-laws dealing with marriage halls and most of the marriage halls are running in blatant violation of bye-laws.

29. As noticed above, in the city there are 200 marriage halls in Allahabad. It is an admitted case of the Development Authority that none of the marriage halls are in conformity with the bye-laws made by Prayagraj Development Authority. It is also admitted at the bar by the Development Authority that the area earmarked for underground parking is not available in any of the marriage halls. It is evident from the aforesaid facts that the bye-laws have been completely breached by marriage hall owners with impunity.

30. It is a trite law that it is duty of the Court to enforce performance of the statutory obligation by the statutory authorities and tax payers have a legal right to demand compliance of law and the statutory provisions which have been made for the benefit of the residents of locality. The Supreme Court in the case of **Sri K. Ramdas Shenoy v. The Chief Officers, Town Municipal Council, Udipi and others**5, has observed that "there is special interest in the performance of the duty. All the residents in the area have their interest in the performance of the duty. The special and substantial interest of the residents in the area are injured by all the illegal constructions.

31. In the case of **Sri K. Ramdas Shenoy (supra)** the Municipal Committee had approved construction of a cinema hall on the ground that the site was earmarked for construction of lecture hall. The High Court declined to quash the resolution on the ground that cinema hall owner has spent huge amount. The matter went to the Supreme Court which set aside the judgment of the High Court and held that "the rights of the residents in the area are invaded by an illegal construction of a cinema hall building. It has to be remembered that a scheme in residential area means planned orderliness in accordance with the requirement of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the power of the municipality, the Court will quash the order passed by municipalities in such cases.

32. In the case of **Machavarapu Srinivasa Rao v. Vijaywada, Guntur, Tenli Mangal Giri Urban Development Authority**6, the Supreme Court has observed that the Master Plan or Zonal Development Plan is approved by the State Government. After they are finalized even the State Government / Development Authority cannot use the land for any purpose other than specified therein except by amendment in Master Plan. In the case of **R.K. Mittal v. State of U.P**.7, the Court has considered the provisions of the U.P. Urban Planning and Land Development Act, 1973 and has held that "the Master Plan and the Zonal Plan specified the user as a residential and, therefore, those plots cannot be used for other purposes. The plans have a binding effect in law. If the scheme / master plan is being nullified by an arbitrary act in excess and derogation of power of the Development Authority under law, the Court will intervene and would direct such authority to take appropriate action and whenever

necessary even quash the orders of the Development Authority". The Court has further held that the convenience of the residents and ecological impact are relevant considerations for the Courts while deciding such issues. It is held that the law imposes an obligation upon the Development Authority to strictly adhere to the plan, regulations and the provisions of the Act thus it cannot ignore its fundamental duty by doing acts impermissible in law.

33. In the case of **Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others**8, the Court has noticed the need of planned development of cities and highlighted the need of the public good and observed that the private interest stand subordinate to the public good quoting with approval the judgment in Friends Colony Development Committee v. State of Orissa9. Paragraph-22 of the judgment in Friends Colony Development Committee (supra) reads as under:

"22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified."

34. In the case of **Dipak Kumar Mukherjee (supra)**, the Court has also noticed that "illegal and unauthorized construction of buildings and other structures not only violates the municipal law and concept of the planned development of a particular area but also affects various fundamental and constitutional rights of other persons. The Court has also taken a judicial notice in respect of demolition of hutments, jhuggi jhopris belonging to the marginalized section of the society. Relevant part of the order in Dipak Kumar Mukherjee (supra) reads as under:

"8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structures not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of

preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to the poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structures raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors."

35. A similar observation has been made by the Supreme Court in the case of **Shanti Sports Club and another v. Union of India and others**10, the Court has observed that the affluent and powerful people with support of the political and executive apparatus of the State have constructed commercial complexes, multiplexes, malls etc. in blatant violation of the Master Plan and Zonal Development Plans. While these constructions are raised, the officers of the development authorities and other regulatory bodies turn blind eye due to influence of higher functionaries of the State for other extraneous reasons. The Court has also construed the grave consequence of their action on the present and future generation and the country as valid force to live in unplanned cities in urban areas. These illegal constructions contrary to the Master Plan and Zonal Plan put the unreasonable burden on infrastructure such as sewerage, water, electricity and they create chaos on the road. The Court has further observed that the pollution caused by the traffic congestion affects the health of pedestrians and the people belonging to weaker section of the society who do not have air conditioners, luxury cars and they are made to suffer from skin diseases, asthama, allergy and cancer. The Court has also observed that despite repeated judgments of the Supreme Court and the High Court, the builders and other affluent people pay scant regard to law and the directions of the Court. Relevant part of the judgment is extracted below:

"74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities

and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc. Such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc. ..."

36. In the case of **M.C. Mehta v. Union of India and others**11, the Supreme Court elaborately went on to the issue of unauthorized use contrary to the Master Plan and Zonal Plan. The Court has referred the first principle of Stockholm Declaration of United Nations on Human Environment, 1972, and quoted with the approval of its earlier judgment in **Virender Gaur and others v. State of Haryana and others**12.

37. This Court has observed that the State has a duty to maintain the ecological plans and hygienic environment. The Supreme Court in a series of cases in **M.C. Mehta (supra),** has issued various directions in respect of running of commercial activity including the industry within the limits and has also issued a direction to the Government of NCT of Delhi to frame a policy for holding functions (marriages) in local area in NCT of Delhi. In pursuance of the orders passed by the Supreme Court, the Director of Local Bodies, Government of NCT of Delhi issued a public notice on 26.2.2019 and suggestions were invited from the public to the said draft. Some of the provisions in the draft policy are relevant for our purposes which can be considered by the PDA in its draft bye-laws which has been produced before us.

38. Along with the draft policy a Schedule-I is relevant for our purposes:

Schedule-I

(Format of undertaking by the owner/ organizer of event w.r.t. General Condition)

I .....(Owner/ Organizer), hereby confirm to abide by following general conditions to conduct .....(name of event) on ..... (date & time.);

a. I will not permit any parking outside the authorized/ approved space on roadside.

b. I will deploy my own security guards to manage the parking within the premises.

c. The number of guests and parking space available will be displayed at the main entrance on a board of minimum size 6' x 4'.

d. No loudspeakers and bands will be permitted beyond 10.00PM

e. Processions and horse-drawn carriage will not be permitted on the roads outside the Motel. However, Horse carriage will be allowed within the premises of Motels.

f. Sanitary conditions will be maintained in and around Motel during and and after the completion of duration of functions and in event of violation, the violators will be persecuted in accordance with law.

g. CCTV cameras on entry/ exit points shall be installed by myself with minimum 30 days recording capacity or in accordance with the directions of Police Authorities whichever is more.

h. I shall obtain fire clearance from Delhi Fire services for holding the functions in the Permanent building.

i. I shall make arrangement to dispose off solid waste as per the 'Solid Waste Management Rules 2016'.

j. I will make sufficient arrangement of water supply for consumption of guests and water for fire tank from legal sources.

k. In house treatment facility of waste water will be installed of sufficient capacity in conformity of CPCB and DPCC norms.

l. Treated water will be compulsorily used for non potable purpose.

m. No untreated waste will be discharged in to drain or sewer.

n. The premises will have electricity connection installed of requisite capacity and use of DG set must be resorted to in event of power failure only.

o. All DG sets installed will meet the air pollution and noise pollution norms as per CPCB.

Signature owner/ organizer

39. A Division Bench of this Court in the case of **Sushil Chandra Srivastava and another v. State of U.P. and others, Writ-C No. 1216 of 2019**, decided on 20.8.2019, in somewhat similar context has observed as under:

"...It is indeed a great pity that authorities appears to have developed a tendency to wait a direction from the Government or the Courts to remind their duties cast upon them by the Statute. The Supreme Court in the case of Delhi Airtech Services (P) Ltd V. State of U.P (2011)9 SCC 354 has held that--

"42. As far as this Court is concerned, being conscious of its constitutional obligation to protect the fundamental rights of the people, it has issued directions in various types of cases relating to the protection of environment and preventing pollution. For effective orders to be passed, so as to ensure that there can be protection of environment along with development, it becomes necessary for the court dealing with such issues to know about the local conditions. Such conditions in different parts of the country are supposed to be better known to the High Courts. The High Courts would be in a better position to ascertain facts and to ensure and examine the implementation of the anti-pollution laws where the allegations relate to the spreading of pollution or non-compliance of other legal provisions leading to the infringement of the anti-pollution laws. For a more effective control and monitoring of such laws, the High Courts have to shoulder greater responsibilities in tackling such issues which arise or pertain to the geographical areas within their respective States. Even in cases

which have ramifications all over India, where general directions are issued by this Court, more effective implementation of the same can, in a number of cases, be effected, if the High Courts concerned assume the responsibility of seeing to the enforcement of the laws and examine the complaints, mostly made by the local inhabitants, about the infringement of the laws and spreading of pollution or degradation of ecology."

40. For all the reasons mentioned above, we are of the view that ends of justice requires to issue directions for running and maintaining marriage halls in the city. Accordingly, Prayagraj Development Authority is directed to get the proposed bye-laws approved from the State Government within four weeks from the date of certified copy of this order is received by it. Till the proposed bye-laws are approved and made effective by the State Government, the existing bye-laws shall continue with the directions issued below:

(i) In respect of noise pollution caused at marriage halls, the directions issued by this Court in **Sushil Chandra Srivastava (supra)** shall be applicable. No loudspeaker shall be used beyond the permissible limit under the schedule of Noise Pollution (Regulation and Control) Rules, 2000. It is pertinent to mention that in **Sushil Chandra Srivastava (supra)** the Court has issued direction to the competent authority not to grant permission for DJ;

(ii) If any marriage hall is found to violate the level of noise pollution or the judgment of this Court in **Sushil Chandra Srivastava (supra)**, a fine of rupees one lakh at the first instance; five lakh at the second instance and ten lakhs at the third instance shall be imposed. After the third offence the licence under Section 3 read with Section 14 of the Sarais Act, 1867 shall be cancelled by the District Magistrate;

(iii) If any resident near the marriage hall is disturbed by the excessive noise caused by loudspeaker or other instruments which is beyond permissible limit under the Rules, 2000, shall inform the police at Telephone No. 100. In case any such complaint is made, the police shall follow the directions of this Court in Sushil Chandra Srivastava (supra).

(iv) Barat shall be assembled within 100 meters from marriage hall and in case of violation, the penalty shall be imposed upon the owner of the marriage hall.

(v) The marriage hall owner shall furnish an affidavit in the format of Schedule-I of Draft Policy of NCT of Delhi extracted above; and

(vi) As regards the draft temporarily proposed bye-laws are concerned, we do not approve it as it is against the existing bye-laws.

41. List this case on 6th November, 2019 before the appropriate Bench. The Secretary, PDA shall file the progress report on the next date.

(2019)10ILR A 1524

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 9071 of 2010

Ram Singh & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajesh Kumar Gupta, Sri Kamlesh Kumar, Sri R.N. Tripathi

Counsel for the Respondents:
C.S.C., Sri Brijendra Kumar

A. Urban Land (Ceiling and Regulation) Act, 1976 - Section 3 & Section 35 - Possession not taken as per the Act - no compensation granted - no recourse u/s 10 (6) taken - possession not illegal and subsequent transfer of the land to the Allahabad Development Authority is in derogation of the Act - Repeal Act will apply.

Writ Petition allowed (E-9)

List of Cases Cited: -

1. U. P. Vs Hari Ram (2013) 4 Supreme Court Cases 280

2. St. of Assam Vs Bhaskar Jyoti Sarma & ors. (2015) 5 Supreme Court Cases 321

3. Shiv Ram Singh Vs St. of U.P. & ors. {2015(7) ADJ 630 (DB)}

4. St. of U. P. Vs Hari Ram (2013) 4 Supreme Court Cases 280

5. St. of U. P. & anr. Vs Nek Singh (2010) LawSuit (All) 3581

6. Ram Chandra Pandey Vs St. of U.P. through Secretary, Avas, Lucknow (2010) (82) ALR 136

7. Ram Singh & ors. Vs St. of U.P. & ors. (2013) (120) RD 389

8. Lalji Vs St. of U.P. & 2 ors. (2018) LawSuit (All) 1276

9. St. of U. P. & anr. Vs Vinod Kumar Tripathi & ors. -SLP (C) No.38922 of (2013)

10. Nanku Lal Yadav Vs St. of U.P. & 3 ors. - Writ C No.60193 of (2015).

11. Mohammad Suaif & anr. Vs St. of U.P. & ors. -Writ C No.12696 of (2009)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Shri R.N. Tripathi, learned counsel for the petitioners and learned Standing Counsel for the State.

2. The petitioners in the present petition claim to be the owners of Bhumidhari land situate at village Chaka Tehsil Karchhana District Allahabad and claim to be in possession of the property in question since for the last about 65 years.

3. The present petition seeks a writ of mandamus declaring the proceedings initiated against the petitioners under the Urban Land (Ceiling and Regulation) Act No.36 of 1976 (herein after referred to as 'the Act') as abated in view of the Repealing Act of 1999.

4. It is alleged that a notice under Section 8 (3) of the Act was served upon the petitioners and the father of the petitioners have filed objections against the said notice on 18.9.1979, however, by means of an ex-parte order the land of the petitioners were declared as surplus by the competent authority on 30.11.1979 (Annexure-2 to the writ petition). It is claimed that no further steps were taken in pursuance to the order dated 30.11.1979 and the petitioners continued to be in actual physical possession of the property in question.

5. The petitioners claimed that the petitioners are still in possession over the said land till date and the physical possession of the said land had not been taken by the respondents till date and up

till now the petitioners are cultivating the aforesaid land as the same is an agricultural land.

6. It is stated that the Uttar Pradesh Urban Land (Ceiling and Regulation) Act, 1976 enacted by the Parliament in exercise of its legislative power under Article 252 (1) of the Constitution of India and came into force in U.P. by adopting aforesaid act under Article 252(2) of the Constitution of India on 17.6.1976. Thereafter Parliament passed a Repeal Act No.15 of 1999 on 22.3.1999 and same is adopted by the state of U.P. by Repeal Act no.15 of 1999 which came into force in Uttar Pradesh by Repeal Act no. 15 of 1999 which came into force in Uttar Pradesh on 31.3.1999.

7. It is also alleged in the writ petition that no compensation was aver paid or accepted by the petitioners under the Ceiling Act. It is also stated that the name of the petitioners' father was entered in the revenue record against Gata Nos. 165, 533, 561 & 196 and after the death of the father of the petitioners, the names of the petitioners were duly recorded vide order dated 14.6.2002. It is also brought on record that the petitioners continued to be in physical possession of the property in question and that the petitioners had deposited the Tube well charges regarding the land in question for cultivation for the years 2008 and 2009. In view of the factual averments made as well as relying upon the judgement of the Supreme Court in the case of ***State of Uttar Pradesh Vs. Hari Ram (2013) 4 Supreme Court Cases 280***, the petitioners claim that they are entitled to reliefs claimed in the writ petition.

8. In the counter affidavit filed by the State Government, no documents have been annexed to demonstrate as to how the possession was taken, the only defence taken is that the name of the State Government has been mutated in the revenue records and that the writ petition filed after several years, is liable to be dismissed.

On 13.3.2019, this Court had passed the following order:-

"Learned Standing Counsel has produced the original record. We find that the petitioners have annexed a notice dated 5.2.1986 under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 issued to the tenure holder/ petitioner which shows that two officers have taken possession on behalf of the State and the Prescribed Authority. There is no explanation of the tenure holder to indicate that he has given possession to the aforesaid authority. In the original record same document is on the record hence we accept annexure-2 as a correct document.

We have carefully perused the original record and we find that no document pertains to the proceeding under Section 10(6) of the Act, 1976 has been shown is in the original record. After perusal, the original record is returned to Sri Mohan Srivastava, learned Standing Counsel.

Learned counsel for the petitioners submits that the petitioners are still in possession and he has drawn our attention to the averments made in paragraph nos. 4, 7 & 8 which have not been specifically denied in the counter affidavit.

Learned counsel for the petitioners has placed reliance on a judgment of the Supreme Court in the case of State of U.P. v. Hari Ram, (2013) 4 SCC 280 and a

judgment of a Division Bench of this Court in the case of Nanaku Lal Yadav v. State of U.P. and others, Writ-C No. 60193 of 2015.

We have heard Sri R.N. Tripathi, learned counsel for the petitioners and learned standing counsel at length.

Judgement is reserved."

9. Allahabad Development Authority has also filed a counter affidavit stating that the possession was transferred to Allahabad Development Authority vide a Government Order dated 11.12.1996 and has relied upon the judgement of the Supreme Court in the case of **State of Assam Vs. Bhaskar Jyoti Sarma and others (2015)** 5 Supreme Court Cases 321 to contend that the writ petition is liable to be dismissed on the ground that the possession has already been transferred by a Government Order, the petition is highly belated and in view of the judgement of the Supreme Court in the case of **State of Assam Vs. Bhaskar Jyoti Sarma and others (supra)** the writ petition is liable to be dismissed. The standing counsel has also relied upon the Division Bench judgement of this Court in the case of Shiv Ram Singh Vs. State of U.P. and others {2015(7) ADJ 630 (DB)}.

10. The counsel for the petitioners has relied upon the judgements in the case of **State of Uttar Pradesh Vs. Hari Ram (2013) 4 Supreme Court Cases 280, State of Uttar Pradesh and another Vs. Nek Singh 2010 LawSuit (All) 3581, Ram Chandra Pandey Vs. State of U.P. through Secretary, Avas, Lucknow 2010 (82) ALR 136, Ram Singh and others Vs. State of U.P. and others 2013 (120) RD 389, Lalji Vs. State of U.P. and 2 others 2018 LawSuit (All) 1276, the judgement of the Hon'ble Supreme Court in the case rendered in Special Leave to Appeal (C) No.38922 of 2013, State of Uttar Pradesh and another Vs. Vinod Kumar Tripathi & others and the judgement passed in Writ C No.60193 of 2015 Nanku Lal Yadav Vs. State of U.P. and 3 others,** decided on 8.3.2018.

11. The factual aspects of the present writ petition are clear to the effect that no possession was taken by the Collector under Section 10 (5) of the Act, the possession memo shown to us does not even bear the signatures of the person giving the possession, there is no factual dispute that the petitioners are still in actual physical possession of the property in question as well as no compensation was either paid or received by the petitioner in the present case. It is also not disputed that no recourse was taken to Section 10 (6) of the Act. This Court extensively considered a similar matter in **Writ C No.12696 of 2009 Mohammad Suaif and another Vs. State of U.P. and others**, decided on 7.5.2019 and had duly considered the judgements of the Supreme Court in the case of ***State of U.P. Vs. Hari Ram (Supra)*** followed by this High Court in series of judgements as well as the judgement of the Supreme Court rendered in the case of State of Assam Vs. Bhaskar Jyoti Sarma and others (supra) this Court after considering the entire judgements framed the following questions:-

i) whether the possession taken by the State Government can be termed as a valid possession in accordance with law provided under the Act No.33 of 1976 read with the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment

of Amount and Allied Matters) Directions, 1983 ?

ii) whether the possession not taken inconsonance with the provisions of the Act and Directions can be termed to be a legal possession ?

iii) whether the subsequent transfer of the land to Allahabad Development Authority can be a sole ground for denying the reliefs to the petitioners ?

iv) what would be the effect of the Repeal Act, in the event the possession is held not to be taken in accordance with the statutory provisions ?

v) whether the judgement of the Supreme Court in the case of State of Assam Vs. Bhaskar Jyoti Sarma and others (2015) 5 Supreme Court Cases 321 can be applied to the cases arising in the State of Uttar Pradesh ?

12. This Court after duly considering the judgements and the provisions of law recorded that in the State of Uttar Pradesh the position of law was as under:-

13. The Urban (Ceiling and Regulation) Act was promulgated as Act No.33 of 1976 and it came into force on 17.2.1976. The object of the Act was to provide for imposition of ceiling of vacant land in urban conglomeration and for acquisition of such lands which were held in excess of the ceiling limits.

14. In terms of Act No.33 of 1976 by virtue of powers conferred under Section 35 of the said Act. The State of Uttar Pradesh issued specific directions prescribing the manner for taking possession known as the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983.

15. The Act No.33 of 1976 was repealed by Section 2 of the Repeal Act, 1999 and the said Repeal Act was adopted in the State of Uttar Pradesh on 18.3.1999. By virtue of Section 3 of the Repeal Act, savings clause was provided, Section 3 of the Repeal Act, 1999 is being quoted herein below:-

"Section 3 in The Urban Land (Ceiling and Regulation) Repeal Act, 1999

3. Saving.--

(1) The repeal of the principal Act shall not affect--

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

16. The relevant directions issued under Section 35 of the Act No.33 of

1976 known as The Uttar Pradesh Urban Land Ceiling (Taking of Possession payment of amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976) are quoted herein below:-

The Uttar Pradesh Urban Land Ceiling (Taking of Possession payment of amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976):

"In exercise of the powers under Section 35 of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), the governor is pleased to issue the following directions relating to the powers and duties of the Competent Authority in respect of amount referred to in Section 11 of the aforesaid Act to the person or persons entitled thereto:

1. Short title, application and Commencement -These directions may be called the Uttar Pradesh Urban Land Ceiling (Taking of Possession Payment of Amount and Allied Matters Directions, 1983).

2. The provisions contained in this direction shall be subjected to the provisions of any directions or rules or orders issued by the Central Government with such directions or rules or orders.

3. They shall come into force with effect from the date of publication in the Gazette.

2. Definitions:-

3. Procedure for taking possession of vacant Land in excess of Ceiling Limit-(1) The Competent Authority will maintain a register in From No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the Gazette.

4. (2) an order in Form No.ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No.ULC-1.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No.ULC-1. The Competent Authority shall in token of verification of the entries, put his signatures in column 11 of Form No.ULC-1 and Column 10 of Form No.ULC-III.

Form No. ULC-1 Register of Notice u/s 10-(3) and 10(5)

1	2	3	4	5	6	7	8
Serial No. of Register of Receipt Serial No. of Register of Taking possessi-on	Case number	Date of Notification u/s 10 (3)	Land to be acquired	Date of taking over possession	Remarks	Signature of competent Authority	

Form No. ULC-II

Notice order u/s 10(5) (See clause (2) of Direction (3)

In the Court of Competent Authority

U.L.C. .....

No..... Date .....

Sri/Smt.....T/o .....

In exercise of the powers vested un/s 10(5) of the Urban Land Ceiling and Regulation Act, 1976 (Act No.33 of 1976, you are hereby informed that vide Notification No..... dated ..... under section 10(1) published in Uttar Pradesh Gazette dated... following land has vested absolutely in the State free from all

encumbrances as a consequence Notification u/s 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27-U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of Vacant Land

Location	*Khasra number identification*	*Area*	*Remarks*
1	2	3	4

Competent Authority

.....

.....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with copy of certificate to verify.

Competent Authority .....

....."

17. The State Government issued a Government Order No. 2228/आठ–6–15–124 यूसी/13 dated 29th September, 2015 accepting the judgement of the Hon'ble Supreme Court in the case of **State of Uttar Pradesh Vs. Hari Ram (Supra)** and necessary directions were issued to take steps for compliance and decision in terms of the directions in the case of State of Uttar Pradesh Vs. Hari Ram (Supra). Copy of the said Government Order dated 29.9.2015 is quoted herein below:-

संख्या – 2228/आठ–6–15–124 यूसी/13

प्रेषक,

पनधारी यादव

सचिव,

उत्तर प्रदेश शासन।

सेवा मे,

जिलाधिकारी,

गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर

आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

आवास एवं शहरी नियोजन अनुभाग–6 लखनऊ : दिनांक 29 सितम्बर 2015

विषय नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 ततक्रम में निर्गत शासनादेश तथा मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 के सम्बन्ध में।

————

महोदय,

उपयुर्क्त विषय पर मुझे यह कहने का निर्देश हुआ है कि भारत सरकार के अधिनियम संख्या–15/1999 दिनांक 18.03.1999 द्वारा नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम 1976 को निरसित करते हुए नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम 1999 प्राख्यापित किया गया जिसके क्रम में शासनादेश संख्या– 502/9– न0 भू0–99–21यू0 सी0/99, दिंनांक 31.03.1999 द्वारा उक्त निरसन अधिनियम को उत्तर प्रदेश राज्य में अंगीकृत किया गया। निरसन अधिनियम 1999 की धारा–3 मे यह प्राविधान है कि मूल अधिनियम का निरसन निम्नलिखित को प्रभावित नहीं करेगा–

(1) (क) धारा–10 की उपधारा– (3) के अधीन ऐसी रिक्त भूमि का निहित होना, जिसका कब्जा राज्य

सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से अधिकृतक किसी व्यक्ति या सक्षम प्राधिकारी ने ले लिया है।

(ख) धारा– 20 की उपधारा– (1) के अधीन छूट देने संबंधी किसी आदेश या उसके अधीन की गयी किसी कार्यवाही की किसी न्यायालय के किसी निर्णय में उसके विरूद्ध किसी बात के होते हुए भी विधिमान्यताः

(ग) धारा– 20 की उपधारा– (1) के अधीन प्रदान की गयी छूट की शर्त के रूप मे राज्य सरकार को किया गया कोई संदायः

(2) जहां–

(क) मूल अधिनियम की धारा–10 की उपधारा (3) के अधीन किसी भूमि को राज्य सरकार मे निहित होना मानी गयी है किन्तु जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से प्राधिकृत किसी व्यक्ति या सक्षम प्राधिकारी द्वारा नही लिया गया : और

(ग) ऐसी किसी भूमि के बाबत जिसके लिए राज्य सरकार द्वारा किसी रकम का संदाय कर दिया गया है तब तक प्रत्यावर्तित नही की जाय और जब तक कि राज्य सरकार को संदाय की गयी रकम का यदि कोई हो, प्रतिदाय नही कर दिया जाता।

उक्त के क्रम मे शासनादेश संख्या–777/9न0भू0–135 यू0 सी0/99 दिनांक 09.02.2000, शासनादेश संख्या –1623/9– न0भू0–2000 दिनांक 09.08.2000 एवं शासनादेश संख्या–190/9–आ–6– 2001 दिनांक 24.01.2001 निर्गत किये गये जिसमे मुख्य रूप से यह व्यवस्था की गई कि मूल अधिनियम धारा –8 (4) के अन्तर्गत जो भूमि रिक्त घोषित की गई थी और धारा–10 (3) के अन्तर्गत राज्य मे निहित हो चुकी थी एवं धारा–10 (5) की कार्यवाही का आदेश हो चुका था परन्तु इस भूमि पर राज्य सरकार का कब्जा प्राप्त नही हो सका था, ऐसी भूमि के सम्बन्ध मे मूल भूधारक को अदा की गई धनराशि भूधारक द्वारा वापस करने पर भूमि मूल भूधारक को प्रत्यावर्तित की जा सकती है किन्तु अदा की गई धनराशि भू– धारक द्वारा वापस न करने की दशा में भूमि पर कब्जा किये जाने के सम्बन्ध मे विधि अनुसार अग्रिम कार्यवाही अमल मे लायी जाय। यह भी व्यवस्था की गई कि जिस भूमि के सम्बन्ध मे धारा–10 (5) की कार्यवाही के उपरान्त धारा–10 (6) की कार्यवाही पूर्व हो चुकी है और भूमि पर राज्य सरकार द्वारा कब्जा लिया जा चुका है वह सरप्लस भूमि अन्तिम रूप से राज्य सरकार में निहित मानी जायेगी।

3. नगर भूमि सीमारोपण– गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर मे लम्बित अर्बन सीलिंग प्रकरणों का समुचित रूप से निस्तारण ने होने की स्थिति मे भू–धारकों/वादियों द्वारा मा0 उच्च न्यायालय में अधिक संख्या मे रिट याचिकाये योजित की जा रही है। नगर बस्ती कार्यालयो द्वारा रिट याचिकाओ मे विभागीय पक्ष समयान्तर्गत साक्ष्यो सहित प्रबलता से प्रस्तुत न किये जाने के कारण मा0 न्यायालय द्वारा पारित आदेशों के क्रम मे शासन को असमंजसपूर्ण स्थिति का सामना करना पड़ रहा है।

4. अर्बन सीलिंग के अन्य प्रकरण मे राज्य सरकार द्वारा मा0 उच्चचम न्यायालय नई दिल्ली मे विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम योजित की गयी। कालान्तर मे अन्य जनपदों के अर्बन सीलिंग से संबधित प्रकरणों मे योजित विशेष अनुमति याचिकाये उक्त विशेष अनुमति याचिका से क्लब की गयी। उक्त विशेष अनुमति याचिका संख्या–12960/2008 तथा उससे क्लब अन्य विशेष अनुमति याचिकाओ में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 मे अर्बन सीलिंग से संबधित प्रकरणों मे मार्गदर्शक सिद्धान्त प्रतिपादित किये गये है। निर्णय दिनांक 11.03.2013 का महत्वपूर्ण एवं क्रियात्मक अंश निम्नवत हैः–

प्रस्तर– 39

The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub section (5) of Section 10 or forceful dispossession under sub section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal At. The Stage Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

प्रस्तर– 40

We, therefore, find no infirmity in the judgment of the High Court and the

appeal is, accordingly dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no ore as to cost.

5- नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 में विहित प्राविधान तथा तत्क्रम मे निर्गत शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 स्वतः स्पष्ट है। विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम तथा उससे क्लब अन्य विशेष अनुमति याचिकाओ मे पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्त/आदेश भी स्वतः स्पष्ट है।

6. कृपया नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 तथा उक्त शासनादेश दिनांक 09.02.2000 , शासनदेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 मे विहित व्यवस्था, विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम मे पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्तो/आदेशों के आलोक मे लम्बित प्रकरणों मे स्महंस पदहतमकपमदजे देखते हुए आवश्यक कार्यवाही की जाय।

भवदीय

ह0 अपठनीय

(पनधारी यादव)

सचिव
संख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक नगर भूमि सीमारोपण , उ0 प्र0 जवाहर भवन– लखनऊ
2. सक्षम प्राधिकारी नगर भूमि सीमारोपण गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर,
आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।
3. मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय, इलाहाबाद
4. गार्ड फाईल।

आज्ञा से

(कल्लू प्रसाद द्विवेदी)

उप सचिव।ष

18. This Court also discussed the judgement of the Supreme Court in the case of ***State of U.P. Vs. Hari Ram (Supra)*** followed by the other judgements as well as judgement in case of ***State of Assam Vs. Bhaskar Jyoti Sarma (supra)*** and answered the questions as under:-

(i) The possession taken by the State Government cannot be termed as a valid possession in accordance with law provided under the Act No.33 of 1976 read with the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983.

(ii) The possession which is not taken in consonance with the provisions of the Act and Directions cannot be termed to be a legal possession in accordance with law.

(iii) Subsequent transfer of land to Allahabad Development Authority cannot be a ground for denying the reliefs in the case where the possession is held to be taken in derogation of the Act No.33 of 1976 read with the Directions, 1983.

(iv) It is held that the Repeal Act will apply with full force and in the event the possession is not taken in accordance with the statutory provisions.

19. The facts of the judgement in the case of **Mohammad Suaif and another Vs. State of U.P. & others (Supra)** decided on 7.5.2019 in Writ C No.12696

of 2009 squarely apply to the facts of the present case, as in the present case the possession has not been voluntarily given by the petitioners, the possession memo does not bear the signatures, the possession has not been taken by the Collector or even anybody authorized by him. The actual physical possession continues to be with the petitioners and as such we have no hesitation in holding that the petitioners are entitled to the benefits of the Repeal Act and the proceedings initiated against the petitioners are liable to be dropped and declared as abated.

20. This Court in the case of **Nanku Lal Yadav Vs. State of U.P. and 3 others (Supra)** decided on 8.3.2018, in Writ C No.60193 of 2015 in similar facts and circumstances, considered the entire gamut of laws allowed the writ petition.

21. We have also gone through the Division Bench judgement of this Court in the case of **Shiv Ram Singh Vs. State of U.P. and others (supra)** wherein this Court dismissed the writ petition claiming the benefit of Section 3 of the Repeal Act. In the said case the Division Bench had perused the record produced by the Standing Counsel and recorded as under :-

"In the present case, the learned Chief Standing Counsel has produced the original file for the perusal of the Court. The material before the Court indicates that the Directions of 1983 were duly observed. Direction 3(2) envisages that an order in Form ULC-II has to be sent to each land holder as prescribed under Section 10(5) and the date of issue and service of the order is to be entered in Column 8 of Form ULC-I. This procedure has been complied and we may only note that a copy of the original ULC-II register has been produced for the perusal of the Court. Similarly, direction 3(3) contemplates that on possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10, entries will be made in a register in Form ULC-III. The original Form ULC-III has similarly been produced before the Court. Entries have been made in compliance with direction 3 both in ULC-II and ULC-III registers. In the present case, it is also clear from the record that on 14 February 1992, a communication was addressed by the Competent Authority to the Tehsildar drawing attention to an earlier letter dated 25 February 1987 and requesting that possession of the land be taken over. A copy of the letter dated 25 February 1987 forms part of the original record which was produced by the learned Chief Standing Counsel. On 25 June 1993, possession of the land was taken over. The possession receipt has been duly executed by the Naib Tehsildar and by the Kanoongo. In this view of the matter, we are unable to accept the contention of the petitioner that possession of the land was not taken over prior to the date of the Repeal Act."

22. The question whether the Collector is empowered to delegate the act of taking possession based on the well settled principles of law that "**Delegatees non protest delegare**" was neither raised nor considered by this Court in the case of **Shiv Ram Singh Vs. State of U.P. and others** (supra). In the said decision even the question of difference of procedure for prescribing the taking over of the possession as provided in the State of U.P. was distinct with regards to the provisions in the State of Assam was

neither raised nor considered and the decision in the case of **Shiv Ram Singh Vs. State of U.P. and others (supra)** had also recorded that the possession in the said case was taken over prior to 18.3.1999 consequent upon which the petitioners would not be entitled to the benefit of the Repeal Act, the Court was impressed with the fact that the sewerage treatment plant was being constructed and substantial part of it had already been constructed which itself dis entitled the petitioners to claim relief as they were not serious to approach the Court within the time. The said judgement, we say respectfully cannot be applied to the facts of the present case for the reasons that the question of manner of taking possession in the State of U.P. and State of Assam are distinct and separate which question was neither adjudicated nor decided by the Court.

23. The question of delegatee not empowered to further sub-delegate was neither raised nor considered by the Court as also in the present case there is no such averment in the pleadings of the State Government to demonstrate that some project has come-up on the land in question, which the petitioners were aware and failed to agitate within a reasonable time, these three factors being different in the present case from that of the case of **Shiv Ram Singh Vs. State of U.P. and others (supra)**, we respectfully hold that the findings recorded in the said case are clearly distinguishable. All these aspects which were not considered in the case of **Shiv Ram Singh Vs. State of U.P. and others (supra)** were duly raised and considered by this Court in the case of **Mohammad Suaif and another Vs. State of U.P. (Supra).**

24. Consequently, relying upon the judgment in the case of **Mohammad Suaif and another Vs. State of U.P. (Supra)** and judgement in case of **Nanku Lal Yadav Vs. State of U.P. and 3 others (Supra)** and considering the facts of the case, the writ petition is allowed declaring the petitioners to be owners with the direction to the State Government to correct the revenue records accordingly.

(2019)10ILR A 1534

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 6971 of 2017

U.P. S.R.T.C. Kanpur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mritunjay Mohan Sahai

Counsel for the Respondents:
C.S.C., Sri Sachin Dubey, Sri Surendra Nath Dubey

A. Payment of Gratuity Act, 1972 - Section 2(b), 2(c) and 2-A - An employee on wages in establishment covered by the Act, 1972 and in continuous service of minimum five years, entitled for gratuity.

Held:- In view of the foregoing discussions, it follows that the entitlement to receive gratuity flows from the provisions of the P.G. Act, 1972 and an "employee" having fulfilled the necessary preconditions for claiming entitlement in terms thereof would be liable to be paid the gratuity amount due to him

irrespective of the fact whether his employment was of a regular nature or whether he was employed on a casual basis or temporary basis or as a daily wager**.** (Para 26)

B. The Act accepts, as a principle, compulsory payment of gratuity as a social security measure to wage earners in industries, factories and establishments. The main purpose and concept of gratuity is to provide for terminal benefits to a workman upon his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease. (Para 28)

Writ Petition rejected (E-9)

List of Cases Cited: -

1. U.P.S.R.T.C. & ors. Vs Ram Shankar Sharma & ors., Writ C No.34125/1995

2. Baban Vs Estate Manager, M.H. St. Farming Corp. Ltd. & ors, 2017 (152)FLR17

3. Netram Sahu Vs St. of Chhattisgarh & anr.(2018) 5 SCC 430

4.Workmen of M/s Firestone Tyre & Rubber Company of India Pvt. Ltd. Vs Management & ors., (1973)1 SCC 813

5. B.D. Shetty & ors. Vs CEAT Ltd. & anr., (2002)1 SCC 193

6. Allahabad Bank & anr. Vs All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 44

7. Jeewanlal Ltd. & ors. Vs Appellate Authority under the Payment of Gratuity Act & ors., (1984)4 SCC 356

8. Bharat Singh Vs Management Of New Delhi Tuberculosis Centre, New Delhi & ors.,(1986) 2 SCC 614

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Mritunjay Mohan Sahai, learned counsel for the petitioner and Sri Surendra Nath Dubey, learned counsel appearing on behalf of respondent no.4.

2. The present petition seeks to challenge the order dated 16.07.2016 passed by the Controlling Authority under the Payment of Gratuity Act, 1972/Assistant Labour Commissioner, U.P., Kanpur in P.G. Case No.105 of 2014 and also the order dated 20.01.2017 passed by the Appellate Authority under the Payment of Gratuity Act, 1972/Deputy Labour Commissioner, U.P., Kanpur whereby the appeal filed there against has been rejected.

3. The factual background of the case as reflected from the records indicates that an industrial dispute was raised by the respondent-workman whereupon a reference was made under Section 4K of the U.P. Industrial Disputes Act, 19471, registered as Adjudication Case No.34 of 1993, before the Presiding Officer, U.P., Kanpur. The question referred for adjudication was as follows:-

"क्या सेवायोजकों द्वारा श्रमिक श्री आर०एस०शर्मा पुत्र श्री झब्बू लाल परिचालक को दि० 2-6-92 को कार्य से पृथक वंचित किया जाना उचित एवं वैधानिक है? यदि नहीं तो संबंधित श्रमिक क्या हितलाभ/क्षतिपूर्ति पाने का अधिकारी है? किस तिथि एवं अन्य किस विवरण के साथ?"

4. The aforementioned reference was answered by the Labour Court vide its award dated 27.05.1995 in the following terms:-

"इसलिए मेरे विचार से श्रमिक आर०एस०शर्मा का नाम प्रतीक्षा सूची से

काट कर हटाये जाने की कार्यवाही में नियम का पूर्णतः पालन नहीं किया गया है इसलिए मेरा अभिमत है कि श्री आर०एस०शर्मा को सेवा समाप्ति की तिथि दिनांक 2-6-92 से पुनः सेवा में परिचालक के पद पर लिया जाए और प्रतीक्षा सूची से पृथक किये जाने की तिथि से अभिनिर्णय की तिथि तक की अवधि के बीच का उसे आधा अन्य भत्ता सहित दिया जाये आधा वेतन इसलिए कि उसने इस बीच किसी कार्य को अंजाम नहीं दिया है और आधा वेतन दिये जाने से कानून का मंशा भी पूरा हो जाता है। उक्त भुगतान अभिनिर्णय के प्रकाशित होने के एक माह के अन्दर दिया जाये।"

5. The award of the Labour Court was put to challenge in the case of **U.P.S.R.T.C. & Ors. Vs. Ram Shankar Sharma & Ors**.2, which came to be decided in terms of judgment and order dated 07.02.2013, the relevant portion of which reads as under:-

"...This writ petition has been filed by the petitioner being aggrieved by an award of the Labour Court dated 27.05.1995 passed in Adjudication Case No.34 of 1993 by which the Labour Court has reinstated the respondent workman with 50% back wages. The Labour Court has come to the conclusion that the petitioner was working in the Corporation as a 'Conductor' on a regular basis and, therefore, has reinstated the workman with 50% back wages. Under the interim orders of this Court, the petitioner has already reinstated the workman and counsel for the workman states that he is working since then without any hatch.

The back wages were stayed by this Court. Insofar as the back wages are concerned, the Labour Court has granted 50% back wages to the workman for the period when he was not working up to the date of passing of the award.

In view of the fact that the Labour Court has not recorded any finding with regard to the fact as to whether the workman was gainfully employed or not during the period the back wages have been awarded, which could only be justified to reduce the back wages to 50% what has been granted by the Labour Court.

Thus, in the interest of justice, the award of the Labour Court is confirmed subject to the modification that the back wages are reduced to half of what has been granted in view of the decision of Hon'ble Apex Court in the case of U.P. State Brossware Corporation Ltd. Vs. U.N. Pandey reported in 2006 (1) SCC 479. The amount, which is due to the workman shall be paid to him within the next two months upon his making an application.

The Writ Petition stands disposed of as above. No costs."

6. Upon his superannuation, the respondent-workman filed an application before the Controlling Authority under Section 7 of the Payment of Gratuity Act, 19723 for a direction, which was registered as P.G. Case No.105 of 2014. The claim application was allowed and a direction was issued for payment of gratuity totalling to Rs.4,45,022/- alongwith 10% interest from the date of filing of the claim application upto the date of payment. Against the aforementioned order the petitioner preferred an appeal under Section 7(7) of the P.G. Act, 1972, registered as P.G. Appeal No.09 of 2016, which has been rejected vide order dated 20.01.2017 and the earlier order passed by the Controlling

Authority directing payment of Rs.4,45,022/- has been affirmed.

7. Challenging the aforementioned orders passed by the Controlling Authority and the Appellate Authority, the present writ petition has been filed.

8. Contention of the learned counsel for the petitioner is that the Controlling Authority as well as the Appellate Auhority have erred in failing to consider that the respondent no.4 was never treated to be a regular employee and no documentary evidence was placed on record by the workman showing that he was granted regularisation and as such the computation of the amount of gratuity payable to the workman is based on conjectures.

9. Per contra, Sri Surendra Nath Dubey, learned counsel for the respondents has submitted that the respondent-workman was selected in a regular selection held by the Corporation in the year 1980 and was placed in the wait list of conductors, and as such the Corporation could not take a stand that he was appointed on a daily-wage basis. Placing reliance upon the award passed by the Labour Court and the judgment of this Court in Writ-C No.34125 of 1995 it is contended that the respondent-workman superannuated from service working as a conductor and as such the claim made by him for gratuity had rightly been allowed. It is further submitted that the P.G. Act, 1972 applies to all employees whether they are regular or not, the only condition being that the employee must have worked for five years and that gratuity is to be computed on the basis of the last drawn wages.

10. Heard the counsel for the parties and perused the records.

11. The records of the case indicate that the reference made with regard to the legality/validity of the termination of the respondent-workman w.e.f. 02.06.1992 was answered by the Labour Court by recording a conclusion that the removal of the name of the respondent-workman from the wait list was not as per the rules. It was directed that the workman be reinstated on the post of conductor from the date of his termination i.e. 02.06.1992 and further that he may be granted 50% back wages from the date of removal of his name from the wait list till the date of the award. The award of the Labour Court was confirmed by this Court in its judgment dated 07.02.2013 in Writ-C No.34125 of 1995 subject to the modification that the back wages were reduced to half of what had been granted.

12. It is an admitted position between the parties that the judgment of this Court dated 07.02.2013 passed in Writ-C No.34125 of 1995, confirming the award subject to the only modification that the back wages were reduced to half of what had been granted, was not subjected to any further challenge by either of the parties, and was allowed to attain finality.

13. The respondent-workman continued to work as a conductor with the petitioner-Corporation and attained his superannuation working in the said capacity.

14. The stand taken by the petitioner-Corporation that the respondent continued to work as a daily wager as on the date of his superannuation is not consistent with the material evidence available on record. The inconsistency in the stand of the petitioner-Corporation

with regard to gratuity payable to the respondent-workman is also reflected from the ambivalent position taken by the petitioner-Corporation before the Controlling Authority. On one hand, a stand was taken that the last drawn wages of the workman together with the dearness allowance was Rs.16,403/- and on the basis of the same the total amount of gratuity due to the workman was said to be Rs.2,93,361/- as on 31.07.2011. On the other hand the witness appearing on behalf of the Corporation before the Controlling Authority stated that the calculation of gratuity was made treating the workman to be a daily wager, and on the basis of the last drawn wages at the rate of Rs.71.34/- per day an amount of Rs.49,928/- was computed towards gratuity. In his cross-examination the witness stated that the workman concerned was appointed as a daily wager in the year 1980 and since his year of birth was 1953 he would have superannuated upon attaining the age of 58 years in the year 2011.

15. The Controlling Authority upon considering the documentary and oral evidence and the arguments advanced by the parties held that for the purposes of computation of gratuity under the provisions of the P.G. Act, 1972 what was relevant was the length of service and the last drawn wages, and the question as to whether the workman had worked as a daily wager or as a regular employee was of no consequence. Taking notice of the fact that there was no dispute between the parties with regard to the length of service which was admitted to be 31 years and in the absence of any clear stand by the employer-Corporation with regard to the last drawn wages the claim made by the workman was accepted and the computation of gratuity was made.

16. The Appellate Authority upon taking notice of the award dated 27.05.1995 passed by the Labour Court in Adjudication Case No.34 of 1993 and the judgment of this Court dated 07.02.2013 passed in Writ-C No.34125 of 1995 in terms of which the award had been confirmed subject to the modification that the back wages were reduced from 50% to 25%, has drawn an inference that the workman superannuated as a regular employee of the Corporation and the computation of gratuity by the Controlling Authority on the basis of a last drawn wages had rightly been made. The Appellate Authority also took note of the fact that the recovery certificate dated 09.08.2007 pursuant to the award passed by the Labour Court had been issued wherein the amount under recovery was computed treating the workman to be a regular employee. The finding of the Controlling Authority that for the purposes of gratuity the status of the workman as a daily wager or as a regular employee was inconsequential and what was to be seen was the length of service and the last drawn wages, was reiterated by the Appellate Authority. In view of the admitted position between the parties with regard to the length of service being 31 years the computation of gratuity made by the Controlling Authority on the basis of the last drawn wages as claimed by the workman was affirmed.

17. The sheet anchor of the argument of the petitioner-Corporation is that the respondent was never appointed in a regular capacity nor was he granted regularisation against any post and as such the authorities under the Payment of Gratuity Act, 19724 have erred in allowing his claim for payment of gratuity. On the other hand it has been

argued on behalf of the respondent-workman that on the basis of a regular selection held by the Corporation in the year 1980 he was placed in the wait list of conductors and that the stand of the Corporation that he had been engaged as a daily wager was incorrect. It was further submitted that the award of the Labour Court had directed his reinstatement on the post of conductor w.e.f. 02.06.1992 and in terms of the judgment of this Court passed in Writ-C No.34125 of 1995 the award of the Labour Court was confirmed subject to the only modification that the back wages were reduced to half of what had been granted.

18. In order to appreciate the rival contentions of the parties the relevant statutory provisions of the P.G. Act, 1972 may be adverted to:-

"**2. Definitions**.--In this Act, unless the context otherwise requires,--

x x x x x

(b) "completed year of service" means continuous service for one year;

(c) "continuous service" means continuous service as defined in Section 2-A;

x x x x x

(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;

x x x x x

(s) "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

2-A. Continuous service.--For the purpose of this Act,--

(1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work out due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer--

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an

establishment which works for less than six days in a week; and (ii) two hundred and forty days, in any other case;

(b) for the said period of six months if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than--

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case;

Explanation.--For the purpose of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which--

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

(3) where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during such period.

x x x x x

4. Payment of Gratuity.--(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,--

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

Provided further that in case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is minor, the share of such minor, shall be deposited with the Controlling Authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.--For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account :

Provided further that in the case of an employee who is employed in a seasonal establishment, and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.--In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed ten lakh rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),--

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so causes;

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

19. In terms of Section 2(e) of the P.G. Act, 1972, an "employee" has been defined as meaning any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies. The only exclusion is in respect of persons holding a post under the Central Government or a State Government who are governed by any other Act or any Rules providing for payment of gratuity.

20. Section 4 of the P.G. Act, 1972 provides for payment of gratuity to an employee on the termination of his employment after he has rendered continuous service for not less than five years, upon the occurrence of either the following contingencies: (i) on his superannuation, (ii) on his retirement, (iii) on his death or disablement due to accident or disease. Sub-section (2) of Section 4 mandates that for every completed year of service or part thereof

in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. The expression "completed year of service" has been defined under Section 2(b) to mean continuous service for one year. As per Section 2(c), "continuous service" means continuous service as defined in Section 2-A. Further, in terms of Section 2-A an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work out due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

21. A conjoint reading of the aforementioned provisions leads to the inference that gratuity becomes payable to an "employee" on his superannuation after he has rendered "continuous service", for not less than five years. The computation of the amount payable as gratuity is to be made at the rate of fifteen days' wages, for every completed year of service or part thereof in excess of six months, based on the rate of wages last drawn by the employee concerned. The expression "completed year of service" has been defined under Section 2(b) as continuous service for one year and the term "continuous service" is defined under Section 2(c) as per the terms of Section 2-A of the P.G. Act, 1972 which is to mean uninterrupted service including service which may be interrupted on account of certain exigencies specified therein.

22. It, therefore, follows that the P.G. Act, 1972 does not make any distinction between an employee on the basis of the fact that the employee is paid daily wages or weekly wages or monthly wages. The only condition is that he should be employed by the employer on wages in an establishment covered by the P.G. Act, 1972 and that he should be in continuous service as required under Section 2-A and that he should have completed a minimum of five years of service in the said capacity. The computation of gratuity as per terms of Section 4 is to be made at the rate of fifteen days' wages for every completed year of service or part thereof in excess of six months based on the rate of wages last drawn.

23. It is thus clear that an employee, subject to fulfillment of the other conditions, is entitled to gratuity for the period he was in employment of the employer irrespective of the fact whether his employment was of a regular nature or whether he was employed on a casual basis or temporary basis or as a daily wager.

24. In this regard reference may be had to the judgment in the case of **Baban Vs. Estate Manager, Maharashtra State Farming Corporation Ltd. & Ors.** wherein it was held as follows:-

"15. This brings me to the first contentious issue raised as regards the manner of calculating the number of days worked so as to be entitled for gratuity.

The primary requirement is that an employee must work continuously with an employer at least for 5 years so as to be eligible for gratuity, notwithstanding whether he has put in temporary service or as a daily wager or in any other manner."

25. The question as to whether benefit of gratuity could be denied to an employee who had been in more than 25 years of continuous service out of which 22 years were as a daily wager, fell for consideration in the case of **Netram Sahu Vs. State of Chhattisgarh & Anr**.6; and upon considering the provisions contained under Section 2(e) read with Section 2-A of the P.G. Act, 1972, it was held that there was no justifiable reason to deny benefit of gratuity to the employee which was his statutory right, and the question as to from which date his services were regularised was of no consequence for the purposes of calculating the total length of service for computing the gratuity payable.

26. In view of the foregoing discussions, it follows that the entitlement to receive gratuity flows from the provisions of the P.G. Act, 1972 and an "employee" having fulfilled the necessary preconditions for claiming entitlement in terms thereof would be liable to be paid the gratuity amount due to him irrespective of the fact whether his employment was of a regular nature or whether he was employed on a casual basis or temporary basis or as a daily wager.

27. In a case where the engagement was initially as a daily wager and subsequently the services were regularised the question as to from which date the services were regularised would be of no consequence for calculating the total length of service for claiming gratuity.

28. It may be noticed that the P.G. Act, 1972 was enacted to introduce a scheme for payment of gratuity for certain industrial and commercial establishments as a measure social security. The significance of the legislation lies in the acceptance of the principle of payment of gratuity as a compulsory statutory retiral benefit. The Act accepts, as a principle, compulsory payment of gratuity as a social security measure to wage earning population in industries, factories and establishments. The main purpose and concept of gratuity is to provide for terminal benefits to a workman upon his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease.

29. The P.G. Act, 1972 being thus a welfare legislation meant for the benefit of the employees who serve their employer for a long time, it would be the duty of the employer to pay gratuity amount to the employees rather than denying the benefit on some technical ground.

30. Applying the rule of beneficent construction, the provisions of the P.G. Act, 1972 are to be interpreted liberally so as to give it a wide meaning rather a restrictive meaning which may negate the very object of the enactment. A beneficial legislation, it is well settled, as to be construed in its correct perspective so as to fructify the legislative intent underlying its enactment.

31. In construing a remedial statute courts are to give it the widest amplitude

which its language would permit. The principle of applying a liberal construction to a remedial legislation has been emphasised in the **Construction of Statues by Crawford**7 pp. 492-493 in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

32. To a similar effect is the observation made by **Blackstone in Construction and Interpretation of Laws**8, by stating as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

33. In the context of beneficial construction as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes**9 as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

34. Further, in the same treatise, in the context of industrial legislation, it has been stated as follows:-

"Industrial legislation provides a fruitful field for the application of the tendency towards beneficial construction..."

35. The principle of applying a liberal construction to a labour welfare legislation was emphasised in the case of **Workmen of M/s Firestone Tyre & Rubber Company of India Pvt. Ltd. Vs. Management & Ors.**10 where in the context of the provisions of the Industrial Disputes Act, 1947, it was observed as follows:-

"35. ...We are aware that the Act is a beneficial piece of legislation enacted in the interest of employees. It is well settled that in construing the provisions of a welfare legislation, courts should adopt, what is described as a beneficent rule of construction. If two constructions are reasonably possible to be placed on the section, it follows that the construction which furthers the policy and object of the Act and is more beneficial to the employees, has to be preferred..."

36. The mode of interpretation of a social welfare legislation, in the context of the provisions of the Industrial Employment (Standing Orders) Act, 1946, came up for consideration in the case of **B.D. Shetty & Ors. Vs. CEAT Ltd. & Anr.**11, and it was held as follows:-

"12. ...a beneficial piece of legislation has to be understood and construed in its proper and correct perspective so as to advance the

legislative intention underlying its enactment rather than abolish it. Assuming two views are possible, the one, which is in tune with the legislative intention and furthers the same, should be preferred to the one which would frustrate it."

37. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the context of the P.G. Act, 1972 in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association**12, and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

38. A similar view was taken with regard to adopting the beneficial rule of construction in respect of social welfare legislation, particularly in the context of the P.G. Act, 1972 in the case of **Jeewanlal Ltd. & Ors. Vs. Appellate Authority under the Payment of Gratuity Act & Ors**.13, wherein it was stated as follows:-

"11. In construing a social welfare legislation, the court should adopt a beneficent rule of construction ; and if a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed..."

39. Reference may also be had to the case of **Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors.**14, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11. ...the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

40. In the case at hand, the respondent-workman having been directed to be reinstated on the post of conductor with the petitioner-Corporation w.e.f. 02.06.1992 in terms of the award dated 27.05.1995 passed by the Labour Court in Adjudication Case No.34 of 1993 and the said award having been confirmed vide judgment dated 07.02.2013 passed by this Court in Writ-C No.34125 of 1995 with the only modification that back wages were reduced to half of what had been granted, and the workman subsequently having attained the age of superannuation, the order passed by the Controlling Authority allowing the claim for payment of gratuity after recording a finding that for the purposes of payment of gratuity under the provisions of the P.G. Act, 1972 what was mainly required to be seen was the existence of the employer-employee relationship, the total length of service and the last drawn wages, and the issue as to whether the employee had worked on daily wages or as a regular employee was of no consequence, cannot be faulted with. The length of service having been held to be admitted between the parties the computation of gratuity was made by the Controlling Authority on the basis of the claim made by the employee with regard to the last drawn wages. The Appellate Authority having affirmed the order passed by the Controlling Authority for the self-same reasons the said order also requires no interference.

41. Counsel for the petitioner has not been able to point out any material error or irregularity in the orders passed by the Controlling Authority and the Appellate Authority so as to warrant interference in exercise of powers under Article 226 of the Constitution of India.

42. No other point was argued by the counsel for the petitioner.

43. The writ petition lacks merit and is accordingly dismissed.

(2019)10ILR A 1546

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

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

Writ- C No. 62286 of 2009
connected with
Writ- C No. 9831 of 2019

District Basic Education Officer ...Petitioner

Versus

Niyantrak Pradhikari Anutoshik Bhugtan Adhiniyam 1972 & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vimal Chandra Mishra, Sri Nand Kishore Singh.

Counsel for the Respondents:
C.S.C., Sri A.K. Trivedi, Fasiha Fatma, Sri Ambika Prasad Tewari, Sri M.S. Khan, Sri Mohammad Najam Siddiqui.

A. Payment of Gratuity Act, 1972 - Section 2 (e) - Gratuity - Applicability of Act to employees of District Basic Education Office - Act not necessarily to be applicable to the employer, but it is necessary that employee should qualify for an employee under section 2 (e) of the Act. (Para 39)

B. Payment of Gratuity Act, 1972 - Section 1 (3) (b) - Meaning of Establishment - It is not confined to commercial establishments or commercial or industrial establishment -

Held, Board of Basic Education is an establishment. (Para 36 & 38)

Writ Petition dismissed (E-1)
Cases relied on :-

1. St. of Punjab Vs Labour Court Jullunder & ors. (1980) 1 SCC 4

2. Regional Provident Fund Commissioner, Bangalore Vs Regional Labour Commissioner (Central) & ors. (1985) 1 LLN 675.

3. U.P. Co-operative Union & ors. Vs Prabhu Dayal Srivastava & ors. (1998) 2 LLN 625.

4. Administrator, Shree Jagannath Temple Puri Vs Jagannath Padhi & ors. (1992) 65 FLR 946.

5. Poona Cantonment Board Vs S.K. Das & ors. 1993 (II) CLR 731.

6. Smt. Jayaben Suryakant Modi Vs Welfare Commissioner & ors. 1997 Lab IC 2581: (1997) ILLJ 139 Guj.

7. V. Venkateswara Rao Vs The Chairman/Governing Body S.M.V.M. Polytechnic, Tanuku & ors. (1998) ILLJ 181 AP.

8. Smt. D. Lakshmi Vs A.P. Agricultural University & ors. (2002) 2 LLN 54.

9. Habibaa Girls Primary School (represented by its Manager) Ambur Vs Smt. Noorinisha & ors. (2004) 1 LLN 592.

10. Senior Superintendent of Post Offices Vs Gursewak Singh & ors. 2019 SCC Online SC 399.

Cases referred :-

1. Rohit Pulp & Paper Mills Ltd. Vs C.C.E. (1990) 3 SCC 447.

2. H.C. Bar Association Allahabad Vs Deputy Labour Commissioner Allahabad & ors. 2004 (4) AWC 3755.

3. Ms. Usha Hamilton & ors. Vs St. of U.P. (Civil Misc. Writ No. 20829, decided on 31/10/1988).

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

1. Civil Misc. Writ Petition No.62286 of 2009 has been brought by the District Education Officer, Hamirpur against an order of the Controlling Authority, Payment of Gratuity Act, 1972-cum-Assistant Labour Commissioner, U.P., Kanpur Region, Kanpur, dated 26.09.2009 passed in P.G. Case no.74 of 2007. By the said order, the Controlling Authority, Payment of Gratuity Act, 1972 (for short, the Authority) has ordered the petitioner to pay the second respondent-employee gratuity in the sum of Rs.1,48,050/- in accordance with the provisions of the Payment of Gratuity Act, 1972 (for short the Act), instead of Section 9(1) of the U.P. Basic Education Act, 1972 (for the short, the Act of 1972) and Service Rules framed thereunder, governing entitlement to post retiral benefits for the second respondent-employee, a Head Clerk employed with the office of the District Basic Education Officer, Nagar Kshetra Maudaha, District Hamirpur.

2. Connected Civil Misc. Writ Petition No.9831 of 2019 has been filed by the employee, Mohammad Ahmad, who is the second respondent in Civil Misc. Writ Petition No.62286 of 2009, praying that a writ of mandamus be issued commanding the Authority to issue a recovery certificate against the District Basic Education Officer, Hamirpur, who is the second respondent in this petition and the petitioner in Civil Misc. Writ Petition No.62286 of 2009, in compliance of the order dated 26.09.2009 passed in P.G. Case no.74 of 2007, determining the employee's entitlement to gratuity under the Act as detailed hereinabove.

3. Since both the writ petitions relate to validity of the order dated 26.09.2009

passed by the Authority under the Act, one assailing its validity and the other seeking its enforcement, the two petitions have been connected and heard together, with Writ - C No.62286 of 2009 being treated as the leading petition.

4. Heard Sri Kunal Shah holding brief of Sri Nand Kishore Singh, learned counsel for the petitioner-District Basic Education Officer, Hamirpur and Ms. Fasiha Fatma, learned counsel appearing on behalf of respondent no.2-employee in Writ - C No.62286 of 2009; and, Sri Ambika Prasad Tewari, learned counsel appearing for the petitioner-employee and Sri Kunal Shah holding brief of Sri Nand Kishore Singh, learned counsel appearing on behalf of respondent no.2-District Basic Education Officer, Hamirpur in Writ - C No.9831 of 2019.

5. Parties have exchanged affidavits in the leading case and by consent of learned counsel appearing for both sides, the two petitions have proceeded to hearing.

6. The facts giving rise to the present petition are set out bearing reference to the leading case. It is the case of the petitioner, District Basic Education Officer that the respondent-employee was initially appointed on 01.11.1965 as Jalkal Store Keeper with the Nagar Palika, Maudaha, District Hamirpur. He was promoted on 21.12.1970 as Head Clerk in the said Nagar Palika, and continued as such until 31st July, 1972. Upon constitution of the Board of Basic Education on 01.08.1972, the second respondent-employee was absorbed in the services of the Board of Basic Education and appointed as In-charge Officer, Shiksha, Nagar Kshetra, Maudaha, Hamirpur working under the immediate control of the District Basic Education Officer, Hamirpur. Admittedly, the date of birth of the second respondent-employee entered in his service book is 10.08.1940. He, therefore, attained the age of superannuation upon turning 60, and retired from service of the Board of Basic Education on 31.08.2000. According to the petitioner, on 06.09.2001, the Regional Assistant Joint Director of Education (Basic), Jhansi, described as the Competent Authority in the matter, passed an order sanctioning pension to the second respondent-employee. The said pension payment order has been passed in accordance with the applicable Government Orders and is addressed to the District Basic Education Officer, Hamirpur. It indicates the date of commencement of entitlement to pension as 01.09.2000. It is the petitioner's further case that the second respondent-employee is in receipt of regular pension since 01.09.2000. It is, however, specifically urged that upon retirement an employee of the petitioner, the Board of Basic Education, that is the second respondent, is not entitled to payment of gratuity under the Act, or Rules framed thereunder. The second respondent-employee asserted his claim to payment of gratuity and also leave encashment. According to the petitioner, earlier there was provision for encashment of earned leave, but that was nullified by a certain Government Order No.3049/15-5-91-370/82 dated May, 1992.

7. Nevertheless, the second respondent-employee filed Civil Misc. Writ Petition no.38566 of 2003 seeking to enforce his claim regarding leave encashment and gratuity. This petition was disposed of on 01.09.2003 directing a

representation to be made to some Authority of the Board of Basic Education described as respondent no.3 in the order of this Court last mentioned, requiring the said Authority to decide the second respondent's representation, if made along with a certified copy of the order of this Court, within three months of its presentation, in case the Basic Shikha Adhikari had power to decide the question about the second respondent's entitlement to these post retiral benefits.

8. It is claimed by the petitioner that the order of this Court dated 01.09.2003 last mentioned was never served upon the District Basic Education Officer. Instead, the District Basic Education Officer was proceeded in contempt before this Court, and shorn of unnecessary detail about those proceedings, the District Basic Education Officer, Hamirpur, passed an order dated 21.06.2004, holding that gratuity as well as leave encashment is not payable to the second respondent-employee.

9. Disillusioned with the decision of the District Basic Education Officer, dated 21.06.2004, the second respondent-employee moved the Authority under the Act vide P.G. Case no.74 of 2007. The Authority issued notice to the petitioner on 16.07.2008 returnable on 13.08.2008 requiring the petitioner to show cause by submitting his reply by the said date, and for the determination of the application. The petitioner in compliance with the notice issued by the Authority, authorized the Finance and Accounts Officer in the office of the District Basic Education Officer, Hamirpur to file a reply and contest the matter on behalf of the petitioner. The Finance and Accounts Officer submitted a reply on 13.08.2008. In the said reply, it was asserted in substance that the second respondent-employee was not a workman. He was a regular employee in the cadre of Class-III with the Board of Basic Education. His service conditions were regulated by the Act of 1972 and departmental Service Regulations, governing post retiral benefits. It was asserted that in accordance with the Act of 1972 and the Service Regulations applicable to the second respondent, no gratuity was payable to him. Another plea about territorial jurisdiction was raised through a separate reply, where it was said that the Authority had held earlier that territorial jurisdiction relating to the District Hamirpur vested with the Authority at Jhansi, and not with the Authority at Kanpur, exercising jurisdiction under the Act.

10. It may be mentioned here that the plea as to territorial jurisdiction was not at all urged before this Court at the hearing of these writ petitions. The challenge was confined to the issue that the Act was not at all applicable to the petitioner in the matter of entitlement of their employees to receive gratuity. It was, therefore, argued that the Authority went beyond jurisdiction in holding the Act to be applicable to the petitioner's establishment, and calculating gratuity payable to the second respondent in accordance with the Act. It was urged that the second respondent's entitlement is governed by the Act of 1972, whereunder a Class-III employee of the Board of Basic Education was entitled to receive pension, but not gratuity. In substance, the contention of the petitioner is that the Act is not at all applicable to the petitioner's establishment, and would not enure to the benefit of the second respondent-

employee, entitling him to gratuity as ordered by the Authority.

11. The applicability of the Act to an employer is governed by Section 1(3) thereof, which reads:

"1.Short title, extent, application and commencement. -- (1) x x x x

(2) x x x x

(3) It shall apply to--

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

[(3-A) x x x x

(4) x x x x"

(Emphasis by Court)

12. The other important provision that governs the question, whether the Act would apply to the employer, vis-a-vis, the claimant-employee are the provisions of Section 2(e) of the Act, that define an employee. The provisions of Section 2(e) of the Act are extracted infra:

"2. **Definitions.**--In this Act unless the context otherwise requires,--

(a) x x x x

(b) x x x x

(c) x x x x

(d) x x x x

(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;

(f) x x x x

(g) x x x x

(h) x x x x

(i) x x x x

(j) x x x x

(m) x x x x

(n) x x x x

(o) x x x x

(p) x x x x

(q) x x x x

(r) x x x x

(s) x x x x"

(Emphasis by Court)

13. It is the submission of Mr. Kunal Shah, learned counsel appearing on behalf of the petitioner, that the Act does not apply to the petitioner, who is an officer of the Board of Basic Education, and represents that establishment, which is incorporated under the Act of 1972. He submits that the Board of Basic Education performs sovereign functions as distinguished from commercial functions. It is urged by Mr. Shah that the words of Section 3(1)(a) of the Act are express, which in no way could be held referable to an employer, like the petitioner. Again, he submits that Clause (c) of sub-Section (3) of Section 1 of the Act also make it

explicit that every establishment, or class of establishments not covered by Clause (a) or (b) of sub-Section (3) of Section 1, may be brought under the regime of the Act, provided they employ ten or more employees, or in the past, have employed that number in the preceding twelve months, but this extended application of the Act, would govern only such establishments which the Central Government may specify by notification in this behalf, to borrow the phraseology of the statute. Mr. Shah has urged that Clause (b) of sub-Section (3) of Section 1, last mentioned comes closest to rendering the petitioner vulnerable, but the said Clause also does not take a sovereign establishment like the petitioner, in its fold.

14. It is further submitted by the learned counsel for the petitioner that the words, "every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State", are of considerable significance. It is Mr. Shah's contention that the words, "shop or establishment", carry a definitive connotation, which is not decisively determined by the word 'or', that separates them. In his submission, it is not decisive to determine the connotation of 'establishment' whether the word 'or' really means an 'and'; not whether that 'or' is conjunctive or disjunctive, but the real legislative intent is to be discerned on the basis of an altogether different principle. Mr. Shah submits that the word 'establishment' occurring after the word 'shop' bears reference to a shop like establishment, a commercial establishment as distinguished from an establishment performing a sovereign function. According to him, this inference is based on a well established cannon of statutory construction. It is the principle of *noscitur a sociis.* It is urged by the learned counsel that the word 'establishment' in the context where it has been placed, and the fact that it occurs after the word 'shop', which is a specific word, would confine the otherwise wide and generic import of the word 'establishment', in the sense that it would have to be understood as an establishment, that has the likeness of a shop. According to Mr. Shah, there is nothing said in the statute, that may suggest that the word 'establishment' is to be understood in the widest import of the word so as to take in its fold all the myriad kinds of establishments, whatever be the essential nature of their activity. He elaborates on that contention to submit that in the absence of a definitive indicator to be found in Clause (b) of sub-Section (3) of Section 1 of the Act, from which the meaning of the word 'establishment' there, may be inferred to be its use in the most generic sense of it, one has to fall back upon the rule of *noscitur a sociis.* It is his submission that the principle only means that a word in a statute is to be understood by the company it keeps. The submission further proceeds that the word 'establishment' if not understood by application of the principle last mentioned, would take within its fold, the most sovereign of establishments, including the Government. This, in the submission of Mr. Shah, cannot be the legislative intent. He, therefore, moots a restricted meaning to be placed on the word 'establishment', that is conditioned by its immediate predecessor, separated by just a conjunction, that is the word 'shop'. Learned counsel for the petitioner in support of his contention, that the word

'establishment' must be read conditioned by the word 'shop', by applying the principle of *noscitur a sociis*, has relied upon the decision of the Supreme Court in **Rohit Pulp and Paper Mills Ltd. vs. CCE1.** In the said decision, explaining the principle of *noscitur a sociis*, it was said by their Lordships thus:

"12. The principle of statutory interpretation by which a generic word receives a limited interpretation by reason of its context is well established. In the context with which we are concerned, we can legitimately draw upon the "noscitur a sociis" principle. This expression simply means that "the meaning of a word is to be judged by the company it keeps." Gajendragadkar, J. explained the scope of the rule in State of Bombay v. Hosptial Mazdoor Sabha [(1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251] in the following words: (SCR pp. 873-74)

"This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in "Words and Phrases" (Vol. XIV, p. 207): "Associated words take their meaning from one another under the doctrine of *noscitur a sociis*, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim ejusdem generis". In fact the latter maxim "is only an illustration or specific application of the broader maxim *noscitur a sociis*". The argument is that certain essential features of attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. We are not impressed by this argument. It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service."

This principle has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used. The cases are too numerous to need discussion here. It should be sufficient to refer to one of them by way of illustration. In Rainbow Steels Ltd. v. CST [(1981) 2 SCC 141 : 1981 SCC (Tax) 90] this Court had to understand the meaning of the word "old' in the context of an entry in a taxing traffic which read thus:

"Old, discarded, unserviceable or obsolete machinery, stores or vehicles including waste products....."

Though the tariff item started with the use of the wide word "old', the

court came to the conclusion that "in order to fall within the expression "old machinery' occurring in the entry, the machinery must be old machinery in the sense that it has become non-functional or non-usable". In other words, not the mere age of the machinery, which would be relevant in the wider sense, but the condition of the machinery analogous to that indicated by the words following it, was considered relevant for the purposes of the statute.

13. The maxim of *noscitur a sociis* has been described by Diplock, C.J. as a "treacherous one unless one knows the societas to which the socii belong" (vide Letang v. Cooper [(1965) 1 QB 232 : (1964) 2 All ER 929]). The learned Solicitor General also warns that one should not be carried away by labels and Latin maxims when the words to be interpreted is clear and has a wide meaning. We entirely agree that these maxims and precedents are not to be mechanically applied; they are of assistance only insofar as they furnish guidance by compendiously summing up principles based on rules of common sense and logic. As explained in CCE v. Parle Exports (P) Ltd. [(1989) 1 SCC 345, 357 : 1989 SCC (Tax) 84] and Tata Oil Mills Co. Ltd. v. CCE [(1989) 4 SCC 541, 545-46 : 1990 SCC (Tax) 22] in interpreting the scope of any notification, the court has first to keep in mind the object and purpose of the notification. All parts of it should be read harmoniously in aid of, and not in derogation of, that purpose. In this case, the aim and object of the notification is to grant a concession to small scale factories which manufacture paper with unconventional raw materials. The question naturally arises: Could there have been any particular object intended to be achieved by introducing the exceptions set out in the proviso? Instead of proceeding on the premise that it is not necessary to look for any reason in a taxing statute, it is necessary to have a closer look at the wording of the proviso. If the proviso had referred only to "coated paper', no special object or purpose would have been discernible and perhaps there would have been no justification to look beyond it and enter into a speculation as to why the notification should have thought of exempting only "coated paper' manufactured by these factories from the purview of the exemption. But the notification excepts not one but a group of items. If the items mentioned in the group were totally dissimilar and it were impossible to see any common thread running through them, again, it may be permissible to give the exceptions their widest latitude. But when four of them -- undoubtedly, at least three of them -- can be brought under an intelligible classification and it is also conceivable that the government might well have thought that these small scale factories should not be eligible for the concession contemplated by the notification where they manufacture paper catering to industrial purposes, there is a purpose in the limitation prescribed and there is no reason why the rationally logical restriction should not be placed on the proviso based on this classification. In our view, the only reasonable way of interpreting the proviso is by understanding the words "coated paper' in a narrower sense consistent with the other expressions used therein."

15. Learned counsel for the petitioner has further submitted that the Board of Basic Education, which is a statutory body established under the Act

of 1972, falls generally within the class of an establishment that would be considered by the law to be a statutory body. He has drawn the attention of the Court to the fact that the petitioner's are not an establishment, or part of a class of establishments employing ten or more employees, which the Central Government has, by its notification specified in this regard under Section 1 (3) (c) of the Act. Mr. Kunal Shah, has drawn the attention of the Court to some eight notifications issued by the Central Government in exercise of their powers under Clause (c) of sub-section(3) of Section 1 of the Act, that refer to various establishments, specifically by name or by reference to there class, to which the application of the Act has been extended. None of those notifications bear reference, in the submission of learned counsel for the petitioner, to a statutory body as a class, or specifically in some manner, indicating that the application of the Act is extended to the petitioner.

16. This submission of learned counsel for the petitioner about the petitioner being covered under Clause (c) of sub-section (3) of Section1, can be straightaway disposed of without much to be examined about the issue, inasmuch as none of the notifications issued under the Act, even remotely apply to a statutory body, like the Board of Basic Education.

17. Ms. Fasiha Fatma, and Mr. Ambika Prasad Tiwari, learned counsel appearing for respondent No.2-employee have also not brought to the notice of this Court any notification under Section 1(3)(c) of the Act, extending its application to the petitioner specifically or by reference to a class, which may include the petitioner. Both learned counsel representing the employee do not dispute this submission of learned counsel for the petitioner. This Court is, therefore, of opinion that the Act has not been extended in its application to the Board of Basic Education, by a notification of the Central Government issued under Section 1(3)(c) of the Act. This clearly confines the question about applicability of the Act to the petitioner-Board, to be determined with reference to Clause (b) of sub-section (3) of Section 1 of the Act, alone.

18. In this regard, learned counsel for the petitioner has placed reliance upon the decision of a Division Bench of this Court in **High Court Bar Association, Allahabad Vs. Deputy Labour Commissioner, Allahabad and others2**, where speaking for the Division Bench, it was held by M.Katju, J. (as His Lordship then was of the High Court):

"6. As regard clause (b) of Section 1(3) this too will not apply because this relates to a shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in the State. In U.P., this law is the U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962. The High Court Bar Association, Allahabad is not a shop or establishment which comes within the purview of the aforesaid U.P. Act, 1962."

19. Learned counsel for the petitioner has depended upon this view of their Lordships of the Division Bench with much emphasis to submit that the earlier part of his contention, applying the principle of *noscitur a sociis*, accords with the aforesaid view of their Lordships where they have interpreted the word establishment in the same genre as the

word "shop", though without referring to the principle last mentioned. Learned counsel for the petitioner has also placed reliance upon a Division Bench decision of this Court in **Ms. Usha Hamilton and another Vs. State of U.P.3**, where it was held thus:

"8. On behalf of the petitioner no.1 reliance is placed upon certain provisions of the Payment of Gratuity Act to show that in the event of an employee having no "Family" within the meaning of the said Act gratuity payable to a particular employee shall be paid to his or her nominee. To get over Rule 4 of the Rules, section 14 of the Payment of Gratuity, which gives an overriding effect to the provisions of the said Act and over other enactment, has been pressed into service. There may be some force in the contention of the learned counsel if the Payment of Gratuity Act was applicable to the case of Miss Elias. Our reading of the said Act shows that it has no application to her. The preamble of the Payment of Gratuity Act, 1972, sets out that it has been enacted to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shop or other establishments. Sub-section (3) of Section 1 makes it clear that the Act shall apply to (a) factory, mines, etc. (b) other shop or establishment and (c) such other establishments or class of establishments in which 10 or more persons are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf. If at all, the provisions of sub-section 1(3)(c) of the Act alone may have some relevance. However, we are clear that even that sub-section had no application to the College wherein Miss. Elias was surviving as a teacher. The preamble coupled with the provisions of section 1(3) of the Act makes it crystal clear that the Payment of Gratuity Act, 1972 is applicable only to commercial and industrial establishment."

(Emphasis by Court)

20. Learned counsel for the petitioner has drawn the attention of the Court to the concluding lines in paragraph-8 of the report to submit that their Lordships of the Division Bench in the said case again, read Section 1(3)(b) of the Act in a manner where without specifically referring to the principle of *noscitur a sociis,* they read the word establishment conditioned by the specific word "shop" to hold that it connotes a commercial and industrial establishment.

21. Learned counsel appearing for the employees, on the other hand, have disputed the aforesaid submission advanced on behalf of the petitioner. It is their contention that the word establishment employed under clause (b) of sub-section (3) of Section 1 of the Act, is in no way conditioned by the word "shop" which carries a disjunctive "or" between the two. In their submission, read as a whole, Section 1(3)(b) would show that the word "or" is to be read as "and". It is not conjunctive but disjunctive. The word establishment has been used in its widest generic sense, completely independent of the word "shop". It is the submission of learned counsel for respondent No.2-employee that the 'establishment' envisaged under Section 1(3)(b) would be any kind of establishment, not necessarily commercial or industrial. Confining the scope of the word establishment by reading it *ejusdem*

generis with the word "shop", or by applying the more settled principles of *noscitur a sociis* would lead to bogging down the statute and result in curtailing its application to subjects, to which the legislature intended it to apply. It is their submission that there is absolutely nothing to suggest upon a reading of the provisions of Section 1(3)(b) of the Act, that may lend itself to the kind of a restricted meaning being given to the word 'establishment' in terms urged by learned counsel for the petitioner.

22. This Court has carefully considered the rival submissions advanced.

23. The question whether the word establishment has been used in a restricted sense, conditioned by the word "shop", to mean that establishments commercial alone fall within the mischief of Section 1(3)(b) of the Act, or the word establishment followed by the words, "within the meaning of any law for the time being in force in relation to shops and establishment in a State", are to be read considering "establishment" free from the shadows of it being a commercial one and in its widest sense, was considered by their Lordships of the Supreme Court in **State of Punjab Vs. Labour Court, Jullunder and Others4. In State of Punjab Vs. Labour Court, Jullunder** *(supra),* their Lordships were confronted with this question in the context of facts where employees of a certain "Hydle Upper Bari, Doab Construction Project", undertaken by the Hydle Department of the Government of Punjab, moved the Labour Court for payment of gratuity upon retrenchment, when the project came to an end. The claim was considered by the Labour Court, under Section 33-C(2) of the Industrial Disputes Act, 1947. The claim was granted, holding the employees entitled to gratuity. It was contended that the employers were an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act, as held by the Labour Court, and that, according to the parties in that case, the question was required to be examined with reference to Section 1(3)(b) of the Act alone. In the aforesaid context, it was held in the **State of Punjab Vs. Labour Court, Jullunder** *(supra)* thus:

"3. .....According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act, Section 2(ii)(g) of which defines an "industrial establishment" to mean any "establishment in which any work relating to the construction development or maintenance of buildings, roads, bridges or canals, relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on". It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a Central enactment and Section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act

is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under Section 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops and Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in Section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it."

(Emphasis by Court)

24. A reading of the part of their Lordships decision in **State of Punjab Vs. Labour Court, Jullunder** *(supra)*, extracted above, shows an authoratative and explicit exposition of law, that the word establishment is to be given its widest meaning, without restricting its scope to commercial establishments. No further illustration is required on the reasoning about it, in view of what their Lordships have held in the said decision. It must, however, be remarked that the fact that in **State of Punjab Vs. Labour Court, Jullunder** *(supra)*, the word establishment was construed to include industrial establishments, is in no way indicative of an intent to confine the word 'establishment' to mean commercial and industrial establishments. It is only that in that case the question was about the applicability of the Act to an industrial establishment, under Section 1(3)(b), that led to a mention of industrial establishments alone, in the decision of

their Lordships. However, the principle enunciated there is clear which, in no way, can be confined to industrial establishments alone. It may be mentioned that the decision of the Supreme Court in **State of Punjab Vs. Labour Court, Jullunder** *(supra),* was not brought to the notice of their Lordships of the Division Bench in **Ms. Usha Hamilton** *(supra),* or the Division Bench of this Court in **High Court Bar Association, Allahabad** (supra).

25. About the said issue, a judgment of the Karnataka High Court in **Regional Provident Fund Commissioner, Bangalore Vs. Regional Labour Commissioner (Central) and others5,** may be referred to with profit. In the said decision, the question arose whether the respondent-employee, who was a Upper Division Clerk in the establishment of the Regional Provident Fund Commissioner, Bangalore, and had resigned after rendering nine years and nine months of service, was entitled to gratuity calculated in accordance with the provisions of the Act. The employee moved the Authority under the Act, who allowed his claim and the employer's appeal was dismissed. In the context of the said facts, it was held thus:

"5. In order to appreciate the contention, it is necessary to extract the relevant part of Section 1(3). It reads:

"1.(3) It shall apply to-

* * *

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months."

As can be seen from the above provision, the Act applies to every establishment within the meaning of any law for the time being in force in relation to such establishments in a State in which ten or more persons are employed. There is no dispute that more than ten persons are employed on the establishment of the Provident Fund. The only question for consideration is whether it is or it is not an establishment within the meaning of any law for the time being in force in this State in relation to shops and establishments. In this State,inter alia, the three relevant laws which are in force are

(i) Karnataka Shops and Establishment Act,

(ii) Payment of Wages Act, and

(iii) Contract Labour Act.

If the establishment of the Petitioner fails under the definition of establishment under any one of these Acts, the provisions of the Act gets attracted. The term 'establishment' is defined in the Contract Labour (Regulation and Abolition) Act, 1970. It reads:

"(i) Any office or department of the Government or a local authority, or;

(ii) Any place where any industry, trade, business, manufacture or occupation is carried on."

According to the above definition all types of establishments including an office fall under the definition of the expression 'establishment'. Therefore, it is difficult to agree with the contention of the Petitioner that the office of the Petitioner does not fall within the meaning of the word 'establishment'."

6. Therefore, if the provisions of the Act are attracted, even though there are regulations regulating the payment of gratuity which are applicable to the

petitioner-establishment, the provisions of the Act do not get excluded, for, Section 14 of the Act gives overriding effect to the provisions of the Act. See State of Punjab v. Labour Court, Jullundur, [1980-I L.L.N. 39]. Therefore, even if under the regulations governing the petitioner-establishment, a person who has tendered resignation is not entitled to gratuity, if under the Act he is entitled to it, the same cannot be denied. It may be seen that under Section 4 of the Act, the criteria for entitlement for gratuity is five years or more of service and the fact that the termination has been brought about by resignation, does not matter."

(Emphasis by Court)

26. It may be noticed in connection with the aforesaid decision of the Karnataka High Court that in order to construe the true import of the word 'establishment', and extending it to include any office or department of Government, the Court relied upon the definition of the word in the Contract Labour (Regulations and Abolition) Act, 1970. The decision does notice the law laid down by the Supreme Court in **State of Punjab vs. Labour Court, Jullunder** *(supra),* but does seem to apply the reasoning there, in order to give the word establishment, a wider meaning as indicated on the principles laid down by their Lordships in **State of Punjab vs. Labour Court, Jullunder** (supra). This question has received the most elaborate consideration by a Division Bench of this Court in **Uttar Pradesh Co-operative Union and others Vs. Prabhu Dayal Srivastava and others6,** where the issue arose whether an employee of the petitioner-Co-operative Union, would be governed by the provisions of the Act, on basis that the Co-operative Union would be an establishment under Section 1(3)(b) of the Act. It was held in **Uttar Pradesh Co-operative Union** *(supra)* thus:

"5. We are conscious that the Act is a progressive, social and beneficial legislation and it has to be interpreted as to promote the purpose or object of the Act. In such matters the construction that promotes the purpose of legislation should be preferred rather than just a literal construction. Under S. 1(3)(c) the relevant clause is "such other establishment" in a State in which ten or more persons are employed or were employed on any day of the preceding twelve months. The preceding Cl. 1(3)(b) was "every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State." The word "and" even though appears to be conjunction, but keeping in view the legislative intent and applying elementary principles of textual and contextual interpretation it appears to have the meaning of "or" and has been accordingly, used in a disjunctive sense. This preceding clause under S. 1(3)(b) to the effect "every shop or establishment within the meaning of any law for the time being in force in relation to shops" has got a complete meaning with the establishment pertaining to shops. There was no sense in using the word "and," a conjunction, and to add subsequent clause "establishment in a State" in which ten or more persons are employed. This obviously indicates that subsequent expression "establishment in a State" has been used in an independent and different sense than the preceding clause and has nothing to do with the establishment in relation to shops. In our opinion the word "and" has been used disjuntively to mean "or." We are

conscious that the word "or" is antithesis of word "and" and the meaning of word "and" has to be sparingly interpreted as "or." The context of expression has been used under Sub-cl. (b) or Sub-cl. (c) of S. 1(3) of the Act. Keeping in view of the intention and purpose of legislation to provide gratuity to employees drawing wages up to Rs. 270 per month or otherwise. The object of the Act can also be in brief looked into, which is to the following effect:

"The Bill provides for payment of gratuity to employees drawing wages up to Rs. 750 per month in factories, plantations, shops, establishments and mines, in the event of superannuation, retirement, resignation and death or total disablement due to accident or disease. The quantum of gratuity payable will be 15 days' wages based on the rate of wages last drawn by the employees concerned for every completed year of service or part thereof in excess of six months subject to a maximum of 15 months' wages. The term wages means basic wages plus dearness allowance."

6. In the aforesaid object of the Act it has been clearly specified that the employees of factories, plantations, shops, establishments and mines have been separately provided. It means that the object of legislation was to provide benefit of gratuity to establishments independently of shops.

7. Much emphasis was laid by the learned counsel for petitioner on the word "establishment" used in second clause after the word "and." the word "establishment" is, however, not a defined term either under the Act or under the General Clauses Act. It is now well-settled principle that dictionary meaning of a word cannot be looked into in case the word has been defined statutorily or has been judicially defined. But where there is no such definition or interpretation, the Court can take the aid of dictionaries to ascertain the meaning in common parlance. In doing so the Court must bear in mind that the words are used in different sense according to its context and the dictionary gives all the meaning of a word and the Court would, therefore, have to select from the meaning which would be relevant to the contest in which it has to interpret the words. See *State of Orissa v. Titaghar Paper Mills Company, Ltd.* [1985 Supp SCC 280 : A.I.R. 1985 S.C. 1296].

8. It is better to have some dictionary meanings of the word "establishment." According to *Black's Law Dictionary* the word "establishment" connotes an institute, a place where conducted, to settle or fix firmly, place of a permanent footing. According to *Words and Phrases* (Permanent Edn.), Vol. 15, the word "establishment" means a place where one is permanently fixed for residence or business, such as an office or place of business with its fixtures. Further it means an establishment in which employee is or was employed. "Establishment" means merely something established. In Webster's International Dictionary the word "establishment" means an institute or place of business with its fixtures and organized staff. Oxford Dictionary defines the term "establishment" as organized body of men maintained for a purpose. According to *Bouvier, Law Dictionary* the word "establishment" connotes that which is instituted or established for public or private use.

9. The word "establish" has also been used in Art. 30(1) of the Constitution where the provision is that the minority whether based on religion or language

shall have right to establish and administer educational institutions of their choice. The word "establishment" under Art. 30(1) of the Constitution means to bring into existence. See I.S. *Aziz Pasha v. Union of India* [A.I.R. 1968 S.C. 662].

10. In *V. Transport [Private), Ltd. v. Regional Provident Fund Commissioner, Madras*[A.I.R. 1965 Mad. 466], it means been held that the word "establishment" has been interpreted to mean an organization which employs persons, where relationship of employee and employer comes into existence.

11. We are accordingly of the opinion that the word "establishment" as used under S. 1(3)(b) or S. 1(3)(c) of the Act connotes an organized body of men and women employed where the relationship of employer and employee comes into existence. There could be no manner of doubt that petitioner 1 has employed a number of employees for a purpose, namely, to carry out the duties assigned to them for the object for which **Uttar Pradesh Co-operative Union** has been established. There is no doubt that the provisions of Gratuity Act would apply to the employees of petitioner 1."

27. This question again fell for consideration before a Division Bench of the Orissa High Court in **Administrator, Shree Jagannath Temple, Puri, Vs. Jagannath Padhi & Others7.** In the said decision, the question arose whether the term establishment that has not been defined under the Act, would apply as defined in any law operating in the State to include within its ambit a "temple". In **Administrator, Shree Jagannath Temple, Puri** *(supra),* Hon'ble A. Pasayat, J. (as His Lordship then was, of the High Court) speaking for the Bench held:

"4. .....The term "establishment" has not been defined in the statute. Section 1(3)(b) of the Act makes it clear that it applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. As observed by the Supreme Court in (1980) 1 SCC 4 : A.I.R. 1979 S.C. 1981 :*State of Punjab v. The Labour Court, Jullundur; Vol. 32 (1990) O.J.D. 42 (S. & L)Executive Officer, Cuttack Municipality, Cuttack v. Appellate Authority under Payment of Gratuity Act-cum-Labour Commissioner, Orissa (to which one of us, Pasayat, J. was a party) and O.J.C. Nos. 1129 to 1131 of 1985. The Executive Officer, Puri Municipality v. Rama Naik etc.*, disposed of on 30-11-1990 (to which my Lord the Chief Justice was a party), the Act is not restricted to only commercial establishments, but to establishments within the meaning of any law for the time being in force in relation to establishments in a State. The question that falls for determination, therefore, is whether the term "establishment" as defined in any law operating in the State includes within its ambit a "Temple". The authorities under the Act have observed that the Industrial Disputes Act and the statute relating to shops and commercial establishments include "Temple Trust" and therefore, the Temple is included therein. It would be relevant at this stage to refer to a decision of this Court reported in 49 (1980) C.L.T. 252'. Gopi Chand Agarwala v. State of Orissa, wherein the question whether deity is an establishment or an undertaking under the Orissa Prevention of Land Encroachment Act came up for consideration and it was

held that deity is neither an establishment nor an undertaking within the meaning of that Act. It was observed that the word "establishment" was not defined in the concerned statute and therefore to be assigned the common sense meaning; it is difficult to conceive that a religious institution like a Hindu temple can constitute an establishment in the sense the words have been used in section 2(e) of the Orissa Prevention of Land Encroachment Act, 1972.

5. According to The Compact Edition of the Oxford Engligh Dictionary, Volume I, page 897 (Reprinted 1972), "establishment" means a public institution; a school; a factory; a house of business etc. In 1851, D. Wilson in Preh Ann, (1863) 11 iv. i. 192 referred to "the religious establishment founded at Iona". "Establishment" also has been defined to be the ecclesiastical system established by law. As observed by the Allahabad High Court in 1986 (53) F.I.R. 227;Municipal Board v. Appellate Authority and Addl L.C. to which reference was made by this Court in executive Officer, Puri Municipality's case *(supra)*, the definition of establishment is very wide, and keeping in view the objective of the Act, it was held that the same is applicable to the retired persons of municipalities. Keeping in view the laudatory objects of the Act, and the same being a part of the social justice, this Court observed that the legislation was to be applied Liberally and a wider meaning was to be given.

6. "Gratuity", as observed by the Supreme Court in its etymological sense, means a gift, especially for services rendered or return for favours received. See A.I.R. 1970 S.C. 919; Delhi Cloth & General Mills Co. Ltd. v. Its Workmen. The general Principle underlying the gratuity schems is that by their length of service, workmen are entitled to claim a certain amount as a retiral benefit. See A.I.R. 1960 S.C. 251; Indian Home Pipe Co. Ltd. v. Its Workman Gratuity has to be considered to be an amount paid unconnected with any consideration and not resting upon it, and has to be considered something given freely or without recompense. It does not have foundation on any legal liability, but upon a bounty stemming from appreciation and graciousness. Long service carries with it expectation of an appreciation from the employer and a gracious financial assistance to tide over post retiral difficulties. Judged in that background, we feel that it would be unconscionable to keep temple out of the purview of the Act, more particularly when opposite party No. 1, a low paid employees has served the temple for a very long span of time."

(Emphasis by Court)

28. The question was considered by the Bombay High Court in **Poona Cantonment Board, Vs. S.K. Das and others8,** in the context of an employee of the Cantonment Board of Poona, who was held entitled to gratuity under the Act, treating the Cantonment Board to be an establishment within the meaning of Section 1(3)(b) of the Act. The Board had contended that they were not an establishment within the meaning of Section 1(3)(b) of the Act, and that, Section 1(3)(c) of the Act did not apply as the notification extending the provisions of the Act to local bodies came to be issued in the month of January 1982, that is to say, before the cause of action arose. This issue was examined with reference to the provisions of Section 1(3)(b), alone.

29. In **Poona Cantonment Board** *(supra)*, it was held:

"7. It is difficult to accept the contention urged on behalf of the petitioner for mere than one reason. In (State of Punjab v. The Labour Court, Jullundur,)1, (1980) 1 SCC 4 : A.I.R. 1979 Supreme Court 1981, the Supreme Court had an occasion to consider a somewhat similar contention. The question arose therein as to whether the Hydel Department of the Government of Punjab, which bad undertaken a construction project, in which the concerned workmen were employed as work-charged employees, answered the test in section 1(3)(b) of the Payment of Gratuity Act, so as to enable the employees to claim gratuity. The State of Punjab contended that section 1(3)(b) required that the establishment within its contemplation most be one "within the meaning of any law for the time being in force in relation to establishments in a State", which meant that it should be an establishment within the meaning of a law applicable to shops and establishments enacted by the State Legislature. This contention was emphatically rejected by the Supreme Court by pointing out:

"It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression 'law' in section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had section 1(3)(b) intended to refer to a single enactment, surely its appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops & Commercial Establishments Act does not relate to all hinds of establishments. Besides shops, it relates to commercial establishments clone. Had the intention of Parliament been, when enacting section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression 'establishments' unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of section 2(ii)(g) of the Payment of Wages Act."

8. The Supreme Court, therefore, held that the Hydel Project run by the State of Punjab was an establishment falling within section 1(3)(b) of the Payment of Gratuity Act, and, therefore, the workmen were entitled to claim gratuity.

9. In my view, the reasoning adopted by the Supreme Court in the judgment in State of Punjab (supra) would equally apply to the case of the petitioner. The Appellate Authority has taken the view that the petitioner's offices/establishments would be 'establishments' within the meaning of the Contract Labour (Regulation and Abolition) Act, 1970, as defined in section 2(1)(e). Interestingly, section 2(1)(e) of the said Act defines the expression 'establishment' as under:

"2(i) In this Act unless the context otherwise requires,--

.....

(e) "Establishment" means--

(i) any office or department of the Government or a local authority, or

(ii) any piece where any industry, trade, business, manufacture or occupation is carried on;"

10. Even a cursory look at section 2(1)(e)(ii) is sufficient to lead to the conclusion that the establishment contemplated thereunder could be an establishment of a local authority. It is not disputed that the Pune Cantonment Board is a local authority, and, therefore, I would have thought that there would be no difficulty in holding that the establishment of the Puns Cantonment Board would be an establishment within the meaning of section 2(1)(e) of the Contract Labour (Regulation end Abolition) Act, 1970.

11. Mr. Presswala, learned Counsel appearing for the petitioner, contended that the petitioner-Board does not employ any contract labour, and, therefore, tits Contract Labour (Regulation and Abolition) Act, 1970, would not apply to any concerned establishment of the Board, as it does not qualify under section 1(4)(a). In other words, the contention seems to be that, in order to made section 1(3)(b) of the Payment of Gratuity Act apply, not only must the establishment be an 'establishment' within the meaning of any law for the time being in force in relation to stops end establishments in the Stats, but that such law must also apply to the establishment in question. I am afraid, it is not possible to accept this contention. The only test of applicability prescribed in section 1(3)(b) is that the establishment must be an 'establishment' within the meaning of a specified type of law in the State. The section does not prescribe the former qualification canvassed by the learned Counsel for the petitioner. It is irrelevant, therefore, in cay view, whether the Contract Labour (Regulation and Abolition) Act, 1970, applies to any of the petitioner-Board concerned establishment or not What may not apply today may apply tomorrow, if the Board decides to engage 20 or more contract labour. While it in true that the application of the Contract Labour (Regulation and Abolition) Act, 1970, may be determined by a voluntary act of the Board in engaging the requisite number of contract laborr, section 1(3)(b) of the Payment of Gratuity Act does not contemplate applicability depending upon the volition of the employer. All that is necessary under section 1(3)(b) is that the establishment in question must answer the description or definition of an "establishment" within the meaning of any tow relating to shops end establishments which is in force in the Stele", nothing mare and nothing less. Although the Appellate Authority has also relied upon the definition of the expression 'establishment' as contained in the Bombay Shops & Establishments Act, 1948, I am not taking the said Act into consideration, since, as rightly contended by the learned Counsel for the petitioner-Board, the question whether the petitioner's establishments would answer the description of the said expression defined in that Act, is not free from doubt. For the purpose of disposing of the present petitions, it is sufficient that we concentrate our attention on the Contract Labour (Regulation and Abolition) Act, 1970, which is capable of applying to all establishments of local authorities like the petitioner-Board.

12. Thus, in my view, the establishments of the petitioner-Board are 'establishments' within the meaning of section 2(1)(e)(i) of the Contract Labour

(Regulation and Abolition) Act, 1970, which is a law in force in the State of Maharashtra in relation to shops and establishments in this State. Thus, the qualifying test in section 1(3)(b) being satisfied, the Payment of Gratuity Act, 1972, was applicable, even at the relevant time, to the establishments of the petitioner-Board, wherein the concerned workmen were working."

30. The question whether the Gujarat Labour Welfare Board is an establishment within the meaning of Section 1(3)(b) of the Act, fell for consideration of the Gujarat High Court in **(Smt.) Jayaben Suryakant Modi Vs. Welfare Commissioner & Others9.**

31. In **(Smt.) Jayaben Suryakant Modi** *(supra)*, it was held:

"12. The basic facts in both the matters are not in dispute. The only question which requires consideration is as to whether the Gujarat Labour Welfare Board is an establishment within the meaning of Section 1(3)(b) of the Payment of Gratuity Act, 1972. Whereas it is clear from definition of the 'employee' given in Section 2(e) of the Payment of Gratuity Act, 1972 and the conditions mentioned in Section 4 of the Payment of Gratuity Act, 1972 are admittedly satisfied factually in case of the employees in both these matters, in case it is found that the Gujarat Labour Welfare Board is an 'establishment' within the meaning of Section 1(3)(b), there cannot be any difficulty in upholding the claim to the entitlement of the gratuity with regard to the employees of the Gujarat Labour Welfare Board.

13. There is no dispute that the Gujarat Labour Welfare Board has been constituted under the Bombay Labour Welfare Fund Act, 1953 and according to the provisions of Section 7 this Board holds the welfare fund and the same is held by the Board as Trustees, the fund also vests in the Board. In this view of the matter, the Gujarat Labour Welfare Board may be a Trust as mentioned in sub-section (2) of Section 2 of the Bombay Shops and Establishments Act, 1948 dealing with the definition of 'commercial establishment'. The Gujarat Labour Welfare Board as a Trustee of the fund under the Bombay Labour Welfare Fund Act, 1953, whether registered or not, carries on work in connection with or incidental or ancillary thereto whether for purposes of gain or not and as such it appears that the Gujarat Labour Welfare Board is covered under the definition of 'commercial establishment' as mentioned under Section 2(4) of the Bombay Shops and Establishments Act, 1948. In the alternative, even if it is assumed that the Gujarat Labour Welfare Board is not covered by the definition of 'commercial establishment' as given in Section 2(4) of the Bombay Shops and Establishments Act, 1948, it is still an establishment within the meaning of Section 1(3)(b) of the Payment of Gratuity Act because it is an establishment within the meaning of the law which is in force in relation to 'establishment' in the State of Gujarat. It is not in dispute that various Central Acts, which have been enumerated in para 8 in the earlier part of the Judgment as pointed out by Mr. Bhaya, viz. Contract Labour (Regulation & Abolition) Act, 1948, Employment Exchange (Compulsory Notification of Vacancies) Act, Industrial Disputes Act, 1947 and Apprenticeship Act are in force in the State of Gujarat and that being so, it is an 'establishment' within the meaning of the law for the time being in force in the State of Gujarat and

it is not in dispute that' more than ten persons are employed in this Board. The use of the word 'and' between the words 'shops' and 'establishments' is clearly disjunctive and it cannot be read to be conjunctive and, therefore, it is not necessary that such establishment must be in relation to shops as well as establishments. It can be 'shops' and distinctly it can be an 'establishment-and yet it would be covered under Section 1(3)(b) of the Payment of Gratuity Act, 1972. In State of Punjab v. Labour Court, Jullundur (supra) the Supreme Court was dealing with a case with reference to the Punjab Shops and Establishments Act and it has been observed that besides shops it relates to commercial establishments also. While referring to the provisions of Section 1(3)(b) of the Payment of Gratuity Act, the Supreme Court has observed that had the intention of the Parliament been while enacting Section 1(3)(b) to refer to a law is relating to commercial establishments, it would not have left the expression 'establishments' unqualified. It also observed that it was difficult to accept the contention that the law referred to under Section 1(3)(b) must be a law relating to both the shops and establishments such as the Punjab Shops and Commercial Establishments Act because the Supreme Court found that there is no warrant to limit the meaning of the expression 'law' in Section 1(3)(b) and further that the expression is comprehensive in its scope and it can mean a law in relation to shops as well as separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. In view of such a categorical pronouncement by the Apex 35 Court, it is not discernible by any reasoning to give a limited meaning to Section 1(3)(b) as has been argued by Mr. Pandya and I have no hesitation in holding that Section 1(3)(b) of the Payment of Gratuity Act applies to every establishment within the meaning of any law for the time being in force in relation to establishment in a State and such an establishment would also include an establishment like Gujarat Labour Welfare Board for the purpose of payment of the gratuity and the Payment of Gratuity Act applies to the Gujarat Labour Welfare Board with full force and the payment of the gratuity could not be denied to the employees of the Gujarat Labour Welfare Board on the ground that Gujarat Labour Welfare Board is not an establishment within the meaning of Section 1(3)(b) of the Payment of Gratuity Act....."

32. In **V. Venkateswara Rao, Vs. The Chairman/Governing Body, S.M.V.M. Polytechnic, Tanuku & Ors.10,** the polytechnic, who were employers imparting education in the technical field, were held to be an establishment within the meaning of Section 1(3)(b) of the Act.

33. The same view has been taken by a Division Bench of the Andhra Pradesh High Court in **Smt. D. Lakshmi Vs. Andhra Pradesh Agricultural University and Anr.11**

34. This view of the law was echoed yet again by a learned Judge of the Madras High Court in **Habibaa Girls Primary School (represented by its Manager), Ambur Vs. Smt. Noorinisha and Others12,** to hold that an educational institution like a private unaided school, would be covered under the definition of

establishment, envisaged under Section 1(3) of the Act. It must be said here that in all decisions relating to educational institutions, the Act would apply also by virtue of Section 1(3)(c) of the Act, after 3rd April, 1997, in view of a notification issued by the Central Government, including Educational Institution in the category of establishments to which the provisions of the Act would apply, under Section 1(3)(c) of the Act.

35. The question has recently received the attention of their Lordships of the Supreme Court in **Senior Superintendent of Post Offices, Vs. Gursewak Singh and Others13,** where, while examining the question whether a Gramin Dak Sewak is an employee within the meaning of Section 2(e) of the Act, the issue whether the Department of Post and Telegraph is an establishment within the meaning of Section 1(3)(b) of the Act, was considered and answered thus:

"9. The first issue to be determined is whether a Gramin Dak Sewak is an 'employee' as per Section 2(e) of the 1972 Act, and is entitled to payment of Gratuity under this Act?

9.1. Section 1(3)(b) of the 1972 Act applies to every 'establishment' within the meaning of "any law" for the time being in force.

This Court in State of Punjab V. Labour Court Jalandhar (1980) 1 SCC 4, has held that there is no reason for limiting the meaning of the expression 'law' in Section 1(3)(b) of the 1972 Act.

The Postal Department is as an establishment under Section 2(k) of the Indian Post Office Act, 1898 which reads as under:

"2. Definitions.-

(k) the expression *"Post Office" means the department, established* for the purposes of carrying the provisions of this Act into effect and presided over by the Director General.

(emphasis supplied)

The Indian Post Act, 1898 would fall under the expression 'law' in Section 1(3)(b). Consequently, the Post & Telegraphs Department would be an establishment under the 1972 Act."

36. The question, therefore, that the word 'establishment' occurring in Section 1(3)(b) of the Act is not confined in its scope to commercial establishments alone, or commercial and industrial establishments in contradistinction to sovereign establishments is no longer *res integra*. Wherever there is an establishment within the meaning of any law for the time being in force relating to establishment in a State, where ten or more persons are employed, the Act would apply. The establishment here, is the Board of Basic Education constituted under the Act of 1972. The petitioner, District Basic Education Officer, is an officer of that establishment at the District Headquarters. The Second respondent-employee is an employee of the Board of Basic Education, working under the administrative control of the District Basic Education Officer. It has nowhere been urged, or can be urged that an establishment, as large as that of the Board of Basic Education, would employ less than ten persons, even under the petitioner, District Basic Education Officer, Hamirpur. The question whether the Board of Basic Education is an establishment within the meaning of any law for the time being in force in relation to establishments in a State, to employ the phraseology of Section 1(3)(b) of the Act,

one has to look to the Act of the 1972. The Act of 1972 is definitely law in force in the State of Uttar Pradesh, being enacted by the State legislature. The Act of 1972 defines the 'Board' under Section 2(c) as follows:

"Section 2 - Definitions

In this Act, unless the context otherwise requires--

(a) x x x x

(b) x x x x

(c) "Board' means the Uttar Pradesh Board of Basic Education constituted under section 3 ;

(d) x x x x

(e) x x x x"

37. Section 3 of the said Act speaks about the constitution of the Board, where sub-Section (1) clearly spells it out to be an establishment to be brought into existence by the State Government by notification in the Gazette. Section 3(1) reads:

"Section 3 - Constitution of the Board

(1) With effect from such date as the State Government may, by notification in the Gazette, appoint, there shall be established a Board to be known as the Uttar Pradesh Board of Basic Education.

(2) x x x x

(3) x x x x"

38. It is, thus, evident that the Board of Basic Education is an establishment within the meaning of the Act of 1972, which is law for the time being in force in the State of Uttar Pradesh. The Board being an establishment under a law for the time being in force, it clearly falls within the mischief of Section 1(3)(b) of the Act. The provisions of the Act, would, clearly be applicable to the Board and to its officers, including the petitioner, District Basic Education Officer, an officer of the Board.

39. At the same time, in order to make the Act govern the rights of an employee, it is just not enough that it is applicable to the employer. It is also necessary that the employee should qualify for an employee under Section 2(e) of the Act. A perusal of Section 2(e) shows that the Act would apply to any person, other than an apprentice, who is paid wages and engaged in any kind of work, manual or otherwise in an establishment to which the Act applies. Section 2(e) further requires that once an employee falls into the inclusive part of the aforesaid provision, he/ she should not fall under the excluding part of the provision. This is so because the provisions of Section 2(e) of the Act exclude from the definition of an employee, a person otherwise well within its fold, in case such person is the holder of a post under the Central Government or a State Government, and is governed by any other Act or by Rules providing for payment of gratuity. Thus, notwithstanding the applicability of the Act to an establishment by virtue of what Section 1(3)(b) envisages, an employee of the Central Government or a State Government, would not be entitled to its benefits at all, subject to the condition that the post that he holds, is governed by any other Act or by Rules, that provide for payment of gratuity. Clearly, employees of the Central Government or a State Government, who are in receipt of gratuity under law applicable to them relating to gratuity, would not be entitled to benefit of the Act. The provisions of

Section 2(e) of the Act have a clarificatory feature about them. These make it explicit that but for the Central Government or a State Government vis-a-vis their employees, who are in receipt of gratuity under law or rules applicable to them for the purpose, every establishment, even if it be an establishment of the State created by statute and entrusted with very sovereign functions, would still be subject to the Act. The principle about a body corporate entirely owned and controlled by the Central Government, that is, just another face of the State, or an *alterego*, that is recognized as State to render such establishment amenable to the writ jurisdiction of this Court, or to other obligations of the State as an instrumentality of it, has no application here.

40. There is yet another feature of the Act, that would positively displace Section 9 of the Act of 1972, or any other Rule framed thereunder governing the liability to pay gratuity to an employee of the petitioner or the Board; that is the overriding effect given to the Act, over all other laws governing gratuity provided under Section 14. Section 14 of the Act reads:

"Section **14 - Act to override other enactments, etc.-** The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

41. There is, thus, no scope for the provisions of the Act of 1972 to work to the exclusion of the Act, as canvassed by Mr. Kunal Shah. The submission of the learned counsel for the petitioner about the inapplicability of the Act to the petitioner, in the matter of entitlement to gratuity for the second respondent, cannot be accepted. The only avenue, that is still available to an employer to be relieved of his liability under the Act to its employees, despite the Act being applicable, is Section 5. Section 5 of the Act speaks about the power to exempt from the operation of the Act. Section 5 of the Act reads thus:

"Section **5.Power to exempt.-** (1) The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

(2) The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act.

(3) A notification issued under sub-section (1) or sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of this Act, but no such notification shall be issued so as to prejudicially, affect the interests of any person."

42. Under Section 5(1) of the Act, the appropriate Government is empowered by notification and subject to such conditions as may be mentioned in the notification, to exempt an establishment from the provisions of the Act, in case such Government are of opinion that the employees of the establishment are in receipt of gratuity or pensionary benefits, not less favourable than what they would be entitled to under the Act. It is not that, that the mere provisions of post retiral benefits as to pension and gratuity that offer better terms to an employee, would ipso facto work to exempt an establishment from the provisions of the Act. The exemption has to be expressly granted by the appropriate Government, after it forms an opinion that pensionary benefits and gratuity under the law or rules applicable to an establishment, are not less favourable to the employee than what he would be entitled to under the Act. This decision, the appropriate Government, has to express through a notification issued for the purpose under the provisions of Section 5. Appropriate Government is defined under Section 2(a) of the Act as follows:

"**2. Definitions.**--In this Act unless the context otherwise requires,--

(a) "appropriate Government" means,-

(I) in relation to an establishment-

(a) belonging to, or under the control of, the Central Government,

(b) having branches in more than one State,

(c) of a factory belonging to, or under the control of, the Central Government,

(d) of a major port, mine, oilfield or railway company, the Central Government,

(ii) in any other case, the State Government;

(b) x x x x
(c) x x x x
(d) x x x x
(e) x x x x
(f) x x x x
(g) x x x x
(h) x x x x
(i) x x x x
(j) x x x x
(k) x x x x
(l) x x x x
(m) x x x x
(n) x x x x
(o) x x x x
(p) x x x x
(q) x x x x
(r) x x x x
(s) x x x x"

43. A perusal of the definition of appropriate Government clearly shows that the Central Government is the appropriate Government in relation to specified categories of establishments under Section 2(a)(i) of the Act, that fall into any of its four sub-clauses (a), (b), (c), and (d). If the establishment does not fall into any of the above mentioned sub-clauses of Section 2(a)(i), in relation to all other establishments, the State Government is the appropriate Government as a matter of residual application.

44. Admittedly, in this case, the petitioner has not come up with a plea that they have been granted exemption by the State Government. Once that is not the case, it goes without saying that the petitioner has not offered any evidence to substantiate such a case. The conclusion is, therefore, inescapable that the petitioner is an establishment/ part of an establishment, to which the Act applies. The Act is in no way excluded by operation of Section 9, or any other provisions of the Act of 1972. Also, the petitioner is not an establishment/ part of establishment, that has been exempted under Section 5 of the Act.

45. In view of these findings, the order impugned cannot be held to be vitiated for want of jurisdiction in the Authority. The order, otherwise also, is in no way manifestly illegal or unjust. It, thus, calls for no interference under Article 226 of the Constitution.

46. In the result, the petition fails and is **dismissed with costs.**

47. Interim order dated 01.12.2009 is hereby vacated.

Order on WRIT - C No. - 9831 of 2019

48. In view of the orders passed in Writ - C No.62286 of 2009 (District Basic Education Officer vs. Niyantrak Pradhikari Anutoshik Bhugtan Adhiniyam, 1972 And Another), no orders are required to be passed in this writ petition, which stand consigned to the Record subject, of course, to liberty to the petitioner of this writ petition, to come up again, should that necessity arise.

49. There shall be no order as to costs.

50. Let this order be communicated by the office forthwith to the Controlling Authority, Payment of Gratuity Act, 1972-cum-Assistant Labour Commissioner, U.P., Kanpur Region, Kanpur.

(2019)10ILR A 1571

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C- No. 26569 of 2019

Smt. Husna Bano ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Muktesh Kumar Singh.

Counsel for the Respondents:
C.S.C., Sri Baleshwar Chaturvedi.

A. UP Electricity Supply Code, 2005 - Electricity connection - Grant of electricity connection is in the nature of basic need today - Legislature is intended to frame rules in manner that such connections to tenant or occupiers are not denied - No reason to refuse electricity connection in the absence of NOC of landlord - Writ Petition allowed. (Para 5 & 6)

B. Indemnity Bond - Importance - Indemnity bond does not become a document of title - Electricity connection granted under Indemnity Bond is protected by way of declaration given by person seeking electricity connection. (Para 6)

Held –
6. In our considered opinion the Indemnity Bond does not become a document of title and

declaration in the said bond to the effect that petitioner is lessee or otherwise in occupation in a proof of his possession. As we have already discussed herein above in this judgment that the petitioner is residing in the capacity of tenant and she has taken plea in the civil suit as well as taken plea by way of Indemnity Bond that she has filed, we find no reason for the electricity department not to grant electricity connection. The electricity connection granted under the Indemnity Bond are clearly protected by way of declaration given by the persons seeking electricity connection. Moreover, grant of electricity connection does not bar an eviction suit by the landlord. Therefore, we find no reason for the electricity department or the concerned officer to refuse electricity connection on the ground that the landlord has come up with an application that the electricity connection should not be given in the absence of no objection certificate.

C. Eviction suit - Bar - Grant of electricity connection does not bar an eviction suit by the landlord. (Para 6)

D. Electricity Act, 2003 - S. 43 (1) - Right to get electricity supply - Provision of S. 43(1) caste an affirmative obligation on the distribution licencee to supply electricity on an application being moved by owner or occupier - It is a statutory right to apply for and obtain supply of electricity. (Para 7)

Writ Petition allowed (E-1)

Case Relied On:-

1. Gaurav Sharma Vs St. of U.P. & ors. (Writ-C No.8396 of 2018 dated 18.9.2018)

2. Smt. Sushama Chowdhary Vs U.P. Power Corp. Ltd. & ors. (Misc. Bench No. 9588 of 2014 dated 24.09.2014)

(Delivered by Hon'ble Ramesh Sinha, J.
Hon'ble Ajit Kumar, J.)

1. Heard Sri Muktesh Kumar Singh, learned counsel for the petitioner, Sri Baleshwar Chaturvedi, learned Counsel for the respondent nos.3, 4 and 5, learned Standing Counsel for respondent nos.1 and 2 and perused the record.

2. The petitioner by means of the present petition, has prayed for quashing the impugned order dated 28.06.2019 passed by respondent no.5 whereby certain more information has been sought from the petitioner regarding her possession over the property in question as electricity connection is being sought by the petitioner.

3. The controversy has arisen on account of landlord tenant dispute between the petitioner and respondent nos.5 to 10 on account of death of the main land-lady Rubiya Begam, w/o Azeemullah. The facts as have pleaded in the present writ petition are that on account of dispute of succession amongst the heirs who are respondent nos.6 to 10 here in this petition, the petitioner has been under serious threat of eviction in an unauthorized way from the premises in question. Since she was a tenant for Rs.200/- per month for the accommodation let out to her by late Rubiya Begam and the petitioner has Rashan Card and permanent Adhar Card issued on the said address, she instituted a suit for permanent injunction bearing O.S. No.294/2019 which is pending in the court of Civil Judge (Junior Division), Aligarh. However, during the pendency of the said suit, respondents got electricity connection in the name of Rubiya Begam cancelled. This led the petitioner to apply for fresh electricity connection to her accommodation. She also submitted Indemnity Bond as per annexure 4.2 of the U.P. Electricity Supply Code, 2005, dated 25.6.2019 but instead of granting

the electricity connection, she has been further directed to supply further documents of proof of possession. The notice dated 28.6.2019 does refer to certain documents like Rashan Card and Adhar Card supplied by the petitioner, however, in spite of that, the petitioner submits, she has been denied electricity connection because of the letter by the heirs of the earlier land-lady that no fresh connection be given without NOC of landlord being produced. Thus upon the said letter, the Executive Officer passed order dated 1.7.2019 refusing the fresh electricity connection to the petitioner.

4. The argument advanced by learned counsel for the petitioner is that the petitioner has filed Rashan Card and Adhar Card which themselves are proof of her possession over the premises in question and it is further submitted that since after the death of land-lady, her successors refused to accept the rent, she could not produce the rent receipt. It is further submitted that Indemnity Bond as required Annexure 4.2 of the Electricity Supply Code, 2005 is meant for such purposes where electricity connection are being sought by the tenant and NOC is not given by its landlord.

5. We have examined the relevant provisions of U.P. Electricity Supply Code, 2005 for the purposes of grant of electricity connection and we appreciate that annexure 4.2 is in respect of an intending consumer who is not owner of the premises. We however find that a person who has obtained Rashan Card and Adhar Card issued way back in the year 2016-17 is having sufficient proof at valid possession for the limited purposes i.e. grant of electricity connection. Besides above, the fact of suit for injunction being going on between the parties, at the instance of respondent is sufficient fact further to demonstrate that the premises in question is in possession of the petitioner and she is under threat of being evicted without due process of law. Providing basic necessity is the duty of the State as the electricity in modern times is basic necessity more especially when persons are residing in semi urban and urban areas. In most of the cases where there is dispute between the landlord and the tenant, the landlord can never issue no objection certificate as he intends to evict his tenant and disconnection of electricity becomes an effective tool to engineer eviction forcefully. Further there are large number of cases where still rent is being paid in cash so there is no possibility of a tenant having rent receipt. In such circumstances the question of possession whether in the capacity of tenant or otherwise becomes a question of fact to be determined by the court competent enough for the said purposes. The grant of electricity connection, since it is in the nature of basic need today, the legislature has intended to frame rules in such manner that such connections to tenants or occupiers are not denied and that is why annexure 4.2 has been prescribed for as Indemnity Bond.

6. In our considered opinion the Indemnity Bond does not become a document of title and declaration in the said bond to the effect that petitioner is lessee or otherwise in occupation in a proof of his possession. As we have already discussed herein above in this judgement that the petitioner is residing in the capacity of tenant and she has taken plea in the civil suit as well as taken plea by way of Indemnity Bond that she has filed, we find no reason for the electricity

department not to grant electricity connection. The electricity connection granted under the Indemnity Bond are clearly protected by way of declaration given by the persons seeking electricity connection. Moreover, grant of electricity connection does not bar an eviction suit by the landlord. Therefore, we find no reason for the electricity department or the concerned officer to refuse electricity connection on the ground that the landlord has come up with an application that the electricity connection should not be given in the absence of no objection certificate.

7. We find support in respect of our above view in the judgement of Division Bench of this Court in the case of Gaurav Sharma Vs. State of U.P. and others (Writ-C No.8396 of 2018 dated 18.9.2018) vide paragraph no.9 of the judgement (supra) the Division Bench has held thus:-

Further, **Misc. Bench No. 9588 of 2014, Smt. Sushama Chowdhary v. U.P. Power Corporation Ltd. & 4 others** decided on 24.09.2014 a concurrent Bench of this Court has relied upon a judgment of Supreme Court in AIR 2011 SC 2897 Chandu Khamaru v. Smt. Nayan Malik, wherein, Supreme Court has come to interpret sub-Section (1) of Section 41 and has held that in case of family dispute, the Electricity Act takes full care for grant of electricity connection and it ensures that nobody is deprived of electricity connection only on account of internal family dispute. The Division Bench in Sushama Chowdhary (supra) held thus:

"Section 43 (1) of the Electricity Act, 20031 provides that save and otherwise provided in the Act, every distribution licensee shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises within one month after receipt of an application requiring such supply. Section 43 (1) of the Act of 2003 casts an affirmative obligation on the distribution licensee to supply electricity on an application being moved by the owner or occupier. A corresponding entitlement or right is conferred by the statute on the owner or occupier to require a supply of electricity. This legal position is not in doubt. In Chandu Khamaru v. Smt. Nayan Malik2, the Supreme Court, while interpreting the provisions of Section 43 (1) of the Act of 2003, observed as follows:

"Sub-section (1) of Section 43 provides that every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply. These provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electric supply from the distribution licensee."

Again, in a subsequent part of the aforesaid decision, the Supreme Court emphasized the statutory right of an occupier and the corresponding statutory obligation on the distribution licensee to supply electricity. The Supreme Court observed as under:

"...The appellant has a statutory right to apply for and obtain supply of electricity from the distribution licensee

and the distribution licensee has a corresponding statutory obligation to supply electricity to the appellant."

We find merit in the contention of the petitioner that the impugned order dated 2 August 2014 contains no reason for the denial of electric supply, save and except for making a reference to the provisions of Clause 4.4 of the Electricity Supply Code-20053. Clause 4.4 of the Code-2005 is in aid of the statutory duty cast by Section 43 of the Act of 2003.

As a matter of fact, an Indemnity Bond, a proforma of which is contained in Annexure 4.2 of the Code-2005, deals with a situation where an occupier of the premises applies for the grant of an electricity connection, but is unable to produce the consent of the owner. Obviously, in a situation, where a dispute is between the owner and occupier (in the present case, the dispute is between members of a family), a provision has been made for furnishing an Indemnity Bond. The record would, in fact, indicate that on 21 July 2014, the petitioner had furnished an Indemnity Bond, describing herself as an occupier of the premises and said that she was unable to obtain the consent of the owner in view of the pendency of the litigation before the Court. Despite this, the Executive Engineer has acted in breach of the statutory obligation, which is cast on a distribution licensee to provide supply of electricity. The impugned order reveals a total non-application of mind and an unawareness of the obligation, which is cast by Section 43 of the Act of 2003 on the distribution licensee.

8. In view of the above, we are not able to sustain the order dated 1.7.2019 and accordingly we hereby set-aside the same. The matter is remitted to the authority competent to grant electricity connection and to consider the application of the petitioner on the basis of Indemnity Bond filed and the Rashan Card and the Adhar Card produced before it. Necessary positive orders and direction for providing electricity connection shall be passed, if otherwise there is no legal impediment, within a period of two weeks from the date of production of certified copy of this order.

9. The petition stands allowed as indicated above.

(2019)10ILR A 1575

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.10.2019

BEFORE

THE HON'BLE MANISH MATHUR, J.

Misc. Single No.- 22407 of 2019

Tarun Kumar Srivastava ...Petitioner
Versus
Gur Bux Singh & Ors. Respondents

Counsel for the Petitioner:
Shriya Saxena, Sri Utkarsh Srivastava.

Counsel for the Respondents:

Code of Civil Procedure, 1908- Order XLI Rule 27-Petitioner's application under Order 41 Rule 27 C.P.C. was allowed by appellate court permitting to bring on record the proceedings and judgment pertaining to Regular Suit No.222/2002-consequentially an application for amendment of memorandum of appeal was filed- rejected- on the ground that it would delay proceedings-cannot be a valid or cogent ground for rejection-overlooking the necessity of incorporating it in the interest of justice.

Held -: the natural consequence would be amendment to memorandum of appeal in order to enable appellant to take the grounds available to him and relating to bringing on record such additional evidence. In case such amendment in the memorandum of appeal is not permitted, the entire purpose of allowing the application under Order 41 Rule 27 C.P.C. would stand defeated. The Learned Court below had completely ignored the necessity of incorporating amendment as sought by appellant and the application has been rejected only on the ground that it would delay proceedings. The said ground cannot be a valid or cogent ground for rejecting the application for amendment. Amendment application should have been allowed by appellate court.

Writ Petition Allowed (E-8)

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

1. Heard Sri Utkarsh Srivastava, learned counsel for the petitioner and Sri Manoj Kumar Dubey, Advocate who has filed his power on behalf of opposite parties 1 and 3. The power is taken on record. It is admitted between learned counsel for parties that opposite parties 2 and 4, though not served, are merely proforma for the purposes of adjudication of present petition which may be heard finally without notices being served upon them. However, it is a relevant fact that earlier vide order dated 26.08.2019, notices had been issued to the said opposite parties and office report dated 04.10.2019 indicates that undelivered notices have not yet been received back indicating service of notice upon opposite parties 2 and 4. However, in terms of explanation to Rule 12 Chapter VIII of the Rules of this Court, service of notices upon opposite parties 2 to 4 is deemed sufficient.

2. Learned counsel for opposite parties 1 and 3 states that he is waving his right to file counter affidavit and that the petition may be disposed of on basis of material on record. Due to such statement, the petition is being decided finally at admission stage itself with consent of learned counsel for the parties.

3. Under challenge is the order dated 08.07.2019 passed by Additional District Judge (PC Act-I), Lucknow in Regular Civil Appeal No.137 of 2014 (Tarun Kumar Srivastava v. Gur Bux Singh and others) whereby Application No.A-146 seeking amendment in the memorandum of appeal has been rejected.

4. As per averments made in the petition, the plaintiffs-opposite parties 1 to 3 instituted Regular Suit No.56 of 2009 (Gurbux Singh & others v. Smt. Neeta Dua and another) against opposite party no.4 and the petitioner who were defendants in the said suit, which was filed seeking relief of possession and damages in relation to some property situate at Aishbagh, Lucknow. The said suit was decreed vide judgment and decree dated 07.04.2014 whereafter Regular Civil Appeal No.137 of 2014 (Tarun Kumar Srivastava v. Gur Bux Singh and others)was filed.

5. It has been stated that earlier another Regular Suit No.222/2002 (M/s Lala Timber Traders v. Guru Bux Singh) seeking the relief of permanent injunction with regard to the same property in question. The said suit was decreed vide judgment and decree dated 08.08.2014, i.e. after the judgment and decree passed in Regular Suit No.56 of 2009.

6. It has been stated that due to the subsequent development, the petitioner-defendant filed an application under Order 41 Rule 27 of C.P.C. in Regular

Civil Appeal No.137 of 2014 bringing on record the details of Regular Suit No.222/2002 along with judgment and decree dated 08.08.2014. The application under Order 41 Rule 27 C.P.C. was allowed by means of an order dated 02.05.2018, which became final.

7. Subsequent to allowing of application under Order 41 Rule 27 C.P.C., the petitioner filed an application for amendment of memorandum of appeal in Regular Civil Appeal No.137 of 2014. The same has been rejected by means of the impugned order dated 08.07.2019.

8. Learned counsel for petitioner challenging the reasoning indicated in the impugned order submitted that once application under 41 Rule 27 C.P.C. was allowed and became final, the application seeking to amend memorandum of appeal was but a natural consequence thereof particularly in view of the fact that judgment and decree in Regular Suit No.222/2002 was passed subsequent to the judgment and decree dated 07.04.2014 in Regular Suit No.56 of 2009. It has been further submitted that only a single ground is sought to be incorporated in memorandum of appeal particularly in view of the provisions of Order 41 Rule 2 C.P.C. to the effect that no submissions can be advanced or evidence led in absence of specific pleadings for the same.

9. Learned counsel for petitioner has relied upon judgments rendered by Hon'ble the Supreme Court in **State of Maharashtra v. Hindustan Construction Company Ltd.** reported in (2010) 4 SCC 518, **P. Kunjukrishna Pillai and others v. D. Sreekantan Nair and others** passed in Civil Appeal No.4439 of 2008 and **Andhra Bank v. ABN Amro Bank N.V. and others** reported in (2007) 6 SCC 167 with the submission that Hon'ble the Supreme Court has clearly held that amendment is permissible to be incorporated in the memorandum of appeal if required to do absolute justice between the parties.

10. Learned counsel for petitioner has also submitted that the amendment application has been rejected on the only ground that it would delay proceedings while completely ignoring necessity of such amendment to be incorporated in the memorandum of appeal.

11. Learned counsel appearing on behalf of opposite parties 1 and 3 while refuting submissions advanced by learned counsel for the petitioner has submitted that proceedings of Regular Suit No.222/2002 were already pending at the time of institution of Regular Suit No.56 of 2009 and therefore, pleadings sought to be incorporated by means of the amendment application could very well have been taken at trial stage itself. The said fact was not brought on record at trial stage due to which no issue was framed with regard to same, which clearly indicates that such amendment being sought to be incorporated at appellate stage is being done only for purposes of delaying the proceedings which have already been pending for the past five years.

12. Heard learned counsel for parties and perused the record.

13. It is admitted fact that although Regular Suit No.222/2002 was instituted by the petitioner prior to filing of Regular Suit No.56 of 2009 but the said Regular

Suit No.222/2002 was actually decided finally subsequent to the decision in Regular Suit No.56 of 2009. It was in these circumstances that application under Order 41 Rule 27 C.P.C. was filed by petitioner at the appellate stage and was allowed by means of order dated 2.05.2018 which remains unchallenged.

14. It is a relevant fact that application under Order 41 Rule 27 pertained to proceedings of Regular Suit No.222 of 2002 and by means of the said application, documents filed in said suit were brought on record along with judgment and decree dated 08.08.2014.

15. In the application filed for amendment of memorandum of appeal, it has been stated that in Regular Suit No.222/2002, the defendant (opposite parties in this petition) also filed written statement with counter claim but thereafter did not participate in the proceedings thereby abandoning the counter claim which, therefore, precluded them from filing another suit. It was stated that in view of the said proceedings, and particularly in view of allowing of application for taking additional evidence, amendment to the memorandum of appeal is required, to do complete justice between the parties.

16. It is thus clear that once the application under Order 41 Rule 27 C.P.C. was allowed by appellate court permitting the appellant to bring on record the proceedings and judgment pertaining to Regular Suit No.222/2002, the natural consequence would be amendment to memorandum of appeal in order to enable appellant to take the grounds available to him and relating to bringing on record such additional evidence. In case such amendment in the memorandum of appeal is not permitted, the entire purpose of allowing the application under Order 41 Rule 27 C.P.C. would stand defeated.

17. A perusal of impugned order dated 08.07.2019 clearly indicates only reason for rejecting the amendment application as being delay in deciding the appeal due to allowing of amendment application. The court below has not at all appreciated the effect and purpose of the amendment sought to be incorporated in memorandum of appeal, which it was necessarily required to do. Rejecting amendment application merely on the ground that it would delay proceedings cannot be said to be a cogent ground without adverting to the purpose, effect and necessity of the amendment sought to be incorporated.

18. Hon'ble the Supreme Court in the case of **Andhra Bank v. ABN Amro Bank N.V. and others**(supra) has clearly held that delay in filing application for amendment of the written statement cannot stand in the way of allowing the prayer for amendment of written statement. It has also been held that while allowing an application for amendment of pleadings, the Court cannot go into the question of merit of such amendment and that the only question required to be seen would be whether such amendment would be necessary for decision of the real controversy between parties in the suit. Relevant paragraphs of the judgment is quoted as follows :

"Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr Kapadia, we do not think that

delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit.?

19. In **P. Kunjukrishna Pillai**(supra), Hon'ble the Supreme Court has held that an amendment application cannot be rejected only for the ground that it was not filed before the trial commenced.

20. In **State of Maharashtra v. Hindustan Construction Company Ltd.**(supra) Hon'ble the Supreme Court has clearly held that provisions in Civil Procedure Code leave no manner of doubt that the appellate court has power to grant leave to amend memorandum of appeal. The relevant potion of the judgment reads as follows :

"23. Do the principles relating to amendment of pleadings in original proceedings apply to the amendment in the grounds of appeal? Order 41 Rule 2 CPC makes a provision that the appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the court. Order 41 Rule 3 CPC provides that where the memorandum of appeal is not drawn up as prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended. The aforesaid provisions in CPC leave no manner of doubt that the appellate court has power to grant leave to amend the memorandum of appeal."

"24. As a matter of fact, in *Harcharan v. State of Haryana* [(1982) 3 SCC 408] , this Court observed that the memorandum of appeal has the same position as the plaint in the suit. This Court said:

"5…. When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of Order 41 Rule 3. The appellant is confined to and also would be held to the memorandum of appeal. To overcome any contention that such is not the pleading the appellant sought the amendment.?

21. Upon applicability of the aforesaid judgments in the facts and circumstances of present case, it can be seen that the learned court below had completely ignored the necessity of incorporating amendment as sought by appellant and the application has been rejected only on the ground that it would delay proceedings. As seen from the judgments of Hon'ble the Supreme Court indicated hereinabove, the said ground cannot be a valid or cogent ground for rejecting the application for amendment.

22. In view of the fact that amendment application has been filed

merely to substantiate pleadings with regard to additional evidence already permitted to be brought on record by the appellate court, this Court is of the opinion that the said amendment application should have been allowed by appellate court.

23. In the aforesaid circumstances, petition is allowed setting aside order dated 08.07.2019 passed by Additional District Judge (PC Act-I), Lucknow in Regular Civil Appeal No.137 of 2014 (Tarun Kumar Srivastava v. Gur Bux Singh and others). Application No.A-146 in Regular Civil Appeal No.137 of 2014 is also allowed as a consequence.

24. Learned counsel for the opposite parties has placed order dated 28.02.2019 passed in Writ Petition No.5955(M/S) of 2019(Gurdeep Singh v. Additional District Judge/Special Judge, P.C.Act-1, Lucknow and another) with the submission that this Court has already directed the appellate court to decide Regular Civil Appeal No.137 of 2014 with expedition, say, within a period of six months from the date a certified copy of order is submitted. Learned counsel for opposite parties submits that in view of aforesaid direction, the appeal is required to be decided in terms of order dated 28.02.2019, although the time frame indicated in said order has already expired.

25. Keeping in mind the direction issued by this Court earlier on 28.02.2019, learned court below, i.e. learned Additional District Judge/Special Judge, P.C.Act-1, Lucknow is directed to decide the appeal with expedition in terms of order dated 28.02.2019, however with the slight modification that in view of this order, the appeal shall be decided preferably within a period of three months from the date a copy of this order is brought on record in the appellate proceedings. Consequential amendment to memorandum of appeal shall be incorporated by the appellant within a period of seven days from the date a copy of this order is brought on record before the court concerned and the proceedings shall thereafter be completed within the time frame as indicated herein-above.

(2019)10ILR A 1580

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2019

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 7515 of 2013

M/S Grasim Industries Ltd. (Unit Indo Gulf Fertilisers) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Md. Altaf Mansoor.

Counsel for the Respondents:
C.S.C., A.S.G., Sri Gaurav Saxena, Jushi Saxena, Sri Lalla Chauhan, Sri Mohd. Yousuf, Nandita Bharti, Sri Neeraj Kumar Saxena, Rajni Saxena, Rishi Saxena, Seena Saxena.

A. Industrial Disputes Act, 1947 - Section 2(a)(2) - petition filed-challenging the order passed by the Presiding Officer, Central Government Industrial Tribunal, Lucknow ('CGIT')- declaring the petitioner-Company to be "Controlled Industry" u/s.2(a)(2) of the Industrial Disputes Act, 1947- unless a notification of Central Government bringing

any industry under its control w.r.t. the Act of 1947-is passed-the same cannot be "controlled industry"-"appropriate Government"-would be State Government-therefore CGIT has no jurisdiction- liberty is granted to approach, either the State Government or the Labour Court-cum-Industrial Tribunal u/s. 2(A)(2) of the Act.

Held: - order is set aside

Writ Petition allowed (E-8)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner Sri Altaf Mansoor, Sri Lalla Chauhan for respondent no.3 and Sri Vivek Shukla, learned Additional Chief Standing Counsel for the State-respondent.

2. This petition had initially been filed by Indo Gulf Fertilizers (A Unit of Aditya Birla Nuvo Ltd.). However, since the Unit has been taken over by M/S Grasim Industries Ltd., Jagdishpur Industrial Area, Amethi, an amendment application was moved, which was allowed on 30.8.2019 and necessary amendments with regard to the petitioner have already been incorporated in the array of parties, by the learned counsel for the petitioner.

3. This petition has been filed, challenging the order dated 23.8.2013 passed by the Presiding Officer, Central Government Industrial Tribunal, Lucknow (for short 'CGIT'), wherein it has been declared that the petitioner-Company falls under the purview of "Controlled Industry" as defined in Section 2(a)(2) of the Industrial Disputes Act, 1947 and, therefore, the CGIT has jurisdiction to entertain a dispute/petition filed by respondent no.3 before respondent no.2.

4. It has been submitted by the learned counsel for the petitioner Sri Altaf Mansoor that respondent no.3 was working as Deputy Manager in the Stores Department of the petitioner-Company, but his services were terminated on 2.4.2012. A departmental appeal was filed and thereafter respondent no.3 filed an application under Section 2-A of the Act before the Regional Labour Commissioner (Central), Lucknow in May, 2012. On the application of respondent no.3, the Regional Labour Commissioner (Central), Lucknow issued notice to the petitioner and the petitioner filed a preliminary objection on the ground of jurisdiction for initiation of conciliation proceedings by the Regional Labour Commissioner (Central), Lucknow. The proceedings remained pending before the Regional Labour Commissioner (Central), Lucknow with regard to the question of jurisdiction. In the meantime, respondent no.3 filed I.D. Case no.66 of 2012 before respondent no.2 on expiry of 45 days from the date of filing of application before the Regional Labour Commissioner (Central), Lucknow. The respondent no.2 issued notice to the petitioner on 29.8.2012. The petitioner again filed its preliminary objection regarding maintainability of the petition before the CGIT on 15.3.2013. The affidavits were exchanged in which, respondent no.3 has stated that the petitioner-Company manufactured fertilizer, which is a commodity that is under the direct control of Department of Fertilizers, Ministry of Agriculture and Rural Development, Government of India and such manufacturing of fertilizer is controlled under the Fertilizer (Control)

Order, 1985 and Essential Commodities Act, 1955. The availability of raw material, production both in quantity and quality, marketing, movement and fixing of sale price etc. for the petitioner-Company is being controlled by the Central Government and, therefore, the claim petition filed by the workman before the CGIT was maintainable. The respondent no.2 by the impugned order dated 23.8.2013 has decided the question of jurisdiction against the petitioner, therefore, this petition has been filed.

5. It has been submitted by Sri Mohd. Altaf Mansoor that a perusal of the impugned order would show that objection was indeed raised, but was disregarded by the respondent no.2 only because of reference to the Fertilizer (Control) Order, 1985, Contract Labour (Regulation and Abolition) Act, 1970 and the Industries (Development and Regulation) Act, 1951. It has been submitted that the definition of "appropriate Government" is given under Section 2 of the Act, which provides that with regard to any industry carried on by or under the authority of the Central Government or by a Railway Company or concerning any such controlled industry as may be "specified in this behalf" by the Central Government, the "appropriate Government" would be the Central Government. In the case of the petitioner-Company, however, no such notification has been made by the Central Government under the Industrial Disputes Act, 1947.

6. It has been submitted by the learned counsel for the petitioner on the basis of the judgments rendered by the Supreme Court in the case of ***Bijay Cotton Mills Limited vs. Workmen and another (1960) 2 SCR 982 and Management of Vishnu Sugar Mills Limited, Harkhua District Saran, Bihar vs. Workmen represented by Chini Mill Mazdoor Union, Harkhua, District Saran Bihar (1960) 3 SCR 214,*** that merely because under an Act, the production, supply and sale of a product of a Company is being controlled and regulated by the Central Government, it would not create any presumption that the "appropriate Government" would be the Central Government under Section 2(A) of the Industrial Disputes Act, 1947. Learned counsel for the petitioner has referred to Para-12 of the judgment in the case of ***Bijay Cotton Mills Limited*** (supra) and has read out the same where almost very same argument was raised and rejected. Para-12 of the said judgment is being quoted hereinbelow:

"12. The last contention urged is that the reference is invalid inasmuch as the Chief Commissioner of Ajmer was not competent to refer the present dispute for adjudication under Section 10(1) read with Section 12(5) of the Act. The argument is that the Textile Industry has been included at Serial No. 23 in the First Schedule to the Industrial (Development and Regulation) Act, 1951 (Act 65 of 1951) and as such the Chief Commissioner of Ajmer was not the appropriate Government under Section 2(a)(i) of the Act. It is urged that the present dispute could have been validly referred for adjudication to the Industrial Tribunal only by the Central Government. Section 2(a)(i) inter alia defines the appropriate Government as meaning, in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government or by a railway company or

concerning any such controlled industry as may be specified in this behalf by the Central Government, the Central Government. The question which arises is: has the textile industry been specified as controlled industry in this behalf by the Central Government? It is true that the textile industry is controlled by the provisions of Act 65 of 1951 and in that sense it is controlled industry; but that would not be enough to attract the application of Section 2(a)(i) of the Act. What this latter provision requires is that the Central Government must specify ?in this behalf? that the industry in question is a controlled industry; in other words the specification must be made by the Central Government by reference to, and for the purpose of, the provisions of the Act in order that the Central Government may itself become the appropriate Government qua such industry under Section 2(a)(i) of the Act. It is conceded by Mr Sastri that no such specification has been made by the Central Government. Indeed, we ought to add in fairness to Mr Sastri that he did not very seriously press this point."

7. Similarly, in ***Management of Vishnu Sugar Mills Limited*** (supra), the Supreme Court has referred to the decision of ***Bijay Cotton Mills Limited*** (supra) and relied upon the same to hold that the sugar may be a controlled industry under the Schedule to the Industries (Development and Regulation) Act, 1951, but that would not by its own raise a presumption that the Central Government is the "appropriate Government" for the purpose of Section 2(a)(1) of the Act. Paras-4 and 5 of the said judgment are being quoted hereinbelow:

"4. Two points have been urged before us on behalf of the appellant. In the first place it is urged that the reference was incompetent as sugar was a controlled industry and only the Central Government could have made the reference and not the State Government. Secondly, it is urged that the order of the Tribunal granting an increment of Rs 30 per month to Ramkrishna Prasad was patently perverse and that there was no change in the status or emoluments of Ramkrishna Prasad by the creation of the new post and the employment of Babulal Parekh on it.

5. So far as the question of the competence of the reference is concerned, we are of opinion that there is no force in it. A similar question was raised before this Court in Bijoy Cotton Mills Ltd. v. Workmen [CA No. 355 of 1958, decided on 12-2-1960] and it was held there on the language of Section 2(a)(i) of the Industrial Disputes Act, 1947, that before that provision could apply to a controlled industry there must be a notification by the Central Government for the purposes of Section 2(a)(i) of the Industrial Disputes Act. Section 2(a)(i) is in these terms-

"Appropriate Government' means in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government or by a railway Company or concerning any such controlled industry as may be specified in this behalf by the Central Government, or in relation to an industrial dispute concerning a banking or an insurance company, a mine, an oil-field or a major port, the Central Government."

The argument is that as sugar is a controlled industry under the Schedule to the Industries (Development and Regulation) Act, 65 of 1951, the appropriate Government for the purposes

of Section 2(a)(i) with reference to the sugar industry is the Central Government. Reliance is placed on the words ?concerning any such controlled industry as may be specified in this behalf by the Central Government? appearing in Section 2 (a)(i). It is true that sugar is a controlled industry under the Industries (Development and Regulation) Act, 1951, but that in our opinion does not conclude the matter. In order that the appropriate government under Section 2(a)(i) may be the Central Government for a controlled industry, it is necessary that such controlled industry should be specified by the Central Government for the purposes of Section 2(a)(i). This in our opinion is obvious from the words controlled industry as may be specified in this behalf by the Central Government? appearing in Section 2(a)(i). It is not enough that an industry should be a controlled industry to attract this provision of Section 2(a)(i); it is further necessary that it should be specified in this behalf, namely for the purposes of Section 2(a)(i), as a controlled industry by the Central Government, before the Central Government can become the appropriate government within the meaning of Section 2(a)(i). We may in this connection refer to Firebricks and Potteries Ltd., etc. v. Firebricks and Potteries Ltd. Workers Union Ltd. [ILR 1955 Mysore 546] where the same view has been taken. We are of opinion that that is the correct meaning of these words appearing in Section 2(a)(i), as already held in Bijoy Cotton Mills Ltd [CA No. 355 of 1958, decided on 12-2-1960] . The objection that the reference was not competent therefore fails." (Emphasis Supplied)

8. The phrase "concerning any such controlled industry as may be specified in this behalf" by the Central Government has been interpreted by the Supreme Court to mean that such an industry, the control of which by the Central Government has been declared to be expedient in public interest under any Central Act. In so far as fertilizer industry is concerned, the same may be controlled industry under the Contract Labour (Regulation and Abolition) Act, 1970 or may be regulated under the Industries (Development and Regulation) Act, 1951, but it has not yet been declared by the Central Government to be a controlled industry under the Industrial Disputes Act and, therefore, the industrial dispute raised shall not automatically be taken up by the CGIT for its consideration.

9. The second limb of argument of Sri Mohd. Altaf Mansoor is that regarding the same petitioner, several other disputes are pending before the Labour Court as referred by the State Government to it under the U.P. Industrial Disputes Act. He has also pointed out from the counter affidavit filed on behalf of respondent no.1 by one Special Secretary, Labour Department, Government of U.P. that the petitioner is under the control of the State Government under Section 2(a)(1) of the Industrial Disputes Act, 1947 and not under the control of the Central Government. The petitioner was never included in the list of Units, which were taken under the control of the Central Government.

10. No doubt, the petitioner-Unit is registered under the Contract Labour (Regulation and Abolition) Act, 1970 and the Factories Act, 1948, but the same registration is with the State Government and the State Government is the controlling authority under Section

2(a)(1) of the Industrial Disputes Act, 1947. Moreover, several industrial disputes relating to the petitioner-Company are pending before the Labour Court and Industrial Tribunal of the State Government.

11. Learned counsel for respondent no.3 Sri Lalla Chauhan, on the other hand, has argued on the same lines as have been considered and relied upon by the respondent no.2 in passing the order dated 23.8.2013. He has argued that the definition of "appropriate Government" in relation to any industrial dispute concerning any such controlled industry, as specified in this behalf, by the Central Government, may be read along with Section 2 of the Industries (Development and Regulation) Act, 1951. Under Schedule 1 of the Act of 1951, fertilizers are mentioned at Item no.18. Hence, for an industry, manufacturing fertilizers, the "appropriate Government" is the Central Government. The Fertilizer (Control) Order has also been issued by the Government of India, Ministry of Agriculture and Rural Development. The control of the Central Government over the production and supply of fertilizers would make the Fertilizer Industry a controlled industry and, therefore, amenable to the jurisdiction of CGIT.

12. Very much the same argument was raised before the Supreme Court in the cases of ***Bijay Cotton Mills Limited*** (supra) and ***Management of Vishnu Sugar Mills Limited (supra)***. The Supreme Court has rejected such argument and observed that unless there is a notification of the Central Government with regard to bringing any industry under its control with respect to Industrial Disputes Act, 1947, the same cannot be said to be a controlled industry under the Industrial Disputes Act. The "appropriate Government" would, therefore, not be the Central Government, but only the State Government.

13. Since in this case, the respondent no.3 had approached the Regional Labour Commissioner (Central), Lucknow initially and while conciliation proceedings remained pending, he also approached the CGIT directly under the enabling provisions of Section 2(A)(2) of the Act of 1947, the order passed by the respondent no.2 dated 23.8.2013 while it is being set aside by this Court, liberty is granted to the respondent no.3 to approach, either the State Government or the Labour Court-cum-Industrial Tribunal directly by filing a claim petition before it under the enabling provisions of Section 2(A)(2) of the Act. If such a petition is filed, the same shall not be rejected only on the ground of delay and shall be considered on merits, by the appropriate Court.

14. The writ petition stands ***allowed*** to the aforesaid extent.

(2019)10ILR A 1585

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.10.2019

BEFORE

THE HON'BLE MANISH MATHUR, J.

Misc. Single No. 2761 of 2014

Som Datt Srivastava ...Petitioner
Versus
Smt. Sobha ...Respondent

Counsel for the Petitioner:
Sri Suresh Chandra Srivastava.

Counsel for the Respondent:
Sri Arvind Kumar Jauhari, Sri Mahesh Kumar Yadav.

A. Civil Procedure Code, 1908 – Section-96 - decision of appeal -Suit for declaration-by respondent-decreed on the basis of a compromise-obtained by playing fraud upon petitioner-appeal filed along with delay condonation application-rejected-vide impugned order-will amount to decree u/s.2(2)-to be challenged in a second appeal-petition not maintainable.

Held :- rejection of application for condonation of delay would definitely determine the rights of the parties conclusively so far as it regards the court expressing it.-condonation of delay in filing first appeal would definitely amount to a decree as contemplated under section 2(2) of the Code of Civil Procedure, 1908 even without a separate order dismissing the appeal.

Writ Petition dismissed (E-8)

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

1. Heard Sri S.C. Srivastava, learned counsel for the petitioner and Sri A.K. Jauhari, learned counsel for opposite party.

2. This petition under Article 227 of the Constitution of India has been filed against order dated 22.01.2014 passed by the court below in Misc. Case bearing No.110/2013 (Som Datt Srivastava v. Smt.Sobha). Further relief for commanding opposite parties not to waste, damage, alienate, sale, remove or dispose the property situate at M.M. 4/64, Vinay Khand, Gomti Nagar, Lucknow has also been sought.

3. It has been averred in writ petition that opposite party had filed regular suit no.361 of 1998 (Smt.Shobha v. Som Datt Srivastava and others) for declaration. The said suit was decreed on 09.11.1998 on the basis of a compromise which is said to have been obtained by playing fraud upon the petitioner. Consequent upon the judgment passed in Regular Suit, petitioner filed belated First Appeal under Section 96 of Civil Procedure Code, 1908 along with application for condonation of delay which was registered as Miscellaneous Case No.110 of 2013 (Som Datt Srivastava v. Smt.Sobha). By means of impugned order dated 22.01.2014, the application for condonation of delay has been rejected leading to filing of the present writ petition.

4. Learned counsel appearing on behalf of the opposite party at the very outset had raised a preliminary objection regarding maintainability of petition against order dated 22.01.2014 with the submission that rejection of an application for condonation of delay would amount to rejection of appeal and would, therefore, come within the meaning of 'decree' as contemplated under Section 2(2) of the Civil Procedure Code and as as such the only remedy against order dated 22.01.2014 would be by way of filing a Second Appeal instead of a petition. The learned counsel has relied upon judgment rendered by Hon'ble the Supreme Court in **Shyam Sunder Sarma v. Panna Lal Jaiswal and others** reported in (2005) 1 SCC 436 in support of his submission.

5. Rebutting the submission advanced by learned counsel for opposite party, learned counsel for the petitioner has submitted that present writ petition would be maintainable in view of the fact that only the application for condonation of delay had been rejected and not the appeal. Thus, order rejecting application for condonation of delay would not

amount to a decree whereby the petition would be maintainable. Learned counsel for the petitioner has also relied upon the decision in **Shyam Sunder Sarma**(supra) with the submission that it has been clearly held by Hon'ble the Supreme Court that an order rejecting application for condonation of delay would amount to decree only when a separate order rejecting appeal as a consequence has been passed. It has been submitted that since in the present case, only the application for condonation of delay has been rejected without any separate order rejecting the appeal, the same would not come within the meaning of term 'decree' and, therefore, the present petition instead of a second appeal would be maintainable.

6. Heard learned counsel for the parties and perused the record.

7. Regarding the aforesaid proposition of law, Hon'ble the Supreme Court in the case of **Shyam Sunder Sarma**(supra) has held has follows:-

"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew [(1987) 2 KLT 848 (FB)] . Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of the law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.?

8. A reading of the aforesaid paragraph of the judgment rendered by Hon'ble the Supreme Court makes it clear that an order rejecting an application for condonation of delay and consequently the appeal would amount to decree against which only a second appeal is maintainable and not a petition under Article 226 or 227 of the Constitution of India.

9. In the present case, however, as per submission of learned counsel for the petitioner, the situation is a bit different because by means of the impugned order only application for condonation of delay has been rejected while no separate order rejecting appeal has been passed by the court concerned.

10. A perusal of the order dated 22.01.2014 makes it clear that only the application for condonation of delay in filing appeal has been rejected with no separate order having been passed in the appeal itself regarding its rejection.

11. Regarding the aforesaid proposition, this Court in the case of **Rajendra Pal Singh v. Additional District Judge, Court No.7, Ghaziabad and another** reported in 2016 (116) ALR

212 has clearly held that an appeal filed along with an application for condonation of delay when dismissed on refusal to condone the delay is nevertheless a decision in appeal. The relevant paragraphs of the said judgment is as follows:-

"7. The law, therefore, on the subject is clear and unequivocal that an appeal presented beyond time was nevertheless an appeal in the eyes of law for all purposes and an order dismissing the appeal on whatever ground was a decree that could be subject to second appeal. Rule 3A of Order 41 introduced by Amendment Act 104 of 1976 to the Court, did not in any way affect the principle. An appeal registered under Rule 9 or Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, upon dismissal of the application for condonation of the delay, is in substance and effect the confirmation of the decree appealed against. Thus, the position that emerges on a survey of the pronouncements is that an appeal filed alongwith an application for condonation of delay when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal."

"8. Submission of the learned counsel for the applicant that the learned Appellate Court merely dismissed the Section 5 application but has nowhere stated that the appeal would also stand dismissed, therefore, the petition under Article 227 would be maintainable, against the order of such dismissal, in my opinion, in view of the authoritative pronouncements stated herein above, the argument is misconceived.?

12. In the aforesaid decision in **Rajendra Pal Singh(supra)**, the situation was the same as in the present case where only the application filed under Section 5 of the Limitation Act was rejected without any separate orders for rejection having been passed in appeal.

13. Upon applicability of the judgment rendered by this Court in **Rajendra Pal Singh**(supra), it is clear that not only the facts but also the proposition of law in the present case would be the same. It is also a pertinent factor that even though a separate order may not have been passed rejecting appeal but the consequence of rejection of application for condonation of delay would have the same consequences as rejection of appeal. Any other view would lead to absurd consequences such as maintaining the appeal not to have been dismissed although the application for condonation of delay stands rejected.

14. The term 'decree' has been defined under Section 2(2) of the Code of Civil Procedure, 1908, which is as follows:

"(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.-A decree is preliminary when further proceedings

have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final; "

15. As can be seen from the definition, 'decree' would mean a formal expression of adjudication which conclusively determines the rights of parties and may either be preliminary or final. It would deem to include rejection of a plaint. As such, it can be seen that rejection of application for condonation of delay would definitely determine the rights of parties conclusively so far as it regards the court expressing it. As such, it can be safely held that rejection of application for condonation of delay in filing first appeal would definitely amount to a decree as contemplated under Section 2(2) of the Code of Civil Procedure even without a separate order dismissing the appeal.

16. In view of the aforesaid, it is clear that against the order impugned in the present petition, the only remedy for the petitioner lies in filing a second appeal and not a petition under Article 227 of the Constitution of India, which would, thus, not be maintainable.

17. In view of the aforesaid, the petition being devoid of merit is accordingly dismissed. The petitioner would be at liberty to avail remedy available to him in accordance with law.

(2019)10ILR A 1589

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.09.2019

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 24283 of 2019

Smt. Shashi Rawat ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rama Pati Shukla, Sri Jay Krishna Shukla.

Counsel for the Respondents:
C.S.C.

Panchayati Raj Act-Section 95(1)(g)- proceedings u/s.95(1)(g)-initiated by the D.M. upon a defective complaint as per the Rules, 1997- regarding return of money advanced for building toilets by 16 doubtful beneficiaries-passed an impugned order ceasing petitioner's (Gram Pradhan)-financial and administrative powers –DM has discretionary power of initiating preliminary inquiry even on his own-writ not maintainable.

Held :- direction to the D.M to endeavour to pass a final order under section 95(1)(g), after holding inquiry as per order VI of Rules 1997 within a period of four months. (Para 13)

Writ Petition Disposed of (E-8)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

(1). Heard learned counsel for the parties.

(2). This petition has been filed challenging the order dated 29.07.2019 passed by the District Magistrate, Lucknow, ceasing the financial and administrative powers of the petitioner who is Gram Pradhan of Village Barauna, Development Block, Sarojni Nagar, Lucknow.

(3). Learned counsel for the petitioner submits that the impugned

order is non-speaking as it does not consider the reply submitted by the petitioner in detail to the notice issued to her. It has also been submitted that the finding recorded in the impugned order regarding return of money advanced for building toilets by 16 doubtful beneficiaries is arbitrary as money was returned before notice was issued to them to return the money and therefore, it cannot be said by the D.M. that there is an admission on the part of the Gram Pradhan regarding money being advanced by the Pradhan and Gram Secretary under Swachha Bharat Mission to ineligible persons.

(4). It has also been submitted by learned counsel for the petitioner that the proceedings under Section 95(1)(g) of the Panchayati Raj Act were initiated by the D.M. only on the basis of a complaint and not on the basis of a complaint supported by an affidavit as is required under the Rules, 1997.

(5). This Court has heard learned Standing Counsel, Shri Tushar Verma also in the matter. He has pointed out from the reply of the petitioner filed as Annexure No. 4 of the writ petition that the petitioner had admitted in para nos. 2, 5, 8, 10, 11 and several paragraphs thereafter, that money had been returned by the ineligible persons and therefore, no specific reply with regard to such ineligible persons in the show-cause notice dated 21.02.2019 is required. It has also been pointed out by Shri Tushar Verma that in the impugned order, the District Magistrate has considered the reply and then come to the conclusion that the petitioner having admitted that at least 16 beneficiaries had returned the money being alleged to be ineligible for being advanced the same. It amounted to an admission on the part of the Gram Pradhan that such 16 beneficiaries had been wrongfully benefited. In advancing money from the Gram Sabha Nidhi.

(6). Shri Tushar Verma has also pointed out the judgment of the Full Bench of this Court in the case of "**Vivekanand Yadav Vs. State of U.P. and Anr., reported in 2011, (29) LCD page 21**" that a question with regard to whether a complaint not being in accordance with the rules can also be entertained by the D.M. for initiation of inquiry under the Rules has been answered by the Full Bench in para 55 onwards, wherein it has been observed that the inquiry initially conducted is only preliminary or a fact finding inquiry. It has to consider prima facie whether any financial irregularities have been committed by the Gram Pradhan or not. The final inquiry is yet to be done. Considering the object, there is no reason to give any restricted meaning to the word "Otherwise" as suggested by the counsel for the petitioner. The normal meaning of "otherwise" should be adopted.

(7). The D.M. has to refer a case for preliminary inquiry even if there is no complaint or report or in other words, he has power to act *"suo moto"*.

(8). In para 60 of the said judgment, the Full Bench has observed thus "Rule 3(5) of the Inquiry, Rules provide that the complaint which does not comply with any of the provisions of Rule 3 should not be entertained. However, even if the complaint is not entertained, the D.M. can always refer the matter for the preliminary enquiry, if he considers that it should be so enquired; he can act as if *"suo moto"*.

(9). In para 61, the contention raised by learned counsel for the petitioner in this petition was also raised by learned counsel for petitioner before the Full Bench.

(10). It is upto the D.M. to consider whether he should entertain the complaint or not.

(11). It was held in para 63 and para 64 of the judgement as follows:-

"63. If the D.M. can order for the preliminary enquiry even in a case, where a complaint could not be entertained, then what is the purpose of permitting a pradhan to object regarding its non-conformity with rules 3(1) to 3(4). To us, it appears to be futile exercise. It is for the D.M. to consider whether he should entertain the complaint or not.

64. (i) The word "otherwise" in Rule 4 means that the D.M. has suo moto powers to order a preliminary inquiry;

(ii) In an appropriate case, the D.M. may order a preliminary inquiry even if there is, No complaint or report; or a defective complaint, not in accordance with Rules 3(1) to Rule 3(4);

(iii) A pradhan has no legal right to object that a complaint is not in accordance with Rule (1) to Rule 3(4) of the Enquiry Rules."

(12). Having considered the Full Bench decision of the Court, this Court is of the considered opinion that the order passed by the D.M. dated 29.07.2019 challenged in this writ petition, there is no ground to show interference under Article 226 of the Constitution of India.

(13). This writ petition is **disposed of** with a direction to the D.M. to endeavour to pass a final order under Section 95 (1)(g), after holding inquiry as per Order 6 of the Rules of 1997 say, within a period of four months from the date, a certified copy of the order is produced before her.

(2019)10ILR A 1591

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.09.2019

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 25896 of 2019

M/S Rajdoot Trading Co. & Anr. ...Petitioners
Versus
Debt. Recovery Tribunal University Road Lko. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Suneet Kumar Sharma, Sri Amarjeet Singh Rakhra.

Counsel for the Respondents:
C.S.C., Sri Vinay Shanker.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Sections 13(4), 17 & 14- petitioners took a loan against a residential property-on failure to repay the loan-the Bank proceeded u/SARFAESI Act, 2002-The petitioners preferred the Securitization Application before DRT challenging the sale notice-rejected on the ground of no jurisdiction to entertain it.-appeal to be filed u/proviso to sec. 18-Writ petition not maintainable.

Held: - writ not maintainable-the right of appeal is a remedy created under a statute –the statutory remedy should have been availed.

Writ Petition Disposed of (E-8)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

(1). Heard Shri Amarjeet Singh Rakhra, who appears for the petitioners and Shri Vinay Shanker, appearing for the respondent no.2 Oriental Bank of Commerce, Ghaziabad.

(2) This petition has been filed by the petitioners challenging the order dated 09.09.2019 passed by the Debt Recovery Tribunal, Lucknow, in Securitization Application No.179 of 2014 ***(M/s Rajdoot Trading Company & Others Vs. Authorised Officer, Oriental Bank of Commerce and Another)*** and a further prayer has been made for issuance of a mandamus directing the Debt Recovery Tribunal, Lucknow to adjudicate the application on merit.

(3). It has been submitted by the learned counsel for the petitioners that the application has been rejected by the Debt Recovery Tribunal, Lucknow, holding that it has no jurisdiction to entertain such application, and such finding has been recorded against the settled position in law. It has been submitted by the learned counsel for the petitioners that the petitioners had taken a loan against a property from the Respondent no.2-Bank. When they could not repay the loan, the Bank proceeded under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred as Act of 2002). The petitioners preferred the Securitization Application No.179 of 2014 challenging the sale notice issued by the Bank on 22.02.2014 with regard to the residential property of the petitioners.

(4). After pleadings were exchanged, the impugned order has been passed.

(5). It has been held by the Hon'ble Supreme Court and by this Court that even where the statute does not provide so, the principles of natural justice have to be read into every statute. Learned counsel for the petitioners has referred to ***M/s Dharam Satyapal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati and Others reported in (2015) 8 SCC 5519.*** Reliance has been placed on Paragraph nos.20, 21, 25, 28, 29, 35 and 42 of the said judgments with regard to importance of following the principles of natural justice.

(6). It has been submitted that the District Magistrate had passed an order under Section 14 of the Act, 2002, on 28.02.2015 without serving any notice, based on incorrect declaration given by the Bank. The petitioners came to know only after filing of the Securitization Application and therefore, filed an amendment application which was allowed and the amendments were duly incorporated. It has been submitted that the Debt Recovery Tribunal, Lucknow, failed to appreciate that the District Magistrate Order under Section 14 of the Act, 2002, was one of the modes available to a secured creditor to take possession of the secured assets. Therefore, when the District Magistrate passed such order taking possession as is contemplated under Sub-Section 13 (4) of the Act only be said to be an order passed during the process initiated under Section 13 which culminates in the order under Section 17.

(7). Learned counsel for the petitioners has placed reliance upon the Division Bench's judgment of the Gujarat High Court in the case of ***Devani Jagdishbhai Vs. District Magistrate, Surat,*** in Special Civil Application No.1805 of 2018, where the Gujarat High Court has considered the submissions regarding Section 14 (3) of the Act excluding the jurisdiction of the Civil Court but not of the Tribunal.

(8). A similar order has been passed by a Division Bench of Madhya Pradesh High Court also in Writ Petition No.19028 of 2017 ***(Sunil Garg Vs. Bank of Baroda & Others).*** Learned counsel for the petitioners has placed reliance on Paragraph nos.8 and 15 of the said judgment.

(9). It has also been submitted that the Division Bench of this Court in ***Manoj Dwivedi and Another Vs. District Magistrate, Lucknow & Others*** (in Writ Petition No.17467 (M/B) of 2018), has considered the remedy is available for a party against the order passed by the District Magistrate under Section 14 of the Act and directed the petitioners therein to approach the Tribunal.

(10). Learned counsel for the petitioners has also placed reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Kanaihyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*** reported in (2011) 2 SCC 782 and in the case of ***United Bank of India Vs. Satyawati Tandon and Others reported in (2010) 8 SCC 110,*** wherein it has been held that the District Magistrate under Section 14 of the Act passes an order which is in the nature of an order facilitating final order to be passed under Section 17 of the Act, and the writ petition is not maintainable under Article 226 of the Constitution of India. In such cases, the remedy is available for the petitioners to approach the Tribunal.

(11). Shri Vinay Shanker, on the other hand, appearing for the Bank, has pointed out that against the order passed by the Debt Recovery Tribunal, Lucknow, under Section 17 of the Act, an Appeal has been provided under Section 18 of the Act. It has been submitted that where the rights have been created under a statutory provision, the remedy lies in the Statutory Forum as provided in the Rules. He has referred to ***N.P. Poonuswami Vs. Union of India and others reported in 1952 AIR 64,*** and also the judgment rendered by the Hon'ble Supreme Court in the case of ***G.P. Siddeshwara Co-operative Bank Ltd. Vs. Mohd. Iqbal & Others reported in 2013 (10) SCC 83,*** and also the judgment rendered by Hon'ble the Supreme Court in ***United Bank of India Vs. Satyawati Tandon reported in (2010) 8 SCC 110,*** to buttress his arguments.

(12). It has been submitted that the petitioners have avoided filing of the Appeal as it involves pre-deposit to be made by the appellant before his Appeal can be heard.

(13). Learned counsel for the petitioners has pointed out that the petitioners from the date of issuance of the order under Section 14 by the District Magistrate have deposited the entire amount that is due to the Bank alongwith interest i.e. from 2015 upto April, 2019, he has deposited Rs.60 lacs as demanded by the Bank in its Demand Notice and the condition of pre-deposit as given under Section 18 of the Act before approaching the Debt Recovery Tribunal and for the Appeal to be considered under Section 18 would again cast an onerous liability on the petitioner to deposit at least 25% of the amount, demanded by the Bank.

(14). Learned counsel for the respondents on merits has submitted that the Securitization Application No.179 of 2014 ***(M/s Rajdoot Trading Company & Others Vs. Authorised Officer, Oriental***

Bank of Commerce and Another) was initially filed only against the sale notice issued by the Bank and not against any orders passed under Section 13 or 14 of the Act. He has referred to the amendment application which was moved by the petitioner which also has only challenged the order passed by the District Magistrate under Section 14 but has not challenged the order passed under Section 13 (4) and 13 (2) of the Act, 2002.

(15). This Court is convinced that when the statutory remedy is available, no writ petition can be entertained, as statutory remedy is different from the alternative remedy. The right of Appeal is a remedy created under the Statute i.e. the Act of 2002 has not been availed of by the petitioners. The petitioners can move an appropriate application for exemption from the condition of pre-deposit as given in the Proviso of Section 18 of the Act.

(16). The writ petition stands ***disposed of*** with a direction to the petitioners to approach the Debt Recovery Appellate Tribunal, Lucknow, within a period of two weeks from today. If such an application is moved within a period of two weeks from today, the Debt Recovery Appellate Tribunal shall also consider the application made by the petitioner for exemption from pre-deposit as the Bank had initially issued demand notice for only Rs.60 lacs, which has been deposited by the petitioner, and pass appropriate orders thereon within a further period of two weeks.

(17). Till 30.10.2019 or till disposal of petitioner's application as aforesaid, whichever is earlier, the petitioner shall not be dispossessed from his residential house. It is evident from page no.73 of the paperbook that the petitioner has still not been dispossessed from the house in question.

(2019)10ILR A 1594

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No. 24558 of 2019

Sanjay Srivastava & Ors. ...Petitioners
Versus
Punjab National Bank New Delhi & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amrendra Nath Tripathi, Sri Ashutosh Shahi.

Counsel for the Respondents:
C.S.C., Sri Mayank Pathak, Sri Prashant Kumar.

A. Constitution of India - Article 12 - PNB - Nationalized bank - instrumentality of Government - Punjab National Bank Institute of Information Technology set up which was governed by a society - Whether the society falls within the ambit of State or "other authority" as provided under Article 12 of the Constitution or not - PNB given a corpus of Rs. 2 crores for starting the society - designated post holder of PNB are member of Society - PNB has persuasive and financial control over Society - Government of India has deep and persuasive control over the PNB - test laid down in *Ajay Hasia case* applied - only where entire share capital of the corporation is held by Government then only Society is said to be the instrumentality or agency of the

Government - entire Governing Body of the Society is not comprised of the officers of PNB - PNB and Society are distinct entities

On applying the test laid down in *Ajay Hasia's case* the Court came to the conclusion that there is no deep and persuasive control of the PNB over the Society in question, the corpus cannot be said to be entire share capital contributed by the PNB, the grant/financial assistance being given by the PNB is not so much as to meet out almost all or substantial portion of the expenses of the Society. (Para 29)

Writ Petition dismissed (E-10)

Cases cited:-

1. Ajay Hasia & ors Vs Khalid Mujib Sehravardi & ors (1981) 1 SCC 722

2. Rajbir Surajbhan Singh Vs The Chairman, Institute of Banking Personnel Selection Mumbai (1981) 1 SCC 722

3. Pradeep Kumar Biswas & ors. Vs Indian Institute of Chemical Biology & ors (2002) 5 SCC 111

4. R.D. Shetty Vs I.A.A.I. (1979) 3 SCC 489

5. Sabhajit Tewary Vs U.O.I. AIR 1975 SC 1329

6. General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur Vs Satrughan Nishad & ors (2003) 8 SCC 639

7. Federal Bank Vs Sagar Tomas (2003) 10 SCC 733

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

1. Heard Sri Amrendra Nath Tripathi, learned counsel for the petitioners, Sri D.K. Pathak, learned Senior Advocate assisted by Sri Mayank Pathak, learned counsel for respondent No.1, Sri Prashant Kumar, learned counsel appearing for respondents No.2 to 4 and the learned Standing Counsel on the question of maintainability of the petition against the Punjab National Bank Institute of Information Technology (hereinafter referred to as "Society") i.e. respondent No.2 to 4 in the writ petition.

2. By means of the present petition, the petitioners have prayed for quashing of the order dated 3.5.2019, a copy of which is Annexure-1 to the writ petition and the consequential impugned termination notices dated 31.7.2019, copies of which are cumulatively annexed as Annexure-2 to the writ petition. Further prayer is for a mandamus commanding and directing the respondents to allow the petitioners to work and pay them salary.

3. Annexure 1 dated 3.5.2019 are the minutes of the 33rd meeting of the Governing Body held on 3.5.2019 of the Society for closure of the operations of the Society and for termination of the services of the employees on the roll of the Society after following the required legal process. The orders/notices dated 31.7.2019 have been issued by the Director of the Society by which the petitioners have been given a notice of closure of operation of the Society and have been informed that after three months of the notice, the services of the petitioners shall stand ceased on 31.10.2019.

4. A preliminary objection has been raised by Sri D.K. Pathak, learned Senior Advocate assisted by Sri Mayank Pathak, learned counsel for respondent No.1 and Sri Prashant Kumar, learned counsel appearing for respondents No.2 to 4 i.e. the Society, of the writ petition being not maintainable as the Society does not fall within the ambit of being a State or 'Other

Authority' and thus it is prayed that the writ petition be dismissed on the ground of maintainability.

5. Arguing on the question of maintainability, Sri Amrendra Nath Tripathi, learned counsel for the petitioners submits that the Society would fall within the ambit of being "other authority" as provided in Article 12 of the Constitution and in this regard reliance has been placed on the Constitution Bench judgment of the Hon'ble Apex Court in the case of ***Ajay Hasia and others vs. Khalid Mujib Sehravardi and others reported in (1981)1 SCC 722.***

6. Sri Tripathi, placing reliance on paragraph 9 of the aforesaid judgment contends that the Apex Court has summarised the relevant tests to hold as to when a society or a corporation can be said to be an instrumentality or agency of the Government.

7. Sri Tripathi argues that the respondent No.1 is a public sector banking company and is governed by the Banking Regulation Act, 1949 and the Government of India has a direct, pervasive and financial control over its affairs and thus is a State within the meaning of Article 12 of the Constitution of India. The respondent No.1/Bank in order to ensure smooth banking business and its functioning and for keeping track with the technological advances in the banking industry has taken decision to set up its own institute of information technology at Lucknow known as Punjab National Bank Institute of Information Technology which was to be governed by the Governing Body and Academic Council to be constituted by its decision dated 4.12.2001. In pursuance of the decision of the respondent No.1, a society was formed under the Societies Registration Act, 1860 vide file No.133987 in the office of the Registrar, Firms and Societies, Lucknow Division, Lucknow on 14.3.2002. The said Society has been renewed from time to time and its last renewal was made vide order dated 22.3.2017 which is valid for 5 years i.e. upto 14.3.2022. It is contended that the Society has its own aims and objects as per the Memorandum of Association, a copy of which has been filed as Annexure-5 to the writ petition.

8. Placing reliance on the tests as enumerated in the case of **Ajay Hasia (supra),** it is contended that the corpus of the Society had been given by the Punjab National Bank (hereinafter referred to as the PNB) and the financial assistance from the PNB is so much as to meet the entire expenditure of the Society. It has also been contended that there is deep and pervasive control of the PNB over the Society and thus the Society is an instrumentality of the State. It is also contended that PNB would fall within the ambit of Article 12 of the Constitution being a Nationalised Bank and thus as the entire control over the Society is exercised by the PNB consequently ,the society would be covered under Article 12 of the Constitution of India. It is contended that taking into consideration the aforesaid parameters as laid down in the case of **Ajay Hasia (supra),** it can safely be said that the Society would fall within the ambit of being "other authority" as contemplated under Article 12 of the Constitution and accordingly the present petition would be maintainable.

9. Elaborating this, Sri Tripathi argues that so far as the seeding capital of

the Society is concerned, the PNB had given a corpus of Rs.2 crores for starting the Society which is clearly reflected in the balance sheet of the Society as on 31.3.2018, a copy of which is Annexure-20 to the writ petition, wherein against the corpus fund, an amount of Rs.2 crores has been indicated. It is also contended that the PNB has been regularly giving grant to the Society as would be apparent from a perusal of the details of grant received, a copy of which is Annexure-6 to the writ petition, as issued from the office of the Deputy Registrar, Firms Societies and Chits, Lucknow. It is contended that a perusal of the said details would indicate that every year the PNB has been giving a grant starting from approximately Rs.19.64 lakhs in the year 2002-03 to an amount of Rs.35 lakhs in the year 2015-16. Placing reliance on minutes of the 22nd meeting of the Governing Body of the Society dated 14.11.2011, a copy of which is Annexure-7 to the writ petition, it is contended that Clause 11 Bullet 2 duly records that the PNB is the promotor bank. Thus it is contended that so far as the first two criteria, as laid down by the Hon'ble Supreme Court in the case of **Ajay Hasia (supra)** pertaining to share capital of the Society and financial assistance of the State are concerned, the aforesaid details would suffice to indicate that finance is being given by the PNB so as to bring the Society within the ambit of Article 12 of the Constitution.

10. So far as the deep and pervasive control is concerned, which is one of the criteria laid down by the Hon'ble Apex Court in the case of **Ajay Hasia (supra),** Sri Tripathi contends that a perusal of the Memorandum of Association of the Society, a copy of which is Annexure-5 to the writ petition, would indicate that the Governing Body, as per Clause-5, comprises of 14 members of which 13 members are all officers of the PNB while 14th member is the PNB itself as a corporate member. It is also contended that a perusal of the list of members of the Governing Body would indicate that the same read with the Memorandum of Association of the Society leaves no scope for any outsider to be member of the Governing Body. It is also contended that the Chairman of the Society is the Chairman and Managing Director of the PNB itself which are all indicative of deep and pervasive control of the PNB in the affairs of the Society. It is also contended that the Society has issued the amended rules/bye-laws (hereinafter refer to as "Rules") and in terms of Rule 5(vi) of the said Rules, the Society or Institute means the Punjab National Bank Institute of Information Technology and further in terms of Rule 6, the Society has two bodies namely (i) General Body and (ii) Governing Body while in terms of Rule 8, the General Body will consist of the members of the Society while in terms of Rule 7(i) the Signatories to the Memorandum of Association shall be the members of the Society. Thus, by natural corollary, the Signatories to the Memorandum of Association would become Members of the Society and the General Body is to consist of all the members of the Society meaning thereby again all the signatories to the Member of Association would also be members of the General Body. Placing reliance on Rule 7(v), it is contended that the members other than the Corporate member will cease to be members on account of death, resignation or ceasing to be in service of the Bank meaning thereby that whoever holds the designated post in the PNB would automatically become a member of

the Society and his membership would cease as soon as he ceases to hold the said post in PNB which are all indicative of the deep and pervasive control that PNB is exercising over the Society in question. Thus, it is contended that the criterion laid down in the case of **Ajay Hasia (supra)** stand fulfilled in view of the deep and pervasive control being exercised by the PNB over the affairs of the Society.

11. In this regard, Sri Tripathi has also invited attention of this Court towards the appointment order of petitioner No.3 Sri Rakesh Jayaswal which has been sent for vetting by the Society to the Chief Manager of the PNB. It is contended that all these factors would primarily indicate that the Society is operating under the control of the PNB and thus once the PNB falls within the ambit of being a State and the Society is controlled by the PNB, as per details given above, consequently the Society would be the "other authority" under Article 12 of the Constitution of India and hence the present petition would be maintainable before this Court against the Society.

12. Controverting this, Sri D.K. Pathak, learned Senior Advocate assisted by Sri Mayank Pathak, learned counsel appearing for the PNB argues that so far as the finance is concerned, no doubt the PNB is the promoter Bank yet the Society has been set up with the aims and objective as set forth in the Memorandum of Association in order to promote the Society as a premier institution of international standards, meeting ISO 9000 series certification requirements, for assimilating, developing and disseminating knowledge and expertise in the field of information technology (IT) with particular reference to the banking and financial sectors and in order to organize training programmes, seminars, conference, encompassing all facets of IT driven banking both operational and functional as also management of IT. The other aims and objectives are to adopt or/and use latest technological aids like internet etc. for assimilation or/and dissemination of knowledge and expertise and various other objectives as have been spelt out in the Memorandum of Association. Placing reliance on the balance-sheets of the Societies, copies of which have been filed in the short counter affidavit filed on behalf of respondents No.2 to 4, Sri Pathak has argued that a perusal of the balance-sheets of all the relevant years starting from the year 2008 would indicate that though for a few years the PNB has given the grant yet the grant only comprises of minimal amount and almost the entire income of the Society is being generated by the Society itself including the income from interest on F.D.R., interest on Saving Bank Account, miscellaneous sources, rent received and tender application money. As an example, Sri Pathak submits that against the total expenditure of Rs.2,63,64,228/- in the year ended on 31.3.2008, the grant from PNB was only Rs.16,59,380/- and likewise in the subsequent years which is a small percentage. It is also contended that no grant was given to the Society for the year 2011-12 and 2014-15 as would be apparent from the perusal of the income and expenditure account which has been annexed by the petitioners themselves. It is also contended that even when the grant has not been given to the Society, it had sufficient income to sustain itself and thus merely because the grant has been given by the Bank and it is the promoter bank, the same will not and

cannot bring the Society, which has its own individual and autonomous existence, as being "other authority" so as to maintain a writ petition before the writ Court.

13. Placing reliance on one of the conditions as have been specified in the case of **Ajay Hasia (supra),** it is contended that the Hon'ble Apex Court has clearly laid down that it is only where the entire share capital of the corporation is held by Government it can be said that the Society is an instrumentality or agency of the Government which is not the case here. Likewise the grant being given by the PNB is not so much to meet the entire expenditure of the Society as laid down in the case of **Ajay Hasia (supra)**.

14. So far as the deep and pervasive control over the Society by the PNB is concerned, Sri D.K. Pathak argues that a perusal of the minutes of the meeting dated 3.5.2019, so far as it pertains to the members alone, would itself indicate that four of the members are not directly associated with the PNB namely Sri R.I.S. Sidhu, who is a retired Chief General Manager of the PNB, Sri A.P. Hota, who is Ex. Managing Director and Chief Executive Officer of the NPCI, Sri Ashok Mukund, who is retired D.B.D. of the State Bank and India as well as Dr. Hemand Darbari, who is Executive Director, CDAC, Pune. Placing reliance on the said annexure, it is contended that a perusal of the members of the Governing Body, a copy of which has been annexed by the petitioners themselves, would indicate that though large number of members may be of the PNB yet it cannot be said that the entire Governing Body comprises of the officers of the PNB. It is also contended that once the Society is running training programme and issuing tenders as such it is an independent Society, consequently it cannot be said that there is deep and pervasive control of the PNB so as to bring it within the ambit of the Article 12 of the Constitution Sri Pathak has also placed reliance on the judgment of the Apex Court in the case of **Rajbir Surajbhan Singh vs. The Chairman, Institute of Banking Personnel Selection, Mumbai reported in (2019) 7 SCALE 23.**

15. Sri Prashant Kumar, learned counsel appearing for the respondents No.2 to 4/Society argues that the Society on its own has introduced as many as 20 courses but no student offered himself for admission for even a single course. It is contended that the PNB and the Society are distinct and separate legal entities. The vacancies available in the PNB are filled through their board while the employees recruited by different subsidiaries etc. are governed by the policies of respective subsidiaries. It is also contended that the Society was set up in terms of the aims and objectives as detailed in the memorandum of association and the main course of the Society was an Advance Diploma in Banking Technology which is also the main source of revenue for the Society. It is contended that the Society has got its independent existence and though it may have been promoted by the PNB, which is a commercial Bank, yet it is set up in a autonomous manner catering to the needs of banking industry in order to ensure availability of trained information technology manpower. It is also contended that in order to ensure that the Society works autonomously, the first

director was appointed from outside the PNB, who was an Ex. Executive Director of the Reserve Bank of India, the Deputy Director has always been an independent professional and the Academic Council had, inter alia, the outside professionals as its members.

16. Sri Prashant Kumar, learned counsel for the Society argues that none of the criteria as specified by the Apex Court in the case of **Ajay Hasia (supra)** are attracted so far as the Society is concerned i.e. neither there is any deep and pervasive control of the PNB in the affairs of the Society nor the financial assistance is so large so as to meet the entire expenditure of the Society. Thus it is contended that the Society does not fall within the ambit of being "other authority" so as to bring it within the ambit of Article 12 of the Constitution of India and consequently the present petition against the Society would not be maintainable.

17. Heard learned counsel for the parties and perused the record.

18. From a perusal of the pleadings of the parties and the arguments raised on behalf of the contesting parties, it comes out that the Society had been formed with certain aims and objectives as have been set out in the Memorandum of Association. The Memorandum of Association provides for establishment of a governing body. The first members of the governing body have been set out in Clause V of the Memorandum of Association. The amended rules of the Society also indicate about the aims and objectives of the Society which are given in the Memorandum of Association. As per the rules of the Society, the Society comprises of two bodies namely the General Body and the Governing Body.

19. The preliminary objection raised on behalf of the respondents is that the Society does fall within the ambit of being "Other Authority" so as to bring it within the ambit of Article 12 of the Constitution of India and, consequently the present against the Society would not be maintainable.

20. The thrust of arguments of learned counsel for the petitioner in order to bring the Society within the ambit of "Other Authority" so as to bring it under Article 12 of the Constitution of India is the judgment of the Constitution Bench in the case of **Ajay Hasia (supra)**. Para 9 of the **Ajay Hasia (supra)** lays down the relevant test for determining as to when a Corporation or a Society can be said to be an instrumentality or agency of the Government so as to bring it within the ambit of Article 12 of the Constitution of India for the purpose of maintainability of the petition, which for the sake of convenience is being reproduced below:-

"9. The tests for determining as to when a corporation can be said to be a instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the

meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case as follows

(1) "One thing is clear that if the entire share capital of the corporation is held by Government it would go a longway towards indicating that the corporation is an instrumentality or agency of Government."

(2) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."

(3) "It may also be a relevant factor.....whether the corporation enjoys monopoly status which is the State conferred or State protected."

(4) "Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

(5) "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12."

21. Being armed with the aforesaid, the Court now proceeds to consider as to whether the aforesaid test as laid down in the case of **Ajay Hasia (supra)** are attracted so far as the present Society is concerned.

22. The first argument of the learned counsel for the petitioner is that the PNB has given a corpus of Rs. 2 Crores for starting the Society. Whether the corpus is the entire share capital of the Society and the entire share capital of the Society is being held by the PNB would be a factor to indicate that the Society is an instrumentality of the PNB.

23. A perusal of the balance sheet as on 31.03.2018 over which reliance has been placed by the learned counsel for the petitioner to contend about the corpus fund of an amount of Rs. 2 Crores indicates that it does not come out that the said corpus fund is the share capital or rather the entire share capital of the Society which is held by the PNB. There is no pleading to the effect that Rs. 2 Crores is the entire share capital of the Society and in absence of any such pleadings, mere argument to the said effect would not bring the said corpus within the ambit of being entire share capital as is being sought to be made out by the learned counsel for the petitioner. Even otherwise, the balance sheet as on 31.03.2018 and for various other years as have been annexed by the respondents no. 2 to 4, would indicate that the Society is having a corpus fund, the general fund, loan account towards the liabilities in the balance sheets of various years and apart from that the Society is also having independent income as would be apparent from a perusal of the Income and Expenditure account of various years. Thus, the said argument is rejected.

24. As regards the grant of financial assistance of the PNB to the Society, based on second criteria laid down in **Ajay Hasia (supra),** a perusal of the balance sheets for the years starting 2008 onwards, as have been annexed along with the short counter affidavit filed by the respondents no. 2 to 4 would indicate the grant being given by the PNB. Placing reliance on the details of grants received, which is a certificate issued by the Deputy Registrar, Farm Society, Lucknow, a copy of which is annexure 6 to the petition, it has been contended that almost every year the PNB has given a grant to the Society. However, the test laid down in the case of **Ajay Hasia (supra)** is **that the financial assistance of the State should be so much as to meet almost the entire expenditure of the Corporation which would afford some indication of the Corporation being impregnated with Governmental character.** A perusal of the balance sheet starting from the year 2008 onwards would indicate that it is not only the grant which has been given by the PNB which goes towards the expenditure but the Society is also generating its own income as would be apparent from a perusal of the income and expenditure account starting from the year 31.03.2008 and onwards which indicates that the Society is generating income from training, interest on FDR, interest on SB Account, Miscellaneous Income, Rent Income and income from Tender Application Money. If only the year 2008 is taking into consideration then the grant from PNB amounts to approximately 16.59 Lacs viz-a-viz the total expenditure of 2.63 Crores and thus it cannot be said that the financial assistance from PNB is so much as to meet the entire expenditure of the Society. Thus, when the financial assistance given by PNB is tested viz-a-viz the total expenditure of the Society as per one of the test laid down in the case of **Ajay Hasia (supra)** the said test fails to bring the Society within the ambit of the Society to be impregnated with Governmental character. The Court hastens to add that the income and expenditure accounts for the subsequent years indicate a similar position viz-a-viz the grant given by the PNB and the total expenditure of the Society. Thus, the said argument is also rejected.

25. The other thrust of argument of the learned counsel for the petitioner is the deep and pervasive control of the PNB over the affairs of the Society through its governing members, which is another test as laid down in the case ***Ajay Hasia (supra)***.

26. A perusal of the Memorandum of Association would indicate that the governing body, as per Clause V of the Memorandum of Association, has been indicated which comprises primarily of the staff of the PNB. However, the said clause of governing body gives the details of the **first members** of the Society and not for all members for times to come. As per clause 6 of the Rules of the Society, the Society comprises of two bodies namely the General Body and the Governing Body. Rule 7 (vi) spells out that "any person/corporate/organization/institute who wants to be a member of the Society shall apply to the Society and governing body shall take decision in the matter....". A perusal of the said rule would indicate that membership of the Society is **not confined** to only the staff of the PNB rather any person or corporate or organization or institute who wants to be a

member of the Society can apply to the Society and the governing body shall take decision in the matter. Further, Rule 7 (vi) (a) of the Rules also indicates about the terms of the members. So far as the governing body is concerned, Rule 9 (a) (ii) and (iii) (a) indicate that "the signatories to the Memorandum of Association shall be the members of the Governing Body till it is **re-constituted** by the general body" and " the Governing Body may be **re-constituted** from time to time by the general body...". A perusal of the aforesaid Rule clearly indicate that signatories to the Memorandum of Association shall be the members of the governing body till it is **re-constituted** by the general body meaning thereby that first signatory members or the first signatories of the governing body, despite being the staff members of the PNB, can always be **re-constituted by the general body** and the general body, as already indicated above can also comprise of any person/corporate/organization/ institute who wants to be a member of the Society.

27. Thus, merely because the first signatories of the governing body comprised of the staff of the PNB, the same does not take away the right of the individuals to apply for the membership of the Society who can become of the member of the Society and thereafter re-constitute the governing body. This would also be apparent from the fact that the impugned minutes of the general body meeting dated 03.05.2019 also comprise of four members who are not associated with the PNB in the capacity of being the staff members inasmuch as they comprise of retired Chief General Manager of PNB, of the NPCI, of the State Bank of India and of the CDAC, Pune.

28. Another aspect of the matter is that in terms of Rule 10 of the Rules, the governing body has been given the power to determine the financial and managerial polices, priorities for the Societies different activities, duties and conduct, salary and allowances and other conditions of the service of the officers and other employee of the Society and to appoint staff in accordance with the rules of the society. In terms of Rule 10 (xii) of the Rules, the governing body has also been given the power to make rule and bye-laws for the conduct of the affairs of the Society and to add, amend, vary or rescind Rules from time to time in accordance with the provision of Section 12 of the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860".). Thus, a perusal of all the said powers as given to the governing body indicates that the said power are being exercised independently by the Society without any interference or control of the PNB which itself is indicative of the fact that the Society is functioning and working independently. Thus, the ground of deep and pervasive control of the PNB over the affairs of the society is rejected.

29. From the aforesaid discussions, it clearly comes out that factors as have been enumerated in the case of **Ajay Hasia (supra)** and has have been applied to the facts of the present case by the Court all have led to the conclusion that there is no deep and pervasive control of the PNB over the Society in question, the corpus cannot be said to be entire share capital contributed by the PNB, the grant/financial assistance being given by the PNB is not so much as to meet out almost all or substantial portion of the expenses of the Society. Even otherwise, the functions of the Society are not related to any Governmental function and neither the Society seems to be enjoying

monopoly status which is State conferred or State protected. So far as the deep and pervasive control is concerned, as already indicated above, there is governing body which also comprises of independent members and further the governing body is to be re-constituted by the general body with the membership of the Society being not confined to only the staff of the PNB rather any person or Corporate or organization or institute can apply to the Society to become a member. The Rules of the society also indicate about its independent functioning the Society the power of framing its rules for the purpose of appointment of its employee and other service conditions of its employees.

30. Thus, none of the criteria as has been laid down in the case of **Ajay Hasia (supra)** are attracted so as to persuade this Court to hold the Society to be 'Other Authority' as contemplated under Article 12 of the Constitution of India.

31. The Apex Court in the case of **Pradeep Kumar Biswas and Ors. vs. Indian Institute of Chemical Biology and Ors** reported in **(2002) 5 SCC 111** after adverting to various authorities including **R.D.Shetty Vs. International Airport Authority of India** reported in **(1979) 3 SCC 489, Ajay Hasia (supra)** as well as **Sabhajit Tewary vs. Union of India (UOI) and Ors** reported in **AIR 1975 SC 1329** has laid down that only where a body is financially, functionally and administratively dominated by or under the control of the Government on **established facts** alone would be "State" under Article 12 of the Constitution of India.

32. The Apex Court has also considered all the aforesaid aspects of the matter and after considering the parameters as laid down in the case of **Ajay Hasia (supra)** has held in the case of **General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur Vs. Satrughan Nishad and Ors** reported in **(2003) 8 SCC 639** as under:-

'"8. From the decisions referred to above, it would be clear that the form in which the body is constituted namely, whether it is a society or co-operative society or a company, is not decisive. The real status of the body with respect to the control of government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively. There can be no hard and fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, Bye Laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter affidavit filed on behalf of the State and it was averred that majority of the shares were held by cane growers. Of course, it was not said that the Government of Uttar Pradesh did not hold any share. Before this Court, it was stated on behalf of the contesting respondents in the counter affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on

behalf of the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has no where been stated that the State used to meet any expenditure of the Mill much less almost the entire one, but, as a matter of fact, it operates on the basis of self generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of Bye-Laws of the Mill would show that its membership is open to cane growers, other societies, Gram Sabha, State Government, etc. and under Bye-Law 52, a committee of management consisting of 15 members is constituted, out of whom, 5 members are required to be elected by the representatives of individual members, 3 out of co-operative society and other institutions and 2 representatives of financial institutions besides 5 members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator. Thus, the ratio of the nominees of State Government in the committee is only 1/3rd and the management of the committee is dominated by 2/3rd non-government members. Under the Bye-Laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much less deep and pervasive one. The role of the Federation, which is the apex body and whose ex-officio Chairman-cum-Managing Director is Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by Managing Director of the Federation on 22nd November, 1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, we find none of the indicia exists in the case of Mill, as such the same being neither instrumentality nor agency of government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution."

33. Likewise the Apex Court in the case of **Federal bank Vs. Sagar Tomas** reported in **(2003) 10 SCC 733** has held as under:-

*"28. The six factors which have been enumerated in the case of **Ajay Hasia (supra)** and approved in the later decisions in the case of Ramana (supra) and the seven Judges Bench in the case of Pradeep Kumar Biswas (supra) may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant*

bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the mal-functioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank of India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Association (supra) does not advance the case of the respondent. It is only in case of mal-functioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general."

34. Similarly, the Apex Court in the case of **Rajbir Surajbhan Singh (supra)** has held has under:-

"8. It is true that the Governor of the Reserve Bank of India and the Chairmen of certain Public Sector Banks along with the Joint Secretary, Banking Division, Ministry of Finance are members of the governing body of the Respondent-Institute. There is no dispute that the Respondent is not constituted under a statute. It is also not disputed that the Respondent does not receive any funds from the Government. The Respondent is not controlled by the Government. The letter dated 20.09.2010 produced by the Appellant along with the rejoinder affidavit does not show deep and pervasive control by the Government of India. The question of whether the Council of Scientific and Industrial Research fell under 'other authorities' within the meaning of Article 12 was referred to a 7 Judge Bench of this Court. [See: Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors. (supra)]. Resolving the dispute, the 7 Judge Bench in Pradeep Kumar Biswas (supra) held that the question as to whether a corporation/society would fall within the meaning of Article 12 should be decided after examining whether the body is financially, functionally and administratively dominated by or under the control of the Government. This Court observed that such control should be particular to the body in question and must be pervasive. A control which is merely regulatory under the statute or otherwise would not make the body 'State' Under Article 12. As there is no control by the Government over the Respondent in the manner mentioned above, we have no doubt in our mind that the Respondent cannot be said to be falling within the expression 'State' Under Article 12 of the Constitution of India."

35. Thus, taking into consideration the aforesaid discussions, it is apparent that the Society does not fall within the

ambit of being "Other Authority" as contemplated in Article 12 of the Constitution of India and thus the present petition is dismissed on the ground of maintainability. However, it would be open for the petitioners to challenge the impugned orders before appropriate Court in accordance with law.

(2019)10ILR A 1607

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.10.2019

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No.- 28697 of 2019

Ranjan Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nagendra Bahadur Singh.

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Intermediate Education Act, 1921; Chapter III Regulation 101 - appointing authority cannot fill any vacancy of non-teaching staff except with the "prior approval" of the DIOS - financial approval of appointment of the petitioner was rejected since he was appointed without approval - appointment ab-initio

Writ Petition dismissed (E-10)

Cases cited: -

1. Deepak kumar Singh Vs St of U.P. & ors (2019) (6) ADJ 376

2. Kunda Motiram Bodalkar Vs Swami Vivekanand Shikshan Sanstha & ors (2010) 6 SCC 712

3. Ashika Prasad Shukla Vs District Inspector of Schools (1998) (3) AWC 2150

4. St of U.P. & ors Vs C/M Sarvodaya Inter College, Sayar District Ghazipur Special Appeal (Defective) No. 542 of 2014

5. Pramod Kumar Pandey Vs The District Inspector of Schools & anr Special Appeal (Defective) No. 684 of 2019

6. Abhendra Anand Singh Vs St. of U.P. & ors (2017) 2 ADJ 23

7. Prabhat Kumar Sharma & ors Vs St of U.P. & ors (1996) 10 SCC 62

8. Shesh Mani Shukla Vs District Inspector of Schools Deoria & ors (2009) 15 Scc 436

9. U.P. Avas Evam Vikas Parishan & anr Vs Friends Coop. Housing Society Ltd. & anr (1995) (Supp.) (3) SCC 463

10. Jaagdish Singh Vs St of U.P. & ors (2006) 2 UPLBEC 1851

11. Ms. Shailja Shah Vs Executive Committee, Bharat Varshiya National Association & anr (1995) 25 ALR 88

12. Pawan Kumar Mishra Vs Joint Director of Education, Azamgarh & ors (2018) 3 AWC 2418

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

1. Heard learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel appearing for respondents.

2. By means of the present petition, the petitioner has prayed for quashing of the order dated 21.02.2019, a copy of which has been filed as Annexure-1 to the petition, by which the District Inspector of Schools, Pratapgarh, has rejected the claim of the petitioner for financial

approval of appointment of the petitioner on the post of Clerk on various grounds including the ground that there was no prior approval to the appointment of the petitioner.

3. The case set forth by the petitioner is that he had been appointed by the Committee of Management i.e. respondent no.4 on a Class III post of Clerk in pursuance to an advertisement issued on 11.07.2017 and the appointment order having been issued on 07.08.2017, a copy of which has been filed as Annexure-5 to the petition. Admittedly, in pursuance to the appointment order dated 07.08.2017, the petitioner had submitted his joining on 15.08.2017 as would be apparent from the joining report of the petitioner, a copy of which has been filed as Annexure-6 to the petition.

4. Admittedly, the appointment to a Class III post in educational institutions is governed by the provisions of Regulation 101 of Chapter III of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'the Act of 1921'). Admittedly, in the instant case there was no prior approval of the competent authority prior to the petitioner being appointed and he having submitted his joining in pursuance thereof. This aspect of the matter has been considered by the District Inspector of Schools apart from other grounds while rejecting the claim of the petitioner by the impugned order dated 21.02.2019.

5. This Court in the case of **Deepak Kumar Singh vs. State of U.P. and others** reported in **2019 (6) ADJ 376** after taking into consideration various Division Bench judgments and the judgments of Apex Court has held that prior approval is a sine-qua-non to a valid appointment on a Class III post in terms of Regulation 101 of Chapter III of the Act of 1921.

6. Learned counsel for the petitioner, however, contends that the Apex Court in the case of **Kunda Motiram Bodalkar vs. Swami Vivekanand Shikshan Sanstha and others - (2010) 6 SCC 712** has held that where an appointment is made on the basis of an advertisement and that the employee's appointment has been approved subsequently consequently even if there was no prior permission of his appointment and there being no other irregularity in the appointment, the appointment cannot be held to be void.

7. Likewise, reliance has been placed on the Division Bench judgment in the case of **Ashika Prasad Shukla vs. District Inspector of Schools - 1998 (3) AWC 2150,** the judgment passed in a bunch of Special Appeals the leading being Special Appeal (Defective) No.542 of 2014 in re:**State of U.P. and others vs. C/M Sarvodaya Inter College, Sayar District Ghazipur,** Division Bench judgment in the case of **Pramod Kumar Pandey and 5 others vs. The District Inspector of Schools and another** passed in Special Appeal Defective No.684 of 2019 decided on 01.08.2019 as well as the judgment of Writ Court passed in the case of **Abhendra Anand Singh vs. State of U.P. and others-2017 (2) ADJ 23.**

8. On the other hand, Sri Ran Vijay Singh, learned Additional Chief Standing Counsel, submits that the cases of **Kunda Motiram Bodalkar (supra), Ashika Prasad Shukla (supra), C/M Sarvodaya Inter College (supra) and Pramod Kumar Pandey (supra)** all pertain to Assistant Teachers who are governed by

different set of rules/provision of law while the present case pertains to an appointment on a Class III post which is governed by Regulation 101 of Chapter III of the Act of 1921 and hence all the aforesaid cases shall not be applicable.

9. So far as the case of **Abhendra Anand Singh (supra)** is concerned, Sri Ran Vijay Singh, learned Additional Chief Standing Counsel submits that the said judgment has been passed without considering the judgments of Apex Court in the cases of **Prabhat Kumar Sharma and others vs. State of U.P. and others - (1996) 10 SCC 62, Shesh Mani Shukla vs. District Inspector of Schools Deoria and others - (2009) 15 SCC 436, U.P. Avas Evam Vikas Parishad and another vs. Friends Coop. Housing Society Ltd. and another - 1995 (Supp.) (3) SCC 456, Union of India and another vs. Raghuwar Pal Singh - (2018) 15 SCC 463,** and the Division Bench judgments in the cases of **Jagdish Singh vs. State of U.P. and others - (2006) 2 UPLBEC 1851 and Ms. Shailja Shah vs. Executive Committee, Bharat Varshiya National Association and another - 1995 (25) ALR 88, Pawan Kumar Mishra vs. Joint Director of Education, Azamgarh and others - (2018) 3 AWC 2418** and even otherwise this Court after considering all the aforesaid Division Bench's judgments including the judgments of Apex Court has held in the case of **Deepak Kumar Singh (supra)** that prior approval is sine-qua-non for a valid appointment on a Class III post.

10. Having heard learned counsel for the contesting parties and having perused the records, what comes out is that it is an admitted fact that the petitioner had been appointed on a Class III post without prior approval of the competent authority. This aspect of the matter has already been considered threadbare by this Court in the case of **Deepak Kumar Singh (supra)**. For the sake of convenience, the relevant observations in the case of **Deepak Kumar Singh (supra)** are reproduced as under:-

15. From a perusal of Regulation 101, it is apparent that the appointing authority could not fill up any vacancy of a non teaching staff except with the prior approval of the DIOS.

16. Thus the sine quo non for filling up the vacancy of non teaching staff by the Management is the prior approval of the DIOS.

*17. The issue of 'prior approval' has engaged the attention of the Courts from time to time. In the case of **Prabhat Kumar Sharma and others Vs. State of U.P and ors** reported in **(1996) 10 SCC 62,** the Hon'ble Supreme Court while considering the provisions of Removal of Difficulties order, which also provides for a prior approval of the DIOS, held that an appointment made inconsistent with the procedure of Removal of Difficulties Order is void abinitio and will not confer any right upon the incumbent to hold the post or to continue in service or to claim salary from the State exchequer. The relevant observations made by Hon'ble Supreme Court in **Prabhat Kumar Sharma (supra)** are reproduced as under:-*

"Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees."

*18. Likewise the Hon'ble Supreme Court in the case of **Shesh Mani***

Shukla Vs. District Inspector of Schools Deoria and others reported in (2009) (15) SCC 436 *held as under:-*

"It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State."

*19. A Division Bench judgment of this Court in the case of J**agdish Singh Vs. State of U.P and Ors reported in 2006 (2) UPLBEC 1851** has held as under:-*

"without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. Requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory."

*20. Another Division Bench of this Court in the case of **Ms. Shailja Shah Vs. Executive Committee, Bharat Varshiya National Association and another** reported in **1995 (25) ALR, 88** has held has under:-*

*"expression "prior approval" and "approval" connotes different situation. **Where a statute uses the term "prior approval" anything done without prior approval is nullity.** Where a statute employs expression "approval", however, in such cases subsequent ratification can make the act valid."*

*21. The word 'Prior Approval' has also been used in Section 59(1)(a) of U.P Urban Planing and Development Act, 1973 and Hon'ble Supreme Court in the case of **U.P Avas Evam Vikas Parishad and Anr Vs. Friends Coop. Housing Society Ltd. and Anr reported in 1995 (Supp) (3) SCC 456** has held that "prior approval" and "approval" are two different connotations and if the statute does not mention "prior approval" what is material would be only "approval".*

*22. Recently Hon'ble Supreme Court in the case of **Union of India and Anr Vs. Raghuwar Pal Singh** reported in **(2018) 15 SCC 463** considered an issue wherein an appointment could have been made only after obtaining prior approval from Competent Authority i.e. Ministry of Agriculture, Department of Animal Husbandry and Dairying, New Delhi. However, prior approval was not obtained and appointments were made. Thereafter, appointments were cancelled/ terminated on the ground that the same were illegal as there was no prior approval. The Hon'ble Supreme Court held that since appointments were made without prior approval, they were de hors the Rules and a nullity, hence, principles of natural justice are also not attracted in such a case. Paras 16 and 17 of judgment which dealt with the aforesaid issue are reproduced below :*

16. We shall now consider the efficacy of the reason so recorded in the office order. The recruitment procedure in relation to the post of Veterinary Compounder is governed by the statutory Rules titled 'Central Cattle Breeding Farms (Class III and Class IV posts) Recruitment Rules, 1969, as amended from time to time and including the executive instructions issued in that behalf. As per the stated dispensation for

such recruitment, the appointment letter could be issued only by an authorised officer and after grant of approval by the competent authority. Nowhere in the Original Application filed by the Respondent, it has been asserted that such prior approval is not the quintessence for issuing a letter of appointment.

17. For taking this contention forward, we may assume, for the time being, that the then Director Incharge H.S. Rathore, Agriculture Officer had the authority to issue a letter of appointment. Nevertheless, he could do so only upon obtaining prior written approval of the competent authority. No case has been made out in the Original Application that due approval was granted by the competent authority before issue of the letter of appointment to the Respondent. Thus, it is indisputable that no prior approval of the competent authority was given for the appointment of the Respondent. In such a case, the next logical issue that arises for consideration is: whether the appointment letter issued to the Respondent, would be a case of nullity or a mere irregularity? If it is a case of nullity, affording opportunity to the incumbent would be a mere formality and non grant of opportunity may not vitiate the final decision of termination of his services. The Tribunal has rightly held that in absence of prior approval of the competent authority, the Director Incharge could not have hastened issuance of the appointment letter. The act of commission and omission of the then Director Incharge would, therefore, suffer from the vice of lack of authority and nullity in law."

23. A Division Bench of this Court in the case of ***Pawan Kumar Mishra Vs. Joint Director of Education, Azamgarh and Ors*** *reported in* ***(2018) 3 AWC 2418*** *after referring to the earlier Division Bench judgment in the case of* ***Jagdish Singh (supra)*** *held as under:-*

"21. In the instant case, the expression used in Regulation 101, is "prior approval" and not "approval". Consequently, when the statute uses the term "prior approval", then anything done without prior approval is a nullity. In Prabhat Kumar Sharma and others vs. State of U.P. and others, AIR 1996(SC)2638 the Supreme Court held:

"Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees."

17. In the light of the aforesaid, we find that admittedly the appellant was appointed without seeking prior approval from the District Inspector of Schools. The said appointment was wholly illegal and was a void order, which conferred no right on the appellant."

24. Likewise, this Court in the case of ***Shashi Kant Gupta Vs. State of U.P and Ors*** *reported in* ***2014 SCC Online (All) 6039*** *has held as under :-*

"1. Principal of Sri Aastik Muni Inter College, Koriyan, Kanpur Nagar (hereinafter referred to as "College") sought permission of District Inspector of Schools, Kanpur Nagar (hereinafter referred to as "DIOS") before commencing selection and appointment on Class-IV post in the College and having received intimation, proceeded to make selection. The advertisement was published in daily newspaper 'Employment Exchange' dated 1-15' February' 2003 published from Kanpur whereby the applications were invited upto 28.2.2003 and interview was to be held on 8.3.2003. Petitioner submitted application on 27.2.2003 and thereafter on 9.3.2003 appointment was made and

petitioner joined on 15.3.2003. It is, therefore, evident from the record that after making selection and before appointment, no record was transmitted to DIOS seeking his prior approval as contemplated under Regulation 101, Chapter-III of the Regulations framed under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Act, 1921"). The law does not require prior approval before the selection but Regulation 101 talks of prior approval before the appointment but after making selection. This distinction has been noticed by Division Bench of this Court in Jagdish Singh etc. Vs. State of U.P. & others, 2006 (3) ESC 2055 (All)(DB) and it has been held that Regulation 101 is mandatory and if no prior approval has been obtained before making appointment, but after the selection the appointment shall be void-ab-initio and it shall not confer any right upon the incumbent to hold the post or to claim salary. The relevant observation made by Division Bench reads as under:

"... without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of any candidate. Requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory."

2. In view of above, the alleged appointment of petitioner cannot be said to be valid. No relief, therefore, as sought for in the writ petition can be granted to petitioner.

3. The writ petition lacks merit. Dismissed."

25. This Court in the case of ***Ram Kumar Shukla Vs. State of U.P and Ors*** *reported in* ***2014 SCC Online (All) 6040*** *has held has under :-*

1. Principal of Sri Aastik Muni Inter College, Koriyan, Kanpur Nagar (hereinafter referred to as "College") sought permission of District Inspector of Schools, Kanpur Nagar (hereinafter referred to as "DIOS") before commencing selection and appointment on Class-IV post in the College and having received intimation, proceeded to make selection. The advertisement was published in daily newspaper 'Employment Exchange' dated 1-15' February' 2003 published from Kanpur whereby the applications were invited upto 28.2.2003 and interview was to be held on 8.3.2003. Petitioner submitted application on 27.2.2003 and thereafter on 9.3.2003 appointment was made and petitioner joined on 15.3.2003. It is, therefore, evident from the record that after making selection and before appointment, no record was transmitted to DIOS seeking his prior approval as contemplated under Regulation 101, Chapter-III of the Regulations framed under the U.P. Intermediate Education Act, 1921 (hereinafter referred to as "Act, 1921"). The law does not require prior approval before the selection but Regulation 101 talks of prior approval before the appointment but after making selection. This distinction has been noticed by Division Bench of this Court in Jagdish Singh etc. Vs. State of U.P. & others, 2006 (3) ESC 2055 (All)(DB) and it has been held that Regulation 101 is mandatory and if no prior approval has been obtained before making appointment, but after the selection the appointment shall be void-ab-initio and it shall not confer any right upon the incumbent to hold the post or to claim salary. The relevant observation made by Division Bench reads as under:

"... without prior approval of the Inspector, the Principal or the committee of management cannot issue an appointment letter or permit joining of

any candidate. Requirement of prior approval in Regulation 101 is a condition precedent before issuing an appointment letter and is mandatory."

2. In view of above, the alleged appointment of petitioner cannot be said to be valid. No relief, therefore, as sought for in the writ petition can be granted to petitioner.

3. The writ petition lacks merit. Dismissed.

26. Thus, from a perusal of the aforesaid, it clearly comes out that prior approval was a sine qua non of filling up of vacancy of non teaching staff and issue of the appointment order. It is settled proposition of law that where a thing is to be done in a particular manner it is to be done in that manner or not at all. In this regard, the Court may refer to the judgment of ***Nazir Ahmad vs. Emperor*** *reported in* ***AIR 1936 PC 253*** *wherein it has been held as under:-*

"where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all."

27. Likewise the Hon'ble Supreme Court in the case of Deep Chand vs. The State of Rajasthan reported in AIR 1961 SC 1527 has reiterated the principle of law as laid down in the case of ***Nazir Ahmad (supra)*** *that:-*

".....Where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden"

28. Likewise the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh vs. Singhara Singh and Ors*** *reported in* ***AIR 1964 SC 358*** *has again followed the principle laid down in the case of* ***Nazir Ahmad (supra).***

29. The Hon'ble Supreme Court in the case of ***Babu Verghese & Ors. vs. Bar Council of Kerala & Ors*** *reported in* ***(1993) 3 SCC 422*** *while following the principle laid down in the case of* ***Nazir Ahmad (supra)*** *has held that:-*

"It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all."

30. Keeping in view the aforesaid discussions, it is thus apparent that the relevant regulations provide for a prior approval before filling in the vacancy of non teaching staff. Consequently, no such vacancy could be filled up except with the prior approval of the DIOS inasmuch as once the prescribed procedure itself contemplates a prior approval for filling up the vacancy, as such, keeping in view the settled proposition of law that where a manner of doing a particular act is prescribed, the act must be done in that manner or not at all and thus the vacancy could not have been filled in and the petitioner appointed without the prior approval of the DIOS.

31. Though, the Joint Director of Education has rejected the claim of the petitioner on the ground of there being no substantive vacancy on the date of his appointment and the ground of prior approval does not find place in the impugned order, as has rightly been contended by the learned counsel for the petitioner, yet this Court is of the view that once the said ground of there being no prior approval prior to appointment of the petitioner has been taken in the counter affidavit and is also a legal ground, consequently instead of remanding back the matter to the Joint Director of Education for a fresh decision, this Court has itself gone through the facts of the case and has also

considered the said ground which deciding the case after hearing the learned counsel for the petitioner on this ground also more particularly when the pleadings have already been completed and the matter was argued at length.

32. As regards, the judgment cited on behalf of the petitioner in the case of ***Rajendra Yadav*** *and* ***Sri Ranjan (supra)*** *which pertains to there being deemed approval after lapse of two weeks from the date of seeking prior approval of the DIOS, suffice to state that once the relevant Regulations do not contemplate any such deemed approval consequently, no such deemed approval can be presumed. Moreover, prior approval has been held to be sine qua non by various Division Bench judgment of this Court before making any appointment in terms of Regulation 101, consequently the aforesaid judgments shall not come to the rescue of the petitioner.*

33. As regards, the judgment in the case of ***Abdul Shafiq Hanfi (supra),*** *the said judgment is distinguishable inasmuch the said judgment did not consider the question of prior approval as specifically provided in the Regulations and as has been considered by various Division Bench judgments of this Court as well as by the Hon'ble Supreme Court.*

34. As regards, the judgment in the case of ***Surya Kumar Dixit (supra),*** *the same pertains to an order held to be sustainable only on the grounds contained therein keeping in view the law laid down by the Hon'ble Supreme Court in the case of* ***Mohinder Singh Gill and Ors Vs. The Chief Election Commissioner, New Delhi and Ors*** *reported in* ***AIR 1987 SC 851.*** *This Court has already recorded as to why despite the ground of prior approval not having been taken by the respondent no. 2 while rejecting the case of the petitioner in the impugned order yet the said ground of prior approval having been taken in the counter affidavit as such this Court has itself proceeded to consider the said ground as the pleadings have been completed and it would have been a futile exercise to remit back the matter to the respondent no. 3 for a decision afresh despite having the legal reasons on record . As such, the said judgment would also not be of any help to the petitioner.*

35. Accordingly, when facts of the instant case are tested on the touch stone of Regulation 101 wherein the words 'Prior Approval' has been used and the interpretation of the words 'Prior Approval' as has been given by the Hon'ble Supreme Court as well as various Division Benches of this Court and the principle of law as enunciated in the case of ***Nazir Ahmad (supra)*** *it clearly comes out that where the appointing authority has issued the appointment order or permitted the joining of any candidate without the* ***prior approval*** *the same would be illegal and void abinitio. In the instant case, the Management having initiated the selection process and having issued the advertisement, formed a select committee, selected the petitioner permitted him to join and even issued an appointment order without the* ***prior approval*** *of the DIOS the same would thus vitiate the appointment of the petitioner.*

36. Keeping in view the aforesaid discussions, no illegality or infirmity is found in the impugned order dated 26.11.2011 passed by the respondent no. 3.

37. The writ petition is accordingly dismissed."

11. Thus, from perusal of the aforesaid judgment, it clearly comes out

that once there was no prior approval to the appointment of the petitioner on a Class III post consequently the appointment of the petitioner is itself void ab-initio in the eyes of law. Having thus being appointed without any prior approval consequently this Court cannot come to the rescue of the petitioner more particularly when the appointment of the petitioner is void ab-initio and having been made without prior approval of the competent authority.

12. So far as the judgments relied upon by learned counsel for the petitioner in the case of **Kunda Motiram Bodalkar (supra), Ashika Prasad Shukla (supra), C/M Sarvodaya Inter College (supra) and Pramod Kumar Pandey (supra)** are concerned, suffice to state that they all pertain to appointment of Assistant Teachers who are governed by different set of rules and provisions of law while the present case pertains to an appointment on a Class III post which is governed by Regulation 101 of Chapter III of the Act of 1921 and hence all the aforesaid cases are distinguishable on their own facts. Further the judgment in the case of **Abhendra Anand Singh (supra)** has been passed without considering the judgment of **Prabhat Kumar Sharma (supra), Shesh Mani Shukla (supra), Jagdish Singh (supra), Ms. Shailja Shah (supra), U.P. Avas Evam Vikas Parishad (supra), Raghuwar Pal Singh (supra) and Pawan Kumar Mishra (supra)** and even otherwise this Court after considering all the aforesaid Division Bench's judgments including the judgments of Apex Court has held in the case of **Deepak Kumar Singh (supra)** that prior approval is sine-qua-non for a valid appointment on a Class III post.

13. Accordingly, taking into consideration the aforesaid discussion no case for interference is made out. The writ petition is **dismissed.**

(2019)10ILR A 1615

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 1736 of 1998

Om Naresh ...Petitioner
Versus
U.P. State Public Services Tribunal Lucknow ...Respondent

Counsel for the Petitioner:
Sri Vijay Krishna, Sri G.C. Verma, Sri Prabhakar Tewari.

Counsel for the Respondent:
C.S.C.

A. Service Law -termination - conditional and temporary appointment of the petitioner - automatic termination when regular appointment is made

The "temporary appointee" has no right to the post, and hence the petitioner has no right to continue even if the post continues to exist. (Para 17 and 18)

If the order of termination is "termination simpliciter", no opportunity for hearing is required to be given to the employee. (Para 19)

B. Review Application - scope of review - maintainability of review application

The application for review is maintainable only on the grounds mentioned in Order 47, Rule 1 C.P.C. A party filing a review application on

the ground of any other " sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in the said provision of C.P.C. (para 28, 29 and 30)

The review application is not filed for the pleasure of the parties or even as a device for ventilating remorselessness but ought to be restored to with a great sense of responsibility as well. (Para 31)

Review application dismissed (E-10)

Cases Referred: -

1. Dharmendra Kumar Tiwari Vs St of U.P. & ors (2002) All LJ 1216

2. Indian Drugs & Pharmaceuticals Ltd. Vs Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC (L & S) 270

3. M/s Thungabhadra Industries Ltd. Vs The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantpur AIR (1964) SC 1372

4. Subhash Vs St of Mah & anors AIR (2002) SC 2537

5. Bhagwant Singh Vs Deputy Director of Consolidation & anr AIR (1977) All. 163

6. Shivdeo Singh Vs St of Pun AIR (1963) SC 1909

7. Zahira Habibullah Sheikh Vs St of Guj (2004) 5 SCC 353 8. P.N. Eswara Iyer etc. Vs Registrar Supreme Court of India (1980) 4 SCC 680

9. Ramdeo Chauhan Vs St of Assam (1999) 9 SCC 323

10. Devender Pal Singh Vs St of NCT of Delhi AIR (2003) SC 3356

(Delivered by Hon'ble Saurabh Lavania, J)

1. Heard Sri G.C. Verma, learned counsel for the review applicant/petitioner and learned counsel for the State-respondents, Sri Amit Sharma.

2. Present review application has been filed for reviewing the judgment and order dated 27.01.2017, whereby this Court after recording the finding, quoted hereinunder, dismissed the writ petition and affirmed the order dated 09.08.1998 passed by U.P. State Public Services tribunal (in short "Tribunal") in claim petition No.278/V/(F)/1992, whereby Tribunal dismissed the claim petition and affirmed the order of termination dated 31.03.1992.

"Petitioner was engaged as Junior Clerk in a short term vacancy on temporary basis on 22.06.1991 and after joining of regular employee, he was ceased. Admittedly, petitioner had no right to hold post since his appointment was temporary and on short term basis. Hence, we find no error on the part of Tribunal in dismissing claim petition."

3. Before the Tribunal, the petitioner challenged the order of termination dated 31.03.1992 and also sought the consequential reliefs. The reliefs sought by the petitioner before the Tribunal are quoted under for ready reference:-

"Wherefore, it most respectfully prayed that this Hon'ble Tribunal may be please to much the impugned order dated 31.03.1992 (contained in Annexure no.1 to this petition) with a declaration that the petitioner continues in his service and is entitled to his fully pay, which he would have been entitled in absence of the impugned order.

Any other orders or direction appropriate in the circumstances of the case and deemed just and proper by the Hon'ble Tribunal may also be passed along with cost of this claim petition."

4. The Tribunal after considering the material available on record dismissed the claim petition of the petitioner vide order dated 05.05.1998, with following observation:-

"From the perusal of annexure No.1 it is clearly proved that the petitioner was working on daily wages basis and his services had been terminated w.e.f. after noon of 31.03.1992. The petitioner being a daily wager he could not be treated to be ad-hoc appointee even he could not be regularized under any of Government order for regularization of ad-hoc services of Government Servant. In these circumstances I am fully convinced with the contention of the learned Presenting Officer that the petitioner has no lien in respect of the post of a Junior Clerk, as such the termination order is legal and justified."

5. Aggrieved by the order dated 05.05.1998 passed by the Tribunal and order of termination dated 31.03.1992 the petitioner filed the writ petition, in which the judgment and order dated 27.01.2017, under review, was passed.

6. Brief facts of the case are that initially the petitioner was appointed in the pay scale of Junior Clerk vide order dated 22.06.1991, against short term vacancy on the post of Head Clerk, by the opposite party no.4, Principal, Government Industrial Training Institute, Bareilly. The appointment was purely temporary and conditioned. The condition of appointment was to the effect that the appointment would come to an end automatically, if Directorate any person on the post in question. The relevant portion of appointment order dated 22.06.1991 reads as under:-

"क्षेत्रीय सेवायोजन कार्यालय, बरेली द्वारा सम्प्रेषित सूची से विभागीय चयन समिति द्वारा संस्तुति के आधार पर पंजीयन नं0–सी. 1881/91 श्री ओम नरेश पुत्र श्री लल्लू प्रसाद को अवकाशकालीन रिक्ति के विरूद्ध कनिष्ठ लिपिक पर वेतनमान रू 950–20–1150–द0रो0–25–1500 में पुर्णतयाः अस्थायी रूप से नियक्ति किया जाता है। निदेशालय द्वारा मुख्य लिपिक पद पर तैनाती होने पर श्री ओम प्रकाश की सेवाएं स्वतः समाप्त समझी जायेगी।"

7. On 31.07.1991, an order was issued by the opposite party no.4. The order dated 31.07.1991 also reflects that the appointment of the petitioner was in the pay scale of Junior Clerk against the post of Senior assistant and was purely temporary and conditional,. The condition in the appointment was to the effect that the appointment of petitioner would come at an end automatically, if an appointment is made on the post of Senior Assistant by the Director. The relevant portion of order dated 31.07.1991 is quoted below:-

"इस संस्थान के पत्रांकःस्था0/क0लि0/नि0/91/3153–53 दिनांकः 22–06–1991 में आंशिक संशोधन करते हुए श्री ओम नरेश को वरिष्ठ लिपिक सहायक के विरूद्ध कनिष्ठ लिपिक वेतनमान रू 950–20–1150–द0रो0–25–1550 में पूर्णतया अस्थाई रूप से नियुक्त किया जाता है। निदेशालय द्वारा वरिष्ठ सहायक की तैनाती किये जाने पर श्री ओम नरेश की सेवाएं स्वतः समाप्त समझी जाएंगी।"

8. Thereafter vide order dated 12.11.1991 he was transferred to Government Industrial Training Institute, Anwala, Bareilly and while was working at Anwala, vide order dated 31.03.1992, the services of the petitioner came to an end. The relevant portion of order dated 31.03.1992 reads as under:-

"राज0औ0प्र0सं0आंवला, बरेली में कनिष्ठ लिपिक के पद पर दैनिक वेतन पर कार्यरत कर्मचारी श्री ओम नरेश की सेवाएं दिनांक 31.03.1992 के उपरान्त समाप्त की जाती है।"

9. Aggrieved by the order dated 31.03.1992, the petitioner filed the claim petition before Tribunal, which was dismissed on 05.05.1998.

10. The writ petition filed against the aforesaid order was dismissed by the judgment and order dated 27.01.2017, under review.

11. Before us, while pressing the review application, the arguments, as advanced by the learned counsel for petitioner Sri G.C.Verma, are summarized as under:-

(i) The appointment of the petitioner was on temporary basis and he was terminated vide order dated 31.03.1992 treating him to be daily wage, and that for without giving proper opportunity of hearing.

(ii) After being appointed as temporary basis at Government Industrial Training Institute, Bareilly the petitioner was transferred to Government Industrial Training Institute, Anwala, Bareilly on clear regular vacancy, treating the petitioner as regular employee and thus the termination of the services of petitioner treating him as daily wage was/is not justified rather illegal.

(iii) The order of termination dated 31.031992 was passed in violation of terms of appointment.

(iv) It is also submitted that while passing the judgment and order dated 27.01.2017 this Court has not taken note of the entire facts of the case as such the present review petition has been filed.

12. We put a query to Sri G.C.Verma, who appeared for review petitioner, that which appointments/engagements are included in expression "temporary appointee" and whether " temporary appointee" is governed by the Rules which says that prior to passing of order of termination simplicitor an opportunity of hearing should be given to a "temporary appointee".

13. To aforesaid, the learned counsel for the review petitioner could not place any Rule and also failed to explain the term/expression "temporary appointee".

14. We have heard learned counsel for the petitioner and perused the record.

15. It transpires from the record, which is admitted position, that the appointment of petitioner was purely temporary and against short term vacancy, which was made on 22.06.1991 and came to an end vide order dated 31.03.1992. The petitioner worked for a very short period/span. The services of the petitioner were not regularized on the post of Junior Clerk and contrary to the same there is neither any pleading nor an order, on record.

16. Before coming to the conclusion that whether the reasoning given by this Court while dismissing the writ petition vide judgment and order dated 27.01.2017 is perfectly valid or not, we would like to consider the expression "temporary appointee" and right to hold the post by a "temporary appointee".

17. In regard to aforesaid the Division Bench of this Court in the case of ***(Dharmendra Kumar Tiwari Vs. State***

of U.P. and others) reported in 2002 All LJ 1216, after observing, as under, ***dismissed*** the writ petition.

"4. Learned counsel for the petitioner submitted that the petitioner has a right to continue till a regularly selected candidate is available for the post. We do not agree with this submission. There is no such legal principle that a temporary employee has a right to continue on the post till a regularly selected candidate is available for that post. Rather, the legal position is just the reverse, namely, that a temporary employee has no right to the post, and hence he has no right to continue even if the post continues to exist. An ad hoc appointee is also a temporary appointee. The expression "temporary appointee' is a general expression under which there are several sub-categories, e.g. casual appointee, daily wage appointee, ad hoc appointee and even a probationer. All such sub-categories fall within the general category of a temporary appointee, as contrasted to a permanent appointee. The legal position is that a temporary appointee has no right to the post and it is not correct to say that a temporary appointee has a right to continue till a regularly selected candidate is available for the post.

5.Learned counsel for the petitioner has brought to our notice certain interim orders passed by the Lucknow Bench of this Court vide Annexures 3 and 4 to the writ petition. These are interim orders and hence are no precedents. The law is well settled by the Supreme Court in various decisions that a temporary employee has no right to the post videState of U.P.v.Kaushal Kishore, (1991) 1 SCC 691 : (1991 AIR SCW 793),Triveni Shankar Saxenav.State of U.P., 1992 Supp (1) SCC 524 : AIR 1992 SC 496 : (1992 All LJ 230) etc. Since the law has been clearly laid down on this point by the Supreme Court anything contrary held by the Lucknow Bench of this Court is not good law."

18. In the case of *Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs & Pharmaceuticals Ltd. (2007) 1 SCC (L&S) 270,* the Hon'ble Apex Court observed as under:-

"13. It may be mentioned that a daily-rated or casual worker is only a temporary employee, and it is well settled that a temporary employee has no right to the post videState of U.P.v.Kaushal Kishore Shukla[(1991) 1 SCC 691 : 1991 SCC (L&S) 587 : (1991) 16 ATC 498] . The term "temporary employee" is a general category which has under it several sub-categories e.g. casual employee, daily-rated employee, ad hoc employee, etc.

14. The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an inquiry, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation."

19. It is also settled principle of law that if an order of termination is "termination simpliciter" then in that case

the opportunity of hearing before passing the order of termination is not required.

20. In the instant case of termination dated 31.03.1992, as appears from the order itself, is termination simpliciter. Thus, there was no need to provide opportunity of hearing to the petitioner before issuing it.

21. Considering the facts of the case particularly, nature of the appointment of the petitioner, which for a very short span and purely temporary appointment, and the principle settled with regard to right to hold the post vests in the daily wages or temporary appointee, mentioned hereinabove, we are of the view that the reasons given by the Division Bench, while passing the judgment and order dated 27.01.2017, under review, are perfectly valid.

22. In addition to above, though we have considered the facts of the case while coming to the conclusion aforesaid, we would like to add the scope of review.

23. In this regard Hon'ble the Apex Court in the case of ***M/s. Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur, AIR 1964 SC 1372,*** The Apex Court held that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

24. Hon'ble the Apex Court in **Subhash Vs. State of Maharastra & Another, AIR 2002 SC 2537,** the Apex Court emphasised that Court should not be misguided and should not lightly entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

25. This Court in the case of **Bhagwant Singh Vs. Deputy Director of Consolidation & Another, AIR 1977 All. 163,** rejected the review application filed on a ground which had not been argued earlier because the counsel, at initial stage, had committed mistake in not relying on and arguing those points, held as under:-

26. It is not possible to review a judgment only to give the petitioner a fresh inning. It is not for the litigant to judge of counsel's wisdom after the case has been decided. It is for the counsel to argue the case in the manner he thinks it should be argued. Once the case has been finally argued on merit and decided on merit, no application for review lies on the ground that the case should have been differently argued."

27. In **Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909,** in a review petition filed under Order 47 Rule 1 CPC the Supreme Court held that the power of

review under Article 226 of the Constitution of India, in reviewing its own orders, every Court including High Court inheres plenary jurisdiction, to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

28. Further, the review lies only on the grounds mentioned in Order 47, Rule 1 read with Section 141 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other " sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in the said provision of C.P.C.

29. Thus, in view of the abovesaid facts, review can be allowed only on (1) discovery of new and important matter of evidence which, after exercise of due diligence, was not within the knowledge of the person seeking review, or could not be produced by him at the time when the order was made, or (2) when some mistake or error on the face of record is found, or (3) on any analogous ground. But review is not permissible on the ground that the decision was erroneous on merits as the same would be the province of an Appellate Court.

30. In View of the above discussion , the law of review can be summarized that it lies only on the grounds mentioned in Order 47, Rule 1 CPC . The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other' sufficient reason' must satisfy that the said reason is analogous to the conditions mentioned in Order 47, Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged inning for possible for the Court to take a view contrary to what had been taken earlier. Review lies only when there is error apparent on the fact of the record and that fallibility is by the over-sight of the Court.

31. Hon'ble Supreme Court in the case of **Zahira Habibullah Sheikh Vs. State of Gujarat, (2004) 5 SCC 353,** after placing reliance on its earlier judgments i.e. **P.N. Eswara Iyer etc. Vs. Registrar Supreme Court of India, (1980) 4 SCC 680; Sutherdraraja Vs. State, (1999) 9 SCC 323; Ramdeo Chauhan Vs. State of Assam, AIR 2001 SC 2231; and Devender Pal Singh Vs. State of NCT of Delhi, AIR 2003 SC 3365;** observed that review applications "are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well."

32. For the foregoing reasons, the review application lacks merit. Hence, ***dismissed*** with no order as to costs.

(2019)10ILR A 1621

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2016
BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.

Service Single No. 7027 of 1996

Mohd. Ajaz ...Petitioner
Versus
Managing Director & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ghaus Beg, Sri Vishal Chaudhary.

Counsel for the Respondents:
Sri S.K. Kaliya.

A. Service Law - challenging oral termination - petitioner appointed as a driver-cum-peon in temporary vacancy - subsequently contractually appointed on said post for three months - appointment came to an end but allowed to continue beyond the prescribed period - terminated by efflux of time

The continuance of a person wrongly appointed on the post does not create any legal right in his favour. (Para 10)

Writ Petition dismissed (E-10)

Cases cited:-

1. Director, Institute of Management Development U.P. Vs Pushpa Srivastava (Smt.) (1992) 4 SCC 33

2. M.S. Patil (Dr.) Vs Gulbarga University (2010) 10 SCC 63

3. State of Orissa & anr Vs Mamata Mohanty (2011) 3 SCC 436

4. Secretary, St of Kar & ors Vs Uma Devi & ors (2006) 4 SCC 1

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

1. The petitioner by means of the present writ petition under Article 226 of the Constitution of India, has challenged the alleged oral termination of his service by the respondents. The petitioner has further prayed for a direction to the respondents to allow him to continue on the post of driver-cum-peon and to pay him salary regularly.

2. The Small Industries Development Bank of India (for short "the Bank') is a development financial institution in India headquartered in Lucknow and having its offices all over the country. It was established in April 1990 through an Act of the Indian Parliament.

3. The petitioner was first appointed in the Bank on 27.06.1995 on daily wage basis as a driver-cum-peon in a temporary vacancy by the Manager of the Bank at Lucknow, the respondent no. 3. Thereafter, by an order dated 13.10.1995, the petitioner was appointed on the said post on a consolidated fixed salary of Rs. 3000/- per month on contract basis for a period of three months. The petitioner joined his duties accepting the term of his appointment letter. By an order dated 03.01.1996, the appointment of the petitioner was extended for a further period of three months on the same terms and conditions and by letter dated 12.04.1996, the appointment of the petitioner was further extended up to 31.05.1996. Although the appointment came to an end on 31.05.1996, by efflux of time, the petitioner was allowed to continue beyond the prescribed period on daily wage basis. It is alleged that on 4.10.1996, the petitioner was orally informed by the respondent no. 3 that his services were no longer required and accordingly, the petitioner was not permitted to work thereafter.

4. Sri Ghaus Beg, learned counsel for the petitioner has submitted that the work and conduct of the petitioner was satisfactory and there was no complaint against the petitioner and as such there was no reason why the services of the petitioner were not extended. The counsel contended that decision of the respondents in not renewing the contract

of the petitioner was arbitrary and unjustified.

5. Per contra, Shri S.K. Kalia, Senior Advocate, has submitted that the engagement of the petitioner was purely on contract basis for a specific period on the terms and conditions mentioned in the said letter and after the term of the service of the petitioner came to an end the petitioner has no right to continue on the post in question. The averments made on behalf of the petitioner that his work and conduct was satisfactory has also been denied.

6. Heard the learned counsel for the parties and perused the record.

7. The only question that arises for consideration in the instant case that is "as to whether the petitioner can claim as a matter of right to continue on the post in question in spite of the fact that his term of appointment has come to an end by efflux of time' is no more res integra.

8. Relevant portion of the appointment order dated 13.10.1995 reads as under:-

ष्आपको निम्नलिखित निबंधनों और शर्तों पर ड्राइवर–सह–चपरासी का पद प्रस्तावित करने का निर्णय किया गया है–

1. आपको रू0 3000/– प्रतिमाह का नियत वेतन दिया जाएगा।

2. *आपकी नियुक्ति, आपकी नियुक्ति तिथि अर्थात् अक्टूबर 04, 1995 से जनवरी 03, 1996 तक संविदा आधार पर होगी।*

3. बैंक मे आपको नियोजन, उक्त अवधि की समाप्ति, अर्थात् जनवरी 03, 1996 को कार्यकाल की समाप्ति पर स्वतः समाप्त हो जाएगा। यह नोट किया जाए कि बैंक पर इस बात की कोई जिम्मेदारी नहीं होगी कि इस संबंध में वह सेवा समाप्ति संबंधी कोई औपचारिक सूचना जारी करे अथवा नोटिस दे। सेवा संविदा की समाप्ति पर कोई क्षतिपूर्ति देय नहीं होगी।

* * *

8. *किसी भी परिस्थिति में, इस नियोजन संविदा के फलस्वरूप बैंक में नियमित नियोजन अथवा सेवा संविदा की अवधि में वृद्धि के संबंध में आपका कोई दावा नहीं बनता है।*

9. बैंक को जब भी आवश्यकता होगी, तब आप बैंक में नियुक्ति के संदर्भ में प्रासंगिक प्रत्येक सूचना बैंक में प्रस्तुत करेंगे।ष

(emphasis supplied)

9. It is well settled where the appointment is contractual, and such appointment comes to an end by efflux of time, the incumbent has no right to continue on the post in question. *{see Director, Institute of Management Development U.P. v. Pushpa Srivastava (Smt.), (1992) 4 SCC 33}.*

10. It is equally settled that merely because the incumbent is allowed to continue beyond the contractual period, it does not confer any right upon him to continue. In *M.S. Patil (Dr.) v. Gulbarga University, (2010) 10 SCC 63,* the Apex Court has held that the concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. Relying upon M.S. Patil (supra) in *State of Orissa and another v. Mamata Mohanty, (2011) 3 SCC 436,* the Apex Court has held that the concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, the continuance of a person wrongly appointed on post does not create any right in his favour.

11. Further a Constitution Bench of the Apex Court in *Secretary, State of*

Karnataka and others v. Uma Devi and others, (2006) 4 SCC 1, has observed as under :-

"43. *If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued.* Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. *It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.* It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. *The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme."*

and then

"45. ... *It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes.* It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a *contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee.* A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. *The*

argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution." (emphasis supplied)

12. Admittedly, the petitioner was appointed on contract basis on a consolidated salary for a fixed term and the same was extended from time to time on the same terms and conditions. By efflux of time the appointment of the petitioner came to an end on 31.05.1996. In view of the settled legal position the petitioner has no right to have his contract renewed and to continue on the post in question. No mandamus can be issued to the respondents to continue the petitioner in service.

13. Moreover, the services of the petitioner were terminated way back in the year 1996 and since then he is out of job. More than 20 years have passed. Even otherwise, at this distance of time no relief, whatsoever, can be granted to the petitioner.

14. For the foregoing reasons the writ petition is devoid of merit and is accordingly dismissed.

15. No order as to cost.

(2019)10ILR A 1625

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.09.2019
BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 6682 of 2019

Kamlesh Kumar Verma ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Deomani Tripathi, Sri Ashok Kumar Mishra, Sri Girish Chandra Verma.

Counsel for the Respondents:
C.S.C.

A. Service law - appointment denied on ground of non-disclosure of pending criminal case - one Shri Dililp Kumar Jaiswal who is charged with more serious offence permitted to join - the Court held that the discretion exercised by the appointing authority should be reasonable - the Court permitted to join the service subject to the final outcome of the criminal proceedings

Writ Petition allowed (E-10)

Cases Cited:-

1. Avtar Singh Vs U.O.I. & ors (2016) 8 SCC 471

2. Commissioner of Police & ors Vs Sandeep Kumar (2011) 4 SCC 644

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri G.C. Verma, learned counsel for the petitioner and learned State Counsel for the State-respondents.

2. By means of this petition, the petitioner has assailed the office memo dated 28.1.2019 passed by the Secretary, Department of Home (Police), Anubhag-9, Lucknow refusing to give appointment to the petitioner for the reason that the petitioner has concealed the relevant fact regarding pending criminal cases against

him. The petitioner has also challenged the order dated 6.2.2019 passed by the Director General of Prosecution, U.P. Lucknow.

3. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.3 to the writ petition, which is an order dated 11.12.2018 passed by this Court in the matter of the petitioner in Service Single No.33643 of 2018, whereby the said writ petition was finally disposed of directing the competent authority to take fresh decision in the matter in the light of the Judgment of the Hon'ble Apex Court in re; **Avtar Singh Vs. Union of India and others, (2016) 8 SCC 471.** In the aforesaid order dated 11.12.2018 this Court had taken cognizance of the fact that one Sri Dilip Kumar Jaiswal, against whom serious criminal cases were pending, was allowed to join, therefore it was expected that while passing the fresh order, the aforesaid fact should have been considered by the competent authority carefully.

4. So as to verify the reasons of the impugned order, I have perused Annexure No.19 to the writ petition, which is a declaration form being submitted by the petitioner and perusal thereof clearly reveals that the petitioner has clearly indicated that a criminal case is pending against him. He has indicated that Crime No.322/2005 is pending before the Court of Addl. District & Sessions Judge-First, Pratapgarh. In the impugned order, there is one reference given regarding N.C.R. No.277/12 under Sections 323, 504 & 506 IPC, which has admittedly been expunged by the court concerned vide order dated 6.12.2014. Learned counsel for the petitioner has indicated in para-19 of the writ petition that in said case, the final report was submitted by the Investigating Officer and the said case was disposed of by the Court concerned on 6.12.2014. The petitioner was absolutely unaware about the aforesaid case as no notice, summon etc. has been issued to the petitioner at any point of time. The aforesaid content of the writ petition was replied by the answering opposite parties in para-16 of the counter affidavit wherein the fact that the petitioner was absolutely unaware about the pendency of the said case has not been disputed, however this much has been indicated that the petitioner has not disclosed the offences. This is beyond any comprehension when the petitioner was absolutely unaware about any case, which was registered under N.C.R., how could he have disclosed such fact. Secondly, there is no dispute that the petitioner has correctly intimated/ disclosed about the pendency of the criminal case bring no.322/2005 pending in the court of Addl. District & Sessions Judge-First, Pratapgarh, however he had not disclosed the Sections under which he was charged. The aforesaid fact was disclosed by the petitioner on 7.2.2017 whereas the impugned order has been passed firstly in the year 2018, meaning thereby on the basis of information so disclosed by the petitioner at the time of attestation, the competent authority must have verified each and every thing relating to the said criminal case pending against the petitioner. Relevant sections against the petitioner are 147, 148, 323, 324, 504, 506, 427 IPC read with Section 3 (1) (x) of the SC/ST Act.

5. It is noted here that vide order dated 16.4.2018, the candidature of Sri Dilip Kumar Jaiswal was examined and against Sri Dilip Kumar Jaiswal, two

crime cases were registered i.e. Criminal Case No.7046/2002, Case Crime No.147/98, under Sections 147/352/188/504/506 IPC, however in that case Sri Jaiswal was exonerated but in Case Crime No.227/99, under Sections 307/504/506 IPC, an interim order was granted in favour of Sri Jaiswal but the fact remains that the case under Section 307 IPC was pending against him but vide order dated 6.9.2018 (Annexure No.14 to the writ petition), Sri Jaiswal has been permitted to submit his joining at Aligarh.

6. So far as severity of the offence is concerned, the present petitioner has been charged under less serious offences comparing to Sri Dilip Kumar Jaiswal. Despite the aforesaid fact, the petitioner has not been permitted to submit his joining rather he has been stopped to submit his joining whereas Sri Dilip Kumar Jaiswal has been permitted to submit his joining. The impugned order against the petitioner has been passed in the light of the dictum of the Hon'ble Apex Court in re; **Avtar Singh** (supra). Paragraphs 38.1 to 38.4, 38.5 & 38.6 of the judgment of the Hon'ble Apex Court in re; **Avtar Singh** (supra) are being reproduced herein below:-

"38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2.While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3. The employer shall take into consideration the Government orders/ instruction/ rules, applicable to the employee, at the time of taking the decision.

38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourses appropriate to the case may be adopted:

38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case."

7. Learned State counsel has vehemently pressed para-38.6 saying that it is a discretion of the appointing authority to permit such appointment wherein criminal cases are pending.

8. No doubt, it is a discretion of the appointing authority to permit someone to submit his/ her joining if criminal cases are pending but such discretion should be reasonable one as unfettered discretion has not been appreciated by the Hon'ble Apex Court and this Court.

9. The sole reason of the impugned order is that the petitioner has not disclosed the facts properly whereas

attestation form clearly indicates that the petitioner has disclosed the facts relating to pendency of criminal case against him. Therefore, even in the light of the dictum of the Hon'ble Apex Court in re; **Avtar Singh** (supra), the petitioner should have not been refused to submit his joining when one identically placed person, namely, Sri Dilip Kumar Jaiswal, whose antecedents/ material is more serious than the petitioner, has been permitted to submit his joining.

10. The Hon'ble Apex Court in re; **Commissioner of Police and others v. Sandeep Kumar, (2011) 4 SCC 644**, in para-12 has held as under:-

"12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter."

11. The Hon'ble Apex Court has held that the offence under Section 325/34 IPC is not so serious to refuse appointment of any person. In the light of the aforesaid dictum of the Hon'ble Apex Court, in the present case, the offence of the petitioner is less serious than the offence under Section 325 IPC inasmuch as under Section 325 IPC, the punishment prescribed as seven years whereas in none of the sections, the petitioner's charge is having punishment of about seven years. Therefore, it appears that while passing the impugned order dated 28.1.2019, the competent authority has not invoked his discretion reasonably and the reason so indicated in the impugned order is misconceived inasmuch as the petitioner has disclosed his details regarding criminal case in his attestation form, therefore, the impugned orders dated 28.1.2019 and 6.2.2019, which have been passed by the Secretary, Home (Police), Lucknow and the Director General of Prosecution, U.P., Lucknow whereby claim of the petitioner on the post of A.P.O. has been cancelled are liable to be quashed and accordingly, both the orders dated 28.1.2019 and 6.2.2019, which are contained in Annexures No.1 & 2 to the writ petition, are hereby quashed.

12. The opposite parties are directed to permit the joining of the petitioner on the post of A.P.O. in the same manner the order has been passed in the case of Sri Dilip Kumar Jaiswal. It is needless to say that such order would be conditional one and shall depend upon the final outcome of the criminal proceedings.

13. The writ petition is accordingly **allowed.**

14. No order as to costs.

(2019)10ILR A 1628

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2019

BEFORE

THE HON'BLE ASHOK KUMAR, J.

Writ- C No. 63354 of 2015
connected with
Writ- C No. 60856, 10636 of 2015

Committee of Management Lalauli Inter College & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Siddhartha Srivastava.

Counsel for the Respondents:
C.S.C., Sri Prabhakar Awasthi.

A. Constitution of India - Art. 226 - Scope and ambit of Writ - Dispute about the number of members of committee of management - This kind of dispute is purely factual dispute - It cannot be considered or decided by a writ court. (Para 10)

Writ Petition dismissed (E-1)

(Delivered by Hon'ble Ashok Kumar, J.)

1. Heard learned counsel for the petitioner and learned counsel for the respondents.

2. By means of the present writ petition (W.P. No. 63354 of 2015) the petitioner has challenged the order dated 1.10.2015 passed by the DIOS, Fatehpur by which the DIOS has attested the signature of the manager of the elected committee of management.

3. The brief facts of the case are that the petitioner nos. 2 to 8 are the Ex-office bearers/members of the outgoing committee of management, election of which was held in the year 2005. Earlier a Writ Petition No. 65152 of 2011 was filed by one Idrish Khan in which following order has been passed:-

"Contention of the petitioner is that District Inspector of Schools, Fatehpur on 11.1.2011 had written a letter for holding of the election of the Managing Committee of the institution by 30.1.2011. Petitioner submits that tenure of the Manging Committee of the institution has already run out and in spite of same no steps whatsoever has been taken in the direction, and even order passed by the District Inspector of schools has not been complied with. Petitioner submits that there is no legal impediment whatsoever for holding the election of the committee of the Management of the institution.

Consequently, District Inspector of schools, Fatehpur is directed to see and ensure that final decision is taken in respect of holding of election of the committee of management in accordance with law, preferably within period of next three months from the date of production of certified copy of this order. In case elections have already been held then this order question will not come to the rescue of the petitioner.

With these observations, writ petition is disposed of."

4. In pursuance of the order dated 16.11.2011 the DIOS called for the relevant documents and a list of 275 members along with documents was submitted before the Assistant Registrar. The said list of 275 members was objected and therefore the Assistant Registrar has instituted an inquiry through auditor. According to the petitioner the inquiry was conducted and a report was submitted before the Assistant Registrar holding that the respondent no.4 has illegally enrolled the members. The DIOS in compliance of the order of this Court dated 26.11.2011 authorised the election officer as observer to constitute the general body of the society by following the bye-laws of the society and it is alleged that the said effect was followed and the list of 4885 members was prepared and forwarded by the DIOS to the Assistant Registrar for approval vide

letter dated 18.12.2013. In pursuance of the letter dated 18.12.2013 the Assistant Registrar has responded vide letter dated 23.1.2014, authorised to the hold the election on the basis of general body of 4885 members prepared by the election officer and the observer. The elections were held according to the notified scheduled. The election of the executive members of the petitioner no.1 committee of management took place on 9.3.2014.

5. The claim of the petitioner was that on the basis of 4885 members of general body elections were held in which the respondent no.4 Sri Zumman Ali also participated and elected as member of executive committee. A writ petition being Civil Misc. Writ Petition No. 16789 of 2014 was filed by the respondent no.4 Zumman Ali, which was disposed of vide order dated 28.3.2014. The relevant extract of the order dated 2.7.2014 are quoted hereinbelow :

"Be that as it may, in my view, the end of justice would be subserved in case the petitioners are granted liberty to file a representation before the Regional Level Committee. The petitioners are permitted to raise all available grounds before the Regional Level Committee. In the event, the petitioner submits any such representation before the Joint Director of Education within two weeks from the date of receipt of certified copy of this order, the Joint Director of Education shall place the same before the Regional Level Committee, which will consider the cause of the petitioners and decide the matter within six weeks from the date of making such representation after hearing the petitioners and all concerned parties.

Needless to say that this Court has not expressed its opinion on the merits of the case. The Regional Level Committee shall pass the order independently in accordance with law.

Accordingly, the writ petition is disposed of.

No order as to costs."

6. Further against the order dated 28.3.2014 another writ petition was filed by the petitioner no.2 Badruddin Khan being writ Petition No. 29044 of 2014 in which this Court has passed the following order dated 2.7.2014 :

"Having considered the submissions of the learned counsel for the parties, I find substance in the submission of Sri Ashok Khare, inasmuch as, the U.P. Intermediate and Education Act, 1921 does not govern primary education. It is noteworthy that Chapter III of the Regulations framed under the Act, 1921 are Regulations prescribing service condition of teachers and employees of recognised institution framed under sub-section (1) of Section 16G of the Act, 1921. The use of the expression " members of the teaching staff or the Principal or Headmaster" is necessarily in reference to an institution which is governed by the provisions of the U.P. Intermediate Education Act, 1921 and it, therefore, does not relate to teachers of a Primary School. I, therefore, do not find substance in the submission of the learned counsel for the petitioners that the respondent No.5 was not eligible for being appointed as an office-bearer of the Committee of Management by virtue of Regulation 5 of Chapter III of the Regulations framed under the Act, 1921.

So far as the validity of election in general is concerned, another writ petition was filed by one Jumman Ali, an elected member of the Committee of

Management, challenging the elections of the office-bearers which was numbered as Writ C No. 16789 of 2014. In the said writ petition, this court disposed of the petition with observation that if petitioners have any grievance with regards to the election, they can make a representation to the Regional Level Committee and in that event, the Regional Level Committee can consider the issue in accordance with law. Therefore, if the petitioners are aggrieved by the election for any other reason, they may, on similar terms, ventilate their grievance.

With the aforesaid liberty to the petitioners, the writ petition is disposed of."

7. Against the order dated 2.7.2014 the petitioner no.2 Badruddin Khan has filed a special appeal being Special Appeal No. 686 of 2014, which according to the petitioner is pending.

8. Pursuant to the order dated 28.3.2014 passed by this Court the Regional Level Committee has passed an order dated 29.8.2014 by which it has held that the election was invalid. After the order dated 29.8.2014 passed by the Regional Legal Committee the DIOS has sent a letter dated 13.10.2014 to the petitioners to provide the attested list of general body. In pursuance thereto the petitioner no.2 has submitted an application dated 18.10.2014 before the Assistant Registrar for providing the attested list of general body. Fresh request was also made by the petitioner no.2. However another writ petition no.64098 of 2014 (The Committee of Management, Lalauli Inter College vs. State of U.P. and others) was filed by the respondent no.4 Sri Zumman Ali, which was finally disposed of on 27.11.2014 by this Court by making the following observations :

"In view of the above, the writ petition is disposed of with the direction upon the respondent No.2 to examine the contents of the letter of the DIOS dated 13th October 2014 and offer requisite assistance in the form of providing records and information which may be required for the purpose of holding of fresh elections. The Assistant Registrar for the purposes may also afford an opportunity of hearing to the parties concerned. The Assistant Registrar will ensure that the aforesaid exercise is carried out within a period of six weeks from the date of production of the certified copy of this order."

9. Based on the order dated 27.11.2014 passed by this Court the Assistant Registrar has passed the order impugned dated 16.1.2015. By the order dated 16.1.2015 the respondent no.2 has approved and attested the list of 275 members. The order dated 16.1.2015 was challenged by means of a writ petition No. 7778 of 2015, which is dismissed vide order dated 30.5.2019. An order was passed by the DIOS dated **1.4.2014** by which he has refused to hold the election on the ground that the writ petition no. 43229 of 2014 is pending. Another Writ Petition No. 3847 of 2015 was filed by the respondent no.4 with a prayer to hold the election of the committee of management and the said writ petition was finally disposed of vide order dated 13.8.2015, by which this Court has directed the DIOS to hold the election in pursuance of the directions issued by the Regional Level Committee. The election therefore are held on the basis of the order passed on 9.9.2015 addressed to the respondent no.4 passed by the DIOS. The respondent no.2 has submitted an application dated 14.9.2015 before the

DIOS in compliance of his order dated 9.9.2015 and has sought the election officer and observer. The respondent no.3 has passed and order dated 14.9.2015 appointing the Principal, Audhauli Inter College, Audhali as Observer and Principal of Audhauli Inter College as the Election Officer to conduct the election. The impugned election has been conducted and the election took place according to the schedule declared and the signature of the manager are attested on 30.9.2015 and the proceedings are concluded on 1.10.2015 in which the signature of respondent no.4 Zumman Ali are attested and the same has been approved.

10. From the perusal of the above details mentioned it is crystal clear that there is a factual disputes about the number of members of committee of management. The petitioner claims certain number of members to be genuine and on the other hand the respondent no.4 claims the different number of members. For holding the election, within a period of two years 5/6 writ petitions are filed by either of the parties in which certain directions are issued, whereas from the pleadings of the present writ petition as well as connected writ petition being Writ Petition Nos. 60856 of 2015 and 10636 of 2015, it is crystal clear that the dispute involved in all the writ petitions are about the number of members of the committee of management. This Court has no reason to keep the matter pending and to decide the correctness of the claim of either of the parties particularly, with respect of membership of the committee of management. This kind of dispute is purely factual disputes, which cannot at all be considered or decided by a writ Court under Article 226 of the Constitution of India.

11. In view of the aforesaid, the writ petition is dismissed. The connected writ petition are also dismissed.

(2019)10ILR A 1632

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.09.2019

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No.-23276 of 2019

Salil Kumar Samaiya ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar Srivastava, Renu Misra.

Counsel for the Respondents:
C.S.C.

A. Service Law - Suspension - of U.P. Government Servant (Discipline & Appeal) Rules, 1999; Rule 4(1) - petitioner who is a Junior Engineer was suspended pursuant to the directions issued by the State Government, who was not the appointing authority

It is a trite law that suspension order can be passed only by the appointing authority on his own accord and not on the behest of some higher authority (Para 11)

Writ Petition allowed (E-10)

Cases Referred:-

1. The Purtabpore Co. Ltd. Vs Cane Commissioner of Bihar & 7 ors (1969) (1) SCC 308

2. Anirudhsinhji Karansinji Jadeja & anr Vs St of Guj AIR (1995) SC 2390

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard learned counsel for the parties.

2. By means of this writ petition, the petitioner has impeached the validity of the order of suspension dated 30/31.07.2019 issued by the Director-cum-Chief Engineer, Rural Engineering Department, U.P., Lucknow on the ground that the said order has not been passed strictly in terms of Rule 4 of U.P. Government Servant (Discipline & Appeal) Rules, 1999 and the sole charge which has been levelled against the petitioner is misconceived.

3. This Court has passed the order dated 30.08.2019 as under:-

"Heard Sri P.K. Srivastava, learned counsel for the petitioner and notices for the opposite parties have been received by the office of learned CSC.

The case set forth by the learned counsel for the petitioner is that the petitioner, who is serving on the post of Junior Engineer, has been placed under suspension vide order dated 30.7.2019 passed by the Director-cum- Chief Engineer, Rural Engineering Department, U.P. Lucknow. The aforesaid suspension order has been passed pursuant to the direction being issued by the State Government and the order to that effect has been enclosed as Annexure No.1 to the writ petition, which has been issued on 12.7.2019 by the Special Secretary, Department of Rural Engineering Anubhag-2, Lucknow addressing to the appointing/ disciplinary authority i.e. Director-cum-Chief Engineer, Rural Engineering Department, U.P. Lucknow.

Learned counsel for the petitioner has assailed the suspension order on couple of grounds; firstly, the suspension order has been issued at the behest of the authority of the State Government, which is not disciplinary/ appointing authority of the petitioner inasmuch as the disciplinary/ appointing authority of the petitioner is Director-cum- Chief Engineer, who has passed the suspension order. Learned counsel for the petitioner has referred Rule 4 (1) of the U.P. Government Servant (Discipline & Appeal) Rules, 1999 (for short "Rules, 1999"), which categorically provides that a Government servant against whose conduct an enquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of enquiry ***in the discretion of appointing authority.*** *Therefore, in the present case, it appears that the suspension order has been issued at the behest of the authority, who is not the appointing authority of the petitioner, therefore, the suspension order is in violation of Rule 4 of the Rules, 1999. Learned counsel for the petitioner has drawn attention of this Court towards the dictum of the Hon'ble Apex Court in re;* ***Anirudhsinhji Karansinhji Jadeja and another v. State of Gujarat, AIR 1995 SC 2390,*** *wherein the Hon'ble Apex Court, vide para-11 of the order, has categorically observed that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether.*

Secondly, the allegation so levelled in the suspension order is relating to one Sri Devesh Singh, who is

said to have alleged against the petitioner that the petitioner has usurped a sum of Rs.1,20,000/- in the name of providing him any suitable appointment under the State Government. Learned counsel for the petitioner has submitted that the petitioner has already filed a suit/ criminal case against Sri Devesh Singh and his family for the fact that Sri Devesh Singh and his family has cheated the petitioner in the name of Insurance Policy and the said suit/ criminal case is still pending. As per learned counsel for the petitioner, having malafide intention and ulterior motive, Sri Devesh Singh has moved false complaint against the petitioner and the State Government has directed the appointing authority to place the petitioner under suspension for the said allegation without conducting any fact finding enquiry to that effect. Not only the above, even the disciplinary authority has not only followed the direction of the State Government regarding allegation but also has not conducted any fact finding enquiry so as to ascertain as to how this cheating was committed by the petitioner. It appears that the suspension order has been passed only on the dictate of the authority of the State Government.

Learned counsel for the petitioner has also assailed the suspension order on the ground that the petitioner is presently serving at Jhansi, his enquiry officer is Superintending Engineer, Rural Engineering Department at Kanpur and he has been attached at Balia, therefore, the suspension order is not a simple suspension order but by means of suspension order, the petitioner has been harassed for no cogent reasons.

On being confronted from learned Addl. Chief Standing Counsel as to why this suspension order has been passed in violation of Rule 4 of the Rules, 1999 and what are the material/ subjective satisfaction of the disciplinary authority placing the petitioner under suspension and why the petitioner has been attached at Balia, learned Addl. Chief Standing Counsel has prayed that he may be granted one week's time to seek complete instructions in the matter.

Time prayed for is granted.

List this petition on 9th September, 2019 as fresh.

In the meantime, attachment order of the petitioner at Balia is stayed.

On the next date, learned Addl. Chief Standing Counsel shall produce the relevant record."

4. In compliance of the aforesaid order, the learned Additional Chief Standing Counsel has produced the entire records before the Court to show the material pursuant to which the petitioner was placed under suspension.

5. I have perused the original record as well as the material available on record.

6. Since the criminal case being filed by the petitioner against Sri Devesh Singh which is pending before the learned criminal court, therefore, if any finding is given by this Court, it would affect the criminal proceeding being pending. I have noted that the criminal court has issued non-bailable warrant against Sri Devesh Singh and as per learned counsel for the petitioner Sri Devesh Singh has yet not appeared before the Court. Further, it is a case where the civil suit is also pending between the parties i.e. the present petitioner and Sri Devesh Singh and others, therefore, any finding of this Court would definitely affect the civil

proceeding also. However perusal of the preliminary inquiry report, prima-facie does not reveal that the petitioner has usurped a sum of Rs.1,20,000/- from Sri Devesh Singh in the name of providing him any suitable appointment under the State Government.

7. To the contrary, it appears that some amount has been paid by the petitioner to the family members of Sri Devesh Singh but since this is a subject matter of criminal and civil proceedings, therefore, I refrain myself to give any finding thereon. The factum of cheating etc. cannot be established during departmental proceedings and it is domain of competent criminal court to establish the factum of cheating if any against erring person.

8. So far as the arguments of learned counsel for the petitioner that suspension order has not been passed by the Appointing Authority but the same has been passed at the behest of the State Government, no satisfactory reply could be given by the State-respondents as to how any suspension order could have been passed by the authority who is not the appointing authority. This is trite law that the suspension order can be passed only by the Appointing Authority and it is statutory prescription under Rule 4 (1) of U.P. Government Servant (Discipline & Appeal) Rules, 1999 (here-in-after referred to as the "Rules, 1999"), therefore, in both counts the suspension order which has been passed at the behest of the State Government appears to be unwarranted.

9. The Hon'ble Supreme Court in re: ***The Purtabpore Co., Ltd. vs. Cane Commissioner of Bihar and others reported in 1969 (1) SCC 308*** has held that the power can be exercised by the authority with whom the power is vested not by any other authority whether superior or inferior. Relevant paras-12 and 13 of the aforesaid judgment are being reproduced here-in-below:-

"12. The executive officers entrusted with statutory discretions may in some cases be obliged to take into account considerations of public policy and in some context the policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior.

13. In Commissioner of Police, Bombay v. Gordhandas Bhanji, this Court struck down the order purported to have been passed by the Commissioner of Police in the exercise of his powers under the Bombay Police Act and the rules made thereunder as the order in question was in fact that of the Government. The rule laid down in that decision governs the question under consideration. This Court reiterated that rule in State of Punjab v. Hari Kishan Sharma. There this Court held that the State Government was not justified in assuming jurisdiction which had been conferred on the licensing authority by Section 5 (1) and (2) of the Punjab Cinemas (Regulation) Act. For the reasons mentioned above we hold that the impugned orders are liable to be struck down as they were not made by the prescribed authority."

10. The Hon'ble Supreme Court in re: ***Anirudhsinhji Karansinjji Jadeja and***

another vs. State of Gujarat reported in AIR 1995 SC 2390 has held the same and followed the settled principles of law and vide para-11, the following has been observed:-

"11.The case against the appellants originally was registered on 19th March, 1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? Was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20A (1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20A (1) was not exercised by the DSP at all."

11. Considering the rival submissions of learned counsel for the parties and perusing the relevant material available on record as well as the original records, I am of the considered view that the suspension order dated 30.07.2019 has been passed by the Director / Chief Engineer, Rural Engineering Department, Government of U.P., Lucknow but the said suspension order has been passed pursuant to the direction being issued by the State Government inasmuch as vide order dated 12.07.2019, which is contained as Annexure No.1 to the writ petition, the Special Secretary, Department of Rural Engineering, Government of U.P., Lucknow has directed the Director & Chief Engineer i.e. the Appointing Authority to suspend the petitioner and initiate the departmental proceedings against him under Rule 7 of the Rules, 1999. Prima-facie, the Appointing Authority has not invoked its discretion rather followed the direction of the State Government placing the petitioner under suspension. So far as the sole charge levelled against the petitioner regarding usurping a sum of Rs.1,20,000/- from Sri Devesh Singh in the name of providing the government employment is concerned, it may be the subject matter before the competent criminal/ civil court and the factum of cheating may not be established through the departmental proceedings.

12. It is needless to say that if the factum of cheating is established against the petitioner by the competent criminal/ civil courts, the Disciplinary Authority may pass any appropriate order strictly in accordance with law but at this stage it appears that the suspension order is unwarranted.

13. Accordingly, the suspension order dated 30.07.2019/31.07.2019 issued by the Director & Chief Engineer, Rural Engineering Department, Government of U.P., Lucknow, is hereby quashed.

14. It is needless to say that appropriate order may be passed by the department at appropriate stage but strictly in accordance with law.

15. The writ petition is, therefore, ***allowed.***

16. No order as to costs.

(2019)10ILR A 1637

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.10.2019

BEFORE

THE HON'BLE RAJAN ROY, J.

Misc. Single No. 27414 of 2019

Shailendra Kumar Awasthi ...Petitioner
Versus
Addl. Commissioner Lucknow Mandal Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Girish Datt Pandey.

Counsel for the Respondents:
C.S.C., Sri Rajesh Kumar Singh.

U.P. Land Revenue Code, 2006- Sections 35(2)- U.P. Land Revenue Act, 1901- Section 210- Against the order passed in the mutation proceedings u/s. 35(1)-Petitioner filed revision u/s. 210 of the Code of 2006-Dismissed on the ground of availability of alternative remedy-appeal u/s. 35(2)-the appellate order-subject matter of revision.
On the other hand, if the original order of mutation u/s. 34 of the U.P. Land Revenue Act 1901-appeal to be filed u/s. 210 of the said Act of 1901-thereafter revision u/s. 219.

Held :- the Court finds that the original order was passed under section 34 of the Act of 1901, to facilitate the ends of justice the appeal filed under section 35(2) of the Code, 2006 in this case would be treated as having been preferred under section 210 and consequent to this judgment, as this Court is inclined to quash the impugned order dated 16.07.2019 the revision filed with reference to section 210 of the Code be treated as revision under section219 of the Act of 1901 shall now be considered and decided accordingly.

Writ Petition Disposed of (E-8)

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. The short point involved herein is as to whether a revision would lie under section 210 of the U.P. Land Revenue Code 2006 (hereinafter referred as 'Code 2006') against an appellate order passed under section 35(2) arising out of mutation proceedings or not.

3. The Additional Commissioner has dismissed the revision of the petitioner filed under section 210 of the Code 2006 on the ground that against the original order passed in the mutation proceedings an appeal lies under section 35(2) of the Code 2006, therefore, revision under section 210 of the Code 2006 would not be maintainable in view of the wording of the said provision.

4. The contention of the learned counsel for the petitioner is that the revisional court has misread and misunderstood the provision contained in section 210. Words used therein "in which no appeal lies" would have to be applied in the context of the appellate order and not the original order and as no appeal lies against the order under section 35(2), therefore, the remedy lies only by way of a revision under section 210. He says that if the interpretation given to the provision contained in section 210 by the Revisional Court is accepted, the revisional provision under section 210 would be rendered otiose.

5. Learned counsel for the opposite party no.4 Sri Rajesh Kumar Singh on being confronted addressed the Court on

the merits of the order impugned in the revision, which is not required to be seen by this Court and ultimately submitted that the revision itself be ordered to be decided at the earliest.

6. Having heard the learned counsel for the parties and having perused the relevant provisions of law, the Court finds that a revision under section 210 would lie against a proceeding in which no appeal lies, meaning thereby, if, as in this case arising out of original proceedings which were under section 35 of the Code 2006 for mutation where an appeal was preferred under section 35(2) against the original order passed under section 35(1) and the same was dismissed, then, against such appellate order, if no appeal lies, then a revision would be maintainable. Now it is not in dispute that under the Code 2006 no appeal is prescribed against an order passed under section 35(2), therefore, a revision under section 210 of the Code 2006 would be maintainable

7. The Additional Commissioner has clearly misread and misunderstood the provisions contained in section 210 by reading the words "in which no appeal lies" in the context of the original order passed under section 35(1) in mutation proceedings and as an appeal lies against such an order under section 35(2), therefore, he has proceeded to hold that a revision would not lie under section 210 of the Code 2006 which is not a correct understanding of the legal position. The words "in which no appeal lies" would have to be read and applied in the context of the appellate order passed under section 35(2) which would be the subject matter of the revision, and not the original order even if the same is also under challenge, when the revision has been preferred after availing the remedy of appeal under section 35(2), as is the case herein.

8. The legal position with regard to section 210 having been clarified above, the Court finds that the original order of mutation was passed under section 34 of the U.P. Land Revenue Act 1901 and not under section 35 of the Code 2006, therefore, the appeal which may have been filed under section 35(2) of the Code 2006 should have actually been filed under section 210 of the U.P. Land Revenue Act 1901 and thereafter the revision would lie under section 219 of the said Act 1901, therefore, to facilitate the ends of justice the appeal filed under section 35(2) of the Code 2006 in this case would be treated as having been preferred under section 210 of the Act 1901 and consequent to this judgment, as this Court is inclined to quash the impugned order dated 16.7.2019, it is provided that the revision which may have been filed with reference to section 210 of the Code 2006 shall be treated as a revision under section 219 of the Act 1901 and shall now be considered and decided accordingly. This does not change the legal position with regard to the maintainability of the petitioner's revision as even under section 219 of the Act 1901 it would be maintainable in view of the provision contained therein. With these observations the impugned order, Annexure-1 to the writ petition, is quashed. The revision of the petitioner shall be restored to its original number and shall be considered and decided in accordance with law at the earliest say within six months from the date a certified copy of this order is submitted.

9. With the above observations/directions the writ petition is **disposed off.**

(2019)10ILR A 1639

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2019

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 18200 of 2019

Arun Kumar Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashwani Kumar.

Counsel for the Respondents:
C.S.C., Sri Amit Singh, Sri Shampurna Nand Shukla, Vishal Tahlani.

A. Service Law - challenging the recommendation of Departmental Promotion Committee for promotion on the post of Chief Engineer - where the criteria for promotion is merit, bench mark for the promotion has to be fixed - no benchmark was fixed - contrary to the law as also the Government Order dated 20.11.2017 - recommendation *non est* in the eyes of law. (Para 15)

Writ Petition allowed (E-10)

Cases referred:-

1. Naveen Kapoor Vs St of U.P. & ors (2019) 4 AWC 3236

2. Om Prakash Pathak & anr Vs St of U.P. & ors (2019) (4) AWC 3236

3. Santosh Kumar Agnihotri Vs St of U.P. & ors (2018) 6 AWC 6125 (LB)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Kapil Dev, learned Senior Advocate assisted by Sri Ashwani Kumar, learned counsel for the petitioner, Sri Ran Vijay Singh, learned Addl. Chief Standing Counsel for the State-respondents and Sri Shampurna Nand Shukla, learned counsel for opposite party no.3, Sri Amit Singh and Sri Vishal Tahlani, learned counsel for the private opposite party i.e. opposite party no.4.

2. By means of this petition, the petitioner has assailed the recommendation of the Departmental Promotion Committee (for short "DPC") given in its meeting held on 11.6.2019 for promotion on the post of Chief Engineer making request that the record of the DPC may be summoned. The petitioner has also assailed the order dated 2.8.2019 passed by opposite party no.1 and the consequential order dated 3.8.2019 passed by opposite party no.3, which are contained in Annexures No.7 & 8 to the writ petition, whereby the private respondent has been promoted on the post of Chief Engineer.

3. Submission of learned counsel for the petitioner is that the aforesaid DPC dated 11.6.2019 has given recommendation for promotion on the post of Chief Engineer without fixing any bench mark.

4. This Court vide order dated 23.7.2019 directed for production of the record. The order dated 23.7.2019 is as follows:-

"Heard learned counsel for the petitioner.

As per submission of learned counsel for the petitioner, the promotion has been made without fixing any bench mark, which is not permissible in the eyes of law.

The aforesaid facts may only be verified from the records, therefore, list this petition on 01.08.2019. On the said date, the learned Additional Chief Standing Counsel shall produce the record in the matter demonstrating the Court as to whether any bench mark has been fixed or not."

5. In compliance of the aforesaid order, learned Addl. Chief Standing Counsel has produced the relevant record. I have perused the entire relevant record including minutes of meeting of DPC held on 11.6.2019 and found that the submission of learned Senior Advocate is absolutely correct inasmuch as no bench mark has been fixed by the DPC in recommending the promotion on the post of Chief Engineer, therefore it has not proceeded in accordance with law and Government Order dated 20.11.2017 which required the DPC to, first of all, fix/determine/prescribe the bench mark where the criteria for promotion is merit.

6. A pin point query has been put up from the Addl. Chief Standing Counsel as to why bench mark has not been fixed by the Departmental Promotion Committee for recommending the promotion on the post of Chief Engineer, learned Addl. Chief Standing Counsel has referred so many pages of the original record, which clearly reveals that various orders of this Court has been indicated in the note-sheet and the specific query regarding fixing bench marks has been noted but nothing has been prescribed for fixing the bench mark. Learned Addl. Chief Standing Counsel has also submitted that it appears that the bench mark has not been fixed but the recommendation of opposite party no.4 for making promotion on the post of Chief Engineer has been done strictly in accordance with law.

7. Since the legal question, as aforesaid, is being adjudicated, therefore, detailed facts of the case are not being dealt with.

8. Brief facts of the case are that the petitioner joined on the post of Assistant Engineer on 7.7.1982 and was promoted on the post of Executive Engineer in the year 2003. Thereafter, he was promoted on the post of Superintending Engineer on 6.4.2016.

9. Since category of the petitioner was downgraded for the years 2009-10, 2012-13, 2013-14, 2014-15 & 2015-16, therefore, the petitioner preferred a representation on 29.7.2016.

10. Vide order dated 1.9.2018, the petitioner was given charge of Chief Engineer on officiating basis without giving salary and other emoluments of that post.

11. On 25.5.2019, the opposite parties prepared an eligibility list of eight persons for promotion on the post of Chief Engineer including the name of the petitioner in which the seniority position of the petitioner on the post of Superintending Engineer has been shown to be at serial no.6, whereas the person placed at serial no.3 had already been superannuated from service and rest of the persons, who were considered for promotion, were juniors to the petitioner.

12. As per learned counsel for the petitioner, the DPC has given its recommendation on 11.6.2019 in favour of opposite party no.4, however opposite party no.4 was junior to the petitioner.

13. The petitioner came to know through reliable sources that the DPC has

not fixed any bench mark, therefore, he filed the present writ petition challenging the aforesaid inaction and this Court on the first date of admission i.e. 4.7.2019 has passed the following order:-

"Heard Sri Kapil Deo, learned senior counsel assisted by Sri Ashwani Kumar appearing for the petitioner, learned State counsel appearing on behalf of the opposite party nos.1 & 2 and Sri Shampurna Nand Shukla who has put in appearance on behalf of the opposite party no.3.

The opposite parties are granted two weeks to file a detailed counter-affidavit to the contents of the writ petition.

List this case on 23.07.2019 specifically indicating as to whether any bench mark was fixed for the departmental promotional committee for the purposes of promotion on the post of Chief Engineer. The counter-affidavit shall also indicate as to whether the representations submitted by the petitioner in the year 2016 against the entries in his service record have been decided or not prior to holding of the departmental promotional committee."

14. Thereafter, this case was listed on 23.7.2019 and on that date, this Court summoned the record to verify the fact as to whether any bench mark was fixed for the DPC for the purpose of promotion on the post of Chief Engineer. The case was again listed on 1.8.2019 but due to paucity of time, it could not be taken up on that date and next date was fixed for 9.8.2019 and in the meantime, the State Government passed an office memo dated 2.8.2019 promoting the private respondent on the post of Chief Engineer. In compliance of the aforesaid office memo dated 2.8.2019 passed by the State Government, the Housing Commissioner has passed the consequential order on 3.8.2019 promoting/ appointing opposite party no.4 on the post of Chief Engineer subject to the final outcome of the present writ petition. Therefore, the petitioner has assailed both the aforesaid orders dated 2.8.2019 and 3.8.2019 by way of amendment application and the amendment application was allowed and the specific prayer to that effect has been incorporated in the writ petition.

15. Having heard learned counsel for the parties and having perused the relevant material available on record, I am of the considered opinion that since the bench mark has not been fixed by the DPC, therefore, recommendation of the DPC dated 11.6.2019 shall vitiate and resultant thereof the promotion order being issued by the State Government on 2.8.2019, which is contained in Annexure No.7 to the writ petition and the consequential order being passed by the Housing Commissioner on 3.8.2019 would not survive.

16. I had occasion to deal the identical matter in re; **Naveen Kapoor Vs. State of U.P. and others** and other connected matter in re; **Om Prakash Pathak and another Vs. State of U.P. and others,** decided on 10.5.2019 reported in **2019 (4) AWC 3236,** wherein decision of the Division Bench of this Court in re; **Santosh Kumar Agnihotri Vs. State of U.P. and others,** reported in **2018 (6) AWC 6125 (LB)** has been relied wherein the Division Bench of this Court was pleased to quash the promotion of the persons, who were however promoted on the basis of merit but without fixing/ determining the bench mark. Para-34 in

re; **Naveen Kapoor** (supra) is reproduced herein below:-

"34. This Hon'ble Court in re: ***Santosh Kumar Agnihotri*** *(supra)* has decided more or less the identical issue. In the said issue, the Division Bench of this Court has interpreted the consequence if the bench mark is not fixed by the Selection Committee, therefore, the relevant paragraphs of the aforesaid judgment are being reproduced here-in-below:-

"7. The first question, which needs adjudication, is as to whether the Departmental Promotion Committee which met on 22.01.2018 for making selection for promotion to the post of Director (Agriculture) has followed the procedure prescribed in the relevant Government Orders, namely, the Government Order dated 22.03.1984 and 20.11.2017 which prescribe the procedure to be followed for considering the candidature of eligible candidates for promotion where the criteria for promotion is merit.

11. For the purposes of prescribing the procedure to be followed by the Departmental Promotion Committee for making recommendations for promotion to the next higher post, the State Government has issued Government Order dated 22.03.1984. The said Government Order prescribes the procedure to be followed by the Departmental Promotion Committee where the criteria is seniority subject to rejection of unfit and also where the criteria is merit. According to sub clause 2 of clause 2 of the said Government Order dated 22.03.1984, where the criteria is merit the Departmental Promotion Committee is required to consider all the officers, who are in the eligibility list. It further provides that the criteria of merit means that the most meritorious officer should be selected from amongst the entire eligibility list. It further provides that where the criteria for selection is merit, the entries of the entire service period should be seen, however, special emphasis should be given to the entries of last ten years. It further provides that, on the basis of character rolls/entries of the eligible officers, the candidates should be categorized in three categories, namely, (i) अति उत्तम, (ii) उत्तम and (iii) अनुपयुक्त It also provides that first of all the vacancy should be filled in the order of seniority from amongst the officers categorized in the category of अति उत्तम and thereafter as per the need, rest of the vacancies, if there are any, shall be filled in from amongst the officers categorized as mŸke and thereafter all the officers categorized as अति उत्तम and उत्तम are to be rearranged in the order of seniority, which shall be the seniority list.

12. The State Government has amended para 2(2) of the aforesaid Government Order dated 22.03.1984 by issuing a subsequent Government Order dated 20.11.2017. According to the said Government Order, in terms of the various orders of Hon'ble Supreme Court and other Courts, the Departmental Promotion Committee is free to evolve its own method and procedure and to apply its mind. Clause 3 of the Government Order dated 20.11.2017 clearly states that the Government Order dated 20.11.2017 has been issued for amending the procedure prescribed in Clause 2(2) of the Government Order dated 22.03.1984 in relation to selections based on the criteria of merit. Clause 3 of the said Government Order further provides that all the officers included in the

eligibility list are to be considered for promotion and evaluation of merit of all the eligible officers is to be made on the basis of their entries in the last ten years, however, if there is any need, the entries of the entire service career can also be seen. It further provides that the Departmental Promotion Committee shall categorize the eligible officers in two categories, namely, उपयुक्त (fit) and अनुपयुक्त (unfit), after determining a bench mark. The Government Order further provides that those officers, who fulfill the bench mark as determined by the Departmental Promotion Committee shall be included in the select panel, on the basis of their being found fit (उपयुक्ता के आधार पर) and thereafter such officers whose names are included in the select panel are to be rearranged in the order of their inter se seniority in the feeding cadre. It also provides that the order of promotion shall be issued in the order of seniority and further that the officers found उपयुक्त (fit) shall not be superseded. The Government Order further states that the officers, who are found अनुपयुक्त (unfit) shall not be included in the select panel.

14. What, thus, we find from a bare perusal of the Government Order dated 20.11.2017 is that once the proposal for making promotion is placed before the Departmental Promotion Committee, the first act which the Departmental Promotion Committee has been mandated by the said Government Order dated 20.11.2017 to perform is to determine/fix/prescribe the bench mark and only thereafter further proceedings are to be drawn by the Departmental Promotion Committee.

15. It has vehemently been argued by the learned counsel for the petitioner that the Departmental Promotion Committee in this case which met on 22.01.2018 did not prescribe/fix/determine the bench mark and proceeded ahead by categorizing the eligible officers into the categories of the officers being fit or unfit. Thus, the submission is that the Departmental Promotion Committee has utterly failed to follow the procedure as mandated by the Government Order dated 20.11.2017.

17. However, it is strange to notice that without determining/fixing/prescribing any bench mark as mandated by the Government Order dated 20.11.2017, the Departmental Promotion Committee categorized the aforesaid four officers into two categories of उपयुक्त (fit) and अनुपयुक्त (unfit). Shri Rajendra Dhar Dwivedi and Shri Sant Ram Kaushal (respondent no.9) were categorized as उपयुक्त (fit) and Shri Santosh Kumar Agnihotri (petitioner) and Shri Prashant Kumar were categorized as अनुपयुक्त (unfit). Thereafter two eligible officers, who were categorized as उपयुक्त (fit) were rearranged in the order of their seniority and name of Shri Rajendra Dhar Dwivedi was put in serial no.1 whereas the name of Shri Sant Ram Kaushal (respondent no.9) was put in at serial no.2.

19. What we notice from a perusal of the minutes of meeting of the Departmental Promotion Committee held on 22.01.2018 is that it clearly did not proceed in accordance with the mandate contained in the Government Order dated 20.11.2017 which required the Departmental Promotion Committee to, first of all, fix/determine/prescribe the bench mark where the criteria for promotion is merit. The Government Order dated 20.11.2017 though is not statutory in nature, however, it has been issued for prescribing the procedure to be

followed by the Departmental Promotion Committee, where the criteria for promotion is merit.

20. It is settled law that the Government Order can always be issued to supplement the statutory service rules and accordingly we have no hesitation to hold that the said Government Order dated 20.11.2017 is binding on every Departmental Promotion Committee which needs to be followed mandatorily in an eventuality where the Departmental Promotion Committee considers the eligible candidates for promotion to the higher posts on the basis of criteria of merit.

21. The first issue which this case poses before us to be determined, is thus decided accordingly and we hold that the Departmental Promotion Committee held on 22.01.2018 has clearly departed from the procedure prescribed in the Government Order dated 20.11.2017 though this Government Order is to be followed mandatorily.

22. The Departmental Promotion Committee in this case has not followed the mandate contained in the Government Order dated 20.11.2017 and thus, the procedure adopted by the Departmental Promotion Committee is vitiated and the recommendations thus made by the Departmental Promotion Committee in its meeting held on 22.01.2018 cannot be held to be lawful.

34. Recommendation of the Departmental Promotion Committee made in its meeting held on 22.01.2018 to the extent it recommends promotion of respondent no.9 is hereby quashed. Consequently, the order dated 28.06.2018, whereby the respondent no.9 has been promoted to the post of Director (Agriculture) is also quashed."

(Emphasis supplied).

17. Since no bench mark was fixed by the DPC while giving recommendations in favour of private respondent on 11.6.2019, therefore, those recommendations being non est in the eyes of law are hereby quashed.

18. In view of the above, a writ in the nature of certiorari is issued quashing the office memo dated 2.8.2019 passed by the State Government promoting opposite party no.4 on the post of Chief Engineer, which is contained in Annexure No.7 to the writ petition and the consequential order dated 3.8.2019 passed by the Housing Commissioner, which is contained in Annexure No.8 to the writ petition.

19. A writ in the nature of mandamus is issued commanding the opposite parties to hold another DPC fixing bench mark strictly in accordance with law and before holding the next DPC, representations of the petitioner, which are pending challenging the down gradation of his entries shall be decided by opposite party no.3 within a period of fifteen days from the date of production of certified copy of this order and after taking such decision on the representation of the petitioner, the competent authority may convene a meeting of DPC with promptness, preferably within a period of fifteen days thereafter and appropriate order shall be passed immediately thereafter.

20. Liberty is given to opposite party no.3 i.e. Housing Commissioner, U.P. Housing and Development Board, Lucknow to permit either the private opposite party i.e. opposite party no.4 to discharge the duties and responsibilities of Chief Engineer or he may pass any

other order for the interregnum period permitting any suitable person to discharge the duties and responsibilities of the Chief Engineer.

21. In the result, the writ petition succeeds and is accordingly allowed.

22. No order as to costs.

(2019)10ILR A 1645

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2019

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ- C No. 59595 of 2007

Prem Singh & Ors. ...Petitioners
Versus
Commissioner Agra Division & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satyendra Kumar Singh, Sri Radhey Shyam Yadav, Sri Suresh Chandra Varma.

Counsel for the Respondents:
C.S.C., Sri V.K. Singh, Sri Ashish Kumar Srivastava.

A. U.P. Zamindari Abolition and Land Reform Act, 1950 - Section 122-B (4-F) - Bhumidhari right - Conferment - Provision not only protect the possession of an agricultural labourer belonging to S.C./S.T. category, but it also confers non-transferable bhumidhari rights - An agricultural labour, otherwise satisfying the requirements of sub-section (4-F) and being eligible, is neither obliged nor can be compelled to obtain a declaration with regard to these rights which are granted and conferred by the statute itself. (Para 8)

Writ Petition allowed (E-1)

Case relied on :-

1. Ramdin Vs Board of Revenue 1994 All LJ 1056.

2. Manorey alias Manohar Vs Board of Revenue (U.P.) & ors. (2003) 5 SCC 521.

(Delivered by Hon'ble Yashwant Varma, J)

1. Heard learned counsel for the petitioners, learned Standing Counsel and Sri Ashish Kumar Srivastava for the fourth respondent. Despite notices having been issued to the fifth respondent on 02 January 2008, none has appeared on his behalf. In any case and bearing in mind the fact that the fifth respondent was only a complainant, the Court finds no justification to defer final disposal of the instant writ petition on that score.

2. The petitioners belonging to the Scheduled Castes were landless labourers in possession of the plots in question. They claimed the benefits conferred by Section 122-B(4-F) of the **U.P. Zamindari Abolition and Land Reforms Act, 1950 ["the Act"]** in terms of which it was asserted that since they were in possession on the relevant date they were entitled to be declared as Bhumidhars with non transferable rights. The provisions of Section 122-B(4-F) is in the following terms:-

"Section 122B (4F):- Notwithstanding anything in the foregoing sub-section, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under section 117 (not being land mentioned in section 132) having occupied it from before May 13, 2007,

and the land so occupied together with land, if any, held by him from before the said date as bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and he shall be admitted as **bhumidhar** with non-transferable rights of that land under section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as **bhumidhar** with non-transferable rights in that land."

(emphasis supplied)

3. It appears that the fifth respondent made a complaint on 22 August 1997 alleging that the petitioners had been extended the benefits of that provision even though they were not entitled. By an ex parte order of 18 November 1998, the SDM cancelled the earlier orders by which the benefits of the aforementioned provision had been extended to the petitioners. While passing the order impugned the SDM placed reliance upon various decisions including that rendered by the Court in **Ramdin v. Board of Revenue1** to observe that the provisions of sub-section (4-F) was only confined to protection of possession and could not be viewed as conferring title on the petitioners. It becomes significant to note that apart from a reproduction of the allegations made by the fifth respondent, no other independent findings have been returned by the SDM in respect of the alleged ineligibility of the petitioners to the benefits of Section 122-B(4-F). Although a report of the Lekhpal is alluded to, it becomes pertinent to note that the said report has neither been brought on the record by the respondents nor has any other evidence been filed to establish that the petitioners were not in possession of the land in question on the relevant date or otherwise ineligible to be extended the benefit of that provision.

4. Aggrieved by the ex parte order passed by the SDM, the petitioners preferred separate revisions before the Commissioner who connected the same and transferred to the Additional Commissioner for adjudication. That revision came to be dismissed with the Additional Commissioner holding that if it be the case of the petitioners that the order of 18 November 1998 was ex parte, the only remedy available to them was to approach the concerned SDM and apply for recall. The Additional Commissioner non suited the petitioners also on the ground that they had failed to place on the record a certified copy of the order passed by the SDM.

5. Dealing firstly with the correctness of the view taken by the Additional Commissioner, this Court is constrained to observe that the same clearly rests on reasons which can neither be countenanced nor accorded judicial approval. Notwithstanding the fact that the original order was rendered ex parte, it was legally permissible for the petitioners to either apply for recall/restoration or to assail the order on merits in revision. In the considered view of this Court, both avenues were consequently open to be pursued by the petitioners. The Additional Commissioner in failing to consider the revision on merits has clearly committed not only a manifest illegality but failed to exercise jurisdiction otherwise conferred without justifiable cause.

6. Insofar as the non filing of a certified copy is concerned, before this

Court it is conceded by learned Standing Counsel that in revenue proceedings taken before statutory authorities, the records of the subordinate courts are always summoned for the purposes of facilitating a final disposal. Viewed in that light, it is evident that since the original record of proceedings taken before the SDM was present, the need for the petitioners to additionally file a certified copy of that order was clearly obviated. In any case the revision could not have been dismissed on this specious ground since the defect, if at all was curable.

7. That then takes the Court to deal with the order passed by the SDM. Quite apart from the fact that the order was rendered ex parte and without notice to the petitioners, this Court finds itself unable to sustain that order on merits either. As noted above, the SDM placing reliance upon the judgment of this Court rendered in **Ramdin** has erroneously proceeded to observe and hold that Section 122-B(4-F) does not vest title on landless SC/ST agricultural labourers. It becomes pertinent to note that the decision in **Ramdin** was specifically noticed by the Supreme Court in **Manorey alias Manohar v. Board of Revenue (U.P.) And Others2** and overruled. The decision in **Manorey** eloquently explains the basic and underlying legislative ethos of Section 122-B(4-F). The Court deems it apposite to extract the following observations as entered by the Supreme Court in **Manorey**:-

"8. First, the endeavour should be to analyze and identify the nature of the right or protection conferred by sub-section (4-F) of Section 122-B. Sub-sections (1) to (3) and the ancillary provisions upto sub-section (4-E) deal, inter alia, with the procedure for eviction of unauthorized occupants of land vested in *Gaon Sabha*. Sub-section (4-F) carves out an exception in favour of an agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe having land below the ceiling of 3.125 acres. Irrespective of the circumstances in which such eligible person occupied the land vested in the *Gaon Sabha* (other than the land mentioned in Section 132), no action to evict him shall be taken and moreover, he shall be deemed to have been admitted as a *bhumidhar* with non-transferable rights over the land, provided he satisfies the conditions specified in the sub-section. According to the findings of the Sub-Divisional Officer as well as the Appellate Authority, the appellant does satisfy the conditions. If so, two legal consequences follow. Such occupant of the land shall not be evicted by taking recourse to sub-sections (1) to (3) of Section 122-B. It means that the occupant of the land who satisfies the conditions under sub-section (4-F) is entitled to safeguard his possession as against the *Gaon Sabha.* The second and more important right which sub-section (4-F) confers on him is that he is endowed with the rights of a *bhumidhar* with non-transferable rights. The deeming provision has been specifically enacted as a measure of agrarian reform, with a thrust on socio-economic justice. The statutorily conferred right of *bhumidhar* with non-transferable rights finds its echo in clause (b) of Section 131. Any person who acquires the rights of *bhumidhar* under or in accordance with the provisions of the Act, is recognized under Section 131 as falling within the class of bhumidhar. The right acquired or accrued under sub-section (4-F) is one such right

that falls within the purview of Section 131(b).

9. Thus, sub-section (4-F) of Section 122-B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of *bhumidhar* on the occupant of the land satisfying the criteria laid down in that sub-section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned Single Judge of the High Court had taken the view in *Ramdin V. Board of Revenue (*followed by the same learned Judge in the instant case) that the bhumidhari rights of the occupant contemplated by sub-section (4-F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-section (4-F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of *bhumidhar*. In other words, the view of the High Court was that a person covered by the beneficial provision contained in sub-section (4-F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-section (4-F) of Section 122-B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as *bhumidhar* with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the sub-division, shall have the right to admit any person as *bhumidhar* with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the *Gaon Sabha*. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-section (4-F) of Section 122-B confers by a statutory fiction the status of *bhumidhar* with non-transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized *bhumidhar* should be as good as a person admitted to bhumidhari rights under Section 195 read with other provisions. In a way, sub-section (4-F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-section. The need to approach the *Gaon Sabha* under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-section (4-F). We find no warrant to constrict the scope of the deeming provision.

10. That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-section (4-F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned Revenue Authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to

do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-section (4-F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of *Gaon Sabha* had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the statutory right of the appellant, is non est in the eye of law and is liable to be ignored."

8. On a consideration of the principles so enunciated, it is manifest that sub-section (4-F) not only protects the possession of an agriculturual labourer belonging to the SC/ST category, it also confers non-transferable bhumidhari rights on eligible occupants. It is thus a provision which not only enables the agricultural labourer belonging to the SC/ST category to protect his possession over the land, but to also claim title over the same by virtue of the provisions made in that section. An agriculturual labourer, otherwise satisfying the requirements of sub-section (4-F) and being eligible, is neither obliged nor can be compelled to obtain a declaration with regard to these rights which are granted and conferred by the statute itself. **Manorey** further commands the revenue authorities to ensure that the revenue records are brought in line and in tune with the rights so conferred in order to give effect to the legislative mandate. The SDM was consequently incorrect in holding that no title stood vested in the petitioners.

9. It would be apposite to reiterate that the SDM also does not allude to any evidence which may have established that the petitioners were not in possession of the land in question on the relevant date or were otherwise ineligible. On an overall conspectus of the aforesaid facts, this Court finds itself unable to sustain the orders impugned.

10. The writ petition is accordingly **allowed.** The impugned orders dated 18 November 1998 and 31 May 2007 are consequently quashed.

(2019)10ILR A 1649

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ- C No. 18094 of 2004

J.K. Cotton Spg. & Wvg. Mills Co. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Ritvik Upadhya, Sri V.K. Upadhyay

Counsel for the Respondents:
C.S.C., Sri P.K. Pandey, Sri Sunita Jhingan

A. Employees State Insurance Act, 1948 - Sick Industrial Companies (Special Provisions) Act, 1985 - S. 32 - Levy of penalty and damages - Provision of the Scheme as sanctioned in terms of

Section 32 of SICA would clearly bind and override all other statutes and instruments mandating to the contrary - Sanctioned scheme restrict liability in respect of ESI due to the principal amount only and penal levies is specifically excluded - It absolves the petitioner from liability towards interest and penalties under the Act. (Para 4 & 8)

Writ Petition allowed (E-1)

Case relied on :-

1. Raheja Universal Vs N.R.C. (2012) 4 SCC 148.

2. J.K. Cotton Weaving & Spinning Mills & anr. Vs U.O.I. 1988 SCR (1) 700.

3. ESI Corp. Vs HMT Ltd. (2008) 3 SCC 35.

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri V.K. Upadhyay, learned Senior Counsel assisted by Sri Ritvik Upadhya in support of this petition. Although, respondents are duly represented, none has appeared on their behalf even when the matter is taken in the revised call.

2. The petition challenges proceedings initiated by the Employees State Insurance Corporation [hereinafter to be referred to as "**the Corporation**"] and seeks quashing of a demand dated 2 April 2004. The Corporation has in terms of the impugned demand called upon the petitioner to discharge liabilities towards dues payable under the **Employees State Insurance Act, 1948** together with penalty and damages. Sri Upadhyay, learned Senior Counsel, has assailed the demand principally on the ground that the liability of the petitioner under the provisions of the aforementioned Act shall stand governed by the provisions made in a Scheme of Rehabilitation sanctioned by the BIFR in respect of the petitioner. Referring to the provisions made in that Scheme insofar as ESI dues are concerned, Sri Upadhyay has drawn the attention of the Court to the relevant clause of the Sanctioned Scheme which provided that the Corporation would accept liquidation of ESI dues over two years without demanding any interest or penalties thereon. In view of that stipulation in the Sanctioned Scheme, Sri Upadhyay contends that the demand insofar as it places a liability of interest and damages is unsustainable.

3. Insofar as the question of principal dues are concerned, there is no dispute before this Court. Sri Upadhyay has stated that the principal dues have already been paid. That only leaves the Court to consider whether the impugned demand insofar as it levies interest and damages is sustainable.

4. Undisputedly, the Sanctioned Scheme restricts the liability of the petitioner in respect of ESI dues to the principal amount only with interest and penal levies being specifically and unambiguously excluded. The provision of the Scheme as sanctioned in terms of Section 32 of **SICA** would clearly bind and override all other statutes and instruments mandating to the contrary. This is manifest from the plain language employed in that provision which reads thus: -

"**S. 32. Effect of the Act on other laws.-** (1) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and the Urban Land (Ceiling and

Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act....."

(emphasis supplied)

5. Section 32, in unambiguous terms statutorily confers overriding authority to schemes sanctioned under SICA notwithstanding anything inconsistent in any other law. The only statutes which stand saved from the position of preeminence conferred to schemes sanctioned under SICA are the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976.

6. While the law on this issue is well settled, the Court deems it apposite to only notice two decisions referred to hereinafter. In **Raheja Universal Vs. NRC1,** the Supreme Court enunciated the legal position as follows: -

"[37] This Court has taken the view in Tata Motors Ltd., (2008) 7 SCC 619 that the Act of 1985 has been enacted to secure the principles specified in Article 359 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. As the Act of 1985 is a special law and on the principle that a special law will prevail over a general law, it is permissible to contend that even if the provisions contained in Section 22(1) read with Section 32 of the Act, giving overriding effect vis-à-vis the other laws, other than the Foreign Exchange Regulation Act, 1973 and the Urban Land Ceiling and Regulation Act, 1976 had not been there, the provisions of the general law like the Companies Act, for regulation, incorporation, winding-up etc. of the companies would have still been overridden to the extent of inconsistency. We have already seen that this Court had, in the case of Jay Engineering, taken the view that the Interest on Delayed Payments to Small Scale and Ancillary Industries Undertaking Act, 1993 shall have to give way for enforcement of the provisions of the Act of 1985. In the case of Tata Davy also, the Court took the view that the State Sales Tax Act would have to be read and construed in comity to the provisions of the Act of 1985 which shall have the overriding effect. In the case of Tata Motors Ltd. v. Pharmaceuticals Product of India Ltd., this Court was concerned with the provisions of mismanagement and oppression contained in Sections 391 and 394 of the Companies Act and whether the Company Court will have the jurisdiction to pass orders in preference to the proceedings pending before the Court under the Act of 1985. The Court while holding the primacy of the Act of 1985 held as under:-

"SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the civil Courts.

What scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company is within the domain of BIFR. Section 26 not only covers orders passed under SICA but also any matter which BIFR is empowered to determine.

23. The jurisdiction of civil court is, thus, barred in respect of any matter for which the appellate authority or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited."

7. A Division Bench of the Court in **J.K. Cotton Weaving & Spinning Mills Vs. Union of India2** was called upon to consider the validity of a demand raised by Excise authorities inconsistent with the provisions made in a Sanctioned Scheme. Dealing with that question the Court held: -

"6. A perusal of the said Scheme would show that as per the terms and conditions of the Rehabilitation Scheme it was provided that the respondent-department would grant exemption to the petitioner-company from payment of interest, penalty etc. and accept payment of excise duty finally payable in pending cases over a period of 2 years from the year in which such amount becomes payable.

7. It was contended that in view of the Scheme and the specific provisions contained in Clause 8.04(d), the impugned demand for Rs.6,89,000/- was absolutely illegal and in violation of the specific terms and conditions of the Rehabilitation Scheme.

...

27. The question that now remains for consideration of this Court is that whether the petitioner is liable for payment of interest and penalty as demanded by the impugned notice dated 17-6-2005.

28. As already noticed in Clause 8.04 (d) of the Rehabilitation Scheme dated 12-11-2002 framed by the BIFR, the petitioner is not liable for payment of interest and penalty. Section 22 of the Act clearly provides that once proceedings have been initiated under the Act and an inquiry under Section 16 is pending or any Scheme referred to under Section 17 is under preparation or consideration or a sanctioned Scheme is under implementation then, notwithstanding anything contained in any other law for the time being in force no proceeding for the winding up or execution or distress or the like against any of the properties of the industrial undertaking company and no proceedings for recovery of money or for enforcement of any security against the company etc. shall be maintainable.

29. Section 32 of the act further provides that the Schemes made under the Act shall have effect notwithstanding anything inconsistent therewith contained any other law except two Acts namely FERA and Urban Land Ceiling Act for the time being in force and Memorandum or Articles of Association of an Industrial Company or in any other instrument having effect by virtue of any other law other than this Act. The Excise Act has not been exempted from the applicability of section 32 of the Act.

...

35. In our opinion, the judgment referred to in the case of *Voltas Ltd*.(supra) was on its own facts and does not help the respondents inasmuch as in the Scheme under consideration before the Apex Court, there was no express waiver from the statutory liability of payment of interest at the rate of 18%. However, in the case before us the provisions of Clause 8.04(d) of the Rehabilitation Scheme contains an express waiver from payment of interest, penalty etc. and to accept payment of excise duty finally payable in pending cases over a period of 2 years, from the

year in which such amount becomes payable.

36. The petitioner having already deposited a sum of Rs.6,89,000/- as 50% part payment for 2004-2005 and having given an undertaking for payment of remaining 50% amount of Rs.689000/- which also was paid on 6-3-2006 (Annexure-SA1 to the supplementary affidavit) the liability towards payment of excise duty had been duly discharged as per the demand notice and the company was not liable for payment of penalty or interest in terms of the specific provisions of the Rehabilitation Scheme."

8. The necessary corollary to the enunciation of the statutory position noticed above would be that the liability of the petitioner insofar as ESI dues are concerned would be governed exclusively by the provisions made in the Sanctioned Scheme in that respect. That Scheme admittedly absolves the petitioner from the liability towards interest and penalties under the Act. That damages are penal in character cannot possibly be doubted in light of the decision of the Supreme Court in **ESI Corp. Vs. HMT Ltd.3** where it was held: -

"16. It is a well-known principle of law that a subordinate legislation must conform to the provisions of the legislative Act. Section 85-B of the Act provides for an enabling provision. It does not envisage mandatory levy of damages. It does not also contemplate computation of quantum of damages in the manner prescribed under the Regulations.

17. The statutory liability of the employer is not in dispute. An employee being required to be compulsorily insured, the employer is bound to make his part of the contribution. An employee is also bound to make his contribution under the Act. But the same does not mean that levy of damages in all situations would be imperative.

18. Section 85-B of the Act uses the words "may recover". Levy of damages thereunder is by way of penalty. The legislature limited the jurisdiction of the authority to levy penalty i.e. not exceeding the amount of arrears. Regulation 31-C of the Regulations, therefore, in our opinion, must be construed keeping in view the language used in the legislative Act and not dehors the same."

9. In light of the legal position noticed above, the Court is of the considered view that the impugned demand insofar as it places a burden of interest and damages upon the petitioners cannot be sustained.

10. The petition is accordingly **allowed.** The impugned demand dated 2 April 2004, insofar as it imposes a liability towards payment of interest and damages upon the petitioner shall stand set aside.

(2019)10ILR A 1653

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ- C No. 4329 of 2019

Manoj Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.S. Chauhan.

Counsel for the Respondents:
C.S.C., Sri Ramesh Chandra Upadhyay.

A. Fair price shop licence - Cancellation - Charges should be clear - If charges is vague then inquiry itself becomes vitiated. (Para 5)

B. Relevancy of charges - Charges not only make the noticee clear about his reply, which he has to give but the notice should also be absolutely clear as to what would be the result of the inquiry if it went against him. (Para 5)

Writ Petition allowed (E-1)

Case relied on :-

1. Anant R. Kulkarni Vs Y.P. Education Society & ors. (2013) 6 SCC 515.

2. Gorkha Security Services Vs Govt. (NCT of Delhi) & ors. (2014) 9 SCC 105.

(Delivered by Hon'ble Siddhartha Varma, J.)

1. Upon a complaint being made by one Sunil Kumar Maurya on the telephone that the petitioner, who was a Fair Price Shop dealer, had in the month of May 2018 not distributed the essential commodities but had sold them out in the open market, an inspection was made by the Supply Inspector on 26.5.2018. Thereafter on 29.5.2018, the petitioner was served with a show-cause notice and a suspension order. The petitioner replied to the show-cause notice on 11.6.2018. However, when the Sub-Divisional Officer, Bansdeeh, District Ballia on 18.8.2018 cancelled the licence of the petitioner to run the Fair Price Shop which was affirmed by the Appellate Authority by its order dated 12.12.2018, the instant writ petition was filed.

2. The contention of learned counsel for the petitioner is that the show-cause notice which was served on the petitioner along with the suspension order did not contain any specific charge. Even though the body of the order indicated that the stock of the petitioner which had to contain 127 bags of wheat and 87 bags of rice, had only 46 bags of wheat and 73 bags of rice but no definite charge was framed. Learned counsel submitted that after the narration of these facts an effort was there to formulate a charge which stated that in the stock of the petitioner 81 bags of wheat were found to be missing. Learned counsel, therefore, submits that the charge appeared to be only with regard to the 81 missing bags of wheat. Learned counsel further submits that despite just one charge, a reply was submitted by the petitioner on 11.6.2018 by which he had stated that in fact there was no bag which was missing from his shop and in fact when the stock of the petitioner's shop was handed over to the shop to which his shop was attached then there was not even a single bag of either wheat or rice which was found to be missing. However, when the order of the Sub-Divisional Officer was passed on 18.8.2018, which ran into nine pages, strangely enough many other charges were looked into including the charge that the card-holders were aggrieved by the distribution which was being made by the petitioner. Learned counsel, therefore, submits that the inquiry itself was vitiated on account of the fact that the charges were vague. He, therefore, relied upon the decisions of the Supreme Court in **Anant R. Kulkarni vs. Y.P. Education Society & Ors., (2013) 6 SCC 515 and in Gorkha Security Services vs. Government (NCT of Delhi) & Ors., (2014) 9 SCC 105** wherein it had been

held that the charge sheet should be very clear with regard to the charges to which a delinquent was required to give a reply. Since learned counsel read-out a certain portion of paragraph 21 of **Gorkha Security Services (supra),** the same is being reproduced hereasunder:

"..... The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. ....."

3. The contention, therefore, of the petitioner was that when the charge was just with regard to the 81 missing bags of wheat then no further charge could have been dealt with while passing the impugned order. Learned counsel for the petitioner further submitted that even the Appellate Authority did not address to the submissions made by the petitioner and, therefore, he prays that the orders impugned be set-aside.

4. Learned Standing Counsel appearing for the State-respondents, however, stated that the charges were so serious that the licence of the petitioner's shop had to be cancelled. He further submits that if the suspension order was perused, it became clear that there were many other charges other than the ones which were enumerated in the order.

5. Having heard learned counsel for the petitioner and the learned Standing Counsel, this Court is of the view that the charges should be very clear. If the charges are vague then the inquiry itself becomes vitiated. Charges should not only make the noticee clear about the reply which he has to give but the noticee should also be absolutely clear as to what would be the result of the inquiry if it went against him. In the instant case, if the suspension/show-cause notice dated 29.5.2018 is perused, it appears that even though stock of both rice and wheat were found to be short, the show-cause notice was only with regard to the missing 81 bags of wheat. Further if the impugned order dated 18.8.2018 passed by the Sub-Divisional Officer is perused, it becomes still further clear that the Sub-Divisional Officer had not confined to the charge which was imposed against the petitioner. The Sub-Divisional Officer had travelled into various other complaints which had probably been there against the petitioner.

6. Under such circumstances, the Court is of the view that when the charge itself was just one in number and that had been replied to by the petitioner then the other charges which could have been gleaned out from the suspension order or from some other record, could not have been taken into account for terminating the licence of the petitioner.

7. In view of the above, the writ petition is, allowed. The order dated 18.8.2018 passed by the Sub-Divisional Officer, Bansdeeh, District Ballia and the order dated 12.12.2018 passed by the Commissioner, Azamgarh Division,

Azamgarh are quashed. A further direction is issued to the State Government that they should advise their officers that when they issue show-cause notices then they should enumerate the charges properly. They should not be merged with the details of the complaints and the inspection report. In this regard the State Government may issue a Government Order to all the concerned officials. A copy of this order may be sent to the Secretary (Food & Civil Supplies), Government of Uttar Pradesh, Lucknow through the Registrar General of this Court.

(2019)10ILR A 1656

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2019

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ- C No. 3835 of 2012

Sunil Singh & Ors. ...Petitioners
Versus
Kashi & Ors. ...Respondents

Counsel for the Petitioners:
S.A. Lari.

Counsel for the Respondents:
C.S.C.

A. Land Revenue Act, 1901 - Section 28 - Correction of map - Necessity of examination of reporting authority - Collector solely relied upon report of Naib Tahsildar, but no recital to the effect that Naib Tahsildar ever appeared and got examined - Mechanism must not only be effective, but also just, fair and objective. (Para 7)

B. Basic rule of procedure - Just, fair and proper procedure - Genuineness of report to be proved - Truly authorities are not the Court of Justice in strict sense of civil court but authorities, who are required to adjudicate any point or issue, it has to apply basic rules of procedure - If a report or an order is placed and relied upon, its genuineness is required to be proved. (Para 8)

C. Rule of Justice - It imbibes within it a mechanism that makes access to Justice not only easy and speedy, but efficacious and authoritatively forceful. (Para 9)

Writ Petition allowed (E-1)

Cases relied on :-

1. Anita Kushwaha Vs Pushp Sudan (2016) 8 SCC 509.

(Delivered by Hon'ble Ajit Kumar, J)

1. List is being revised. Nobody is present on behalf of heirs of respondent no. 1 who have already been brought on record and are represented by one Sri Ram Jatan Yadav, learned Advocate.

2. Learned Standing Counsel is present but he has not filed any counter affidavit on behalf of respondent nos. 2 and 3. Despite time granted for the said purpose, the matter is of the year 2012 and so the Court proceeds to hear and decide the writ petition.

3. Heard learned counsel for the petitioners and learned Standing Counsel.

4. The present writ petition arises out of proceeding under Section 28 of the U.P. Land Revenue Act, 1901 wherein, the application of the deceased respondent no. 1 for correction of map came to be allowed on the basis of report submitted

by the Nayab Tehsildar, Sadar Mau dated 24th February, 2003. The petitioners' revision against the order passed by the Collector has also been dismissed.

5. The sole ground taken in the present petition is that Collector, Mau fell in serious error of law in accepting the report of the Nayab Tehsildar as it is without examining the Nayab Tehsilar who had prepared the report on the spot. The contention is that until the report is duly proved by the person or the authority submitting report the same cannot be led in evidence nor, the authority adjudicating the issue can attribute it with any evidenciary value to be accepted as it is more especially, when the contesting party has raised objection to the report concerned. It is further contended that specific plea was taken as ground no. 5 in the memo of revision before Commissioner that report was not proved and yet Collector proceeded to rely upon the report against which objection was filed by the petitioner and, therefor, the argument is that orders passed by the Collector as well as the Additional Commissioner cannot be sustained in law and deserve to be set aside.

6. *Per contra,* the argument advanced by learned Standing Counsel is that the orders are justified as no ground seems to be forthcoming that the area assigned to the contesting respondent no. 1 now represented by his heirs became larger than the area prescribed or provided for in the Khatauni. He further submits that these are summary proceedings and the Collector does not act as a Court of law so as to bind him by the intricacies of the Indian Evidence Act, 1872. He submits that it is still open for the parties to litigate the matter in common law. He submitted that nobody was found to be in unauthorized possession or excessive area than the area given in the relevant annual register/ Khatauni and thus, he defended the order impugned in the present writ petition for the reasons assigned therein.

7. Having heard learned counsel for the parties, their respective arguments against and for the orders passed by the authorities and have perused the records and having carefully examined the orders passed by the Collector and the Commissioner, I find that the Collector solely relied upon report of Nayab Tehsildar Sadar Mau while allowing the application of the contesting respondent no. 1 for correction of map. The observations that have come in the order passed by the Collector are indicative of the fact that he had himself examined the report and there is no recital to the effect that Nayab Tehsildar concerned had, at any point of time, appeared before the Collector and got himself examine. There is no statement recorded of the Nayab Tehsildar concerned. The Collector has referred to the objection raised by the petitioner but while dealing with objection , he held the report to be just and proper.

8. This Court fails to understand as to when proper objection has been raised to the report, what was the mechanism available to Collector to accept the report as it is . It is admitted fact that Collector did not visit the spot and it is equally admitted fact that the report presented before Collector by Nayab Tehsildar, was in fact not prepared by the Nayab Tehsildar was in fact not prepared in the presence of Collector and therefore, the Collector would not have been party to any such report which is based on hand

sketched map. Justice calls for a finding based on appreciation of a document either admitted one to the contesting parties or affirmed by the authority rejecting any objection to it on the basis of statement recorded of such authority or person who had prepared the argument. None of the above to ingredients are found in the order to sustain it. It is true that the authorities are the not the Court of justice in strict sense of civil court but authority who is required to adjudicate any point or issue it has to apply basic rules of procedure. While rule of evidence law may not be strictly adhered to in such matters but basic principle of law would certainly be applied that if a report or an order is placed its genuineness is required to be proved.

9. The rule of justice imbibes within it a mechanism that makes access to justice not only easy and speedy but efficacious and authoritatively forceful. This is for the above reason why adjudicattory mechanism is always required to be well guarded by rules of procedure begetting just and fair play.

10. The Apex Court in the case of **Anita Kushwaha v. Pushp Sudan (2016) 8 SCC 509** held: *In order that the right of a citizen to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach; so also the procedure which court, tribunal or authority may adopt for adjudication, must in itself by just and fair and in keeping with the well recognized principles of natural justice.*

11. The Additional Commissioner has simply concurred with findings recorded by the Collector without adverting to the points so raised and, therefore, in my opinion the Commissioner also manifestly erred in rejecting the revision petition . For ignoring the prayer for consideration of the documents and legal plea taken in the memo of revision , such order cannot be sustained in law.

10. In view of above, the order passed by the Collector dated 25.11.2008 and of the Commissioner dated 12th March, 2009, Annexures -6 and 7 to the writ petition respectively are hereby quashed. The matter is remitted to the Collector to consider objection afresh regrading report submitted by Nayab Tehsildar on 24th February, 2003. The Collector shall proceed to hear the matter and decide afresh in the light of observations made hereinabove in this order. Entire exercise shall be carried out by the concerned Collector within period of three months from the date of production of certified copy of this order.

11. The writ petition is allowed with the aforesaid observations and directions.

(2019)10ILR A 1658

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2019

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ- C No. 25710 of 2019

Bahadur Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Prem Sagar Verma, Sri Madan Mohan, Sri H.N. Singh.

Counsel for the Respondents:
C.S.C., Sri Amit Kumar Singh, Sri Ashish Kumar Srivastava, Sri Rahul Mishra.

A. U. P. Zamindari Abolition and Land Reform Act, 1950 - Section 123C - Allotment - Order of preference - It is clearly different from ambit of Rules 115L & 115M of U.P. Zamindari Abolition and Land Reform Rules - Provision of S. 123C (7) has no application to proceeding under Rule 115 P - Impugned orders set aside. (Para 11 & 12)

Held :-

11. The Board of Revenue has wrongly held the revision filed by the petitioner to be not maintainable. It is not in dispute and is conceded by counsel for respondent no. 5 that the proceedings wherefrom the writ petition arises under Rule 115 P. It is also correct that the order of preference provided for allotment under Section 123C of the U.P.Z.A. & L.R. and under Rule 115 L and M are clearly different. An allotment made under B/122C can be cancelled, exercising powers conferred by Section 122C(4) which an allotment made under Rule 115L or 115M can be cancelled on a complaint under Rule 115P.

Writ Petition allowed (E-1)

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Shri H.N. Singh, learned Senior Advocate for the petitioners and Shri Amit Kumar, learned counsel for respondent no. 5.

2. The instant writ petition arises out of proceedings under Rule 115P instituted by the petitioners for cancellation of an allotment made by the Gaon Sabha in favour of the respondent no. 5 for the purposes of a cottage industry.

3. The resolution of the Gaon Sabha in this regard was approved by the S.D.M. on 23.05.1989.

4. On the cancellation application under Rule 115P being filed by the petitioners, the A.D.M. vide order 29.10.2003 cancelled the allotment. Against this order respondent no. 5 filed review which was dismissed on 09.01.2004. A Second review application was filed on 29.11.2004, which was allowed ex-parte on 27.12.2004. Thereafter, the complaint under Rule 115P has been rejected on 28.01.2005.

5. Against the order rejecting the complaint under Section 115P, the petitioners preferred a revision. The revision was allowed vide order dated 31.08.2006, the order passed on 28.01.2005 was set aside and the original order passed by the A.D.M. on 29.10.2003, cancelling the allotment, was affirmed.

6. Against this order, the petitioner preferred a revision before the Board of Revenue which has been dismissed holding it to be not maintainable by referring to Sub section 7 of Section 122C of the U.P.Z.A. & L.R. Act.

7. The contention of Shri H.N. Singh, learned Senior Advocate is that proceedings wherefrom the proceedings arises under Rule 115P of the U.P.Z.A. & L.R. Rules and that proceedings under Section 122 C and Rule under 115 P are clearly different. Even the order of preference provided for allotments under Section 123C and Rules 115 L and M are clearly different.

8. Therefore, the Board of Revenue has committed manifest illegality in

holding the revision to be not maintainable. No finality could be attached to an order of the trial court in proceedings under Section 115P, by referring to or taking shelter of sub section 7 of Section 123 C of the Act.

9. Counsel appearing for the respondent no. 5 has tried to support the impugned order by submitting that the allotment was in accordance with law and that the initial order of cancellation of the allotment obtained in the year 2003 had been so obtained by misrepresentation of facts. The High Court therefore, in exercise of its equity jurisdiction should not interfere in the matter.

10. I have considered the submission made by counsel for the parties and perused the record.

11. I find merit in the submission of counsel for the petitioners that the Board of Revenue has wrongly held the revision filed by the petitioner to be not maintainable. It is not in dispute and is conceded by counsel for respondent no. 5 that the proceedings wherefrom the writ petition arises under Rule 115 P. It is also correct that the order of preference provided for allotment under Section 123C of the U.P.Z.A. & L.R. and under Rule 115 L and M are clearly different. An allotment made under B/122C can be cancelled, exercising powers conferred by Section 122C(4) which an allotment made under Rule 115L or 115M can be cancelled on a complaint under Rule 115P.

12. Under the circumstances, therefore the two proceedings cannot be equated to each other and for this reason alone, sub section 7 of section 123C has no application to proceedings under Rule 115 P. For this reason alone, the impugned order cannot be sustained and is hereby set aside.

13. The matter is remanded back to the Board of Revenue to decide the revision on its merits after hearing all concerned.

14. It is also provided that this exercise be completed expeditiously, preferably within a period of three months from the date a certified copy of this order is filed before the Board of Revenue.

15. No costs.

(2019)10ILR A 1660

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2019

BEFORE

THE HON'BLE SHASHI KANT GUPTA, J.
HON'BLE PANKAJ BHATIA, J.

Writ- C No. 1438 of 2019

Shanker Shahi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.R. Tiwari

Counsel for the Respondents:
C.S.C., Sri Devi Prasad Mishra, Sri Arun Kumar

A. Constitution of India - Articles 12 and 226 - Maintainability of Writ - Writ petition against private person, who is not the State within meaning of Article 12, is not maintainable. (Para 11)

B. Urban Planning & Development Act, 1973 - Section 33 - Scope of Writ - No

statutory obligation caste upon authority to enforce UP Apartment (Promotion of Construction, Ownership & Maintenance) Act - Relief as claimed in representation cannot be granted by the authority. (Para 9 & 10)

Writ Petition dismissed (E-1)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The petitioner has filed the present petition seeking the following reliefs:

"(1) Issue a writ, order or direction in the nature of mandamus commanding the respondent No. 3 to consider and decide the representation/application submitted by petitioner dated 15.12.2008 (Annexure No. 6 to this writ petition), within a time framed period as may be deemed by this Hon'ble Court.

(2) Issue another writ, order or direction in the nature of mandamus restraining the authority from allotting the agreed Flat No. 401, 4th Floor, Block-C, Tulsiani Square, Phase-II, Civil Lines, Allahabad, to anybody else during pendency of the claim before the respondent No. 3."

2. The facts, in brief, are that the petitioner entered into an agreement to sell with respondent no. 4 on 20.6.2013 with regard to Flat No. 401, 4th Floor, Block-C, Tulsiani Square, Phase-II, Civil Lines, Allahabad and the petitioner paid a sum of Rs. 32,55,647/- and the balance amount of Rs. 37,44,353/- was to be paid by the petitioner on completion of the flat in question. It is alleged that the respondent no. 4-company has not completed the construction work of the flat within the stipulated time and despite the work not being completed, the respondent-4-company issued a letter dated 30.8.2018 to the Chief Manager, Bank of Baroda for remitting of the balance amount of Rs. 37,00,000/-. The petitioner has made allegations that the fourth respondent is not taking steps for completion of the construction and as such the petitioner made a representation before the respondent no. 3 who has not taken any step thereupon.

3. Learned counsel for the petitioner has argued that statutory duties are cast upon respondent no. 3 under section 15(9) of the Uttar Pradesh Urban Planning and Development Act, 1973 (hereinafter referred to as the 'Act'). Reliance is also placed upon Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 to stress that in terms of the statutory duty cast upon the respondent no. 3, the respondent no. 3 is bound to pass an order and take steps for the reliefs as claimed by the petitioner in its representation dated 15.12.2018. On 14.2.2019, this Court while entertaining the petition had directed the petitioner to serve the respondent no. 4. Supplementary affidavit has been filed stating that the services were effected on the respondent no. 4, however, respondent no. 4 has not put in appearance and no counter affidavit was filed. The respondent no. 3 has filed a short counter affidavit stating that the respondent no. 3 is not empowered to enforce the contractual obligations as prayed by the petitioner. It has been further highlighted that the petitioner should approach the authority under the Real Estate Regulatory Authority Act (in short 'RERA' Act) for redressal of his grievance and have thus argued that the writ petition is not maintainable and is liable to be dismissed.

4. We had confronted with the counsel for the petitioner as to how the writ petition, which is essentially seeking relief against a private respondent, is maintainable.

5. The counsel for the petitioner has vehemently argued that in terms of the provisions of Section 33 of the Urban Planning and Development Act, 1973, the respondent no. 3 is empowered to take action for the relief as claimed by the petitioner. We have perused the representation dated 15.12.2018 (Annexure-6 to the writ petition) given by the petitioner, as prayed, is as under:

"अतः निवेदन करना है कि अपने स्तर से मामले की जॉच कराकर उपरोक्त "मेसर्स तुल्सीयानी डवलपर्स" से प्रार्थी को प्लैट सं० 401, चौथी मंजिल, ब्लाक-सी तुल्सीयानी स्कवैर, द्वितीय फेज, का कब्जा अध्यासन बजरिये पंजीकृत बैनामा दिलाये जाने तथा वर्ष 2013 से प्रार्थी द्वारा प्रतिपक्षी के समक्ष जमा की गयी धनराशी पर 25 प्रतिशत/प्रतिवर्ष, की दर से ब्याज दिलाये जाने की कृपा करें। प्रार्थी समस्त बकाया देयकों का भुगतान दिनां क20.06.2013 को किये गये इकरारनामें की शर्तें के अनुसार प्रतिपक्षी ब्यूल्डर को करने को सदैव तत्पर है और रहेगा। पूर्व में दिये गये प्रार्थना पत्रों की प्रतिलिपि संलग्न है।"

6. Considering the request made by the petitioner before the respondent no. 3 as well as the reliefs claimed in the present writ petition, the first question to be decided is whether the writ petition would be maintainable for the reliefs claimed before this Court. Respondent no. 4, admittedly, is a private builder, under the U.P. Urban Planning and Development Act, 1973, it is obligatory upon the respondent no. 4 to carry out the development of the land after seeking permission of the development authority under Sections 14 and 15 of the Act. The Development Authority in pursuance of the powers conferred under the Act is empowered to see that the development is carried out in terms of the permission given and the plan sanctioned under section 15 of the U.P. Urban Planning and Development Act, 1973.

7. Learned counsel for the petitioner has stressed on Section 33 of the Act confers the powers. Section 33 of the Act is quoted here-in-below:

"33. Power of the Authority to provide amenity or carry out development at cost of owner in the event of his default and the levy cess In certain cases.-

(1) If the Authority, after holding a local inquiry or upon report from any of its officers or other information in its possession, is satisfied that any amenity in relation to any land in a development area has not been provided in relation to that land which, in the opinion of the Authority, ought to have been or ought to be provided, or that any development of the land for which permission approval or sanction had been obtained under this Act or under any law, in force before the coming into force of this Act has not been carried out, it may, after affording the owner of the land or the person providing or. responsible for providing the amenity a reasonable opportunity to show cause, by order require him to provide the amenity or carry out the development within such time as may be specified in the order.

(2) If any amenity is not provided or any such development is carried out within the time specified in the order, then the Authority may itself

provide the amenity or carry out the development or have provided or carried out through such agency as it deems fit:

Provided that before taking any action under this sub-section, the Authority shall afford a reasonable opportunity to the owner of the land or to the person providing or responsible for providing the, amenity to show cause as to why such action should not be taken.

(3) All expenses incurred by the Authority or the agency employed it in providing the amenity or carrying out the development together with interest at such rate as the State Government may by order fix from, the date when a demand for the expenses is made until payment may be recovered by the Authority from the owner or the person providing or responsible for providing the amenity as arrears of land revenue, and no suit shall lie in the Civil Court for recovery of such expenses.

(4) Notwithstanding anything contained in the foregoing sub-section where the Authority on the written representation by so many of the owners of any land in a development area as represent not less than one and half of the area,of that land is satisfied that any amenity in relation to such land has not been provided, which in the opinion of the Authority ought to be provided, or that any development of that land for which permission, approval or sanction had been obtained under this Act or under any law in force before the 2[commencement of this Act] has not been carried out, it may itself provide the amenity or carry out the development or have it provided or carried out such agency as it deems fit, and recover the expenses by levy of cess from all the owners of the said land :

Provided that if the owners making the said representation contend that the amenity had been agreed to be provided or the development had been agreed to be carried out by a coloniser or co-operative housing society through or from whom the land was acquired by them, they shall file with the Authority a copy of such agreement, or of the deed of transfer or of the bye-laws of the society incorporating such agreement, and no action shall be taken by the Authority under this sub-section unless notice has been given to the coloniser of the society, as the case may be, to show cause why such action should not be taken:

Provided further that where the Authority is satisfied that the coloniser or the society has become defunct or is not traceable, no notice under the last preceding proviso need be issued.

1[(4-A) Where the authority provides any amenity in an area developed by it the authority shall, till the responsibility for maintenance is assumed by the local authority as provided in Section 34, be entitled to recover, in the manner prescribed, from the owner of land or building, such charges therefor as may be fixed by the State Government, by a notified order, having regard to the expenses incurred for maintaining and continuing to provide such amenity.]

(5) The cess referred to in Sub-section (4) shall be equivalent to the expenses incurred by the Authority or the agency employed by it in providing the amenity or carrying out the development, together with interest at such rate as the State Government may by order fix, from the date of completion of the work until payment, and shall be assessed land levied on all the owners of the land in proportion to the respective areas of land owned by them.

(6) The said cess shall be payable in such number of installments,

and each installment shall be payable at such time and in such manner, as the Authority may fix, any arrear of cess shall be recoverable as arrears be land revenue, and no suit shall lie in the Civil Court for recovery thereof.

The expenses incurred by the Authority or the agency employed by it under this section shall be certified by the Authority; and such certificate as also the assessment of the cess, if any under Sub-section (5) shall be final.

If under any agreement between the owners of the land and the coloniser or the society referred to in Sub-section (4) the responsibility for providing the amenity or carrying out the development rested with such coloniser or society, the cess Payable under the sub-section by the owners shall be recoverable by them from the coloniser or the society, as the case may be."

8. A bare perusal of the Section 33 makes it clear that the power is conferred in relation to amenities which are to be provided with regard to any land in a development area which are provided for in the sanctioned map but not undertaken, in such an eventuality, the Authority under the Act is empowered to ensure that the amenities as sanctioned in the map but not provided by the person responsible for doing so can be compelled to provide the said amenities or in default the Authority itself is empowered to carry out to provide such amenity after giving an opportunity of hearing to the owner of the land in question. The reliefs claimed by the petitioner in his representation are that the developer be directed to give the possession of the flat in question by executing the requisite deeds and for refund of the money deposited by the petitioner along with interest at the rate of 25% even in the present writ petition. The relief claimed relates to Flat No. 401.

9. We are afraid that the reliefs claimed by the petitioner in the representation as well as before this Court do not fall within the scope of powers conferred under Section 33 of the Act. Learned counsel for the petitioner has then relied upon the provision of Section 7 of the Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010. Statement of objects and reasons of the Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act made it clear that the said Act was framed to provide ownership of an individual apartment in a building and of undivided interest in the common areas and facilities appurtenant to such apartment and to make such apartment heritable and transferable Section 7 of the said Act clearly provides that the individual apartment shall be heritable and transferable together with the undivided interest in the common areas and facilities appurtenant to such apartment. The said Act also provides for the rights and obligations of the apartment owners as well as the duties and liabilities of the promoters. No statutory obligation is cast upon the respondent no. 3 under the said Act for enforcing the provision of Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act.

10. We have perused the Act and see nothing which casts statutory duty on the respondent no. 3 either under the RERA Act or the U.P. Urban Planning & Development Act for grant of relief as claimed by the petitioner in his

representation before the respondent no. 3.

11. The writ petition is an attempt to settle a private dispute with the respondent no. 4 under Article 226 of the Constitution of India and the averments made in the writ petition as well as the argument are nothing but a disguised attempt to rope the respondent no. 3 for settlement of a private dispute with the respondent no. 4. It is well settled that a writ petition is not maintainable against a private respondent. The relief claimed in the petition as well as before the respondent no. 3 is essentially a private dispute with the respondent no. 4 who is not the State within the meaning of Article 12. Thus, the writ petition is not maintainable for the reliefs claimed and is, accordingly, dismissed.

12. The petitioner may avail of such remedy as may be available to him before any other adjudicatory forum.

13. The petition is dismissed.

(2019)10ILR A 1665

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 60572 of 2011

M/s Triveni Engineering & Industries Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh, Sri Diptiman Singh.

Counsel for the Respondents:
C.S.C., Sri Anoop Trivedi, Sri Ram Prakash.

A. Labour law - Sugar Factories Standing Order notified under Section 3 (b) of the U.P. Industrial Disputes Act, 1947 - Clause K - Claim of Re-employment - To claim Re-employment as a seasonal workman the factum of having worked for whole of second half of last preceding season is necessary. (Para 36)

B. Labour law - Sugar Factories Standing Order - Clause A5 - Meaning of expression "season" - Expression "season" means the period commencing from the date when the crushing commences till the date when the crushing ends. (Para 14)

Held –

14. ... The conditions of service of workmen engaged in the petitioner's sugar unit are governed in terms of the Sugar Factories Standing Orders notified under Section 3 (b) of the U.P. Industrial Disputes Act, 1947. Clause A5 of the Sugar Factories Standing Orders defines the expression "season" as meaning the period commencing from the date when the crushing commences till the date when the crushing ends. The classification of workmen is provided for under Clause B which includes seasonal workmen as one of its categories and the expression "seasonal workman" has been defined under Clause B (II).

C. Rule of Evidence - Burden of proof - It is the legal obligation on a party to prove allegation made by him - Principle is associated with maxim '*Semper necessitas probandi incumbit ei qui agit*' which means the burden of proof is on the claimant - Held, Burden of proof is clearly on the workman to establish his entitlement. (Para 32 & 39)

Held :-
39. The burden of proof in this regard is clearly on the workman in order to establish

his entitlement to be reengaged during the succeeding crushing season. In the present case no evidence having been led by the respondent workman to discharge the burden of proof in this regard, the finding returned by the Labour Court cannot be supported.

D. Rule of Evidence - Distinction between Burden of proof and Onus of proof - Burden of proof lies upon person who has to prove a fact and it never shifts, however shifting of onus of proof is a continuous process. (Para 33)

Writ Petition allowed (E-1)

Case relied on :-

1. Range Forest Officer Vs S.T. Hadimani (2002) 3 SCC 25.

2. Raj. St. Ganganagar Sugar Mills Ltd. Vs St. of Raj. & ors. (2004) 8 SCC 161.

3. Municipal Corp. Faridabad Vs Siri Niwas (2004) 8 SCC 195.

4. M.P. Electricity Board Vs Hariram (2004) 8 SCC 246.

5. Manager, R.B.I. Bangalore Vs S. Mani & ors. (2005) 5 SCC 100.

6. Surendranagar District Panchayat Vs Dahyabhai Amarsingh (2005) 8 SCC 750.

7. R.M. Yellatti Vs Assistant Executive Engineer (2006) 1 SCC 106.

8. Ranip Nagar Palika Vs Babuji Gabhaji Thakore & ors. (2007) 13 SCC 343.

9. Sub Divisional Engineer Irrigation Project Yavatmal Vs Sarant Marotrao Gurnule 2009 (120) FLR 114.

10. Haridwar Vs Smt. Kulwant 2013 (6) ADJ 485.

11. Rangammal Vs Kuppuswami & ors. (2011) 12 SCC 220.

12. A. Raghavamma & ors. Vs A. Chenchamma & ors. AIR 1964 SC 136.

13. Batala Cooperative Sugar Mills Ltd. Vs Sowaran Singh (2005) 8 SCC 481.

14. M/s Triveni Engineering and Industries Ltd. Vs St. of U.P. & ors. (Writ Petition No. 60160 of 2005, decided on 4.3.2008).

15. U.P. St. Sugar Corp. Ltd. Vs Niraj Kumar & ors. (2009) 14 SCC 712.

16. Kisan Sahakari Chini Mills. Ltd. & ors. Vs Awadesh Singh & ors. 1993 (67) FLR 602.

Cases referred:-

1. Morinda Cooperative Sugar Mills Ltd. Vs Ram Kishan & ors. (1995) 5 SCC 653

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Diptiman Singh, learned counsel for the petitioner and Sri Ram Prakash Pandey, learned counsel appearing for the respondent no. 3.

2. The present petition seeks to challenge the award of the Labour Court U.P. Saharanpur dated 30.3.2011 passed in Adjudication Case No. 14 of 2006 in the matter of M/s Triveni Engineering and Industries Limited (Sugar Unit) Khatauli and Sant Ram in terms of which the Labour Court has granted the relief of reinstatement to the respondent-workman on the post of Seasonal Weighment Clerk with continuity of service from the season 2004-05 onwards with full back wages and consequential reliefs.

3. Briefly stated the facts of the case are as follows :-

4. Upon an industrial dispute having been raised by the respondent no. 3-workman, the State Government, on 31.12.2005, made a reference under Section 4-K of the U.P. Industrial Disputes Act, 1947 (in short 'the Act') which was registered as Adjudication

Case No. 14 of 2006 by the Labour Court U.P. Saharanpur. The question which was referred for adjudication is as follows :-

"क्या सेवायोजक द्वारा अपने कर्मचारी श्री संतराम पुत्र श्री कालीचरण, सीजनल कर्मचारी की सेवायें सीजन वर्ष २००४-०५ के प्रारम्भ से समाप्त किया जाना उचित एवं वैधानिक है। यदि नहीं तो सम्बंधित कर्मचारी क्या हितलाभ/ अनुतोष पाने का अधिकारी है एवं अन्य किस विवरण सहित?"

5. In support of his case, the respondent no. 3-workman filed his written statement on 25.5.2006 claiming that he had been appointed as Seasonal Weighment Clerk in the petitioner establishment during the crushing season 1999-2000. He claimed that he had been called for work by written intimation sent by post by the petitioner establishment upto the season 2003-2004; however he was denied work from the season 2004-2005.

6. The petitioner also filed his written statement on the same date stating therein that the respondent-workman had never been engaged by the petitioner establishment in any capacity during any crushing season. An alternative plea was also taken that the respondent-workman may have been engaged by a registered contractor namely M/s Pilania Security and Allied Services, Ghaziabad as per the terms of the Contract Labour (Regulation & Abolition) Act, 1970. The petitioner pleaded lack of master-servant relationship between the petitioner establishment and respondent no. 3.

7. Rejoinder statements were filed by both the respondent-workman and the petitioner reiterating their assertions made in the written statements. No documentary evidence was filed by the respondent-workman in support of his claim.

8. The respondent-workman appeared as a witness and recorded his statement before the Labour Court on 10.7.2008 and 26.3.2009. In his oral testimony it was stated by him that he had been called for work from the season 1999-2000 upto the season 2003-2004 and from the season 2004-2005 he was not called for work. In his cross-examination it was stated that he had not retained copies of the forms which had been filled by him when he had been called for the seasonal engagement.

9. On behalf of the petitioner establishment, the Time Keeper, appeared before the Labour Court and in his oral testimony it was stated by him that the respondent-workman had never worked for the petitioner-establishment as a seasonal employee. It was further stated by him that in support of the aforesaid assertion he had brought with him the original records pertaining to the payments made by the petitioner-establishment during the season 1999-2000 and thereafter from 2002-2004, and he had also brought with him the pay register containing the details of payment of the retaining allowance. The employer's witness also proved the documents (Ex.1) which had been filed by the petitioner establishment along with the list of documents (List 11-B1) containing the details of the workers engaged by M/s Pilania Secruity and Allied Services Private Ltd. which included the name of the respondent-workman Sant Ram at serial no. 54.

10. Contention of the counsel for the petitioner is that the respondent-workman

did not adduce any evidence nor did he discharge the burden to prove the existence of master- servant relationship with the petitioner establishment. On the contrary the petitioner establishment had adduced documentary evidence in the form of pay register, attendance register and also documents of the registered contractor M/s Pilania Secruity and Allied Services Private Ltd. to establish the non-existence of master-servant relationship between the petitioner establishment and the respondent-workman. It is submitted that from the documentary and oral evidence adduced by the petitioner establishment it was proved that the respondent-workman was never engaged by the petitioner in any capacity during any season. It was further submitted that the burden of proving the master-servant relationship was on the workman which he failed to discharge and that the burden of proof could not have been placed on the petitioner establishment in this regard. It is stated that the petitioner is a sugar manufacturing unit engaged in manufacture of crystal sugar through vacuum pan process and the conditions of service of its workmen are governed in terms of the *'Standing Orders Covering the Conditions of Employment of Workmen in Vacuum Pan Sugar Factories in Uttar Pradesh'* (hereinafter referred to as 'the Sugar Factories Standing Orders') which have been notified under Section 3(b) of the U.P. Industrial Disputes Act, 1947. It is stated that the respondent-workman neither pleaded nor adduced any evidence to eastablish that he had ever become entitled to payment of retaining allowance as per the terms of *'U.P. Payment of Retaining Allowances To Unskilled Seasonal Workmen of Sugar Factories Order, 1972'*.

11. Reliance is placed upon the judgments in the case of ***Batala Cooperative Sugar Mills Ltd. Vs. Sowaran Singh1, Morinda Cooperative Sugar Mills Ltd. Vs. Ram Kishan and others2, and U.P. State Sugar Corporation Ltd. Vs. Niraj Kumar and others3.***

12. Counsel appearing for the respondent-workman has tried to support the award of the Labour Court by asserting that the respondent had worked from the crushing season 1999-2000 upto the season 2003-2004 and he was illegally not called for work for the season 2004-2005. It is submitted that since the relevant documents pertaining to his working in the seasonal establishment were not available with him and the said documents having not been produced by the petitioner-establishment the Labour Court has rightly drawn an adverse inference and made the award in favour of the workman.

13. Heard learned counsel for the parties and perused the record.

14. The records of the case indicate that the petitioner is a sugar manufacturing unit of M/s Triveni Engineering and Industries Ltd., Khatauli, Saharanpur (a company incorporated under the Companies Act, 1956). The Sugar Unit is situate at Khatauli, Saharanpur and is engaged in the manufacture of crystal sugar through vaccum pan process. The conditions of service of workmen engaged in the petitioner's sugar unit are governed in terms of the Sugar Factories Standing Orders notified under Section 3 (b) of the U.P. Industrial Disputes Act, 1947. Clause A-5 of the Sugar Factories Standing Orders defines the expression "season" as meaning the period

commencing from the date when the crushing commences till the date when the crushing ends. The classification of workmen is provided for under Clause-B which includes seasonal workmen as one of its categories and the expression "seasonal workman" has been defined under Clause B (II).

15. For ease of reference the relevant provisions of the aforementioned Sugar Factories Standing Orders are being extracted below :-

"5. "Season" means the period commencing from the date when the crushing commences till the date when crushing ends. Provided that for these departments which are not in operation when crushing begins and which continue in operation after crushing ends, the "season" so far as it affects the workmen in those departments, shall commence with the date the department commences operation and shall end when the department ceases to be operated.

xxxxxx

(II) A "seasonal workman" is one who is engaged only for the crushing season:

Provided that if he is retainer, he shall be liable to be called on duty at any time in the off-season and if he refuse to join or does not join, he shall lose his lien as well as his retaining allowance. However, if he submits a satisfactory explanation of his not joining duty, he shall only lose his retaining allowance for the period of his absence.

xxxxxx

2 (c)(ii) Every seasonal workman will be given a ticket as in Form "E".

xxxxxx

K. Special conditions governing employment of seasonal workmen-

1. A seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half of the last preceding season will be employed by the factory in the current season.

Explanation - Unauthorised absence during the second half of the last preceding season of a workman has not been validly dismissed under these Standing Orders and of a workman who has been re- employed by the management in the current season, shall be deemed to have been condoned by the management."

16. Clause B-2 (c) (ii) of the Sugar Factories Standing Orders provides that every seasonal workman is to be given a ticket in Form-E. The payment of retaining allowance including the eligibility of payment of the said allowance is provided for under the 'U.P. Payment of Retaining Allowances *To Unskilled Seasonal Workmen of Sugar Factories Order, 1972'.*

17. In the case at hand, in order to answer the reference with regard to the claim raised by the workman in respect of the termination of his services as a seasonal workman from the commencement of the season 2004-2005, the Labour Court framed an issue with regard to the existence of master-servant relationship between the petitioner establishment and the workman. In support of his claim with regard to his working as 'Seasonal Taul Lipik' from the crushing season 1999-2000 upto the season 2003-2004 the workman apart from the assertions made in his written

statement did not produce any documentary evidence to support his case. In his oral statement the respondent-workman specifically admitted to having no documentary evidence to support the claim of his working in a seasonal capacity with the petitioner establishment.

18. On behalf of the petitioner the Time Keeper of the Sugar Unit appeared as the employer's witness and categorically asserted that the respondent-workman had never worked in any capacity with the petitioner establishment and to support the said assertion he had brought with him the original records in the form of pay register and retaining allowanceregister for the period from crushing season 1999-2000 upto the season 2003-04. The said witness also proved the documents (Ex.1) which had been filed along with list of documents (List 11-B1) which demonstrated that the name of the respondent-workman found mention in the list of workers engaged by the contractor M/s Pilania Security and Allied Services, Private Ltd. The monthly statement of provident fund contribution pertaining to the aforementioned contractor for the month of March 2004 showing the name of respondent workman was also filed by the petitioner establishment along with its list of documents in order to prove that the respondent was working with the said contractor.

19. The claim raised by the respondent-workman with regard to the termination of his engagement from the season 2004-2005 rested upon the claim of his continuous engagement as a seasonal workman from the season 1999-2000 to the season 2003-04 and the burden of proof in this regard was clearly on the workman. In the present case admittedly the respondent-workman did not adduce any documentary evidence in support of his claim of seasonal engagement and despite the fact that the employer witness had categorically denied the factum of working of the respondent in any capacity and had also brought with him the original records including the pay register and the retaining allowance register to support the case of the employer the Labour Court proceeded to draw an adverse inference against the petitioner- employers.

20. The law with regard to the burden of proof for establishing employer-employee relationship is fairly well settled and it has been consistently held that person who sets up the plea of the existence of employer-employee relationship the burden of proof would clearly be upon the said person.

21. In the case of ***Range Forest Officer vs. S.T.Hadimani4,*** where a claim had been made by the workman regarding working for more than 240 days, it was held that the onus to prove the said fact was on the workman. The relevant observations made in the judgment are as follows :-

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10th August, 1998, came to the conclusion that the service had been terminated without giving retrenchment compensation. In

arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratam Singh Narsinh Parmar, (2001) 9 SCC 713. In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

22. The aforementioned legal position was reiterated in the case of ***Rajasthan State Ganganagar Sugar Mills Ltd. Vs. State of Rajasthan and another5***, wherein it was held as follows :-

"6.It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in Range Forest Officerv.S.T. Hadimani[(2002) 3 SCC 25 : 2002 SCC (L&S) 367] . No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. Even if that period is taken into account with the period as stated in the affidavit filed by the employer, the requirement prima facie does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15-1/2 days in November 1991, 15-1/2 days in January 1992, 24 days in February 1992, 20-1/2 days in March 1992, 25 days in April 1992, 25 days in May 1992, 7-1/2 days in June 1992 and 5-1/2 days in July 1992. The Labour Court demanded production of muster roll for the period of 17-6-1991 to 12-11-1991. It included this period for which the muster

roll was not produced and came to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable."

23. Again in the case of ***Municipal Corporation Faridabad Vs. Siri Niwas6,*** it was held that the burden was on the workman to prove that he had worked for more than 240 days in the preceding one year prior to his retrenchment and the workman having not adduced any evidence with regard to the same the claim raised by him could not be allowed only on the basis of adverse inference drawn against the employer for not producing the muster rolls. The relevant observations made in the judgment are as follows :-

"13. The provisions of the Indian Evidence Act per se are not applicable in an industrial adjudication. The general principles of it are, however applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent herein to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. In terms of Section 25F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent therefore are satisfied. Section 25F postulates the following conditions to be fulfilled by employer for effecting a valid retrenchment :

(i) one month's notice in writing indicating the reasons for retrenchment or wages in lieu thereof;

(ii) payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months.

14. For the said purpose it is necessary to notice the definition of 'Continuous Service' as contained in Section 25B of the Act. In terms of Sub-section (2) of Section 25B that if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took place on 17.5.1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5.8.1994 to 16.5.1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman. From the Award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the Appellant herein including the muster rolls. It is improbable that a person working in a Local Authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned

period. He even did not examine any other witness in support of his case.

15. A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld.

Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration in the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the Appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the Respondent.

16. No reason has been assigned by the High Court as to why the exercise of discretional jurisdiction of the Tribunal was bad in law. In a case of this nature, it is trite, the High Court exercising the power of judicial review, would not interfere with the discretion of a Tribunal unless the same is found to be illegal or irrational.

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19. Further more a party in order to get benefit of the provisions contained in Section 114(f) of the Indian Evidence Act must place some evidence in support of his case. Here the Respondent failed to do so.

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21.....The High Court, therefore, proceeded to pass the impugned judgment only on the basis of the materials relied on by the parties before the Tribunal. The High Court, in our opinion, committed a manifest error in setting aside the award of the Tribunal only on the basis of adverse inference drawn against the Appellant for not producing the muster rolls."

24. The aforementioned position of law was restated in the case of ***M.P.Electricity Board Vs. Hariram7,*** in the following terms :-

"11.The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in the case ofMunicipal Corpn., Faridabadv.Siri Niwas[(2004) 8 SCC 195 : JT (2004) 7 SC 248] wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents."

25. The question of onus of proof regarding the factum of working was again considered in the case of ***Manager, Reserve Bank of India Bangalore Vs. S.Mani and others8*** and it was held that initial burden of proof is always on the workman to prove his working and that the onus of proof does not shift to the employer nor is the burden of proof on the workman discharged merely because the employer fails to prove a defence. The

relevant observations made in the judgment are as follows :-

"28.The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service"

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"35.Only because the appellant failed to prove its plea of abandonment of service by the respondents, the same in law cannot be taken to be a circumstance that the respondents have proved their case."

26. The question of onus of proof and the evidence to be led again came up in the case of ***Surendranagar District Panchayat vs. Dahyabhai Amarsinh9,*** and it was held that the burden to prove his working lies on the workman and it is for him to adduce evidence to prove the said factum and in a case if the evidence with regard to the same has not been led by the workman it would be held that he has failed to discharge the burden. It was only in a case where sufficient evidence was led by the workman that the Court could have drawn adverse inference against the other party. The relevant observations made in the judgment are as follows :-

"18.In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he had actually worked with the employer for not less than 240 days during the period of twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that the workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The courts below have wrongly drawn an adverse inference for non-production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25-F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25-B(1) of the Act. In the facts and situation and in the light of the law on the subject, we find that the respondent workman is not entitled to the protection or compliance with Section 25-F of the Act before his service was terminated by the employer. As regards non-compliance with Sections 25-G and 25-H suffice it to say that witness Vinod Misra examined by the appellant has stated that no seniority list was maintained by the department of daily-wagers. In the absence of regular employment of the workmen, the appellant

was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so-called seniority, no relief could be given to him for non-compliance with provisions of the Act. The courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the court. In order to entitle the court to draw inference unfavourable to the party, the court must be satisfied that evidence is in existence and could have been proved".

27. The question of burden of proof yet again came up for consideration in the case of ***R.M.Yellatti Vs. Assistant Executive Engineer10,*** wherein it was reiterated that burden of proof lies on the workman and it is for him to adduce cogent evidence, both oral and documentary, and mere non-production of muster rolls per se will not be a ground to draw an adverse inference against the employer. The relevant observations made in the judgment are as follows :-

"12.Now coming to the question of burden of proof as to the completion of 240 days of continuous work in a year, the law is well settled. InManager, Reserve Bank of Indiav.S. Mani[(2005) 5 SCC 100 : 2005 SCC (L&S) 609] the workmen raised a contention of rendering continuous service between April 1980 to December 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The Tribunal based its decision on the management not producing the attendance register. In view of the affidavits filed by the workmen, the Tribunal held that the burden on the workmen to prove 240 days' service stood discharged. In that matter, a three-Judge Bench of this Court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that he had worked for 240 days; that no document in support of the said plea was ever produced and, therefore, this Court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the management to produce the relevant documents. The Court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this Court set aside the award of the Industrial Tribunal ordering reinstatement.

13.InMunicipal Corpn., Faridabadv.Siri Niwas[(2004) 8 SCC 195 : 2004 SCC (L&S) 1062] the employee had worked from 5-8-1994 to 31-12-1994 as a tubewell operator. He alleged that he had further worked from 1-1-1995 to 16-5-1995. His services were terminated on 17-5-1995 whereupon an industrial dispute was raised. The case of the employee before the Tribunal was that he had completed working for 240 days in a year; the purported order of retrenchment was illegal as the conditions precedent to Section 25-F of the Industrial Disputes Act were not complied with. On the other hand, the management contended that the employee had worked for 136 days during the preceding 12 months on daily wages.

Upon considering all the material placed on record by the parties to the dispute, the Tribunal came to the conclusion that the total number of working days put in by the employee were 184 days and thus he, having not completed 240 days of working in a year, was not entitled to any relief. The Tribunal noticed that neither the management nor the workman cared to produce the muster roll w.e.f. August 1994; that the employee did not summon muster roll although the management had failed to produce them. Aggrieved by the decision of the Tribunal, the employee filed a writ petition before the High Court which took the view that since the management did not produce the relevant documents before the Industrial Tribunal, an adverse inference should be drawn against it as it was in possession of best evidence and thus, it was not necessary for the employee to call upon the management to do so. The High Court observed that the burden of proof may not be on the management but in case of non-production of documents, an adverse inference could be drawn against the management. Only on that basis, the writ petition was allowed holding that the employee had worked for 240 days. Overruling the decision of the High Court, this Court found on facts of that case that the employee had not adduced any evidence before the court in support of his contention of having complied with the requirement of Section 25-B of the Industrial Disputes Act; that apart from examining himself in support of his contention, the employee did not produce or call for any document from the office of the management including the muster roll (MR) and that apart from muster rolls, the employee did not produce the offer of appointment or evidence concerning remuneration received by him for working during the aforementioned period.

14.InRange Forest Officer[(2002) 3 SCC 25 : 2002 SCC (L&S) 367] the dispute was referred to the Labour Court as to whether the workman had completed 240 days of service. Vide award dated 10-8-1988, the Tribunal held that the services were wrongly terminated without giving retrenchment compensation. In arriving at this conclusion, the Tribunal stated that in view of the affidavit of the workman saying that he had worked for 240 days, the burden was on the management to show justification in termination of the service. It is in this light that the Division Bench of this Court took the view that the Tribunal was not right in placing the burden on the management without first determining on the basis of cogent evidence that the workman had worked for 240 days in the year preceding his termination. This Court held that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination; that filing of an affidavit is only his own statement in his own favour which cannot be recorded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had worked for 240 days in a year. This Court found that there was no proof of receipt of salary or wages for 240 days; that the letter of appointment was not produced; that the letter of termination was not produced on record and, therefore, the award was set aside.

15.InRajasthan State Ganganagar S. Mills Ltd.[(2004) 8 SCC 161 : 2004 SCC (L&S) 1055] the workman had alleged that he had worked for more than 240 days in the year concerned, which claim was denied by the management. The workman had merely filed an affidavit in support of his case. Therefore, the Division Bench of this

Court took the view that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination. This Court observed that filing of an affidavit was not enough because the affidavit contained self-serving statement of the workman which cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that the claimant had worked for 240 days in a year. Further, this Court found that there was no proof of receipt of salary or wages for 240 days and, therefore, mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. On the facts of that case, the Court found that even if the period for which the workman had alleged to have worked was taken into account, as mentioned in his affidavit, still the said workman did not fulfil the requirement of completion of 240 days of service and, therefore, this Court set aside the award of the Labour Court.

16.InM.P. Electricity Board[(2004) 8 SCC 246 : 2004 SCC (L&S) 1092] the workmen were engaged by the Board on daily wages for digging pits to erect electric poles. It was the case of the Board that on completion of the project, the employment was terminated and whenever a similar occasion arose for digging pits, the workmen were re-employed on daily wages and, therefore, their employment was not permanent in nature nor had the workmen completed 240 days of continuous work in a given year. The project jobs came to an end in 1991 and the workmen were never re-employed by the Board. Being aggrieved by the said non-employment, the workmen filed applications under the M.P. Industrial Relations Act seeking permanent employment, primarily on the ground that they have completed 240 days in a year and their discontinuation of service amounted to retrenchment without following the legal requirements. The Board denied the allegations made in the application before the Labour Court. An application was moved before the Labour Court by the workmen seeking direction to the Board to produce the muster roll for the period concerned. However, no other material was produced by the workmen to establish the fact that they had worked for 240 days continuously in a given year. Some of the workmen were also examined before the Labour Court. However, no document was produced in the form of letter of appointment, receipt indicating payment of salary, etc. After examining the entry in the muster rolls, the Labour Court came to the conclusion that the workmen had not worked for 240 days continuously in a given year, hence, they could not claim permanency nor could they term their non-employment as retrenchment. Aggrieved by the award of the Labour Court, the workmen preferred an appeal before the Industrial Court at Bhopal which took the view that since the Board has failed to produce the entire muster roll for the year ending 1990, an adverse inference was required to be drawn against the Board and solely based on the said inference, the Industrial Court accepted the case of the workmen that they had worked for 240 days continuously in a given year. Accordingly, the Industrial Court granted reinstatement to the workmen with 50% back wages. Drawing of such an adverse inference was challenged before this Court by the M.P. Electricity Board. In the light of the aforestated facts, this Court opined that the Industrial Court or the High Court could not have drawn an

adverse inference for non-production of the muster rolls for the years 1990 to 1992, particularly in the absence of a specific plea by the claimants that they had worked during the period for which muster rolls were not produced. This Court observed that the initial burden of establishing the factum of their continuous work for 240 days in a year was on the workmen and since that burden was not discharged, the Industrial Court and the High Court had erred in ordering reinstatement solely on an adverse inference drawn erroneously.

17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rollsper sewithout any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

28. After referring to earlier judgments on the issue of onus of proof, a similar view was taken in the case of ***Ranip Nagar Palika Vs. Babuji Gabhaji Thakore and others11.*** The relevant observations made in the judgment are as follows :-

"8.....the burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."

29. In the context of burden of proof of 240 days continuous service and drawing of an adverse inference, reference may also be had to the judgment in the case of ***Sub-Divisional Engineer, Irrigation Project Yavatmal Vs. Sarant Marotrao Gurnule12.***

"21.The next question is how the workman is expected to discharge this burden? Does it follow from the observations in the judgments quoted above (underlined for the sake of convenience) that a workman is expected

to tender a particular quantum of evidence, or to examine a particular number of witnesses in support of his plea? The Evidence Act, which does not apply to matter under the Industrial Disputes Act, too does not lay down that any particular number of witnesses must be examined to prove a particular fact. A fact is held as proved when a Judge upon considering the matter before him either believes it to exist or considers its existence so probable that a man of ordinary prudence would believe that it exists. Just as it would be futile to expect an employer to prove a non-existent fact, namely that a workman had not worked for 240 days, it would be futile to expect a workman to produce non-existent evidence. The best evidence rule would mandate that if the workman has in his possession any documentary evidence which would support his word on oath, he must produce such evidence, and, if he is not doing so, it would result in discrediting his word. The observations of the Apex Court that in addition to his own word, the workman must put in something more has to be read with this caveat. The difficulties and dangers in examining another workman in support of his own claim may be imagined. Ordinarily out of fear of reprisal a workmen who is already in employment is unlikely to step into the witness box to support the case of a colleague who has been thrown out. Workman's examining another workman who has been similarly thrown out would not cut ice with the Court because the Court may feel that two lies do not make one truth. Therefore, ultimately in the matter of appreciation of evidence, it is for the Judge who sees the parties in person and receives their evidence to decide whether he would believe them or not. Whether burden on workman is discharged by him or not would have to be decided by applying law declared in following few sentences from para 17 in judgment of three-Judge Bench inR.M. Yellati, which we wish to again reproduce, for, there would be no clearer pronouncement on the subject.

"17. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear thatmere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year.The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

A careful re-reading of this passage would show that the Court does not hint at necessity of examining anyone in addition to the workman, while at the same time saying that affidavit alone would not be sufficient. What is expected of workman is to tender "cogent evidence", by stepping in the witness box (and thereby allowing the truth of his version to be tested by cross-examination)."

30. The legal position with regard to the burden of proof and onus is well settled and it has been consistently held that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. In this regard reference may be had to the judgment in the case of ***Haridwar Vs. Smt. Kulwant13,*** wherein it was held as follows :-

"12. In my view, learned counsel for the appellant is misconstruing the concept of term "burden of proof" and "onus" by identifying the two as synonymous. The onus probandi i.e. "Burden of proof" lies upon a person who is bound to prove the fact and it never shifts.

13. Section 101 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872") talks of burden of proof, and says:

"Burden of proof.- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

14. The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. The provision is based on the rule, ie incumbit probatio qui dicit, non qui negat. In Constantine Line Vs. I S Corpn, (1941) 2 All England Report 165, Lord Maugham said;

"It is an ancient rule founded on consideration on good sense and should not be departed from without strong reasons."

15. A person who asserts a particular fact has to prove the same. Until such burden is discharged, the other party is not required to be called upon to prove his case. Whoever desires a Court to give judgment, dependent on the existence of facts which he asserts, must prove that those facts exist. The distinction between "burden of proof" and "onus" is that the former lies upon the person and never shifts but the "onus" shifts. Shifting of onus is a continuous process in the evaluation of evidence. For example, in a suit for possession, based on title once the plaintiff is able to create a high degree of probability so as to shift the onus on the defendant, it is then for the defendant to discharge his onus and in absence of such discharge by defendant, burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of plaintiff's title.

16. The above distinction between "burden of proof" and "onus" of proof has been explained in A.Raghavamma Vs. A. Chenchamma, AIR 1964 SC 136, followed in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple & Anr., (2003) 8 SCC 752.

17. Section 102 of Act, 1872 says that burden of proof in a suit would

lie on a person who would fail if no evidence at all were given on either side. Here it is not degree of proof but the onus to lead evidence i.e. obligation to begin to prove a fact. The burden of proof as such has not been defined in the Act but looking to the substance and the context and spirit, it can be said that burden to establish case, loosely, can be said to be burden of proof.

18. For applying above provision in the case in hand, there can be no manner of doubt in holding that burden of proof lies upon the plaintiff. In the case in hand, to prove that sale deed in question suffers an infirmity, justifying its cancellation, as pleaded in the plaint and to prove those facts, burden lies upon plaintiff. But then it has to be understood that there is a distinction between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. In the first sense, the burden is always constant but burden in the sense of adducing evidence shifts from time to time, having regard to evidence adduced or the presumption of fact or law raised in favour of one or the other. On this aspect, more light emanates when we go through Sections 103 and 104 of Act, 1872, which read as under:

"S. 103. Burden of proof as to particular fact.- The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

S. 104. Burden of proving fact to be proved to make evidence admissible.- The burden of proving any fact necessary to be provided in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

31. In the case of ***Rangammal Vs. Kuppuswami and another,14 referring to Section 101*** of the Evidence Act, it was held that the burden of proving a fact always lies upon the person who asserts the fact and until such burden is discharged, the other party is not required to be called upon to prove his case. The relevant observations made in the judgment are as follows :-

"21.Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

***"101. Burden of proof.**--Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

32. The burden of proof is thus the legal obligation on a party to prove the allegation made by him, and is often associated with the maxim *"Semper necessitas probandi incumbit ei qui agit"* which means the burden of proof is on the claimant.

33. The essential distinction between 'burden of proof and onus of proof' is legally well settled. The burden of proof lies upon the person who has to prove a fact and it never shifts; however the shifting of onus of proof is a continuous process in the evaluation of evidence. In this regard reference may be had to the judgment in the case of ***A. Raghavamma and another Vs. A. Chenchamma and another15*** wherein it was held as follows :-

"12.....There is an essential distinction between 'burden of proof and onus of proof', burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence."

34. The aforementioned legal position with regard to the burden of proof, in the context of the seasonal engagement in a sugar industry, was reiterated in the case of ***Batala Cooperative Sugar Mills Ltd. Vs. Sowaran Singh1.***

35. Counsel for the petitioner has referred to the judgment in ***M/s Triveni Engineering and Industries Ltd. Vs. State of U.P. and others16*** which was a case where the management witness had entered the witness box along with the original records and yet the Labour Court had drawn an adverse inference against the management. In view of the aforementioned facts the award passed by the Labour Court was held to be unsustainable. The relevant observations made in the judgment are as follows :-

"It is evident from the record that there was denial by the petitioner of any relationship of master and servant between it and the workman. However, the specific case of the workman was that he was employed in the seasons 1993-94 and 1994-95. A party cannot be asked to prove a negative fact but the party who insists on existence of a fact, has to prove it. The specific case of the workman was that he was issued an appointment letter and for the season 1994-95 he was asked to join at the start of the season by a written order, but none of these two documents have been produced on the premise that the officials of the Company had taken back the two letters. However, in his statement he has stated that in the seasons between 1993-94 and 1994-95 he was paid the retaining allowance. It is also his case that apart from wages that he was paid, he used to get T.A. allowance at the rate of Rs. 1.05 per kilo meter. Yet, he has neither filed the wage receipt nor any document to show that he was paid retaining allowance. In fact, he has not disclosed any details about his alleged wages. On behalf of the Management, Sri Birjesh Paliwal had entered the witness box along with the attendance register for the seasons 1993-94 and 1994-95, in original, and had deposed that the name of the workman does not find place in it. He had explained that since the size of the register was extremely big and as it was voluminous, he could not file its copies but he offered the register for inspection to the Presiding Officer and also to the representative of

the workman. However, despite the offer neither the Court nor the workman scrutinized it and also did not put any question with regard to its authenticity. In this background, the Labour Court was wholly unjustified in drawing an inference against the Management. Merely producing certain alleged T.A. Bills would not lead to the inference that the workman was, in fact, actually employed in the company. Assuming the reasons given for not producing the appointment letter or call letter for the season 1994-95, to be true, there is no reason forthcoming why no document evidencing payment or receipt of wages or retaining allowance was filed or request to produce the same by the Management was made. The Apex Court in the case of Forest Range Officer v. S.T.Hadimani (2002 (94) F.L.R. 622) and subsequently in State of Maharashtra Vs. Dattatraya Digambar Birajdad (2007 (114) F.L.R. 1191) has held that the burden of proving engagement in the establishment is upon the person claiming it and not upon the Management. Thus, the argument of the petitioner is liable to be accepted.

For the reasons above, this petition succeeds and is allowed and the impugned award dated 15.1.2005 is hereby quashed."

36. There is yet another aspect of the matter. In the context of a sugar industry, in order to claim re-employment as a seasonal workman the factum of having worked for the whole of the second half of the last preceding season as per the provisions contained under Clause-K of the Sugar Factories Standing Orders is necessary and in the absence of proving the said fact no entitlement for re-employment in succeeding season can be claimed. Reference in this regard may be had to the judgment in the case of ***U.P. State Sugar Corporation Ltd. Vs. Niraj Kumar and others3,*** wherein it was stated as follows :-

"9.The Standing Orders incorporating the conditions of employment of workmen in Vaccum Pan Sugar Factories in U.P. define `Season' thus:

"Season" means the period commencing from the date when the crushing commences till the date when crushing ends. Provided that for these departments which are not in operation when crushing begins and which continue in operation after crushing ends, the "season" so far as it affects the workmen in those departments, shall commence with the date the department commences operation and shall end when the department ceases to be operated."

10. Workmen, in the Standing Orders, are classified in six categories viz.; (i) Permanent, (ii) Seasonal, (iii) Temporary, (iv) Probationers, (v) Apprentices, and (vi) Substitutes.

11. A seasonal workman is:

"One who is engaged only for the crushing season:

Provided that if he is a retainer, he shall be liable to be called on duty at any time in the off-season and if he refuses to join or does not join, he shall lose his lien as well as his retaining allowance. However, if he submits a satisfactory explanation of his not joining duty, he shall only loss his retaining allowance for the period of his absence."

12. Under the Standing Orders, a temporary workman is one who is engaged for a work of temporary or casual nature or to fill in a temporary need of extra hands on permanent, seasonal or temporary posts.

13. It is pertinent to notice that for a temporary workman, Standing Orders do not provide for any lien of employment in the succeeding season based on the employment in the last preceding season. As regards, seasonal workmen, there are special conditions. Clause K(1) of the Standing Orders is relevant for this purpose which reads thus:

" K. Special conditions governing employment of seasonal workmen-

1. A seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half of the last preceding season will be employed by the factory in the current season.

Explanation - Unauthorised absence during the second half of the last preceding season of a workman has not been validly dismissed under these Standing Orders and of a workman who has been re-employed by the management in the current season, shall be deemed to have been condoned by the management."

14. The question that falls for our consideration is whether in the facts noticed above, the workman was engaged as a temporary workman or seasonal workman and whether he is entitled to be re-employed in the succeeding year?

15. It is not that the daily rated employees engaged during the season by the Corporation automatically become seasonal workmen. If an employee is engaged for work of a temporary or casual nature like additional workload during a season, his engagement would be that of a temporary workman. Having perused the award of the Labour Court carefully, we find it difficult to fathom on what basis the Labour Court recorded the finding that the first respondent was engaged as seasonal workman. The burden lay on the workman to establish that he was engaged as `seasonal workman'. There is no material from which it can be held that the workman has discharged his burden. The High Court brushed aside the objection raised by the Corporation that respondent No.1 was engaged on temporary basis in one line by observing that the counsel of the petitioner has not been able to show any perversity in the finding recorded by the Labour Court. In our view, the finding recorded by the Labour Court that the respondent No. 1 was engaged as a seasonal workman, is based on no legal evidence and High Court was not justified in affirming the said finding.

16. Even if we assume that the respondent No. 1 was engaged as a seasonal workman, it is pertinent to notice that before the Labour Court, it was an admitted position that the crushing season 1996-97 commenced from November 11, 1996. That the season came to an end on May 3, 1997 was not disputed. It was also an admitted position before the Labour Court that the workman was engaged on January 1, 1997 and worked upto April 15, 1997. These admitted facts would amply show that the workman had neither worked in the previous full crushing season nor he remained in employment during the whole of the second half of the crushing season 1996-97. The Standing Orders contemplate lien of a seasonal workman in the succeeding crushing season if he has worked in the previous full crushing season or in the whole second half of that crushing season. It is true that `second half of the crushing season' is not defined in the Standing Orders but in absence thereof an ordinary meaning of the

expression "second half of the crushing season" has to be given and that would mean the crushing season be divided into two parts and later part of the crushing season would be second half of the season.

17. To be entitled for reemployment in the succeeding crushing season, a seasonal workman has to show that he worked in the previous full crushing season or in whole of the second half of the last preceding year. Merely because workman has worked during the part of the previous crushing season, he does not become entitled for re-employment in the succeeding season. If a claim of re-employment is based on engagement in the second half of season, such engagement has to be for full second half of the season i.e. until the end of that season. In view of the admitted facts that have come on record and legal position discussed above, the conclusion is inescapable that workmen in these appeals have no right to be re-employed in the succeeding crushing season. We are, therefore, unable to uphold the decision of the High Court."

37. Similar view was taken in the case of ***Kisan Sahakari Chini Mills. Ltd. and others Vs. Awadesh Singh and others17,*** wherein it was held as follows :-

"4.The question which is required to be decided by this Court is as to whether on the basis of material on record the respondent could be treated to be seasonal workman so as to give him a right to work in subsequent crushing seasons. It is admitted to both the parties that Standing Orders covering the condition of Employment of workmen in vacuum Pan Sugar Factories in U.P. has been framed and appellants' mill is a vacuum Pan Sugar Factory to which Standing Orders are applicable. Standing Order defines seasonal workmen as follows:

"A "Seasonal workman' is one who is engaged only for the crushing season:

Provided that if he is a retainer, he shall be liable to be called on duty at any time in the off-season and if he refuses to join or does not join, he shall lose his lien as well as his retaining allowance. However, if he submits a satisfactory explanation of his not joining duty, he shall only lose his retaining allowance for the period of his absence."

5.In paragraph 5 of the supplementary counter-affidavit numbers of days on which the respondent has worked during the three crushing seasons, have been given according to which in the crushing season 1988-89 out of 160 working days the respondent worked for 98 days, in season 1989-90 out of 160 days he worked for 126 days and in the year 1990-91 out of 140 days he worked for 127 days. From perusal of the affidavit is filed by the parties it is apparent that the respondent was not appointed on any post temporary or permanent and his appointment was not for any of the crushing seasons. He did not work for the whole of the crushing seasons and during the days on which he worked, he worked on daily wages basis. Such an appointment runs from day to day and is not for any fixed period. His appointment was necessitated due to allotment of extra cane centres to the mills. The nature of work of the respondent was of casual and temporary nature, and as such he can utmost claim status of temporary workman on daily wages basis. Such a workman cannot be

treated to be seasonal workman. Even if the work is of permanent nature the workman will be temporary workman, if engaged to fill in temporary need of extra hand.

6.Learned single Judge allowed the writ petition of respondent on the basis that he has worked during the major parts of the three crushing seasons from 1988-89 to 1990-91 and that the appellants have not produced any material to show that his appointment was made with a view to meet any casual requirement of the mills. It was further held by the learned Judge that as the respondent has worked for major parts of the three crushing seasons, nature of his work cannot be said to be casual in nature. It is not possible to agree with the learned Judge.

Before a workman can be declared as seasonal workman he must be engaged for the crushing seasons. The appointment of the respondent was not for the crushing season but was on daily wages basis without reference to any fixed period. Such an appointment cannot be treated to be appointment for the crushing season. Merely because the nature of work of a daily wager is not of casual nature, he cannot be treated to be seasonal workman. A daily wager cannot be declared to be seasonal workman because he has worked for substantive part in more than one crushing season. Such a workman may at the most be treated as temporary workman, unless his appointment is referable to crushing season and he has worked in that season. Two learned Single Judges of this Court in Writ Petition No. 2053 of 1992Shashi Bhushan Singhv.State of U.P.decided on 1.12.1992 and Writ Petition No. 22843 of 1988,Rajaram Misrav.District Magistrate, decided on 18.1.1993, have negatived the claim of the daily wagers for declaration as seasonal workmen and have accordingly dismissed their writ petitions. We respectfully agree with the views taken in the above decisions in the cases ofShashi Bhushan Singh and Rajaram Misra(supra).

7.The submission of learned counsel for the respondent, in this connection, is that artificial breaks were created in the service of the respondent by the appellants, which is nothing but unfair labour practice, on account of which the workmen cannot be denied the benefit of continuity of service. Certain cases, relating to artificial break of service, have also been cited by the learned counsel for the respondent. But this question does not arise in the instant case. No such plea has been taken by the respondent in his writ petition. There is nothing on record to show that his service was terminated to deny him the benefit of continuity of service. He was appointed purely on daily wages basis to meet the temporary need which arose on account of allotment of eight new cane centres to the mills."

38. In the facts of the present case the respondent-workman having not proved the factum of his seasonal engagement from the season 1999-2000 upto the season 2003-2004 by leading any cogent evidence, the claim of his engagement for the season 2003-2004 which formed the basis of the reference, was clearly unsustainable in view of the provisions contained under *Clause K* of the Sugar Factories Standing Orders, which provide that in order to be entitled for re-engagement in the succeeding crushing season, a seasonal workman has to show that he had worked in the previous full crushing season or in whole of the second half of the last preceding season.

39. *Clause K* of the Sugar Factories Standing Orders, referred to above, provides a lien of a seasonal workman in the succeeding crushing season if he has worked in the previous full crushing season or in the whole second half of that crushing season. The burden of proof in this regard is clearly on the workman in order to establish his entitlement to be re-engaged during the succeeding crushing season. In the present case no evidence having been led by the respondent workman to discharge the burden of proof in this regard, the finding returned by the Labour Court cannot be supported.

40. The Labour Court has also misdirected itself in proceeding to draw an adverse inference against the petitioner despite the necessary evidence having been placed on its behalf, and coming to the conclusion that the respondent-workman had worked as a seasonal workman on the post of 'Cane Weighment Clerk' in the petitioner establishment and was entitled to the benefits under the Sugar Factories Standing Orders. Accordingly, the inference drawn by the Labour Court that the services of the respondent-workman had been terminated without following the due procedure and that he was entitled to reinstatement with continuity of service and full back wages and other consequential benefits, is patently erroneous and cannot be sustained.

41. The award of the Labour Court is thus legally unsustainable and the same is set aside.

42. The writ petition is allowed in the aforementioned terms.

(2019)10ILR A 1687

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ C No. 17180 of 1996
Connected with
Writ C No. 13050 of 1996

Ram Das & Ors. ...Petitioners
Versus
Addl. Commissioner & Ors. ...Respondents

Counsel for the Petitioners:
Sri S.D.N. Singh, Sri S.O.H. Singh, Sri Sushil Jaiswal, Sri V.D. Ojha.

Counsel for the Respondents:
C.S.C.

A. UP Imposition of Ceiling on Land Holding Act, 1960 - S. 27(4) - Settlement of surplus land - Jurisdiction of Additional Commissioner while cancelling settlement of surplus land - The moment an authorization is made u/s 13(3) of UP Land Revenue Act, 1901, the statutory fiction comes into play and Additional Commissioner would consequently be empowered to exercise power u/ 27(4) of the Act, 1960 - Principle articulated by Full Bench in Brahm Singh case clearly set the controversy rest. (Para 24)

B. UP Land Revenue Act, 1901 - Section 13(4) - Meaning of expression 'for the time being in force' - It would necessarily include any subsequent legislation that may be in force at a time when an order is made u/s 13(3) - Legislature is intended to apply subsection (3) and (4) of S. 13 to the statutes that may come into force even after 1901. (Para 20)

Held:-

20. Viewed in the light of the principles enunciated in the decisions noted above, it is manifest that the expression "every other law for the time being applicable" cannot be interpreted as freezing in time only such enactments which were in existence in 1901. The words "for the time being" would necessarily include any subsequent legislations that may be in force at a time when an order is made by either by the State Government or the Commissioner under Section 13(3). Regard must also be had to the fact that subsection (4) of Section 13 is not placed in the statute as a transitory or temporary provision. This is also clearly indicative of the intent of the legislature to expand the applicability of subsections (3) and (4) of Section 13 to statutes that may come into force even after 1901.

C. UP Imposition of Ceiling on Land Holding Act, 1960 - Section 27(4) - Scope of expression 'Commissioner' - Whether expression Commissioner include Additional Commissioner - An Additional Commissioner empowered by S. 13(3) would be entitled to exercise all powers and discharge any duties of a Commissioner - Hierarchal dichotomy, if any existing, vanishes and swept aside. (Para 21)

D. Validity of settlement - Charge of settlements being an outcome of nepotism is well founded - None of petitioners were landless labourer - Settlement in favour of such person deprive needy and eligible persons - Held, Such a settlement is a fraud on statute. (Para 25)

Writ petitions dismissed (E-1)

Case relied on :-

1. Brahm Singh Vs Board of Revenue & ors. (2008) 5 ADJ 331.

2. Devkumarsinghji Vs St. of M.P. AIR 1967 MP 268.

3. Municipal Corp. of Delhi (MCD) Vs Prem Chand Gupta & anr. (2000) 10 SCC 115.

4. Yakub Abdul Razak Memon Vs St. of Mah. (2013) 13 SCC 1.

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri V.D. Ojha learned Senior Counsel in support of the writ petitions and Sri Sanjay Goswami learned Additional Chief Standing Counsel on behalf of the State respondents.

2. Both these writ petitions assail the order dated 29 March 1996 pursuant to which a settlement of surplus land made in favour of the petitioners under Section 27 of the **U.P. Imposition of Ceiling on Land Holdings Act, 1960 ["the 1960 Act"]** has come to be cancelled. They are with the consent of parties taken up for disposal together.

3. The Court for the purposes of disposal deems it sufficient to notice the essential facts pertaining to Writ-C No. 17180 of 1996. The petitioners claim to be landless labourers. In proceedings initiated under the 1960 Act, the agricultural land of one Smt. Girja Kumari was declared surplus and came to vest in the State of U.P. The aforesaid land is stated to have been settled in favour of the petitioners on 19 November 1990 by the Sub Divisional Officer in accordance with the provisions made in Section 27 of the 1960 Act. The details of the leases as granted are set-forth in paragraph-8 of the writ petition. It transpires from the record that on 25 August 1993 the Naib Tehsildar concerned forwarded a note to the Commissioner Jhansi division raising issues with respect to the validity of the settlement made in favour of the petitioners. Upon receipt of that note, the Commissioner by an order dated 25 August 1993 drew proceedings and transferred them for adjudication to the Additional Commissioner. Pursuant to

notices issued, the petitioners entered appearance and filed their written statements. The objection taken by the State respondents to the validity of the settlement made was that the petitioners were unlawfully allotted land even though they were not residents of the concerned village. It was asserted that the petitioner No. 1 was not a landless laborer but a priest of a temple. Insofar as the petitioner No. 2 is concerned, it was stated that he was a jeweller also not residing in the village in question. A similar objection was taken in respect of the petitioner No. 3. In the counter affidavit filed in these proceedings it was averred that none of the petitioners were residents of village Tinduhi. In paragraph-3 details have been given of the land held by the petitioners in different villages. It was essentially asserted that the petitioners were neither landless labourers nor members of the Gram Sabha of Tinduhi and consequently they were ineligible to have been allotted the land under Section 27 of the 1960 Act. It was also alleged that the petitioner Nos. 3 and 4 were the cousins of the then Gram Pradhan and that the settlement made in their favour was clearly illegal and in abuse of the process of law. The respondents asserted that despite numerous landless labourers belonging to the Scheduled Castes being available and eligible for allotment, their claims were overlooked and the land settled in favour of the petitioners illegally and as an outcome of the nexus between them and the erstwhile Gram Pradhan. The impugned order further records that the petitioner Nos. 3 and 4 in their statements recorded before the respondents on 20 April 1991 had admitted to being residents of village Pachpahra. Taking into consideration the aforesaid glaring facts, the Additional Commissioner by the impugned order proceeded to annul the leases granted in favour of the petitioners. When the Court entertained the writ petition on 22 July 1996, interim protection was accorded to the petitioners with a learned Judge providing that if the petitioners are in possession, they shall remain as such over the land in dispute. Pursuant to that interim order, the petitioners are stated to have continued to occupy the land in question.

4. Sri V.D. Ojha, learned Senior Counsel, apart from assailing the order on merits has principally raised a jurisdictional question with respect to the Additional Commissioner exercising powers under Section 27 of the 1960 Act. According to Sri Ojha the power to cancel a settlement as comprised in Section 27(4) of the 1960 Act stands vested in the *"Commissioner"* and that consequently the Additional Commissioner has acted clearly without jurisdiction in passing the order impugned. Sri Ojha would contend that the expression "Commissioner" does not include an Additional Commissioner nor does the 1960 Act empower the Commissioner to delegate the functions entrusted to him under Section 27(4). In view of the above, it was his submission that the impugned order deserved to be set-aside on this short ground alone. Assailing the order on merits Sri Ojha has referred to the entries appearing in the Voters List, Ration Card as well as the statement of the Lekhpal to submit that the allegations levelled against the petitioners were clearly not established. Sri Ojha contends that the entries appearing in the Voters List as well as the Ration Cards held by the petitioners clearly established that they were residents of village Tinduhi. It is his submission that the objections which were

taken by the respondents were wholly untenable and that the order impugned is consequently liable to be set aside.

5. Refuting those submissions Sri Goswami, the learned Additional Chief Standing Counsel, contends that the details set forth in paragraph-3 of the counter affidavit clearly established that the settlement made in favour of the petitioners was an outcome of nepotism and the illegal acts of commission of the erstwhile Pradhan who had a personal interest in the allotments made in favour of the petitioner nos. 3 and 4. Sri Goswami highlighted the fact that the Additional Commissioner had found that the petitioners had fraudulently managed to have their names inserted in the Voters List and obtained Ration Cards by furnishing false information. He also referred to the admission of the petitioner Nos. 3 and 4 themselves as noticed in the impugned order to the effect that they were not residents of village Tinduhi. Sri Goswami contended that Section 27 is to be viewed as a measure of social amelioration aimed at uplifting the status of landless labourers and members of the Scheduled Castes designed to empower them to eke out a living and find means of sustenance. According to Sri Goswami those objectives have been belied by virtue of the wholly illegal settlements made in favour of the petitioners.

6. Addressing the Court on the question of jurisdiction Sri Goswami contends that while the provisions of the 1960 Act do not define the word "Commissioner", an Additional Commissioner is entitled to exercise the powers enshrined in Section 27(4) by virtue of subsections (3) and (4) of Section 13 of the **U.P. Land Revenue Act, 1901 ["the 1901 Act"]** and in any case in light of the order passed by the Commissioner assigning the matters for disposal to the Additional Commissioner. Sri Goswami has also placed reliance upon the decision rendered by a Full Bench of the Court in **Brahm Singh v. Board of Revenue And Others1** in support of his submission that an Additional Commissioner is sufficiently empowered in law to exercise the powers enshrined in Section 27(4) of the 1960 Act. It is these rival submissions that fall for determination.

7. This Court in its order of 25 July 2019 noted the issue of jurisdiction which was principally raised in the following terms: -

"The principal submission which has been addressed by Sri V.D. Ojha, learned Senior Counsel for the petitioners, is that exercise of powers by the Additional Commissioner purportedly invoking Section 27(4) of the Act is without jurisdiction.

The Court notes that the 1960 Act does not define the expression 'Commissioner' as employed in Section 27(4). However Section 3(21) of that Act provides that words and expressions not defined in the 1960 Act would draw meaning as prescribed to those words and expressions under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. When the Court travels to the U.P. Z.A. & L.R. Act 1950, it notes that Section 3(27) of the 1950 Act refers to meanings of words and expressions as used in the United Provinces Land Revenue Act 1901. Under Section 13(3) of the 1901 Act although the Additional Commissioner is empowered to exercise powers vested in a Commissioner, that

exercise is subject to an express authorisation made either by the State Government or by the Commissioner. The issue which would therefore, arise would be whether in the present case the Additional Commissioner had been sufficiently empowered to exercise powers comprised in Section 27(4) of the 1960 Act by virtue of an order made under Section 13(3) of the 1901 Act.

Learned Standing Counsel may in this connection place the relevant record for the perusal of the Court on the next date of listing.

List again for final disposal on 13 August 2019."

8. As noted in that order, the 1960 Act does not define the word "Commissioner". Section 3(21) of that Act however states that the words and expressions not defined therein but used in the **Uttar Pradesh Zamindari Abolition And Land Reforms Act, 1950 ["the 1950 Act"]** shall have the meaning assigned to them in that Act. The Court had noted that even the 1950 Act does not place any definition of the expression "Commissioner". Section 3(27) of the 1950 Act, however, makes the following provision:-

"words and expressions, under-proprietor, sub-proprietor, revenue, mahal, Assistant Collector, Assistant Collector in-charge of sub- division, Commissioner, Board, Tahsildar and minor, not defined in this Act and used in the United Provinces Land Revenue Act, 1901, shall have the meaning assigned to them in that Act;"

9. When the Court proceeds to review the provisions of the 1901 Act, it is faced with an identical absence of a specific provision defining the expression "Commissioner". However the State respondents place reliance upon Section 13 of the 1901 Act to contend that by virtue of the provisions made therein, an Additional Commissioner is entitled to exercise all powers and discharge duties of a Commissioner pursuant to orders made in that behalf either by the State Government or the Commissioner himself. Section 13 of the 1901 Act reads thus: -

"13. Appointment, powers and duties of Additional Commissioner. - (1) The [State Government] may appoint Additional Commissioner in a division, or in two or more divisions combined.

(2) An Additional Commissioner shall hold his office during the pleasure of the [State Government].

(3) An Additional Commissioner shall exercise such powers and discharge such duties of a Commissioner in such cases or classes of cases as the [State Government] or in the absence of orders from the [State Government], the Commissioner concerned, may direct.

(4) The Act and every other law for the time being applicable to a Commissioner shall apply to the Additional Commissioner, when exercising any powers or discharging any duties under sub-section (3), as if he were the Commissioner of the division."

10. Upon a review of the statutory position as existing, it is apparent that none of them define the expression "Commissioner". Even Section 13, as is plainly evident, is not a defining provision. As is discernable from a reading of subsection (3) of Section 13, an Additional Commissioner may be

empowered either by an order of the State Government or the Commissioner himself to exercise the powers and discharge duties of a Commissioner in such cases or classes of cases as may be directed. While the impact and scope of this provision would clearly have relevancy to the issue at hand, it may only be noted that it does not state or expound the meaning of the word "Commissioner".

11. Section 27(4) on its plain terms empowers the Commissioner either of his own motion or on the application of an aggrieved person to enquire into the question whether a settlement made is irregular. Subsection (4) reads thus: -

"27(4). The Commissioner may of his own motion and shall, on the application of any aggrieved person, enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made to show cause-

(i) cancel the settlement and the lease, if any and thereupon, notwithstanding anything contained in any other law or in any instrument, the rights, title and interest of the person in whose favour such settlement was made or lease executed or any person claiming through him in such land shall cease, and such land shall revert to the State Government; and

(ii) direct that every person holing or retaining possession thereof may be evicted, and may for that purpose use or cause to be used such force as may be necessary."

12. The seminal question which, therefore, arises for consideration is whether the expression "Commissioner" as used in subsection (4) would include an Additional Commissioner. While the Court dwells on the provisions as contained in the 1960 Act, it would also be pertinent to note the following aspect. Significantly, although the 1960 Act makes a specific provision for the Collector delegating his powers to an Assistant Collector in terms of Section 43 of that Act, no similar provision is made with respect to a Commissioner of the Division.

13. As noticed hereinabove in the proceedings that were drawn against the petitioners, the Commissioner by his order of 25 August 1993 transferred the matter for adjudication to the concerned Additional Commissioner. Although the Commissioner chose to employ the word "transfer" in his orders, it essentially appears to have been an assignment of the matters for disposal by the Additional Commissioner. Subsection (3) of Section 13 of the 1901 Act, as noticed hereinabove, is clearly not a definition clause. It only confers a power on the State Government or the Commissioner to authorise an Additional Commissioner to exercise the powers and duties of a Commissioner. It clearly appears to be a provision for conferment of power as distinct from a defining provision as was contended on behalf of the respondents.

14. Although this provision also uses the expression *"...in such cases or classes of cases"* that may not impact the order of assignment made by the Commissioner when one bears in mind the provisions of Section 13 of the General Clauses Act, 1872 which clearly provide that words in the singular would also include the plural and vice versa.

15. In the considered view of this Court, it is the provisions made in subsection (4) of Section 13 that are of greater import and significance. Subsection (4) provides that the 1901 Act and *"...every other law for the time being applicable...."* to a Commissioner would also apply to an Additional Commissioner exercising powers and discharging duties in accordance with subsection (3) as if he were the Commissioner of the Division. It is thus manifest that on an Additional Commissioner being empowered to discharge duties and exercising powers by virtue of an order made either by the State Government or the Commissioner under subsection (3) it is liable to be viewed as being a discharge of duties or exercise of powers by the Commissioner of the Division himself.

16. The ancillary issue which immediately springs up is by virtue of subsection (4) employing the phrase *".... every other law for the time being applicable..."*. The U.P. Land Revenue Act was indubitably promulgated in 1901. The Ceiling Act came to be enacted in 1960. The question, which consequently arises, is whether the 1960 Act would fall within the ambit of the expression *"every other law for the time being applicable"*. This since if that phrase is interpreted literally, it would be likely to be perceived as being confined to a law which was in existence in 1901 when the Land Revenue Act came to be promulgated.

17. In **Devkumarsinghji v. State of Madhya Pradesh2,** a Division Bench of the Madhya Pradesh High Court was called upon to interpret the expression "any other enactment for the time being in force". The question was answered by the Division Bench as under: -

"9. The power of the State Legislature to impose a tax for general revenue is not taken away by the empowerment by it to the municipal corporations to impose a tax on lands and buildings. Nor is the State Legislature precluded by sub-section (4) of Section 132 of the 1956-Act from imposing a tax on lands and buildings after the corporation has exercised its power under Section 132(1)(a) of imposing a tax on lands and buildings. In our opinion, the construction put on sub-section (4) of the Section 132 by Shri Chitale is a forced and unnatural construction. That sub-section no doubt provides that the "imposition of any tax under this section shall be subject to the provisions of any other enactment for the time being in force". The expression "any other enactment for the time being in force" does not mean an enactment which was already in force at the time the corporation imposed a tax under Section 132(1)(a); but means any legislation enacted whether before or after the imposition of the tax by the corporation. The general sense of the phrase "for the time being" is that of time indefinite, and refers to indefinite state of facts which will arise in future and which may vary from time to time. See *Ellison v. Thomas*, (1862) 31 LJ Ch 867. If with this construction sub-section (4) of Section 132 is read along with Section 4(3) of the impugned Act, then it is plain that the lax imposed by the Corporation on lands and buildings and the tax imposed by the impugned Act can validity co-exist. " (emphasis supplied)

18. The Supreme Court in **Municipal Corporation of Delhi (MCD) v. Prem Chand Gupta And Another3** had an occasion to rule on the meaning of

the expression "for the time being in force". The question that arose before it was whether the service conditions of the employee would be governed by the 1949 Rules which stood incorporated by reference in the service regulations or the 1959 Rules which had repealed and replaced the earlier Rules. Referring to the expression "for the time being in force" as employed therein, it was argued that the service conditions would be governed only by those rules which were in force when the 1959 Regulations were promulgated and not any latter rules. Answering that issue the Supreme Court held as under: -

"13. In this connection, one submission of learned counsel for the respondent workman may be noted. He submitted that as laid down by Regulation 4(1), the rules for the time being in force as mentioned therein would refer to only those rules which were in force when the Service Regulations of 1959 were promulgated and not any latter rules. It is difficult to countenance this submission. Rules for the time being in force will have a nexus with the regulation of condition of service of the municipal officers at the relevant time as expressly mentioned in Regulation 4(1). Therefore, whenever the question of regulation of conditions of service of the municipal officers comes up for consideration, the relevant rules in force at that time have to be looked into. This is the clear thrust of Regulation 4(1). Its scope and ambit cannot be circumscribed and frozen only to the point of time in the year 1959, when the Service Regulations were promulgated. If such was the intention of the framers of the Regulation, Regulation 4(1) would have employed a different phraseology, namely, "rules at present in force" instead of the phraseology "rules for the time being in force". The phraseology "rules for the time being in force" would necessarily mean rules in force from time to time and not rules in force only at a fixed point of time in 1959 as tried to be suggested by learned counsel for the respondent workman.

14. As a result of the aforesaid discussion, it must be held that the termination of the respondent workman from service on 29.4.1966 was not violative of the amended Rule 5 of the latter Rules of 1965 which only applied in his case. Therefore, there was no obligation, on the part of the appellant Corporation to simultaneously offer requisite compensation to the respondent workman as a condition precedent to such termination and such compensation could be offered to him within reasonable time later on. The termination had to be treated to have come into force forthwith when the order of termination was passed and served on the respondent workman. Non-payment of requisite compensation as per the said rule even later on did not attract any invalidating consequences. The first point of determination, therefore, is held in the negative in favour of the appellant and against the respondent workman. " (emphasis supplied)

19. In **Yakub Abdul Razak Memon v. State of Maharashtra4** three learned Judges of the Supreme Court were called upon to resolve a contended conflict between the provisions made in TADA and the Juvenile Justice Act. Dealing with that question the Supreme Court held thus: -

"1554. Section 1(4) of the JJ Act was added by amendment with effect from 22-8-2006. In fact, this provision

gives the overriding effect to this Act over other statutes. However, it reads that the Act would override "anything contained in any other law for the time being in force". The question does arise as to whether the statutory provisions of the JJ Act would have an overriding effect over the provisions of TADA which left long back and was admittedly not in force on 22-8-2006. Thus, the question does arise as what is the meaning of the law for the time being in force. This Court has interpreted this phrase to include the law in existence on the date of commencement of the Act having overriding effect and the law which may be enacted in future during the life of the Act having overriding effect. (Vide Thyssen Stahlunion GmbH v. SAIL [(1999) 9 SCC 334: AIR 1999 SC 3923] and MCD v. Prem Chand Gupta [(2000) 10 SCC 115: 2000 SCC (L&S) 404]."(emphasis supplied)

20. Viewed in the light of the principles enunciated in the decisions noted above, it is manifest that the expression "every other law for the time being applicable" cannot be interpreted as freezing in time only such enactments which were in existence in 1901. The words "for the time being" would necessarily include any subsequent legislations that may be in force at a time when an order is made by either by the State Government or the Commissioner under Section 13(3). Regard must also be had to the fact that subsection (4) of Section 13 is not placed in the statute as a transitory or temporary provision. This is also clearly indicative of the intent of the legislature to expand the applicability of subsections (3) and (4) of Section 13 to statutes that may come into force even after 1901.

21. The 1960 Act undisputedly is a law that is applicable to a Commissioner. It is therefore, evident that the provisions of subsection (4) of Section 13 would stand attracted and consequently an Additional Commissioner empowered by an order made under Section 13(3) would be entitled to exercise all powers and discharge any duties of a Commissioner as enjoined "as if he were the Commissioner of the division". By virtue of the fiction introduced by subsection (4) such exercise of powers or duties would be entitled to be understood and viewed as actions initiated and decisions taken by the Commissioner himself. On an order being made under Section 13(3), the Additional Commissioner steps into the shoes and dons the robes of the Commissioner himself. Once an order under Section 13 (3) comes to be made empowering the Additional Commissioner to discharge all duties of a Commissioner, the hierarchal dichotomy, if any existing, vanishes and is swept aside in light of the provisions made in Section 13 (4).

22. In light of the interpretation accorded to Section 13 above, it is evident that the absence of a provision for delegation of powers akin to Section 43 of the 1960 Act in respect of a Commissioner would neither stand in the way nor be of any significance.

23. A similar question fell for determination before the Full Bench of this Court in **Brahm Singh**. The question which arose was whether the word "Collector" as employed in Section 198 (4) of the 1950 Act would include an Additional Collector. Coincidentally, Section 198 (4) of the 1950 Act empowers a Collector to cancel a

settlement of land made by way of a lease. The Full Bench, as in this case, fell back to the provisions made in the 1901 Act. Section 14A of the 1901 Act, it becomes apposite to note is pari materia to Section 13 which this Court has considered. Noticing the provisions made in Section 14A, the Full Bench held: -

16.The aforesaid sub-section (4) was inserted in 1950 Act by Section 3 of the U.P. Act No. 34 of 1974, from a perusal whereof it is evident that the "Collector' for the purposes of 1950 Act is an officer appointed as "Collector' under 1901 Act and also includes the "Assistant Collector' of the first class empowered by the State Government by notification in the Gazette to discharge all or any of the functions of a "Collector' under 1950 Act. Thus, the Act by itself does not confine the term "Collector' only to those officers, who are appointed under sub-Section 14 of 1901 Act, rather it expands the definition of "Collector' as an officer appointed as "Collector', under 1901 Act. It does not confine the word "Collector' for the purposes of 1950 Act to an officer appointed under Section 14 of 1901 Act but it would also include a person appointed under Section 14-A as well by virtue of declaration made under sub-Section (4) thereof, if we read sub-section (4) of Section 3 of 1950 Act together with sub-section (4) of Section 14-A the expression "Collector' used in 1950 Act shall have and shall be deemed always to be the "collector' appointed under Section 14 of the Act and will include "Additional Collector' appointed under Section 14-A when it exercises power and discharges duty of a "Collector' under sub-section (3) of Section 14-A because of sub-section (4) of Section 14-A, which provides that the Additional Collector while discharging the powers and duties of a "Collector' under 1901 Act or under any other law, for the time being applicable to the Collector, as if he were the Collector of the district. Therefore, there is no intention of the legislature to confine the term "Collector' for the purpose of 1950 Act to an officer appointed under Section 14 of 1901 Act, but it would also include a person appointed under Section 14-A as well by virtue of the declaration made under sub-section (4) thereof.

18.From the provisions of the two Acts, referred to above, it is evident that the power under Section 198(4) of 1950 Act can be exercised by a "Collector' appointed under 1901 Act. From a plain reading one may refer to only Section 14 of 1901 Act but that would amount to ignore the legislature's intention and not to give effect to the legislative declaration under sub-section (4) of Section 14-A of 1950 Act. To ascertain and to give full meaning, as per legislative intent, one has to read sub-section (4) of Section 3 of 1950 Act together with Section 14 and Section 14-A of 1901 Act. It is true that in finding out the meaning of the word "Collector' used in the Act, the ordinary meaning given in the definition clause is to be construed, but it is not inflexible and there may be sections in the Act where the meaning have to be departed from on account of the subject or context in which the word had been used. That is why, the definition clause starts with the sentence that unless there is anything repugnant in the subject or context "Collector' means an officer appointed as "Collector' under the provisions of 1901 Act. Therefore, because of this qualification, while giving correct meaning of definition of the word "Collector' used in the Act, one has not only to look at the word but also to the context, the collocation and the object of

such words relating to such matter and thereafter to interpret the meaning intended to be conveyed by the use of the words under the circumstances.

24. The principles articulated by the Court in **Brahm Singh** clearly set the controversy to rest and beyond the pale of dispute. Once it is recognised that an Additional Commissioner stands duly authorised by virtue of an order made by the Commissioner under Section 13 (3) of the 1901 Act, he, for all intents and purposes, must be recognised as having donned the mantle of the Commissioner himself and the powers so exercised and decisions rendered are entitled in law to be viewed as those made by the Commissioner. The, fiction, statutorily introduced, as evident from the use of the phrase *"...as if he were the Commissioner of the division"* must be given full effect. The moment an authorisation is made under Section 13 (3), the statutory fiction comes into play and the Additional Commissioner would consequently be entitled to be viewed as being sufficiently empowered to exercise the powers enshrined in Section 27 (4) of the 1960 Act.

25. Turning to the merits of the case, the Court notes that the allegations set-forth in paragraph-3 of the counter affidavit were clearly serious and strike at the root of the validity of the settlements made in favour of the petitioners. All the petitioners were neither the residents of the concerned village nor were they landless labourers eligible under Section 27 of the 1960 Act. The charge of the settlements being an outcome of nepotism as raised by the State respondents is clearly well founded. It is manifest that the settlements were made illegally thus depriving various other needy and eligible persons existing in the village of the fruits of Section 27. The settlements made in favour of the petitioners was clearly a fraud on statute. The defense of the petitioners based on the entries appearing in the Voters List and Ration Cards, even if assumed to be correct, could not have saved the settlements made in light of the copious evidence gathered by the respondents which established that none of them were landless labourers. The counter affidavit has also brought on record the revenue records which established that they were not residents of the village concerned. This evidence clearly overshadows the entries stated to appear in the Voters List and Ration Cards. The Court is constrained to note that the findings recorded by the respondents with respect to the vocation of respective petitioners was not seriously assailed either in the writ petition or by learned Senior Counsel in his oral submissions. On merits, therefore, the Court finds itself unable to sustain the settlements made in favour of the petitioners.

26. The writ petitions consequently fail and are **dismissed.**

(2019)10ILR A 1697

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 23708 of 2019

Chandra Bhal Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Anand Srivastava.

Counsel for the Respondents:
C.S.C., Sri Anuj Pratap Singh, Sri Swapnil Kumar.

A. Labour law - Industrial Dispute Act, 1947 - Section 33C (2) - Jurisdiction of Labour Court - When the claim involve adjudication of a dispute, Labour Court cannot assume jurisdiction - Computation of difference of wages in respect of claim for promotional post involve adjudication of dispute - Such a dispute is beyond jurisdiction of Labour Court. (Para 26 & 27)

B. Labour law - Power of Labour Court - Grant of relief - Relief can be granted only if the right has been recognised already and benefits flow from such recognition - Claim not being based on any pre-existing benefits or flowing from pre-existing rights, is beyond power of Labour Court. (Para 26 & 28)

Writ Petition dismissed (E-1)

Case relied on :-

1. The Central Bank of India Ltd. Vs P. S. Rajagopalan AIR 1964 SC 743.

2. St. Bank of Bikaner & Jaipur Vs R.L. Khandelwal 1968 (16) FLR 315.

3. M/s Punjab Beverages Pvt. Ltd. Chandigarh Vs Suresh Chand & ors. (1978) 2 SCC 144.

4. Central Inland Water Transport Corp. Ltd. Vs The Workmen & ors. (1974) 4 SCC 696

5. Muncipal Corp. of Delhi Vs Ganesh Razak & ors. (1995) 1 SCC 235.

6. St. Bank of India Vs Ram Chandra Dubey & ors. (2001) 1 SCC 73.

7. St. of U.P. & ors. Vs Brijpal Singh (2005) 8 SCC 58.

8. U.P. St. Road Transport Corp. Vs Birendra Bhandari (2006) 10 SCC 211.

9. U.O.I. & ors. Vs Kankuben (Dead) by L.R.S. & ors. (2006) 9 SCC 292.

10. National Textiles Corp. (U.P.) Kanpur Vs Presiding Officer, IV Labour Court, Kanpur & ors. 2007 (114) FLR 645.

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Anand Srivastava, learned counsel for the petitioner and Sri Swapnil Kumar, learned counsel appearing for Respondent No.3.

2. The present petition seeks to challenge the order dated 15.04.2019 passed by the Presiding Officer, Labour Court (1st), U.P. Kanpur Nagar in Misc. Case No. 08/2018 *(Chandrabhal Mishra vs. U.P.S.I.D.C.)* whereby the application filed by the petitioner under Section 33-C(2) of the Industrial Disputes Act, 1947 (in short 'the Act') has been rejected.

3. The records of the case indicate that an application under Section 33-C (2) of the Act was filed by the petitioner claiming that he was entitled to promotion on a higher post from the date on which his juniors had been promoted and further claiming computation of the difference of wages in respect of the promotional post. A chart had also been appended along with the application in respect of the claim for difference of wages which would have been admissible had he been granted promotion to the higher post.

4. The aforementioned claim had been sought to be put forth by the petitioner on the basis of an earlier judgment of this Court dated 9.11.2004 passed in Special Appeal No. 1463 of 2004 (Chandra Bhal Mishra Vs. Principal Secretary Industries, Government of U.P. and others) which had been allowed in the following terms :-

"We, therefore, quash the order dated 07.07.1099 by which the resignation letter is said to have been accepted. The petitioner-appellant shall be treated to be in continuous service and shall be entitled to all the benefits as he had been continuous service but he shall not claim any salary for the period he remained out of service.The respondent Corporation shall reinstate the petitioner -appellant forthwith."

5. The Labour Court in the order dated 15.4.2019 which is sought to be challenged in the present petition has duly recorded a finding that it was the admitted case of the petitioner that in compliance of the aforementioned judgment dated 9.11.2004 the petitioner had been taken in service by his employers vide order dated 16.12.2004 and he had been paid the admissible salary and allowances against the post on which he had been working.

6. The Labour Court has also taken note of the fact that the respondent-employer was a State Government Undertaking where promotions were made under certain specified norms as per the relevant rules. The Labour Court upon taking note of the fact that the claim sought to be raised by the petitioner was for computation of an amount which would be admissible to the petitioner upon his being granted promotion to a higher post, has held that the said claim would not be maintainable under Section 33-C (2) of the Act in view of the fact that the petitioner having not been promoted to the higher post there was no existing right to raise a claim for computation of the amount which would become due to him upon his being granted the promotional post. It has also recorded that the adjudication of the claim raised by the petitioner could be made only upon a valid reference under the U.P. Industrial Disputes Act, 1947 and adjudication of the same by a competent court, and only thereafter the petitioner could seek computation of the amount. The application filed under Section 33-C(2) has accordingly been rejected.

7. Contention of the counsel for the petitioner is that he was entitled to promotion from the date on which his juniors had been promoted and was also entitled to claim computation of the amount which would become due to him upon being granted the promotional post.

8. Per contra, Sri Swapnil Kumar, learned counsel appearing for the respondent no. 3 has submitted that in terms of the order dated 9.11.2004 passed by this Court, the petitioner had been taken back in service and was granted all the benefits which he was entitled to in respect of the post on which he had been working by treating him to be in continuous service. It was submitted that the aforementioned order dated 9.11.2004 did not grant entitlement to the petitioner to claim benefits of the promotional post or to apply for computation of difference of wages in respect of the promotional post. It was further submitted that the petitioner having not been promoted to the higher post no claim for computation of the said benefits could be made under Section 33-C (2) of the Act.

9. Heard learned counsel for the parties and perused the record.

10. The question which falls for consideration is as to whether the petitioner could have invoked the

provisions of Section 33-C (2) of the Act seeking computation of the amount which would have been admissible to him upon being granted promotion to a higher post.

11. In order to appreciate the controversy it would be necessary to advert to the relevant statutory provision which is as follows :-

33-C. Recovery of money due from an employer

"(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months :

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

12. In terms of the aforementioned provision, in a case where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, be decided by the Labour Court.

13. It is thus seen that the benefit of which computation may be sought under Section 33-C (2) must be based on a previous entitlement of the workman or in other words it must be based on a pre-existing benefit or a benefit flowing from pre-existing right.

14. The proceedings under Section 33-C (2) have been held to be in the nature of execution proceedings under which the Labour Court calculates the amount due to a workman from his employer or if the workman is entitled to any benefit which is capable of being computed in terms of money the Labour Court may proceed to compute the said benefit in terms of money. However, the right to the money which is sought to be calculated or the benefit which is sought to be computed must be an existing one i.e. already adjudicated upon, and it would not be competent for the Labour Court exercising jurisdiction under Section 33-C (2) to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an existing right but which may be subject matter of an industrial dispute to be raised in a reference under Section 10 of the Act.

15. The scope of Section 33-C (2) fell for consideration in the case of ***The Central Bank of India Ltd. v. P. S. Rajagopalan1,*** wherein it was held that while construing the provisions of Section 33-C (2) it was to be borne in mind that cases which fall under Section 10 (1) are not brought within its scope. The relevant observations made in the judgment are as follows:-

"9.....It is urged by the appellant that sub-section (2) can be invoked by a workman who is entitled to receive from the employer the benefit

there specified, but the right of the workman to receive the benefit has to be admitted and could not be a matter of dispute between the parties in cases which fall under sub-section (2). The argument is, if there is a dispute about the workman's right to claim the benefit, that has to be adjudicated upon not under sub-section (2), but by other appropriate proceedings permissible under the Act, and since in the present appeals, the appellant disputed the respondents' right to claim the special allowance, the Labour Court had no jurisdiction to deal with their claim. In other words, the contention is that the opening words of sub-section (2) postulate the existence of and admitted right vesting, in a workman and do not cover cases where the said right is disputed.

10.On the other hand, the respondents contend that sub-section (2) is broad enough to take in all cases where a workman claims some benefit and wants the said benefit to be computed in terms of money. If in resisting the said claim, the employer makes several defences, all those defences will have to be tried by the Labour Court under sub-section (2). On this argument all questions arising between the workmen and their employers in respect of the benefit which they claim to be computed in terms of money would fall within the scope of sub-section (2)."

16. Further, after referring to the legislative history of the provision, it was held as follows :-

"15.The legislative history to which we have just referred clearly indicates that having provided broadly for the investigation and settlement of industrial disputes on the basis of collective bargaining, the legislature recognised that individual workmen should be given a speedy remedy to enforce their existing individual rights, and so, inserted Section 33-A in the Act in 1950 and added Section 33-C in 1956. These two provisions illustrate the cases in which individual workmen can enforce their rights without having to take recourse to Section 10(1) of the Act, or without having to depend upon their union to espouse their cause. Therefore, in construing Section 33-C we have to bear in mind two relevant considerations. The construction should not be so broad as to bring within the scope of Section 33-C cases which would fall under Section 10(1). Where industrial disputes arise between employees acting collectively and their employers, they must be adjudicated upon in the manner prescribed by the Act, as for instance, by reference under Section 10(1). These disputes cannot be brought within the purview of Section 33-C. Similarly, having regard to the fact that the policy of the legislature in enacting Section 33-C is to provide a speedy remedy to the individual workmen to enforce or execute their existing rights, it would not be reasonable to exclude from the scope of this section cases of existing rights which are sought to be implemented by individual workmen. In other words, though in determining the scope of Section 33-C we must take care not to exclude cases which legitimately fall within its purview, we must also bear in mind that cases which fall under Section 10(1) of the Act for instance, cannot be brought within the scope of Section 34-C (sic 33-C)."

17. In a case where a claim was raised with regard to entitlement of supervisory allowance alleging wrongful reversion in the case of ***State Bank of***

Bikaner & Jaipur Vs. R.L. Khandelwal2, it was held by the Supreme Court that an application under Section 33-C (2), in the absence of any adjudication of the rights of the workman, would not be maintainable. The relevant observations made in the judgment are as follows.

"5.The scope of the function and powers of a Labour Court, when dealing with an application under Section 33-C(2) of the Act, has been laid down by this Court in several cases, amongst which mention may be made of Punjab National Bank Limited v. K.L. Kharbanda, [1962] Suppl. 2 S.C.R. 977 ; 22 F.J.R. 171, The Central Bank of India Ltd. v. P.S. Rajagopalan etc., (1963)IILLJ89SC , and Bombay Gas Co. Ltd. v. Gopal Bhiva and others, (1963)IILLJ608SC . The effect of these decisions was recently summarised in the judgment delivered on August 8,1967, in Chief Mining Engineer, M/s.East India Coal Co. Ltd. v. Rameshwar and others, Civil Appeals Nos. 257-267 of 1966-- (1967) 33 F.J.R. 90. These decisions make it clear that a workman cannot put forward a claim in an application under Section 33-C(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject-matter of an industrial dispute only requiring reference under Section 10 of the Act.

In the present case, the respondent himself in paragraph 2 of his application under Section 33-C(2) admitted that he continued to do the work in the supervisory capacity until on February 3, 1956, he was wrongfully reverted to do clerical work because he demanded benefit of the supervisory allowance prescribed under the Sastry Award. The question whether his reversion was wrongful or rightful, or whether it should be set aside, is not a matter within the jurisdiction of a Labour Court dealing with an application under Section 33-C(2). The vacation of such an order can only be sought by raising an industrial dispute and having it decided in accordance with the other provisions of the Act. A Labour Court, acting under Section 33-C(2), has to decide the application on the basis that, in fact, the respondent was, during the relevant period, doing clerical work and not employed on supervisory duties....."

18. In the case of ***M/s Punjab Beverages Pvt. Ltd., Chandigarh Vs Suresh Chand And Another3,*** while considering the scope of Section 33-C (2) it was held that the proceedings thereunder are in the nature of execution proceedings. The relevant observations made in the judgment are as follows :

"4.....It is now well-settled, as a result of several decisions of this Court, that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from his employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. But the right to the money which is sought to be calculated or to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. (Vide Chief Mining Engineer,East India Coal Co. Ltd.v.Rameshwar[AIR 1968 SC 218 : (1968) 1 SCR 140 : (1968) 1 LLJ 6 : 33

FJR 90] .) It is not competent to the Labour Court exercising jurisdiction under Section 33-C(2) to arrogate to itself the functions of an industrial Tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the Act. (VideState Bank of Bikaner and Jaipurv.R.L. Khandelwal[(1968) 1 LLJ 589 : (1967-68) 33 FJR 462 : (1968) 38 Com Cas 400] .) That is why Gajendragadkar, J. pointed out in The Central Bank of India Ltd.v.P.S. Rajagopalan[AIR 1964 SC 743 : (1964) 3 SCR 140 : (1963) 2 LLJ 89 : 25 FJR 44] that :

"if an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages under Section 33-C(2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal or demotion is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing contract, cannot be made under Section 33-C(2)."

The workman, who has been dismissed, would no longer be in the service of the employer and though it is possible that on a reference to the Industrial Tribunal under Section 10 the Industrial Tribunal may find, on the material placed before it, that the dismissal was unjustified, yet until such adjudication is made, the workman cannot ask the Labour Court in an application under Section 33-C(2) to disregard his dismissal as wrongful and on that basis to compute his wages. The application under Section 33-C(2) would be maintainable only if it can be shown by the workman that the order of dismissal passed against him was void ab initio. Hence it becomes necessary to consider whether the contravention of Section 33-(2)(b) introduces a fatal infirmity in the order of dismissal passed in violation of it so as to render it wholly without force or effect, or despite such contravention, the order of dismissal may still be sustained as valid."

19. A similar view was taken in the case of ***Central Inland Water Transport Corporation Limited Vs.The Workmen and Another.4,*** wherein it was held that the proceedings under Section 33-C (2) being in the nature of an execution proceeding, an investigation of the alleged right of re-employment is outside its scope and Labour Court exercising powers under Section 33-C (2) cannot arrogate to itself the functions of adjudication of a dispute relating to the claim of re-employment. The observations made in the judgment are as follows :-

"12. It is now well-settled that a proceeding under Section 33-(C)(2) is a proceeding, generally, in the nature of an execution proceeding wherein the Labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in terms of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or benefit, in view of its being previously adjudged, or, otherwise, duly provided for. In Chief Mining Engineer East India

Coal Co. Ltd. v. Rameswar 1968 (1) Lab LJ 6, it was reiterated that proceedings under Section 33-(C)(2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by workmen is in such cases in the position of an executing court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer.

13. In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of (i) the plaintiff's right to relief; (ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and (iii) the extent of the defendant's liability, if any. The working out of such liability with a view to give relief is generally regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under Section 33-(C)(2) is in the nature of an execution proceeding it should follow that an investigation of the nature of determinations (i) and (ii) above is, normally, outside its scope. It is true that in a proceeding under Section 33-(C)(2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely 'Incidental'. To call determinations (i) and (ii) 'Incidental' to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief. Therefore, when a claim is made before the Labour Court under Section 33-(C)(2) that Court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions-say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as 'Incidental' to its main business of computation. In such cases determinations (i) and (ii) are not 'Incidental' to the computation. The computation itself is consequential upon and subsidiary to determinations (i) and (ii) as the last stage in the process which commenced with a reference to the Industrial Tribunal. It was, therefore, held in State Bank of Bikaner and Jaipur v. R.L. Khandelwal that a workman cannot put forward a claim in an application under Section 33-(C)(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject matter of an ID which requires a reference under Section 10 of the Act.

14. The scope of Section 33-(C)(2) was illustrated by this Court in The Central Bank of India Ltd. v. P.S. Rajagopalan etc.(1963)IILLJ89SC . Under the Shastri Award, Bank clerks operating the adding machine were declared to be entitled to a special allowance of Rs. 10 per month. Four clerks made a claim for computation

before the Labour Court. The Bank denied the claim that the clerks came within the category referred to in the award and further contended that the Labour Court under Section 33-(C)(2) had no jurisdiction to determine whether the clerks came within that category or not. Rejecting the contention, this Court held that the enquiry as to whether the 4 clerks came within that category was purely 'incidental' and necessary to enable the Labour Court to give the relief asked for and, therefore, the Court had jurisdiction to enquire whether the clerks answered the description of the category mentioned in the Shastri Award, which not only declared the right but also the corresponding liability of the Employer bank. This was purely a case of establishing the identity of the claimants as coming within a distinct category of clerks in default of which it would have been impossible to give relief to anybody falling in the category. When the Award mentioned the category it, as good as, named every one who was covered by the category and hence the enquiry, which was necessary, became limited only to the clerks' identity and did not extend either to a new investigation as to their rights or the Bank's liability to them. Both the latter had been declared and provided for in the Award and the Labour Court did not have to investigate the same. Essentially, therefore, the assay of the Labour Court was in the nature of a function of a court in execution proceedings and hence it was held that the Labour Court had jurisdiction to determine, by an incidental enquiry, whether the four clerks came in the category which was entitled to the special allowance.

15. It is, however, interesting to note that in the same case the Court at page 156 gave illustrations as to what kinds of claim of a workman would fall outside the scope of Section 33-(C)(2). It was pointed out that a workman who is dismissed by his employer would not be entitled to seek relief under Section 33-(C)(2) by merely alleging that, his dismissal being wrongful, benefit should be computed on the basis that he had continued in service. It was observed:

"His ... dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed ... him, a claim that the dismissal ... is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing contract, cannot be made under Section 33-(C)(2)". By merely making a claim in a loaded form the workmen cannot give the Labour Court jurisdiction under Section 33-(C)(2). The workman who has been dismissed would no longer be in the employment of the employer. It may be that an industrial tribunal may find on an investigation into the circumstances of the dismissal that the dismissal was unjustified. But when he comes before the Labour Court with his claim for computation of his wages under Section 33-(C)(2) he cannot ask the Labour Court to disregard his dismissal as wrongful and on that basis compute his wages. In such cases, a determination as to whether the dismissal was unjustified would be the principal matter for adjudication, and computation of wages just consequential upon such adjudication. It would be wrong to consider the principal adjudication as 'incidental' to the computation. Moreover, if we assume that the Labour Court had jurisdiction to make the investigation into the circumstances of the dismissal, a very anomalous situation would arise. The

Labour Court after holding that the dismissal was wrongful would have no jurisdiction to direct reinstatement under Section 33-(C)(2). And yet if the jurisdiction to compute the benefit is conceded it will be like conceding it authority to pass orders awarding wages as many times as the workman comes before it without being reinstated. Therefore, the Labour Court exercising jurisdiction under Section 33-(C)(2) has got to be circumspect before it undertakes an investigation, reminding itself that any investigation it undertakes is, in a real sense, incidental to its computation of a benefit under an existing right, which is its principal concern.

20. In the case of ***Muncipal Corporation of Delhi Vs. Ganesh Razak and another5,*** the respondents who were daily rated/causal workers, initiated proceedings under Section 33-C (2), claiming that they were doing the same kind of work as regular employees and were therefore entitled to the same pay as regular employees on the principle of "equal pay for equal work". The Labour Court allowed their claim and writ petitions filed there against were dismissed. In appeals by special leave, the Supreme Court after referring to the various judgments on the issue, held that the Labour Court cannot adjudicate the dispute of entitlement or the basis of claim of the workmen and it could only interpret the award or settlement on which the claim is based its jurisdiction being like that of an executing court. The relevant observations made in the judgment are being extracted below.

*"12 .....where the very basis of the claim or the entitlement for the workmen to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not incidental to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33-C(2) of the Act.The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33-C(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognised by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33-C(2) like that o*f the Executing Court's power to interpret the decree for the purpose of its execution."

21. Observations to a similar effect were made in ***State Bank of India Vs. Ram Chandra Dubey and Ors.6,*** which was a case where the Industrial Tribunal had ordered for reinstatement but the award was silent with regard to payment of back wages. The workmen filed an application under Section 33-C (2) whereupon an order was passed by the Tribunal-cum-Labour Court allowing the application and computing the amounts payable to the workmen by way of back wages. Upon the matter being taken up to the Supreme Court the order passed by the Labour Court as affirmed by the High Court was set aside and it was held that jurisdiction of Labour Court under Section 33-C (2) extends to computation of a pre-existing benefit or one flowing from a pre-existing right and not to computation of a benefit which is considered just and fair. The relevant

observations made in the judgment are as follows :-

"7.When a reference is made to an Industrial Tribunal to adjudicate the question not only as to whether the termination of a workman is justified or not but to grant appropriate relief, it would consist of examination of the question whether the reinstatement should be with full or partial back wages or none. Such a question is one of fact depending upon the evidence to be produced before the Tribunal. If after the termination of the employment, the workman is gainfully employed elsewhere it is one of the factors to be considered in determining whether or not reinstatement should be with full back wages or with continuity of employment. Such questions can be appropriately examined only in a reference. When a reference is made under Section 10 of the Act, all incidental questions arising thereto can be determined by the Tribunal and in this particular case, a specific question has been referred to the Tribunal as to the nature of relief to be granted to the workmen.

8.The principles enunciated in the decisions referred by either side can be summed up as follows:

Whenever a workman is entitled to receive from his employer any money or any benefit which is capable of being computed in terms of money and which he is entitled to receive from his employer and is denied of such benefit can approach Labour Court under Section 33-C(2) of the Act. The benefit sought to be enforced under Section 33-C(2) of the Act is necessarily a pre-existing benefit or one flowing from a pre-existing right. The difference between a pre-existing right or benefit on one hand and the right or benefit, which is considered just and fair on the other hand is vital. The former falls within jurisdiction of Labour Court exercising powers under Section 33-C(2) of the Act while the latter does not. It cannot be spelt out from the award in the present case that such a right or benefit has accrued to the workman as the specific question of the relief granted is confined only to the reinstatement without stating anything more as to the back wages. Hence that relief must be deemed to have been denied, for what is claimed but not granted necessarily gets denied in judicial or quasi-judicial proceeding. Further when a question arises as to the adjudication of a claim for back wages all relevant circumstances which will have to be gone into, are to be considered in a judicious manner. Therefore, the appropriate forum wherein such question of back wages could be decided is only in a proceeding to whom a reference under Section 10 of the Act is made. To state that merely upon reinstatement, a workman would be entitled, under the terms of award, to all his arrears of pay and allowances would be incorrect because several factors will have to be considered, as stated earlier, to find out whether the workman is entitled to back wages at all and to what extent. Therefore, we are of the view that the High Court ought not to have presumed that the award of the Labour Court for grant of back wages is implied in the relief of reinstatement or that the award of reinstatement itself conferred right for claim of back wages."

22. Reiterating a similar view in the case of ***State of U.P. and another Vs. Brijpal Singh7*** it was held that the difference between a pre-existing right or benefit and one which is considered just

and fair is vital, and it is not competent for Labour Court exercising jurisdiction under Section 33-C (2) to entertain a claim which is not based on an existing right but which may appropriately be subject matter of an industrial dispute. Referring to the earlier judgments on the point it was held as follows :-

"13. Thus, it is clear from the principle enunciated in the above decisions that the appropriate forum where question of back wages could be decided is only in a proceeding before a forum to whom a reference under Section 10 of the Act is made. Thereafter, the Labour Court, in the instant case, cannot arrogate to itself the functions of an Industrial Tribunal and entertain the claim made by the respondent herein which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the ID Act. Therefore, the Labour Court had no jurisdiction to adjudicate the claim made by the respondent herein under Section 33-C(2) of the ID Act in an undetermined claim and until such adjudication is made by the appropriate forum, the respondent workman cannot ask the Labour Court in an application under Section 33-C(2) of the ID Act to disregard his dismissal as wrongful and on that basis to compute his wages....."

23. In the case of ***U.P. State Road Transport Corporation Vs. Birendra Bhandari8,*** a claim petition filed for payment of arrears relating to difference of salary, leave encashment, DA arising out of recommendations of 5th Pay Commission, was accepted by the Labour Court and a direction was made for payment within a period of two months. The said order was affirmed by the High Court in the writ petition. Upon a challenge being raised, it was held that Section 33-C (2) was not applicable as there was no pre-existing benefit or right available to the workman in this case and the orders passed by the Labour Court and High Court were set aside.

24. The question of maintainability of an application claiming overtime allowance, under Section 33-C (2), where the said claim was disputed by the employer came up for consideration in the case of ***Union of India and another Vs. Kankuben (Dead) by LRS. and others9,*** and after discussing the case law on the point the said application was held to be not maintainable.

25. In ***National Textiles Corporation (Uttar Pradesh), Kanpur Versus Presiding Officer, IV Labour Court, Kanpur, and another10,*** where a similar claim, as in the present case, had been raised by the workmen claiming difference of pay in respect of a higher post, this Court held that entitlement to a particular post can only be adjudicated in a reference made under Section 10 of the Industrial Disputes Act, 1947, and such a claim could not be entertained under Section 33-C (2). The relevant observations made in the judgment are as follows :-

"5. The right to money which is sought to be calculated or the benefit which is sought to be computed under S. 33-C(2) must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the workman and his employer. The Labour Court cannot entertain a

claim which is not an existing right and which could be made the subject-matter of an industrial dispute in a reference under S. 10 of the Act. Where the very basis of the claim or the entitlement of the workman to a certain benefit is disputed and there being no earlier adjudication or recommendation thereof by the employer, a dispute relating to such entitlement which is not incidental to the benefit claimed would be clearly outside the scope of S. 33-C(2) of the Act.

In Tara v. Director, Social Welfare, [(1998) 8 S.C.C. 671], the Supreme Court held that the status and nature of employment of the workman being disputed could not be adjudicated in an application under S. 33-C(2) unless there was a prior adjudication on merit.

6. In the present case, the claim of the workman is one of the entitlement on the post of cashier and consequently the benefit arising out of it. The entitlement on a particular post can only be adjudicated under S. 4-K of the U.P. Industrial Disputes Act or under S. 10 of the Industrial Disputes Act. This type of claim cannot be adjudicated under S. 33-C(2) of the Act. Consequently, the impugned order of the Labour Court passed under S. 33-C(2) cannot be sustained and is quashed. The writ petition is allowed."

26. The legal position which thus emerges is that the benefit which can be enforced under Section 33-C (2) must be a pre-existing benefit or one flowing from pre-existing right, and in an application filed under the said provision, relief can be granted only if the right had been recognized already and the benefits flow from such recognition and not otherwise. The Labour Court's jurisdiction under Section 33-C (2) is only in respect of computation of the monetary benefit which a workman is entitled to receive from the employer and powers can be exercised only in a case where the entitlement to the claim is not disputed. In a case where the claim of the workman involves adjudication of a dispute, the Labour Court cannot assume jurisdiction to first determine the entitlement and then to make the computation.

27. It may thus be inferred that an application filed for computation of difference of wages in respect of a claim for a promotional post, in the absence of any promotion having been granted, would essentially involve adjudication of a dispute regarding entitlement, which would be beyond the scope of the jurisdiction of the Labour Court under Section 33-C (2) of the Industrial Disputes Act, 1947, and would not be maintainable.

28. In view of the foregoing discussion, the claim sought to be raised in the present case for computation of an amount which would have been admissible to the petitioner had he been granted promotion to the higher post, would not fall within the ambit and scope of the powers under Section 33-C (2). The claim being not based on any pre-existing benefit or flowing from pre-existing right, the necessary preconditions for invocation of powers of the Labour Court under Section 33-C (2) did not exist, and as such the Labour Court has rightly rejected the claim.

29. Counsel for the petitioner has not been able to point out any material error or infirmity in the order passed by the Labour Court so as to warrant inference.

30. The writ petition is devoid of merits and is accordingly dismissed.

(2019)10ILR A 1710

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 31072 of 2009

Gayur & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gaurav Sisodia, Sri Madhusudan Dikshit.

Counsel for the Respondents:
C.S.C., Sri Brijesh Ojha, Sri P.K. Singh.

A. Urban Land (Ceiling and Regulation) Act, 1976 - Section 3, 4 and Section 10(3) - if after notification u/s 10(3), the land is vested in the State Government, but possession not taken, the entire proceeding stands lapsed.

Held-: If after the notification under sub-section (3) of Section 10 of the Act, 1976 the land is vested in the State Government but the possession has not been taken by the State Government or an officer nominated by the State Government or the competent authority, then in that event the proceedings shall be lapsed. However, the compensation paid to the land owner shall be got refunded. (Para 36)

B. Urban Land (Ceiling and Regulation) Act, 1976 - Section 10 (5) & 10 (6) - In any view of the matter, if the possession has not been taken in terms of Sections 10(5) and 10(6) of the Act, the petitioners are entitled for the benefit under Sections 3 and 4 of the Repeal Act. We find that the ceiling proceeding stood lapsed and the petitioners are entitled to land in question which has been declared surplus. If the claim of the Saharanpur Development Authority that it has raised construction over the land in question is correct, it would be open to the petitioners to take recourse to such remedy which is available under the law. (Para 45)

Writ Petition allowed (E-9)

List of Cases Cited: -

1. St. of U.P. Vs Hari Ram-(2013) 4 SCC 280

2. State of U.P. and another v. Vinod Kumar Tripathi and others, (2013) 4 SCC 280

3. St. of U.P. & anr. Vs Nek Singh,2010 Law Suit (All) 3581 2010 (81) AllLR 456

4. Ram Chandra Pandey Vs St. of U.P. & ors., 2010 (82) ALR 136

5. Ehsan Vs St. of U.P. & anr., Writ-C No. 21009 of 2012, decided on 08.10.2018

6. Lalji Vs St. of U.P. & ors., 2018 LawSuit (All) 1276: 2018 (5) ADJ 566

7. Yasin & ors. Vs St. of U.P. & ors., 2014 (4) ADJ 305 (DB)

8. St. of Assam Vs Bhaskar Jyoti Sarma & ors., (2015) 5 SCC 321

9. St. of U.P. & ors. Vs Surendra Pratap & ors. MANU/SC/0588/2016: AIR 2016 SC 2712: 2016 LawSuit (SC) 501.

10. Shiv Ram Singh Vs St. of U.P. & ors., (2015) 5 AWC 4918

11. Gajanan Kamlya Patil Vs Addl. Collector & Comp. Auth. & ors., JT 2014 (3) SC 211

12. St. of U.P. Vs Doon Udhyog (P) Ltd., 2005 (60) AllLR 535

13. St. of U.P. Vs Hart Ram, (2005) 60 AllLR 535, 2005 (60) AllLR 535

14. St. of U.P. Thru Secy Avas Avam Shahri Niyojan Vs Ruknuddin & ors.

15. Rati Ram Vs St. of U.P. & ors. (2018) (4) ALJ 338

16. Mohd. Islam & 3 Others Vs St. of U.P. in Writ Petition No. 15864 of (2015)

17. Mohammad Suaif & anr. Vs St. of U.P. & ors., 2005 (60) AllLR 535

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J)

1. The petitioners have instituted this writ proceedings for issuance of a writ of mandamus directing the respondents not to compel them to handover the possession of the land, which is said to be declared surplus under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 (for short Act No. 33 of 1976)1. They claim to be true and actual owner of this land.

2. The facts which emerge from the material on the record are that the petitioners claim to be owner of Plot Nos. 250, 251 and 283M situated in Village Chak Adampur, district Saharanpur. A proceeding under the Act, 1976 was initiated against the father of the petitioners, Yusuf, for declaration of the surplus land. The petitioners' father had filed a statement under sub-section (1) of Section 6 of the Act, 1976. On the basis of the said statement Case/ Suit No. 2201/1976, State v. Yusuf, was registered. A statement under sub-section (3) of Section 8 of the Act, 1976 was issued on 06th November, 1978, wherein total 8196.80 square meters land was proposed to be surplus inclusive of 2000 square meters land from Khasra Nos. 250, 251 and 283 and accordingly, by excluding said 2000 square meters of land, only 6196.80 square meters of land was proposed to be declared surplus. The said statement is said to be served upon the tenure holder on 30th November, 1978 through the process server. In response thereto, the petitioners' father had filed an objection on 12th December, 1978. The Prescribed Authority passed an order on 27th November, 1980 under sub-section (4) of Section 8 of the Act, 1976 and the final statement under Section 9 of the Act, 1976 was issued on 02nd April, 1981. It is stated that it was served on the tenure holder on 06th April, 1981. Thereafter the matter was sent for publication in the Government Gazette in terms of sub-section (1) of Section 10 and sub-section (3) of Section 10 of the Act, 1976 on 28th February, 1983 and 18th December, 1986 respectively. After the notification, a notice under Sub-section (5) of Section 10 of the Act, 1976 was issued on 29th October, 1987 calling upon the tenure holder to surrender the possession. This notice is alleged to be served upon the tenure holder personally by process server on 20th November, 1987. The State claimed that the possession has been taken pursuant to the said notice under sub-section (5) of Section 10 of the Act, 1976 on 31st November, 1987, the name of the State Government has been recorded in the revenue record on 06th March, 1993 and the surplus land has been handed over to the Saharanpur Development Authority, Saharanpur on 29th June, 2002.

3. It is asserted by the petitioners that they are still in physical and cultivatory possession of the land which

has been declared surplus. The petitioners have also averred that no notice under sub-section (5) of Section 10 of the Act, 1976 was issued to the petitioners and they have never signed any document regarding the delivery of possession. It is also averred that no forceful possession under the provisions of sub-section (6) of Section 10 of the Act, 1976 was taken by the State from the petitioners or actual tenure holder (father of the petitioners). The petitioners have also averred that they have not received any compensation of the land, which has been declared surplus. It is further stated that for the first time the name of the State Government was mutated in the revenue records on 06th February, 2008, after about ten years of coming into force of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act 15 of 1999)2. It is stated that the State Government is alleged to have transferred the land in favour of the Saharanpur Development Authority on 29th January, 2002, much after coming into force of the Repeal Act. In the Dakhalnama it is clearly recorded that the land is agricultural land, which shows that at the time of handing over possession to the Saharanpur Development Authority the land was not an urban land and it was agricultural land. The petitioners claim that they are still in possession.

4. It is stated that under Section 2(o) of the Act, 1976 the "urban land" is defined, it does not include the land which is mainly used for the purpose of agriculture. Section 2(q) also provides "vacant land", not being land mainly for the purpose of agriculture.

5. Counter affidavits have been filed on behalf of the State authorities and the Saharanpur Development Authority.

6. The stand taken in the counter affidavit of the State is that after the publication in the Government gazette under sub-section (1) of Section 10 and sub-section (3) of Section (10) of the Act, 1976 the land vests in the State Government. Thereafter a notice under sub-section (5) of Section 10 of the Act, 1976 was issued on 29th October, 1987 and the same was served upon the tenure holder through the process server personally on 20th November, 1987. It is further stated that after adopting all the proceedings according to law on the aforesaid declared surplus land, the possession was taken by the State on 31st November, 1987 and thereafter the aforesaid surplus land has been handed over to the Saharanpur Development Authority on 29th January, 2002 for construction of Awas Yojna. In support of the fact that the possession has already been taken much before the Repeal Act came into force, a xerox copy of the possession order/ letter dated 31st November, 1987 is annexed along with the counter affidavit.

7. In the counter affidavit filed on behalf of the Saharanpur Development Authority it is stated that the stand taken by the tenure holder Yusuf in his application dated 12th December, 1978 that his land be exempted under Section 20 of the Act, 1976 on the ground that the disputed land was being used for the agricultural purpose, was not found correct whereas the competent authority has found that the disputed land was not agricultural land. It is stated that after the land was declared surplus by the competent authority on 27th November, 1980, the notifications under sub-sections (1) and (3) of Section 10 of the Act, 1976 were made on 24th February, 1983 and

04th December, 1986 respectively. Thus, the disputed land stood vested in the State Government. It is stated that notice under sub-section (5) of Section 10 of the Act, 1976 was issued to the tenure holder on 01st October, 1987, which was served upon him and pursuant thereto the possession memo was prepared on 31st November, 1987. The said Dakhalnama is on the record as CA-5 to the counter affidavit. Later, the State Government has transferred the property to the Saharanpur Development Authority on 29th January, 2002 for being utilized in its residential schemes. Subsequent transfer/ possession memo dated 29th January, 2002 was executed by the Revenue Inspector, Saharanpur (as representative of the Zila Adhikari, Saharanpur), Tehsildar Saharanpur, Surveyor Urban Land Ceiling and Junior Engineer Saharanpur Development Authority (as representative of the Vice-Chairman of the Saharanpur Development Authority). The said possession memo is on the record as annexure-CA-6 to the counter affidavit.

8. We have heard Sri Madhusudan Dixit, learned counsel for the petitioners, learned Standing Counsel and learned counsel for the Saharanpur Development Authority.

9. Sri Madhusudan Dixit, learned counsel for the petitioners, submitted that the proceedings stood abated in terms of Section 3 of the Repeal Act. It is submitted that the expression "deemed to have acquired" or "deemed to have vested" would not be applicable if the State fails to establish that the actual possession has been taken in terms of sub-section (5) of Section 10 and sub-section (6) of Section 10 of the Act, 1976. He submitted that in terms of the notice issued under sub-section (5) of Section 10 of the Act, 1976 the tenure holder has not handed over possession to the Collector, which is evident from the material on the record. He further submitted that from the pleadings of the respondents in their counter affidavits it is clear that recourse to sub-section (6) of Section 10 of the Act, 1976 has not been taken as there is no pleading in the counter affidavits that forcible possession has been taken under sub-section (6) of Section 10 of the Act, 1976. Moreover, the State has failed to point out any document in the original record showing taking over the forcible possession.

10. Sri Dixit has drawn our attention to the Dakhalnama and the averments made in the counter affidavits filed on behalf of the State and the Saharanpur Development Authority that the possession has been taken on 31st November, 2002, which is non-existent date on calender and the repeated reference of the said date not only in the original records but also in the affidavits filed on behalf of both the respondents clearly demonstrate that the documents showing possession is a paper work in the office of the concerned respondent. He has further pointed out that it is not the case of the respondents that tenure holder voluntarily surrendered the possession. Thus, it was imperative that the possession should have been taken in terms of sub-section (6) of Section 10 of the Act, 1976 and there is no pleading in the affidavits of the respondents that forcible possession from the tenure holder was taken.

11. He further urged that from the memo of possession it is evident that the tenure holder was not present at the time

of delivery of possession and on the possession memo there is no signature of the tenure holder. This fact clearly shows that the petitioners have not given possession voluntarily pursuant to the notice issued under sub-section (5) of Section 10 of the Act, 1976. In view of the said facts, it is urged that the proceedings stood abated as the tenure holders are still in possession of the surplus land when the Repeal Act came into force.

12. He urged that the notice under sub-section (5) of Section 10 of the Act, 1976 was issued on 29th October, 1987 and is alleged to have been served upon Yusuf on 20th November, 1987 and the possession is taken on 31st November, 1987 i.e. before expiry of 30 days. Learned counsel for the petitioners asserted that the Directions, issued by the State Government under Section 35 of the Act, 1976, namely, The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 19833 has been completely ignored in taking the possession.

13. He submitted that the petitioners' land is agricultural land as defined under Sections 2(o) and 2(q) of the Act, 1976, which is evident from the possession memo dated 31st November, 1987 when land was alleged to be transferred to the Saharanpur Development Authority and it is recorded therein that land is agricultural land. It was sought to be urged that transfer of land to the Saharanpur Development Authority is no transfer in the eye of law because the State had not taken possession in accordance with law, therefore, it had no authority to transfer it in favour of the Saharanpur Development Authority.

14. Sri Dixit has placed reliance on the judgments of the Supreme Court in the case of **State of Uttar Pradesh v. Hari Ram4; Special Leave Petition (C) No. 16582 of 2014** decided with **Special Leave Petition (C) No. 38922 of 2013, State of U.P. and another v. Vinod Kumar Tripathi and others,** on 19th January, 2016; and the judgments of this Court in S**tate of U.P. and another v. Nek Singh5; Ram Chandra Pandey v. State of U.P. and others6; Ehsan v. State of U.P. and another7; Lalji v. State of U.P. and others8;** and **Yasin and others v. State of U.P. and others9.**

15. We had summoned the original record as there was serious dispute with regard to taking over of physical possession of the surplus land. We have perused the original records. Possession memo is dated 31(Sic) November, 1987. One Sarjeet Singh, Bhulekh Nirikshak, and the Lekhpal of the area have taken the possession. Petitioners or their father did not sign on the possession memo. There is no explanation in counter affidavits filed by the respondents on this aspect.

16. We have pointed out to the learned Standing Counsel that in the original dakhalnama the date has been mentioned as 31st November, 1987, which is apparently incorrect as the month of November is always of 30 days. Learned Standing Counsel has not taken a stand that it was a typographical error. Moreover, in both the counter affidavits filed by the State authorities and the Saharanpur Development Authority the same date has been mentioned in several paragraphs of the affidavits. Hence, there is no stand taken by the respondents that the said date appears to be recorded inadvertently or it is a typographical error. Even at this stage learned Standing Counsel has not tried to explain this

apparent error. Hence, we are not in a position to treat the obvious mistake as typographical or inadvertent mistake.

17. Learned Standing Counsel submitted that after the notifications under sub-section (1) and sub-section (3) of Section 10 of the Act, 1976 the land stood vested in the State Government and a notice was served upon the petitioners under sub-section (5) of Section 10 of the Act, 1976 personally by the process server on 20th November, 1987 and thereafter on 31st November, 1987 the possession has been taken. Hence, the proceedings cannot be said to be abated under the Repeal Act.

18. Learned Standing Counsel has placed reliance on the judgments of the Supreme Court in the cases of **State of Assam v. Bhaskar Jyoti Sarma and others10** and **State of U.P. and others v. Surendra Pratap and others11,** and judgment of this Court in **Shiv Ram Singh v. State of U.P. and others12.**

19. Learned counsel for the Saharanpur Development Authority has adopted the submissions of learned Standing Counsel.

20. It is apposite at this stage to set out relevant provisions of the Acts and the executive orders issued from time to time.

21. Section 2(o) of the Act, 1976 defines "urban land" and Section 2(q) defines "vacant land". Section 6 of the Act, 1976 provides that owner of the land shall submit a statement giving detail of the vacant land. Section 8(1) enjoins that the competent authority shall get a survey of the land conducted and on the basis of the said survey a draft statement under sub-section (3) of Section 8 of the Act, 1976 was required to be served upon the land owner calling for objection to the said statement within thirty days and the order is passed under sub-section (4) of Section 8 of the Act, 1976 and later a notification is issued under sub-section (1) of Section 10 for publication in the Gazette giving particulars of the vacant land. Thereafter another notice is published stating that the land shall be deemed to have been vested on the Government free from all encumbrances. Thereafter a notice under sub-section (5) of Section 10 of the Act, 1976 is issued calling upon the land owner to hand over possession of the land declared surplus. If the land owner fails to handover the possession voluntarily in response to the aforementioned notice, sub-section (6) of Section 10 of the Act, 1976 confers a power upon the competent authority to take forceful possession. For the sake of convenience, Sections 2(o), 2(q) and sub-sections (5) and (6) of Section 10 of the Act, 1976 are reproduced hereunder:

*"**2(o)** "urban land" means,--*

(i) any land situated within the limits of an urban agglomeration and referred to as such in the master plan; or

(ii) in a case where there is no master plan, or where the master plan does not refer to any land as urban land, any land within the limits of an urban agglomeration and situated in any area included within the local limits of a municipality (by whatever name called), a notified area committee, a town area committee, a city and town committee, a small town committee, a cantonment board or a panchayat,

but does not include any such land which is mainly used for the purpose of agriculture.

Explanation.--For the purpose of this clause and clause (q),--

(A) "agriculture" includes horticulture, but does not include--

(i) raising of grass,

(ii) dairy farming,

(iii) poultry farming,

(iv) breeding of live-stock, and

(v) such cultivation, or the growing of such plant, as may be prescribed;

(B) land shall not be deemed to be used mainly for the purpose of agriculture, if such land is not entered in the revenue or land records before the appointed day as for the purpose of agriculture:

Provided that where on any land which is entered in the revenue or land records before the appointed day as for the purpose of agriculture, there is a building which is not in the nature of a farm-house, then, so much of the extent of such land as is occupied by the building shall not be deemed to be used mainly for the purpose of agriculture:

Provided further that if any question arises whether any building is in the nature of a farm-house, such question shall be referred to the State Government and the decision of the State Government thereon shall be final;

(C) Notwithstanding anything contained in clause (B) of this Explanation, land shall not be deemed to be mainly used for the purpose of agriculture if the land has been specified in the master plan for a purpose other than agriculture;"

"2(q) "vacant land" means land, not being land mainly used for the purpose of agriculture, in an urban agglomeration, but does not include--

(i) land on which construction of a building is not permissible under the building regulations in force in the area in which such land is situated;

(ii) in an area where there are building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day with the approval of the appropriate authority and the land appurtenant to such building; and

(iii) in an area where there are no building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day and the land appurtenant to such building:

Provided that where any person ordinarily keeps his cattle, other than for the purpose of dairy farming or for the purpose of breeding of live-stock, on any land situated in a village within an urban agglomeration (described as a village in the revenue records), then, so much extent of the land as has been ordinarily used for the keeping of such cattle immediately before the appointed day shall not be deemed to be vacant land for the purposes of this clause."

*"**10(5)** Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice."*

*"**10(6)** If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.*

Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government."

22. Section 11 of the Act, 1976 enjoins that compensation shall be paid to the land owner.

23. In exercise of the powers under Section 35 of the Act, 1976 the State Government issued the Directions, 1983 known as The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976) which is reproduced below:

"The Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 (Directions issued by the State Government under Section 35 of 1976 Act):

"In exercise of the powers under Section 35 of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), the Governor is pleased to issue the following directions relating to the powers and duties of the competent authority in respect of amount referred to in Section 11 of the aforesaid Act to the person or persons entitled thereto:

***1. Short title, application and commencement.**-- These Directions may be called the Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983*

(2) The provisions contained in this direction shall be subjected to the provisions of any directions or rules or orders issued by the Central Government with such directions or rules or orders.

(3) They shall come into force with effect from the date of publication in the gazette.

***2. Definitions.**--* * **

***3. Procedure for taking possession of vacant land in excess of ceiling limit.**--(1) The competent authority will maintain a register in Form No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the gazette.*

*4. (1) * * **

(2) An order in Form No. ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No. ULC-I.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No. ULC-1. The competent authority shall in token of verification of the entries, put his signatures in Column 11 of Form No. ULC-1 and Column 10 of Form No. ULC-III.

Form No. ULC-1

Register of notice under Sections 10(3) and 10(5)

1	2	3	4	5	6	7	8	9	10	11

Sl. No.	Sl. No. of register of receipt	Sl. No. of register of taking possession	Case Number	Date of Notification under Section 10(3)	Land to be acquired village Mohali	Date of taking over possession	Remarks	Signature of competent authority		

Form No. ULC-II

Notice order under Section 10(5)

[See clause (2) of Direction (3)]

In the court of competent authority

U.L.C. .....

No..... Date .....

Sri/Smt..... T/o .....

In exercise of the powers vested under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (Act No.33 of 1976), you are hereby informed that vide Notification No..... dated ..... under Section 10(1) published in Uttar Pradesh Gazette dated ..... following land has vested absolutely in the State free from all encumbrances as a consequence Notification under Section 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27- U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of vacant land

Location	Khasra No. identification	Area	Remarks
1	2	3	4

Competent Authority

.....

No. .....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with the copy of certificate to verify.

Competent Authority

....."

24. The Act, 1976 was repealed by the Parliament pursuant to the resolutions passed by the State Legislatures of Haryana and Punjab empowering the Parliament to repeal the Act, 1976 in those States. Accordingly, the Urban Land (Ceiling and Regulation) Repeal Act, 1999 (Act 15 of 1999) was passed by the Parliament. Subsequently, it was open to the other States also to adopt the Repeal Act by resolution and accordingly, the Act, 1976 would stand repealed in such State from the date of adoption of the Repeal Act. In the State of Uttar Pradesh, the Repeal Act was adopted on 18th March, 1999. Sub-section (2) of Section 3 of the Repeal Act provides that if the possession has not been taken, the proceeding under the Act, 1976 shall stand abated. For convenience, Section 3 of the Repeal Act is reproduced as under:

*"**3. Saving.**-- (1) The repeal of the principal Act shall not affect--*

(a) the vesting of any vacant land under sub-section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land

then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

25. The only question which falls for determination is whether the possession taken by the respondents-State functionaries on 31st November, 1987 is a valid and legal and in case it is found that the said possession was illegal and void, in that event whether the proceedings shall stand abated in terms of Section 3 of the Repeal Act or not. An ancillary question also arises as to whether the possession can be taken by the Revenue Inspector and the Lekhpal as representative of the District Magistrate.

26. The Supreme Court in the case of **Hari Ram (supra)** went elaborately into all implications of the statutory provisions and the directions issued by the State of U.P., wherein detailed procedures have been laid down for taking possession of surplus land. It is worthwhile to mention that the Directions, 1983 has statutory flavour as it has been issued under Section 35 of the Act, 1976. In the said case, the Supreme Court has held as under:

"30. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the

extent necessary to achieve the legislative intent.

Voluntary surrender

31. The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in Maharaj Singh v. State of U.P.13, while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in Rajendra Kumar v. Kalyan14 held as follows: (SCC p. 114, para 28)

"28. ...We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. 'To "vest", generally means to give a property in.' (Per Brett, L.J. Coverdale v. Charlton15 : Stroud's Judicial Dictionary, 5th Edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executor devise. Be it noted however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."

32. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

33. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

34. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.

35. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be

voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) to Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force - as may be necessary - can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted only in a situation which falls under sub-section (6) and not under sub-section (5) to Section 10. Sub-sections (5) and (6), therefore, take care of both the situations, i.e. taking possession by giving notice that is "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), than "forceful dispossession" under sub-section (6) of Section 10."

27. The same issue with regard to peaceful possession and forceful possession in terms of sub-sections (5) and (6) of Section 10 of the Act, 1976 has been elaborately considered again by the Supreme Court in the case of **Gajanan Kamlya Patil v. Addl. Collector & Comp. Auth. & ors.16**. The Supreme Court followed its earlier judgment in **State of U.P. v. Hari Ram (supra)**. In this case the Supreme Court extensively quoted with approval Paragraphs-30 to 36 of **Hari Ram (supra)**. The relevant part of the judgment of **Gajanan Kamlya Patil (supra)** is extracted below:

"13. We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the Appellants. Consequently, we are inclined to allow this appeal and quash the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC

Act. The above reasoning would apply in respect of other appeals as well and all proceedings initiated against the Appellants, therefore, would stand quashed."

28. In **Special Leave Petition (C) No. 16582 of 2014 (supra),** the Supreme Court has held as under:

"...As could be seen from the Possession Certificate under Section 10(6) of the repealed ULC Act, District Magistrate, who has been authorised, possession of the land in question was not taken. The Tehsildar was given liberty to make the mutation proceedings and make entry in the Revenue Record after taking over possession as provided under Section 10(6) of the ULC Act and inform the same to the competent authority. The possession of the land in question is not taken from the declarant or his legal representatives in accordance with Section 10(6) of the ULC Act, from the original record it is noted that, there is no signature of taking over possession from the declarant or the legal representatives, more so, the competent authority has no power to nominate officer on behalf of the State Government to take possession as provided under Section 10(6) of the ULC Act, therefore, we are not inclined to interfere with the impugned order."

29. In **Special Leave Petition (C) No. 17799 of 2015 (supra)**, which was also taken up with Special Leave Petition (C) No. 38922 of 2013, State of U.P. and another v. Vinod Kumar Tripathi and others, vide order dated 19th January, 2016 the Supreme Court has held as under:

"As could be seen from the original record, possession of the land in question is taken neither by the competent authority or his authorised representative by following the procedure as laid down under Section 10(5) and Section 10(6) of the Urban Land (Ceiling & Regulation) Act, 1976 (now repealed), therefore, the impugned order cannot be interfered. Hence, the special leave petition is liable to be dismissed and is hereby dismissed accordingly."

30. We find that this Court has also followed the same principle in long line of decisions. A Division Bench of this Court in **State of U.P. and another v. Nek Singh17** followed the judgments of earlier Division Benches of this Court in **State of U.P. v. Doon Udhyog (P) Ltd.18 and State of U.P. v. Hart Ram19,** and held as under:

"[9] Otherwise also, the statutory benefit of the Repealing Act is also available to the landholder-respondent in the fact-situation of the matter, as the taking of the "possession" in the present case was neither de jure nor de facto. The term "possession" as per sections 3 and 4 of the Repealing Act and section 10(6) of the U.L.C.R. Act means and implies the lawful "possession" after "due compliance of the statutory provisions". In State of U.P. v. Doon Udhyog (P) Ltd., 1999 4 AWC 3324, a Division Bench of this Court has held that where possession has been taken, its legality is to be decided on merits. Similarly, another Division Bench of this Court in State of U.P. v. Hart Ram, 2005 60 AllLR 535, has held that "in case possession is purported to be taken under section 10(6) of the Act, still Court is required to examine whether 'taking of such possession' is valid or invalidated on any of the considerations in law. If Court

finds that one or more grounds exist which show that the process of possession, though claimed under section 10(5) or 10(6) of the Act is unlawful or vitiated in law, then such possession will have no recognition in law and it will have to be ignored and treated as of no legal consequence"..."

31. In **State of U.P. Thru Secy Avas Avam Shahri Niyojan v. Ruknuddin and others20** the issue whether the possession had been taken from the tenure holder complying with the provisions of Section 10(5) and 10(6) of the Act, 1976 came to be considered by this Court. After perusing the original record the Court has held as under:

"We having gone through the records and we find that the possession memo which was prepared on 22/23.03.1998, no where indicates as to how possession was taken and what is the name of witness in whose presence such possession was taken. There is no name indicated in the writ petition filed by the State or even in the rejoinder affidavit. The name of the Lekhpal in whose presence the alleged possession is said to have been taken has not been mentioned and the printed proforma of the possession memo is blank to that effect. The question as to how the factum of taking actual physical possession has been established by the State was discussed by a Division Bench in the case of ***Mohd. Islam & 3 Others Vs. State of U.P.*** *in Writ Petition No. 15864 of 2015 decided on 4th December, 2017. The said decision was quoted with approval by a Division Bench in the case of* ***Rati Ram Vs. State of U.P. & Others 2018 (4) ALJ 338*** *paragraph no. 8 as follows:-*

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District-Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this judgment we are not able to accept the alleged possession

memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

32. A Division Bench of this Court in **Ram Chandra Pandey (supra)** has held thus:

"34. In the background of the facts of this case and the submissions made by the learned counsel for the parties as well as on perusal of the record produced by the learned Standing Counsel, especially the document by which possession of the land is said to have been taken from the grand father of the petitioner late, Dhani Ram, we are not satisfied that actual physical possession of the plots in question was ever taken by the State Government. From the record, we find that the memo of possession prepared in the present case is nothing but a mere noting of three officials of the State Government made on 2.4.1992, which is also not on the proper format and appears to have been prepared by the State officials in their office, and as such no authenticity can be attached to the same. On such memorandum, there is no signature of the grand father of the petitioner (late Dhani Ram) or any independent person to show that actual physical possession had been delivered to the State Government. More so, the name of late Dhani Ram continued in the revenue record till his death in the year 1995 and thereafter the name of the petitioner was admittedly recorded in the Khasra and Khatauni in the year 1996, which continued so till the passing of the exparte order in 2004, where after also the land revenue was being accepted from the petitioner."

33. In **Ehsan (supra)** a Division Bench of this Court has held in the following terms:

"...Even otherwise the document which has been filed as Annexure No. 1 to the counter affidavit is a report and not the actual possession memo. It also

records that Bashir, who is the father of the petitioner refused to sign on the proceedings while possession was taken and the petitioner was not present at the time. It is, therefore, clear that this was a sheer paper transaction prepared before the expiry of the statutory period of 30 days and if the petitioner had not handed over voluntary possession, the dispossession could have been possible only by complying with the provisions of section 10(6) of 1970 Act. No such procedure has been followed nor any such evidence is on record.

*** *** ***

The law relating to taking over possession and the manner of preparation of possession memo has been explained in various judgements. Reference be had to in all such matters where the State relies on the judgment of the Apex Court in the case of **State of Assam Vs. Bhaskar Jyoti Sharma & Others 2015 (5) SCC 321** that has been followed by a Division Bench of this Court in the case of **Shiv Ram Singh Vs. State of U.P. & Others 2015 (5) AWC 4918**. In the instant case the aforesaid judgments would not apply in view of the peculiar facts of this case as discussed herein. To the contrary since taking over of possession by the State has not been established in the present case, the issue stands covered by the decision of the Apex Court in the case of **State of U.P. Vs. Hari Ram 2013 (4) SCC 280** and the decision in the case of **Raghbir Singh Sehrawat Vs. State of Haryana & Others 2012 (1) SCC 792** as well as the Division Bench judgment of this Court in the case of **Yasin Vs. State of U.P. & Others 2014 (4) ADJ 305.** The latest Division Bench of this Court with which we find ourselves in complete agreement with is in the case of **Lalji Vs. State of U.P. & 2 Others 2018 (5) ADJ 541** that has been delivered after taking into account the judgment of the Apex Court in the case of Bhasker Jyoti Sharma (supra).

34. Pertinently, in respect of the Saharanpur Development Authority the same issue was considered in the case of **Rati Ram v. State of U.P. and others21**, wherein the Division Bench of this Court has held as under:

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District- Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily

surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this. judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

35. It is apposite to mention that after the judgment of the Supreme Court in **Hari Ram (supra),** the State Government issued a Government Order dated 29th September, 2015 for compliance of the judgement and extensively quoted the relevant parts of the judgement, which deals with possession. It is mentioned that if after issuance of the notice under Section 10(5) of the Act, 1976 possession could not be taken but the owner has taken the compensation under Section 11 of the Act, 1976, in that event if owner returns the compensation, the land shall not be returned unless the amount of the compensation is not returned. The said Government order reads as under:

ष्संख्या–2228/आठ–6–15–124 यूसी/13

प्रेषक,

पनधारी यादव

सचिव,

प्रदेश शासन।

सेवा में,

जिलाधिकारी,

गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर

आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

आवास एवं शहरी नियोजन अनुभाग–6

लखनऊः दिनांक 29 सितम्बर 2015

विषय– नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 ततक्रम में निर्गत शासनादेश तथा मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 के सम्बन्ध में।

————

महोदय,

उपयुर्क्त विषय पर मुझे यह कहने का निर्देश हुआ है कि भारत सरकार के अधिनियम संख्या–15/1999 दिनांक 18.03.1999 द्वारा नगर भूमि (अधिकतम सीमा एवं विनियमन) अधिनियम 1976 को निरसित करते हुए नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम 1999 प्राख्यापित किया गया जिसके क्रम में शासनादेश संख्या– 502/9– न0 भू0–99–21यू0सी0/99, दिनांक 31.03.1999 द्वारा उक्त निरसन अधिनियम को उत्तर प्रदेश राज्य में अंगीकृत किया गया। निरसन अधिनियम 1999 की धारा–3 में यह प्राविधान है कि मूल अधिनियम का निरसन निम्नलिखित को प्रभावित नहीं करेगा–

(1) (क) धारा–10 की उपधारा– (3) के अधीन ऐसी रिक्त भूमि का निहित होना, जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से अधिकश्तक किसी व्यक्ति या सक्षम प्राधिकारी ने ले लिया है।

(ख) धारा– 20 की उपधारा– (1) के अधीन छूट देने संबंधी किसी आदेश या उसके अधीन की गयी किसी कार्यवाही की किसी न्यायालय के किसी निर्णय में उसके विरुद्ध किसी बात के होते हुए भी विधिमान्यताः

(ग) धारा– 20 की उपधारा– (1) के अधीन प्रदान की गयी छूट की शर्त के रूप मे राज्य सरकार को किया गया कोई संदायः

(2) जहां–

(क) मूल अधिनियम की धारा–10 की उपधारा (3) के अधीन किसी भूमि को राज्य सरकार में निहित होना मानी गयी है किन्तु जिसका कब्जा राज्य सरकार या राज्य सरकार द्वारा इस निमित्त सम्यक रूप से प्राधिकृत किसी व्यक्ति या सक्षम प्राधिकारी द्वारा नही लिया गया : और

(ग) ऐसी किसी भूमि के बाबत जिसके लिए राज्य सरकार द्वारा किसी रकम का संदाय कर दिया गया है तब तक प्रत्यावर्तित नही की जाय और जब तक कि राज्य सरकार को संदाय की गयी रकम का यदि कोई हो, प्रतिदाय नही कर दिया जाता।

उक्त के क्रम में शासनादेश संख्या–777/9न0भू0–135 यू0सी0/99 दिनांक 09.02.2000, शासनादेश संख्या–1623/9–न0भू0–2000 दिनांक 09.08.2000 एवं शासनादेश संख्या– 190/9–आ–6–2001 दिनांक 24.01.2001 निर्गत किये गये जिसमे मुख्य रूप से यह व्यवस्था की गई कि मूल अधिनियम धारा –8 (4) के अन्तर्गत जो भूमि रिक्त घोषित की गई थी और धारा–10 (3) के अन्तर्गत राज्य में निहित हो चुकी थी एवं धारा–10 (5) की कार्यवाही का आदेश हो चुका था परन्तु इस भूमि पर राज्य सरकार का कब्जा प्राप्त नही हो सका था, ऐसी भूमि के सम्बन्ध मे मूल भूधारक को अदा की गई धनराशि भूधारक द्वारा वापस करने पर भूमि मूल भूधारक को प्रत्यावर्तित की जा सकती है किन्तु अदा की गई धनराशि भू– धारक द्वारा वापस न करने की दशा में भूमि पर कब्जा किये जाने के सम्बन्ध मे विधि अनुसार अग्रिम कार्यवाही अमल मे लायी जाय। यह भी व्यवस्था की गई कि जिस भूमि के सम्बन्ध में धारा–10 (5) की कार्यवाही के उपरान्त धारा–10 (6) की कार्यवाही पूर्व हो चुकी है और भूमि पर राज्य सरकार द्वारा कब्जा लिया जा चुका है वह सरप्लस भूमि अन्तिम रूप से राज्य सरकार में निहित मानी जायेगी।

3. नगर भूमि सीमारोपण– गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर में लम्बित अर्बन सीलिंग प्रकरणों का समुचित रूप से निस्तारण ने होने की स्थिति मे भू–धारकों/वादियों द्वारा मा0 उच्च न्यायालय में अधिक संख्या में रिट याचिकायें योजित की जा रही है। नगर बस्ती कार्यालयों द्वारा रिट याचिकाओं में विभागीय पक्ष समयान्तर्गत साक्ष्यों सहित प्रबलता से प्रस्तुत न किये जाने के कारण मा0 न्यायालय द्वारा पारित आदेशों के क्रम में शासन को असमंजसपूर्ण स्थिति का सामना करना पड़ रहा है।

4. अर्बन सीलिंग के अन्य प्रकरण में राज्य सरकार द्वारा मा0 उच्चचम न्यायालय नई दिल्ली में विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम

हरीराम योजित की गयी। कालान्तर मे अन्य जनपदों के अर्बन सीलिंग से संबधित प्रकरणों मे योजित विशेष अनुमति याचिकायें उक्त विशेष अनुमति याचिका से क्लब की गयी। उक्त विशेष अनुमति याचिका संख्या–12960/2008 तथा उससे क्लब अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 मे अर्बन सीलिंग से संबधित प्रकरणों मे मार्गदर्शक सिद्धान्त प्रतिपादित किये गये हैं। निर्णय दिनांक 11.03.2013 का महत्वपूर्ण एवं कियात्मक अंश निम्नवत हैः–

प्रस्तर– 39

The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act. The State Government in this appeal could not establish any of those situations and hence the High Court is right in holding that the respondent is entitled to get the benefit of Section 3 of the Repeal Act.

प्रस्तर–40

We, therefore, find no infirmity in the judgment of the High Court and the appeal is, accordingly dismissed so also the other appeals. No documents have been produced by the State to show that the respondents had been dispossessed before coming into force of the Repeal Act and hence, the respondents are entitled to get the benefit of Section 3 of the Repeal Act. However, there will be no order as to cost.

5. नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 में विहित प्राविधान तथा तत्क्रम में निर्गत शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 स्वतः स्पष्ट है। विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम तथा उससे क्लब अन्य विशेष अनुमति याचिकाओं में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्त/आदेश भी स्वतः स्पष्ट हैं।

6. कृपया नगर भूमि (अधिकतम सीमा एवं विनियमन) निरसन अधिनियम, 1999 तथा उक्त शासनादेश दिनांक 09.02.2000, शासनादेश दिनांक 09.08.2000 एवं शासनादेश दिनांक 24.01.2001 में विहित व्यवस्था, विशेष अनुमति याचिका संख्या–12960/2008 उत्तर प्रदेश राज्य बनाम हरीराम में पारित मा0 उच्चतम न्यायालय के निर्णय दिनांक 11.03.2013 में उल्लिखित सिद्धान्तों/आदेशों के आलोक में लम्बित प्रकरणों मे स्महंस पदहतमकपमदजे देखते हुए आवश्यक कार्यवाही की जाय।

भवदीय
ह0 अपठनीय
(पनधारी यादव)
सचिव

ख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

1. निदेशक नगर भूमि सीमारोपण, उ0प्र0 जवाहर भवन– लखनऊ

2. सक्षम प्राधिकारी नगर भूमि सीमारोपण गोरखपुर, वाराणसी, इलाहाबाद, लखनऊ, कानपुर, आगरा, मेरठ, मुरादाबाद, अलीगढ, बरेली, सहारनपुर।

3. मुख्य स्थायी अधिवक्ता मा0 उच्च न्यायालय, इलाहाबाद

4. गार्ड फाईल।

आज्ञा से

(कल्लू प्रसाद द्विवेदी)
उप सचिव।ष

36. From a perusal of the aforesaid Directions issued by the State Government in 1983 and the Government Order dated 29th September, 2015 it is evident that if after the notification under sub-section (3) of Section 10 of the Act, 1976 the land is vested in the State Government but the possession has not been taken by the State Government or an officer nominated by the State Government or the competent authority, then in that event the proceedings shall be lapsed. However, the compensation paid to the land owner shall be got refunded. It is also made clear that only in those cases where after the notice under Section 10(5) of the Act, 1976 the possession has been taken under Section 10(6), the surplus land shall be finally vested in the State. The aforesaid Government Order has also quoted Paragraphs- 39 and 40 of the judgment of Hari Ram (supra).

37. A Division Bench of this Court in **Lalji (supra),** after considering the judgment of the Supreme Court in **Hari Ram (supra)** and ***Bhaskar Jyoti Sarma (supra),*** has held as under:

"[29]. Faced with a situation where respondents could not place even an iota of evidence showing actual physical possession of disputed land by respondent, learned Standing Counsel sought to rely upon Supreme Court judgment in State of Assam Vs. Bhasker Jyoti Sharma & Ors. 2015 (5) SCC 321 and contended that irrespective of any defect in notice under Sections 10(5) or 10(6) of Act, 1976, if possession has been taken in any manner, Repeal Act 1999 will have no application.

*** *** ***

[37]. We may also mention at this stage that except bare averment that disputed land was transferred to ADA by competent Authority, no material has been placed on record about transfer of possession to ADA and infact nothing has been placed on record even to show that de facto possession of land in dispute before or after Repeal Act, 1999 is with ADA. ADA has also not placed on record anything to show that land in dispute is in its actual physical possession and in absence thereof, we had no occasion to require petitioner to prove, how de facto possession of land in dispute came in the hands of ADA. With regard to possession of land in dispute, except bare averments, nothing has been placed on record. It appears that respondents were under impression that once notification under Section 10(3) has been issued, land in dispute vested in 'State' and thereafter, irrespective of fact whether actual physical possession is taken by respondents or not, land owner would cease to have any right and Repeal Act, 1999 will have no application though this assumption on the part of respondents, as we have already discussed, stood negated by Court in State Vs. Hari Ram."

38. Learned Standing Counsel has placed reliance on a judgment of the Supreme Court in the case of **Bhaskar Jyoti Sarma (supra)** and a Division Bench of this Court in **Shiv Ram Singh (supra).** Both the judgments have been considered by a Division Bench of this Court in the case of **Mohammad Suaif and another v. State of U.P. and others22** and **Lalji (supra).**

39. In the case of **Bhaskar Jyoti Sarma (supra)** the land owner has not denied the fact that possession was taken from him by the State before enactment of the Repeal Act. In view of the admitted

fact the Supreme Court refused to examine the matter that whether the possession was taken forcefully or illegally. Once possession was taken by the State and land vested in the State Government, the benefit of Section 4 of the Repeal Act shall not be applicable. Hence, the said case is distinguishable as in the present case the main issue raised by the petitioners is that they are still in physical possession and the State has never taken possession from them.

40. As regards the case of **Shiv Ram Singh (supra),** the petitioner therein had challenged the order passed by the District Magistrate holding that the possession of the land declared surplus has been taken on 25th June, 1993, much before Repeal Act came into force. Hence, it was found that he was not entitled to the benefit of the provisions of Section 3 (2) of the Repeal Act. In the said case, the notice under Section 10(1) was issued on 15th May, 1985, thereafter on 02nd June, 1986 a notification under Section 10(3) was issued and published in the official gazette, and on 25th February, 1987 a notice under Section 10(5) of the Act, 1976 was issued. The respondents-State had taken a stand that the possession was taken on 25th June, 1993 pursuant to the notice dated 25th February, 1987 i.e. prior to enforcement of the Repeal Act and in the revenue record the name of the State was mutated. The petitioner therein had earlier approached the Court by means of Writ Petition No. 47279 of 2002 claiming that he is still in possession over the land which was declared surplus, hence after the Repeal Act the possession cannot be taken over from him. The said writ petition was disposed of by this Court by issuing a direction upon the District Magistrate to consider his representation. The District Magistrate, after furnishing opportunity to the petitioner, by an order dated 10th May, 2007 held that the possession has already been taken on 25th June, 1983, hence the petitioner would not be entitled to the benefit of the Repeal Act. The petitioner challenged the said order of the District Magistrate after two years in July, 2009. In the meantime in the year 2008 the construction of a Sewage Treatment Plant (STP) for treating 210 MLD of sewage was commenced. The Jal Nigam, in whose favour the land was transferred, filed a counter affidavit in the said writ petition and took the stand that by the time the writ petition was filed, nearly 65% of the work had been completed at a cost of Rs.73 crores and the petitioner was fully aware of the said facts but he did not file the writ petition for two years. In the light of those peculiar facts the Court did not interfere. Moreover, the Court has also found that the procedure for taking possession was followed by the administration. The District Magistrate after affording opportunity to the petitioner has recorded a finding that the possession was taken on 25th June, 1993.

41. We have carefully gone through the judgment of **Shiv Ram Singh (supra)** and we find that the said judgment is distinguishable for the reasons recorded above.

42. Keeping in the mind the principle laid down by the Supreme Court and this Court, as indicated in the authorities referred herein-before, we find that in the counter affidavit the State has taken a very general and vague stand about the possession. In Paragraph-4 of the counter affidavit of the State the only averment made in this regard is that the

process server personally served the notice under Section 10(5) of the Act, 1976 on 20th November, 1987. It is also averred therein that "It is further stated that after adopting all proceeding according to law on the aforesaid declared surplus land the possession of the State Government has been taken on 31.11.1987". It is not mentioned in the counter affidavit that the petitioners have given voluntary possession after receiving the notice under Section 10(5) of the Act, 1976. From the original record it was evident that there was no material to show that the petitioners have given voluntary possession to the State authorities after receiving the notice under Section 10(5). If they had not given the voluntary possession then the only course open to the authorities was to take forceful possession under Section 10(6) of the Act, 1976. There is no material on the record or averment made in the counter affidavit to show that the forceful possession was taken from the petitioners under Section 10(6) of the Act, 1976. In the counter affidavit filed on behalf of the State, the name of the officer, who has taken the possession, is not disclosed. However, in the counter affidavit filed by the Saharanpur Development Authority it is stated that the Tehsildar has taken the possession. As mentioned above, the only document which is on the record to indicate taking over the possession is a memo dated 31st November, 1987. The said date has been mentioned in several paragraphs of the counter affidavits of the State and the Saharanpur Development Authority. The said document does not inspire any confidence. There are only thirty days in the month of November. So, apparently 31st November is a wrong date. As held by the Supreme Court in **Hari Ram (supra)** and the directions issued by the State Government in the Directions, 1983 as well as the Government Order dated 29th September, 2015, we find that the possession has not been taken in terms of the Directions, 1983 and the Government Order. The Revenue Inspector and the Lekhpal are not authorized to take possession as held in a large number of cases mentioned above.

43. As regards the stand of the State that the possession has been handed over to the Saharanpur Development Authority, we find that except the memo of possession/ Dakhalnama, there is no other material to indicate that the possession was legally handed over to the Saharanpur Development Authority. Pertinently, in the Dakhalnama it is recorded that the land is agricultural. We find merit in the submission of the petitioners that agricultural land cannot be declared surplus. But this issue was not raised seriously, hence we are not recording any finding on this issue. In the counter affidavit filed by the Saharanpur Development Authority the alleged possession is stated to have been taken on 29th January, 2002 but no detail has been mentioned regarding the construction, which has been raised. As regards the claim of the respondents that possession of the land was handed over to the Saharanpur Development Authority, we find that the proceedings stood abated in terms of Section 4 of the Repeal Act, therefore, any subsequent transfer is non est.

44. In addition to above, as discussed above, there is no material on the record to demonstrate that actual possession was handed over to the Saharanpur Development Authority

except a Dakhalnama wherein the land has been shown to be agricultural land. The petitioners have brought on record the minutes of a meeting dated 18th August, 2008 of the district administration and the officials of the Saharanpur Development Authority, presided over by the District Magistrate. In the said meeting it was resolved to handover the surplus land declared under the urban ceiling to the development authority for construction of residential accommodation. In the said meeting it was resolved that the Saharanpur Development Authority shall take steps to obtain permission from the competent authority for conversion of land use. From the record it appears that before any construction started, the petitioners have obtained an interim order in the petition on 25th June, 2009. The said interim order is continuing for the last ten years. Record shows that neither the State nor the Saharanpur Development Authority has taken any step for early hearing of the matter. A general and vague statement has been made that the 'development authority is presently utilizing' the said land for development of the residential colony, wherein EWS houses are being constructed under the Manyawar Kanshiram Durbal Warg Awasiya Yojna. But except bald statement no other material is on the record to show that any construction has been made. In any view of the matter, if the possession has not been taken in terms of Sections 10(5) and 10(6) of the Act, 1976, the petitioners are entitled for the benefit under Sections 3 and 4 of the Repeal Act.

45. For all the reasons stated above, we find that the ceiling proceeding stood lapsed and the petitioners are entitled for the land in question which has been declared surplus. If the claim of the Saharanpur Development Authority that it has raised construction over the land in question is correct, it would be open to the petitioners to take recourse to such remedy which is available under the law.

46. With the aforesaid observations and directions, the writ petition is allowed.

47. No order as to costs.

(2019)10ILR A 1732

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 13541 of 2016

Ram Ayodhaya Prasad ...Petitioner
Versus
Presiding Officer Labour Court Ghaziabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Devendra Kumar, Sri Babu Lal Ram

Counsel for the Respondents:
C.S.C., Sri Chandra Bhan Gupta.

A. Industrial Dispute Act, 1947 - Section 2(k) - services of the workman not terminated- name continued in the rolls of the employer, and back wages been directed to pay; there exist no industrial dispute; reference rightly rejected.

Held:- In the facts of the present case in the absence of any real and substantial difference existing between the parties which could be said to be connected with the employment or non-employment, or with regard to discharge,

dismissal, retrenchment or termination there could not be said to be any industrial dispute subsisting, which required adjudication, and the award passed by the Labour Court which is sought to be challenged in the present petition, cannot be faulted with. (Para 24)

Writ Petition rejected (E-9)

List of Cases Cited: -

1. Narendra Kumar Sen & ors. Vs All India Industrial Disputes (Labour Appellate) Tribunal & ors., AIR 1953 Bombay 325

2. Workmen of Dimakuchi Tea Estate Vs Management of Dimakuchi Tea Estate, AIR 1958 SC 353

3. M/s Dharam Pal Prem Chand Vs M/s. Dharam Pal Prem Chand 4 & J.H. Jadhav Vs Forbes Gokak Ltd., AIR 1966 SC 182

4. Shambu Nath Goyal Vs Bank Of Baroda, Jullundur, AIR 1978 SC 1088

5. Beetham Vs Trinidad Cement Ltd, (1960) 1 All ER 274

6. ANZ Grindlays Bank Ltd. Vs UOI & ors. (2005)12 SCC 738

7. Prabhakar Vs Joint Director, Sericulture Department, & anr. (2015)15 SCC 1

8. Conway Vs Wade, (1909) A.C.506(House of Lords)

9. Ram Singh Vs J.K. Jute Mills Co.Ltd. & ors., 2002 (95) FLR 1058

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Babu Lal Ram holding brief of Sri Devendra Kumar, learned counsel for the petitioner and Sri Chandra Bhan Gupta, learned counsel appearing for the respondent no. 2.

2. The present petition has been filed seeking to challenge the award dated 18.08.2015 passed by the Labour Court (First) U.P. Ghaziabad in Adjudication Case No. 302/86 and also the order of the same date passed upon an application under Section 6-F of the U.P. Industrial Disputes Act, 1947 (in short 'U.P.I.D.Act, 1947'), which was registered as Misc. Case No. 15/96.

3. While considering the reference which had been made with regard to the legality/validity of the termination of the workman (petitioner herein) with effect from 10.10.1985, the Labour Court, upon taking notice of the fact that the workman had joined his duties on 12.9.1996 came to the conclusion that there did not exist any dispute regarding which the reference had been made. Thereafter, considering the grievance of the workman that he had not been paid his wages from September, 1985 upto 10.10.1985, the Labour Court held that the workman was entitled for being paid wages for the said period and no other relief was granted.

4. The application under Section 6-F of the U.P.I.D.Act, 1947 was rejected by the Labour Court vide order dated 18.08.2015 after taking into consideration the fact that the workman was continued to be shown on the rolls of the employer, and that the workman had not been able to prove the fact that his conditions of service were changed during pendency of the proceedings.

5. Learned counsel for the petitioner made a feeble attempt to assail the award by raising a grievance with regard to his alleged termination dated 10.10.1985 relating to which the reference had been made. However, he did not controvert the

fact that the workman had joined his duties on 12.9.1996 and as a consequence thereof there existed no dispute with regard to his termination relating to which the reference had been made.

6. The learned counsel appearing for the respondent no. 2-employer submitted that it was the specific stand of the employer before the Labour Court that the services of the workman were never terminated from 10.10.1985, as stated in the reference order, and that the management had made an offer to the workman concerned to report for duty. It was also pointed out that the name of the workman was continued to be shown in the attendance register and he was on rolls of the factory even after the alleged date of termination i.e. 10.10.1985, and that the workman joined his duties on 12.9.1996 and started working. It was accordingly submitted that workman having never been terminated and subsequently having admittedly joined his duties there existed no dispute with regard to his termination which required adjudication, and in view of the same the Labour Court had rightly passed the award.

7. Heard learned counsel for the parties and perused the record.

8. The core issue in the present petition revolves around the interpretation of the term 'industrial dispute'.

9. The term 'industrial dispute' as defined under Section 2 (l) of the U.P.I.D.Act, 1947 which is in similar terms as the definition contained under Section 2(k) of the Industrial Disputes Act, 1947 (in short 'I.D.Act, 1947') essentially means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

10. As per Section 2-A of the I.D.Act, 1947 where any employer discharges, dismisses, retrenches, or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination is deemed to be an industrial dispute.

11. The ambit and scope of the meaning of the term 'industrial dispute' came up for consideration in the case of **Narendra Kumar Sen and others Vs. All India Industrial Disputes (Labour Appellate) Tribunal and others1,** and upon taking into view the definition of the term under Section 2(k) of the I.D.Act, 1947 it was held that in order that a controversy between workmen and employers can become an industrial dispute, two conditions are necessary: first, it must be a dispute; and second, it must be an industrial dispute. The observations made in the judgment are as under :-

"(5) Now, in order that a controversy between workmen & employers can become an industrial dispute, two conditions are necessary. It must be a dispute and it must be an industrial dispute. There is no difficulty in understanding what "industrial dispute" is because it is clearly defined in Section 2(k). A controversy which is connected

with the employment or non-employment or the terms of employment or with the conditions of labour is an industrial controversy. But it is not enough that it should be an industrial controversy; it must be a dispute; and in my opinion it is not every controversy or every difference of opinion between workmen and employers which is constituted a dispute or difference within the meaning of Section 2(k). A workman may have ideological differences with his employer; a workman may feel sympathetic consideration for an employee in his own industry or in other industry; a workman may feel seriously agitated about the conditions of labour outside our own country; but It is absurd to suggest that any of these factors would entitle a workman to raise an industrial dispute within the meaning of Section 2(k). The dispute contemplated by Section 2(k) is a controversy in which the workman is directly and substantially interested. It must also be a grievance felt by the workman which the employer is in a position to remedy. Both the conditions must be present; it must be a grievance of the workman himself; it must be a grievance which the employer as an employer is in a position to remedy or set right."

12. The test with regard to existence of an industrial dispute was laid down in the aforementioned judgment of **Narendra Kumar Sen and others,** in the following terms :-

"7...Therefore, when Section 2(k) speaks of the employment or non-employment or the terms of employment or the conditions of labour of any person, it can only mean the employment or non-employment or the terms of employment or the conditions of labour of only those persons in the employment or non-employment or the terms of employment or with the conditions of labour of whom the workmen themselves are directly and substantially interested. If the workmen have no direct or substantial interest in the employment or non-employment of a person or in his term of employment or his conditions of labour, then an industrial dispute cannot arise with regard to such person.."

13. The scope and effect of the definition clause in Section 2(k) of the I.D.Act, 1947 again fell for consideration in the case of **Workmen of Dimakuchi Tea Estate Vs. Management of Dimakuchi Tea Estate2,** and upon analyzing the definition of the term 'industrial dispute' it was held that in order to fall within the scope of the definition under Section 2(k), the following conditions must be satisfied: (i) there must be a dispute or difference; (ii) the dispute or difference must be between employers and employers, or between employers and workmen, or between workmen and workmen; and (iii) the dispute or difference must be connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. The relevant observations made in the judgment are as follows :-

"8....If we analyse the definition clause, it falls easily and naturally into three parts: first, there must be a dispute or difference; second, the dispute or difference must be between employers and employers, or between employers and workmen or between workmen and workmen; third, the dispute or difference must be connected with the employment

or non-employment or the terms of employment or with the conditions of labour, of any person..."

14. In the abovementioned case of **Workmen of Dimakuchi Tea Estate** after referring to '**Maxwell on the Interpretation of Statutes3**' and also examining the object of the I.D.Act, 1947 and its salient features, it was observed as follows :

"9...the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act. It is well settled that "the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained."

(Maxwell, Interpretation of Statutes, 9th Edition, p. 55).

10. It is necessary, therefore, to take the Act as a whole and examine its salient provisions. The long title shows that the object of the Act is "to make provision for the investigation and settlement of industrial disputes, and for certain other purposes." The preamble states the same object..

.....

14..It is obvious that a dispute between employers and employers, employers and workmen, or between workmen and workmen must be a real dispute capable of settlement or adjudication by directing one of the parties to the dispute to give necessary relief to the other. It is also obvious that the parties to the dispute must be directly or substantially interested therein, so that if workmen raise a dispute, it must relate to the establishment or part of establishment in which they are employed..."

15. The aforementioned view that the term 'industrial dispute' as defined under Section 2(k) of the I.D.Act, 1947 means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen which is concerned with the employment or non-employment or the terms of employment or with the conditions of labour, of any person, was reiterated in **Workmen of M/s Dharam Pal Prem Chand Vs. M/s. Dharam Pal Prem Chand4 and J.H.Jadhav Vs. Forbes Gokak Ltd5.**

16. The meaning of the term 'industrial dispute' as defined under Section 2(k) of the I.D.Act, 1947 again came up for consideration in the case of **Shambu Nath Goyal vs Bank Of Baroda, Jullundur6,** wherein it was held that the the key words in the definition of the term industrial dispute are 'dispute' or 'difference' and the existence of an industrial dispute pre-supposes a dispute or difference between the parties as contemplated by the definition. The relevant observations made in the judgment are as follows :-

"5.A bare perusal of the definition would show that where there is a dispute or difference between the parties contemplated by the definition and the dispute or difference is connected with the

employment or non-employment or the terms of employment or with the conditions of labour of any person there comes into existence an industrial dispute. The Act nowhere contemplates that the dispute would come into existence in any particular, specific or prescribed manner. For coming into existence of an industrial dispute a written demand is not asinequanon, unless of course in the case of public utility service because Section 22 forbids going on strike without giving a strike notice..."

17. While discussing the meaning **of the words 'dispute' and 'difference' in the aforementioned case of** Shambu Nath Goyal (supra) the judgment in the case of **Beetham Vs. Trinidad Cement Ltd.7**, was referred to and the observations made by Lord Denning in the context of the definition of the term 'trade dispute' under Section 2 (1) of the Trade Disputes (Arbitration and Inquiry) Ordinance (Laws of Trinidad and Tobago, 1950) were also extracted and it was stated as follows :-

"5.....The key words in the definition of industrial dispute are 'dispute' or 'difference'. What is the connotation of these two words. InBeethamv.Trinidad Cement Ltd,(1960) 1 All ER 274 at p. 279, Lord Denning while examining the definition of expression 'trade dispute' in Section 2(1) of Trade Disputes (Arbitration and Inquiry) Ordinance of Trinidad observed:

"By definition a "trade dispute' exists whenever a "difference' exists; and a difference can exist long before the parties became locked in a combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening."

6.Thus the term 'industrial dispute' connotes a real and substantial difference having some element of persistency and continuity till resolved and likely if not adjusted to endanger the industrial peace of the undertaking or the community. When parties are at variance and the dispute or difference is connected with the employment, or non-employment or the terms of employment or with the conditions of labour there comes into existence an industrial dispute. To read into definition the requirement of written demand for bringing into existence an industrial dispute would tantamount to re-writing the section."

18. The definition of the term 'industrial dispute' as under Section 2(k) of the I.D.Act, 1947 and also the meaning of the word 'dispute' as defined in the **Black's Law Dictionary and also Advance Law Lexicon by P. Ramanatha Aiyar,** were referred to in the case of **ANZ Grindlays Bank Ltd. Vs. Union of India and others8,** and it was observed as follows:-

"11...Section 2(k) of the Act defines "industrial dispute" and it means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. The definition uses the word "dispute". The dictionary meaning of the word "dispute" is: to contend any argument; argue for or against something asserted or maintained. InBlack's Law Dictionarythe meaning of the word "dispute" is: a conflict or controversy, specially one that has given rise to a

particular lawsuit. InAdvanced Law Lexiconby P. Ramanatha Aiyar the meaning given is: claim asserted by one party and denied by the other, be the claim false or true; the term "dispute" in its wider sense may mean the wranglings or quarrels between the parties, one party asserting and the other denying the liability. InGujarat State Coop. Land Development Bank Ltd.v.P.R. Mankad[(1979) 3 SCC 123 : 1979 SCC (L&S) 225] it was held that the term "dispute" means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other."

19. A similar view was taken in the case of **Prabhakar Vs. Joint Director, Sericulture Department, and another9,** and after considering the definition of the term under Section 2(k) and also Section 2-A of the I.D.Act, 1947, it was held that the term 'industrial dispute' connotes a real and substantial difference having some element of persistency which is likely to endanger the industrial peace. The relevant observations made in the judgment are as follows :

"31. Section 2(k) of the IDA defines 'industrial dispute' and it reads as under:

"2.(k) 'industrial dispute' means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;"

32. As per Section 2-A dispute relating to discharge, dismissal, retrenchment or termination of an individual are also deemed as industrial dispute and, therefore, an individual is given right to raise these disputes.

33. The term 'industrial dispute' connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. The expression 'dispute or difference' as used in the definition, therefore, means a controversy fairly definite and of real substance, connected with the employment or non-employment or with the terms of employment or the conditions of labour of any person, and is one in which the contesting parties are directly interested in maintaining the respective contentions.

34. To understand the meaning of the word 'dispute', it would be appropriate to start with the grammatical or dictionary meaning of the term:

"'Dispute': to argue about, to contend for, to oppose by argument, to call in question - to argue or debate (with, about or over) - a contest with words; an argument; a debate; a quarrel;"

35. Black's Law Dictionary, 5th Edn., p. 424 defines "dispute" as under:

"Dispute.--A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined."

36.Thus, a dispute or difference arises when demand is made by one side (i.e. workmen) and rejected by the other side (i.e. the employer) and vice versa. Hence an "industrial dispute" cannot be said to exist until and unless the demand is made by the workmen and it has been rejected by the employer..."

20. Reference may also be had to the judgment in the case of **Conway Vs. Wade10,** wherein the words 'contemplation or furtherance of a trade dispute', fell for consideration in the context of the Trade Disputes Act, 1906, in which the expression 'trade dispute' had been defined under sub-section (3) of Section 5 as meaning any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and in the context of the aforementioned definition, it was observed as follows :-

"'Trade dispute' is a familiar phrase in earlier Acts of Parliament, and is defined in this Act. I do not know that the definition is of much assistance. If this section is to apply there must be a dispute, however the subject-matter of it be defined. A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance."

21. In a similar set of facts, as in the present case, in **Ram Singh Vs. J.K.Jute Mills Co.Ltd. and others11,** where the employer, in their written statement, had categorically stated that they had not terminated the services of the concerned workman and the name of the workman was continuing on the rolls of the employer, it was held that there was no necessity of adjudicating whether his services were terminated or not and whether the termination is legal and justified or not. The relevant observations made in the judgment are as follows :-

"2. The following dispute was referred to the labour court for adjudication :

''क्या सेवायोजकों द्वारा अपने श्रमिक श्री राम सिंह पुत्र श्री मतई, मजदूर एवजीदार शिफ्ट–सी, हवाघर की सेवायें दिनांक 26.9.1990 से समाप्त किया जाना उचित तथा वैधानिक है? यदि नहीं, तो संबंधित श्रमिक क्या लाभ/क्षतिपूर्ति पाने का आधिकारी है, तथा किस तिथि एवं किस अन्य विवरण सहित?''

3. The parties have exchanged their pleadings and adduced evidence before the labour court. The employer, in their written statement, have categorically stated that they have not terminated the services of the concerned workman and no order terminating the services of the concerned workman was passed. The name of the concerned workman is still on the rolls of the employer. In this view of the matter, the concerned workman is not entitled for any relief.

.....

8....in view of the admitted facts that the employer themselves have admitted that they have not terminated the services of the concerned workman and his name is still continuing on the rolls of the employer, in my opinion, the labour court has travelled beyond the pleadings of the parties and arrived at the conclusion referred to above. Once the employer have admitted that they have not terminated the services of the concerned workman, the labour court should have stopped there and answered the reference that since, it is the employers' own case that they have not terminated the services of the concerned workman, therefore, there is no necessity of adjudicating whether his services were terminated or not and whether the termination is legal and justified or not? "

22. It is thus seen that the term 'industrial dispute' connotes a real and substantial difference having some element of persistency which is likely to endanger industrial peace. The essence of an industrial dispute is disagreement. In order to constitute a dispute there must be some disagreement between workmen and employer who stand in some industrial relationship upon some matter that affects or arises out of that relationship. It must be concerned with an industry and the difference between the parties must be concerned in some way with the 'workmen' as defined in the Act.

23. The expression 'dispute' or 'difference' as used under the statutory definition of the term 'industrial dispute' means a controversy which is fairly definite and of real substance and being connected with the terms of employment or non-employment or with the conditions of labour or dismissal etc., and is one in which the contesting parties are directly and substantially interested in maintaining the respective contentions. It must be a grievance felt by the workmen which the employer is in a position to remedy or set right. The dispute in order to come within the definition of 'industrial dispute' must be capable of being made the subject of an award, and therefore, the claim made by one party to the dispute must be one which the other party has power to grant. The key words in the definition of the term 'industrial dispute' are 'dispute' or 'difference'. The existence of an 'industrial dispute' thus pre-supposes the existence of a 'dispute' or 'difference' as a condition precedent.

24. In the facts of the present case in the absence of any real and substantial difference existing between the parties which could be said to be connected with the employment or non-employment, or with regard to discharge, dismissal, retrenchment or termination there could not be said to be any industrial dispute subsisting, which required adjudication, and the award passed by the Labour Court which is sought to be challenged in the present petition, cannot be faulted with.

25. The Labour Court having held that there existed no subsisting industrial dispute and the workman having not been able to prove the fact that the employer had contravened the provisions of Section 6-E during the pendency of the proceedings before the Labour Court, the rejection of the application under Section 6-F of the U.P.I.D.Act, 1947, also cannot be held to be improper.

26. No other point was argued by the counsel for the petitioner.

27. Counsel for the petitioner has not been able to point out any material error or illegality in the award of the Labour Court dated18.08.2015 and also the order of the same date passed upon an application under Section 6-F of the U.P.I.D.Act, 1947.

28. The writ petition lacks merit and is accordingly dismissed.

(2019)10ILR A 1740

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 38391 of 2016

State of U.P. & Anr. ...Petitioners
Versus
Chhunna Lal & Anr. ...Respondents

Counsel for the Petitioners:
Sri Chandrakesh Rai, Sri Prakash Singh.

Counsel for the Respondents:
Sri Manta Ram Gupta.

A. U.P. Industrial Dispute Act, 1947 - Burden of proving a fact - on the party who substantially asserts the issue and not upon who denies it. The workman unable to prove the factum of his continuous service - not entitled to benefit of the protection of section 6N of the Act.

Held:- In the instant case the aforementioned burden of proof having not been discharged by the respondent-workman the finding recorded by the Labour Court with regard to the workman having been completed 240 days in a calendar year so as to claim entitlement of the protection under Section 6N of the Act, 1947 is not supported from the records and the same being contrary to the material evidence which is available on record the finding cannot be legally sustained. (Para 31)

Writ Petition allowed (E-9)

List of Cases Cited: -

1. Range Forest Officer Vs S.T. Hadimani, (2002) 3 SCC 25

2. Rajasthan St. Ganganagar S. Mills Ltd. Vs St. of Raj. & anr., (2004) 8 SCC 161

3. Municipal Corp. Faridabad Vs Siri Niwas, (2004) 8 SCC 195

4. Manager, R.B.I., Bangalore Vs S. Mani & ors., (2005) 5 SCC 100

5. Surendranagar District Panchayat Vs Dahyabhai Amarsinh, (2005) 8 SCC 750

6. R.M. Yellatti Vs Assistant Executive Engineer, (2006)1 SCC 106

7. Ranip Nagar Palika Vs Babuji Gabhaji Thakore & ors. (2007) 13 SCC 343

8. Sub-Divisional Engineer, Irrigation Project, Yavatmal Vs Sarang Marotrao Gurnule, 2009 (120) FLR 114 (Bom.H.C.)

9. Haridwar Vs Smt. Kulwant, 2013 (6) ADJ 485

10. Rangammal Vs Kuppuswami & anr., (2011) 12 SCC 220

11. A. Raghavan & anr. Vs A. Chenchamma & anr., (1964) AIR SC 136

12. M/s Triveni Engineering & Industries Ltd. Vs St. of U.P. & ors., Writ C No.60572/2011

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Sri Prakash Singh, learned Standing Counsel for the petitioners and Sri Manta Ram Gupta, learned counsel appearing on behalf of respondent no.1-workman.

2. The present petition seeks to challenge the award dated 10.04.2015 passed by the Labour Court, U.P., Jhansi in Adjudication Case No.03 of 2013.

3. The records of the case indicate that upon an industrial dispute having been raised by the respondent-workman a reference was made under Section 4K of the U.P. Industrial Disputes Act, 19471 which was registered as Adjudication Case No.03 of 2013 before the Labour Court, U.P., Jhansi. The question which was referred for adjudication is as follows:-

ष्क्या सेवायोजक द्वारा अपने श्रमिक श्री छुन्नालाल पुत्र स्व. श्री रामगोपाल कर्मकार की

सेवायें दिनांक 01.03.83 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं तो सम्बन्धित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किस विवरण सहित?ष

4. The aforementioned reference which was with regard to the legality/validity of the termination of the respondent-workman w.e.f. 01.03.1983 was answered by the Labour Court in terms of the award dated 10.04.2015 wherein it was held that prior to the termination of the services of the respondent-workman the provisions of Section 6N of the Act, 1947 were not followed, and, accordingly, the termination dated 01.03.1983 was held to be illegal and invalid, and a direction was issued for reinstatement of the respondent-workman from the date of his termination i.e. 01.03.1983. The Labour Court declined to grant back wages, however, it was provided that the workman would be entitled to payment of full wages from the date of publication of the award.

5. Perusal of the records of the case indicates that as per the case set up by the respondent-workman in his written statement filed before the Labour Court he had claimed to have continuously worked for a period of two years as a daily-wager from 04.05.1981 to 28.02.1983 without any break and that his services were illegally terminated on 01.03.1983 without complying with the provisions of Section 6N of the Act, 1947.

6. A written statement was filed by the petitioners wherein it was stated that the respondent-workman had not worked for the period from 04.05.1981 to 28.02.1983 and in fact he had never worked with the petitioners' department in any capacity. It was asserted that the workman had not completed 240 days of working in a calender year so as to claim that he was in continuous service. It was further stated that after the alleged termination said to have been made on 01.03.1983 the workman had remained silent for a long period of time and the reference which had been made in terms of the order dated 05.09.2011 was highly belated and as such the reference itself was bad in law.

7. In support of his case the respondent-workman filed his affidavit reiterating the stand taken by him in his written statement. Reliance was placed upon a letter dated 20.10.2011 said to have been issued by the Assistant Engineer of the Department to support his claim of having worked for the period in question. In his cross-examination it was categorically admitted by the respondent-workman that apart from the aforesaid letter dated 20.10.2011 there was no other documentary evidence to prove his working.

8. The petitioners in support of their case filed documentary evidence including copies of the muster rolls for the period from May, 1981 upto 28.02.1983 i.e. the period for which the workman had claimed to have worked with the Department.

9. The Labour Court though has referred to the copies of the muster rolls filed as documentary evidence by the petitioners which did not indicate the name of the respondent-workman at any place; however, proceeding to rely upon a letter dated 20.10.2011 which is said to have been issued by the Assistant

Engineer of the Department in response to an R.T.I. Application claimed to have been filed by the respondent-workman, a finding has been returned that the workman had worked for a period of 240 days during the period from 04.05.1981 to 28.02.1983 and as such he was in continuous services and the provisions under Section 6N of the Act, 1947 having not been followed, the workman was entitled to grant of reinstatement.

10. Contention of the learned Standing Counsel appearing for the petitioners is that the factum of engagement of the respondent-workman having been categorically denied by the petitioners in their written statement the burden of proof with regard to the working of the respondent-workman in the establishment for a period of 240 days in a calender year so as to establish his continuous working and claim the benefit of Section 6N of the Act was upon the workman, which burden the workman had failed to discharge.

11. As regards the letter dated 20.10.2011 which has been relied upon by the Labour Court, attention has been drawn to the Objections dated 11.09.2014 filed before the Labour Court on behalf of the petitioners wherein it had been stated that the letter dated 20.10.2011 bearing Letter No.341 was never issued by the department. It is submitted that the findings recorded by the Labour Court with regard to the respondent-workman having worked for a period of 240 days in a calender year is not based on any evidence available on record and as such the same is perverse and the award of the Labour Court is liable to be set aside.

12. Learned counsel appearing for the respondent-workman has tried to support the award of the Labour Court by relying upon the letter dated 20.10.2011 to submit that the factum of his working from 04.05.1981 to 28.02.1983 was proved and accordingly he had completed 240 days of working in a calender year so as to claim benefit of protection under Section 6N of the Act, 1947 and reinstatement with consequential benefits.

13. Heard the learned counsel for the parties and perused the record.

14. From a perusal of the records of the case it is demonstrated that no material evidence apart from the letter dated 20.10.2011 was filed by the respondent-workman to support his case of having continuously worked for the period in question so as to claim entitlement of protection of Section 6N of the Act, 1947. The petitioner-establishment on the other hand had filed documentary evidence in the form of muster rolls for the periods (i) May, 1981 to December 1981, (ii) 1st January, 1982 to December, 1982 and (iii) 1st January, 1983 to 28.02.1983, which categorically demonstrated that the name of the respondent-workman did not find mention in the muster rolls and accordingly his working for the period in question was not proved.

15. The letter dated 20.10.2011 filed by the respondent-workman to make out a case was categorically denied by the petitioners and it was stated that the same was never issued by the department. The letter dated 20.10.2011, a copy whereof has been filed alongwith the supplementary affidavit filed by the petitioners demonstrates that the same is said to have been issued in response to an R.T.I. Application filed by the workman

and the letter contains a clear recital that the information being furnished therein was based on the personal records of the officer who had issued the letter. Moreover, the aforementioned letter only contains reference to the working of the respondent-workman for a certain period of time and nowhere shows the actual number of days of his working on the basis of which an inference could be drawn with regard to the workman having completed 240 days in a calender year so as to claim continuous service.

16. It is legally well settled that the burden to prove the factum of 240 days of working in a calender year so as to claim benefit of being in continuous service as defined under Section 2(g) and consequently the protection of Section 6N of the Act, 1947, lies upon the workman.

17. In the case of ***Range Forest Officer vs. S.T. Hadimani2,*** where a claim had been made by the workman regarding working for more than 240 days, it was held that the onus to prove the said fact was on the workman. The relevant observations made in the judgment are as follows:-

"2. In the instant case, dispute was referred to the Labour Court that the respondent had worked for 240 days and his service had been terminated without paying him any retrenchment compensation. The appellant herein did not accept this and contended that the respondent had not worked for 240 days. The Tribunal vide its award dated 10-8-1998 came to the conclusion that the service had been terminated without giving retrenchment compensation. In arriving at the conclusion that the respondent had worked for 240 days, the Tribunal stated that the burden was on the management to show that there was justification in termination of the service and that the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year.

3. For the view we are taking, it is not necessary to go into the question as to whether the appellant is an "industry" or not, though reliance is placed on the decision of this Court in State of Gujarat v. Pratamsingh Narsinh Parmar [(2001) 9 SCC 713 : 2002 SCC (L&S) 269 : JT (2001) 3 SC 326]. In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today."

18. The aforementioned legal position was reiterated in the case of ***Rajasthan State Ganganagar S. Mills***

Ltd. Vs. State of Rajasthan & Anr.3, wherein it was held as follows:-

"6. It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in Range Forest Officer v. S.T. Hadimani [(2002) 3 SCC 25 : 2002 SCC (L&S) 367]. No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. Even if that period is taken into account with the period as stated in the affidavit filed by the employer, the requirement prima facie does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15-1/2 days in November 1991, 15-1/2 days in January 1992, 24 days in February 1992, 20-1/2 days in March 1992, 25 days in April 1992, 25 days in May 1992, 7-1/2 days in June 1992 and 5-1/2 days in July 1992. The Labour Court demanded production of muster roll for the period of 17-6-1991 to 12-11-1991. It included this period for which the muster roll was not produced and came to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable."

19. Again in the case of ***Municipal Corporation Faridabad Vs. Siri Niwas4,*** it was held, in the context of Section 25F of the Act, 1947 (containing provisions similar as under Section 6N of the Act, 1947), that the burden was on the workman to prove that he had worked for more than 240 days in the preceding one year prior to his retrenchment and the workman having not adduced any evidence with regard to the same the claim raised by him could not be allowed only on the basis of adverse inference drawn against the employer for not producing the muster rolls. The relevant observations made in the judgment are as follows:-

"13. The provisions of the Indian Evidence Act, 1872 per se are not applicable in an industrial adjudication. The general principles of it are, however applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent herein to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment. In terms of Section 25-F of the Industrial Disputes Act, 1947, an order retrenching a workman would not be effective unless the conditions precedent therefore are satisfied. Section 25-F postulates the following conditions to be fulfilled by employer for effecting a valid retrenchment:

(i) one month's notice in writing indicating the reasons for retrenchment or wages in lieu thereof;

(ii) payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months.

14. For the said purpose it is necessary to notice the definition of "continuous service" as contained in Section 25-B of the Act. In terms of sub-section (2) of Section 25-B that if a workman during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for 240 days within a period of one year, he will be deemed to be in continuous service. By reason of the said provision, thus, a legal fiction is created. The retrenchment of the respondent took place on 17-5-1995. For the purpose of calculating as to whether he had worked for a period of 240 days within one year or not, it was, therefore, necessary for the Tribunal to arrive at a finding of fact that during the period between 5-8-1994 to 16-5-1995 he had worked for a period of more than 240 days. As noticed hereinbefore, the burden of proof was on the workman. From the award it does not appear that the workman adduced any evidence whatsoever in support of his contention that he complied with the requirements of Section 25-B of the Industrial Disputes Act. Apart from examining himself in support of his contention he did not produce or call for any document from the office of the appellant herein including the muster rolls. It is improbable that a person working in a local authority would not be in possession of any documentary evidence to support his claim before the Tribunal. Apart from muster rolls he could have shown the terms and conditions of his offer of appointment and the remuneration received by him for working during the aforementioned period. He did not even examine any other witness in support of his case.

15. A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration in the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent.

16. No reason has been assigned by the High Court as to why the exercise of discretional jurisdiction of the Tribunal was bad in law. In a case of this nature, it is trite, the High Court exercising the power of judicial review, would not interfere with the discretion of a Tribunal unless the same is found to be illegal or irrational.

x x x x x

19. Furthermore a party in order to get benefit of the provisions contained in Section 114 Ill. (g) of the Indian Evidence Act must place some evidence in support of his case. Here the Respondent failed to do so.

x x x x x

21. ...The High Court, therefore, proceeded to pass the impugned judgment only on the basis of the materials relied on by the parties before the Tribunal. The High Court, in our opinion, committed a manifest error in setting aside the award of the Tribunal only on the basis of

adverse inference drawn against the appellant for not producing the muster rolls."

20. The aforementioned position of law was restated in the case of ***M.P. Electricity Board Vs. Hariram5,*** in the following terms:-

"11. The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously. At this stage it may be useful to refer to a judgment of this Court in the case of Municipal Corpn., Faridabad v. Siri Niwas [(2004) 8 SCC 195 : JT (2004) 7 SC 248] wherein this Court disagreed with the High Court's view of drawing an adverse inference in regard to the non-production of certain relevant documents..."

21. The question of onus of proof regarding the factum of working was again considered in the case of ***Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors.6*** and it was held that initial burden of proof is always on the workman to prove his working and that the onus of proof does not shift to the employer nor is the burden of proof on the workman discharged merely because the employer fails to prove a defence. The relevant observations made in the judgment are as follows:-

"28. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service..."

x x x x x

"35. Only because the appellant failed to prove its plea of abandonment of service by the respondents, the same in law cannot be taken to be a circumstance that the respondents have proved their case."

22. The question of onus of proof and the evidence to be led again came up in the case of ***Surendranagar District Panchayat Vs. Dahyabhai Amarsinh7,*** and it was held that the burden to prove his working lies on the workman and it is for him to adduce evidence to prove the said factum and in a case if the evidence with regard to the same has not been led by the workman it would be held that he has failed to discharge the burden. It was only in a case where sufficient evidence was led by the workman that the Court could have drawn adverse inference against the other party. The relevant observations made in the judgment are as follows:-

"18. In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he had actually worked with the employer for not less than 240 days during the period of twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that the workman who claimed to have worked with the appellant

for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The courts below have wrongly drawn an adverse inference for non-production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25-F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25-B(1) of the Act. In the facts and situation and in the light of the law on the subject, we find that the respondent workman is not entitled to the protection or compliance with Section 25-F of the Act before his service was terminated by the employer. As regards non-compliance with Sections 25-G and 25-H suffice it to say that witness Vinod Misra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers. In the absence of regular employment of the workmen, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so-called seniority, no relief could be given to him for non-compliance with provisions of the Act. The courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the court. In order to entitle the court to draw inference unfavourable to the party, the court must be satisfied that evidence is in existence and could have been proved".

23. The question of burden of proof yet again came up for consideration in the case of ***R.M. Yellatti Vs. Assistant Executive Engineer8,*** wherein it was reiterated that burden of proof lies on the workman and it is for him to adduce cogent evidence, both oral and documentary, and mere non-production of muster rolls per se will not be a ground to draw an adverse inference against the employer. The relevant observations made in the judgment are as follows :-

"12. Now coming to the question of burden of proof as to the completion of 240 days of continuous work in a year, the law is well settled. In Manager, Reserve Bank of India v. S. Mani [(2005) 5 SCC 100 : 2005 SCC (L&S) 609] the workmen raised a contention of rendering continuous service between April 1980 to December 1982 in their pleadings and in their representations. They merely contended in their affidavits that they had worked for 240 days. The Tribunal based its decision on the management not producing the attendance register. In view of the affidavits filed by the workmen, the Tribunal held that the burden on the workmen to prove 240 days' service stood discharged. In that matter, a three-Judge Bench of this Court held that pleadings did not constitute a substitute for proof and that the affidavits contained self-serving statements; that no workman took an oath to state that he had worked for

240 days; that no document in support of the said plea was ever produced and, therefore, this Court took the view that the workmen had failed to discharge the burden on them of proving that they had worked for 240 days. According to the said judgment, only by reason of non-response to the complaints filed by the workmen, it cannot be said that the workmen had proved that they had worked for 240 days. In that case, the workmen had not called upon the management to produce the relevant documents. The Court observed that the initial burden of establishing the factum of continuous work for 240 days in a year was on the workmen. In the circumstances, this Court set aside the award of the Industrial Tribunal ordering reinstatement.

13. In Municipal Corpn., Faridabad v. Siri Niwas [(2004) 8 SCC 195 : 2004 SCC (L&S) 1062] the employee had worked from 5-8-1994 to 31-12-1994 as a tubewell operator. He alleged that he had further worked from 1-1-1995 to 16-5-1995. His services were terminated on 17-5-1995 whereupon an industrial dispute was raised. The case of the employee before the Tribunal was that he had completed working for 240 days in a year; the purported order of retrenchment was illegal as the conditions precedent to Section 25-F of the Industrial Disputes Act were not complied with. On the other hand, the management contended that the employee had worked for 136 days during the preceding 12 months on daily wages. Upon considering all the material placed on record by the parties to the dispute, the Tribunal came to the conclusion that the total number of working days put in by the employee were 184 days and thus he, having not completed 240 days of working in a year, was not entitled to any relief. The Tribunal noticed that neither the management nor the workman cared to produce the muster roll w.e.f. August 1994; that the employee did not summon muster roll although the management had failed to produce them. Aggrieved by the decision of the Tribunal, the employee filed a writ petition before the High Court which took the view that since the management did not produce the relevant documents before the Industrial Tribunal, an adverse inference should be drawn against it as it was in possession of best evidence and thus, it was not necessary for the employee to call upon the management to do so. The High Court observed that the burden of proof may not be on the management but in case of non-production of documents, an adverse inference could be drawn against the management. Only on that basis, the writ petition was allowed holding that the employee had worked for 240 days. Overruling the decision of the High Court, this Court found on facts of that case that the employee had not adduced any evidence before the court in support of his contention of having complied with the requirement of Section 25-B of the Industrial Disputes Act; that apart from examining himself in support of his contention, the employee did not produce or call for any document from the office of the management including the muster roll (MR) and that apart from muster rolls, the employee did not produce the offer of appointment or evidence concerning remuneration received by him for working during the aforementioned period...

14. In Range Forest Officer [(2002) 3 SCC 25 : 2002 SCC (L&S) 367] the dispute was referred to the Labour Court as to whether the workman had

completed 240 days of service. Vide award dated 10-8-1988, the Tribunal held that the services were wrongly terminated without giving retrenchment compensation. In arriving at this conclusion, the Tribunal stated that in view of the affidavit of the workman saying that he had worked for 240 days, the burden was on the management to show justification in termination of the service. It is in this light that the Division Bench of this Court took the view that the Tribunal was not right in placing the burden on the management without first determining on the basis of cogent evidence that the workman had worked for 240 days in the year preceding his termination. This Court held that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination; that filing of an affidavit is only his own statement in his own favour which cannot be recorded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had worked for 240 days in a year. This Court found that there was no proof of receipt of salary or wages for 240 days; that the letter of appointment was not produced; that the letter of termination was not produced on record and, therefore, the award was set aside.

15. In Rajasthan State Ganganagar S. Mills Ltd. [(2004) 8 SCC 161 : 2004 SCC (L&S) 1055] the workman had alleged that he had worked for more than 240 days in the year concerned, which claim was denied by the management. The workman had merely filed an affidavit in support of his case. Therefore, the Division Bench of this Court took the view that it was for the claimant to lead evidence to show that he had worked for 240 days in the year preceding his termination. This Court observed that filing of an affidavit was not enough because the affidavit contained self-serving statement of the workman which cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that the claimant had worked for 240 days in a year. Further, this Court found that there was no proof of receipt of salary or wages for 240 days and, therefore, mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. On the facts of that case, the Court found that even if the period for which the workman had alleged to have worked was taken into account, as mentioned in his affidavit, still the said workman did not fulfil the requirement of completion of 240 days of service and, therefore, this Court set aside the award of the Labour Court.

16. In M.P. Electricity Board [(2004) 8 SCC 246 : 2004 SCC (L&S) 1092] the workmen were engaged by the Board on daily wages for digging pits to erect electric poles. It was the case of the Board that on completion of the project, the employment was terminated and whenever a similar occasion arose for digging pits, the workmen were re-employed on daily wages and, therefore, their employment was not permanent in nature nor had the workmen completed 240 days of continuous work in a given year. The project jobs came to an end in 1991 and the workmen were never re-employed by the Board. Being aggrieved by the said non-employment, the workmen filed applications under the M.P. Industrial Relations Act seeking permanent employment, primarily on the ground that they have completed 240 days

in a year and their discontinuation of service amounted to retrenchment without following the legal requirements. The Board denied the allegations made in the application before the Labour Court. An application was moved before the Labour Court by the workmen seeking direction to the Board to produce the muster roll for the period concerned. However, no other material was produced by the workmen to establish the fact that they had worked for 240 days continuously in a given year. Some of the workmen were also examined before the Labour Court. However, no document was produced in the form of letter of appointment, receipt indicating payment of salary, etc. After examining the entry in the muster rolls, the Labour Court came to the conclusion that the workmen had not worked for 240 days continuously in a given year, hence, they could not claim permanency nor could they term their non-employment as retrenchment. Aggrieved by the award of the Labour Court, the workmen preferred an appeal before the Industrial Court at Bhopal which took the view that since the Board has failed to produce the entire muster roll for the year ending 1990, an adverse inference was required to be drawn against the Board and solely based on the said inference, the Industrial Court accepted the case of the workmen that they had worked for 240 days continuously in a given year. Accordingly, the Industrial Court granted reinstatement to the workmen with 50% back wages. Drawing of such an adverse inference was challenged before this Court by the M.P. Electricity Board. In the light of the aforestated facts, this Court opined that the Industrial Court or the High Court could not have drawn an adverse inference for non-production of the muster rolls for the years 1990 to 1992, particularly in the absence of a specific plea by the claimants that they had worked during the period for which muster rolls were not produced. This Court observed that the initial burden of establishing the factum of their continuous work for 240 days in a year was on the workmen and since that burden was not discharged, the Industrial Court and the High Court had erred in ordering reinstatement solely on an adverse inference drawn erroneously.

17. Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on

the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

24. After referring to earlier judgments on the issue of onus of proof, a similar view was taken in the case of ***Ranip Nagar Palika Vs. Babuji Gabhaji Thakore & Ors.9.*** The relevant observations made in the judgment are as follows:-

"8. ...the burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."

25. In the context of burden of proof requiring 240 days continuous service and drawing of an adverse inference, reference may also be had to the judgment in the case of ***Sub-Divisional Engineer, Irrigation Project, Yavatmal Vs. Sarang Marotrao Gurnule10.***

"21. The next question is how the workman is expected to discharge this burden? Does it follow from the observations in the judgments quoted above (underlined for the sake of convenience) that a workman is expected to tender a particular quantum of evidence, or to examine a particular number of witnesses in support of his plea? The Evidence Act, which does not apply to matter under the Industrial Disputes Act, too does not lay down that any particular number of witnesses must be examined to prove a particular fact. A fact is held as proved when a Judge upon considering the matter before him either believes it to exist or considers its existence so probable that a man of ordinary prudence would believe that it exists. Just as it would be futile to expect an employer to prove a non-existent fact, namely that a workman had not worked for 240 days, it would be futile to expect a workman to produce non-existent evidence. The best evidence rule would mandate that if the workman has in his possession any documentary evidence which would support his word on oath, he must produce such evidence, and, if he is not doing so, it would result in discrediting his word. The observations of the Apex Court that in addition to his own word, the workman must put in something more has to be read with this caveat. The difficulties and dangers in examining another workman in support of his own claim may be imagined. Ordinarily out of fear of reprisal a workmen who is already in employment is unlikely to step into the witness box to support the case of a colleague who has been thrown out. Workman's examining another workman who has been similarly thrown out would not cut ice with the Court because the Court may feel that two lies do not make one truth. Therefore, ultimately in the matter of appreciation of evidence, it is for the Judge who sees the parties in person and receives their evidence to decide whether he would believe them or

not. Whether burden on workman is discharged by him or not would have to be decided by applying law declared in following few sentences from para 17 in judgment of three-Judge Bench in R.M. Yellati v. The Asstt. Executive Engineer (supra), which we wish to again reproduce, for, there would be no clearer pronouncement on the subject at pp. 448 & 449 of 2006 (1) LLJ 442.

"17. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

A careful re-reading of this passage would show that the Court does not hint at necessity of examining anyone in addition to the workman, while at the same time saying that affidavit alone would not be sufficient. What is expected of workman is to tender cogent evidence, by stepping in the witness box (and thereby allowing the truth of his version to be tested by cross-examination)."

26. The legal position with regard to the burden of proof and onus is well settled and it has been consistently held that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. In this regard reference may be had to the judgment in the case of ***Haridwar Vs. Smt. Kulwant11,*** wherein it was held as follows:-

"12. In my view, learned counsel for the appellant is misconstruing the concept of term "burden of proof" and "onus" by identifying the two as synonymous. The onus probandi i.e. "Burden of proof" lies upon a person who is bound to prove the fact and it never shifts.

13. Section 101 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872") talks of burden of proof, and says:

"Burden of proof.--Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said

that the burden of proof lies on that person."

14. The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. The provision is based on the rule, ie incumbit probatio qui dicit, non qui negat. In Constantine Line v. I S Corpn, (1941) 2 All ER 165, Lord Maugham said;

"It is an ancient rule founded on consideration on good sense and should not be departed from without strong reasons."

15. A person who asserts a particular fact has to prove the same. Until such burden is discharged, the other party is not required to be called upon to prove his case. Whoever desires a Court to give judgment, dependent on the existence of facts which he asserts, must prove that those facts exist. The distinction between "burden of proof" and "onus" is that the former lies upon the person and never shifts but the "onus" shifts. Shifting of onus is a continuous process in the evaluation of evidence. For example, in a suit for possession, based on title once the plaintiff is able to create a high degree of probability so as to shift the onus on the defendant, it is then for the defendant to discharge his onus and in absence of such discharge by defendant, burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of plaintiff's title.

16. The above distinction between "burden of proof" and "onus" of proof has been explained in A.Raghavamma v. A. Chenchamma, AIR 1964 SC 136, followed in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and another, (2003) 8 SCC 752.

17. Section 102 of Act, 1872 says that burden of proof in a suit would lie on a person who would fail if no evidence at all were given on either side. Here it is not degree of proof but the onus to lead evidence i.e. obligation to begin to prove a fact. The burden of proof as such has not been defined in the Act but looking to the substance and the context and spirit, it can be said that burden to establish case, loosely, can be said to be burden of proof.

18. For applying above provision in the case in hand, there can be no manner of doubt in holding that burden of proof lies upon the plaintiff. In the case in hand, to prove that sale deed in question suffers an infirmity, justifying its cancellation, as pleaded in the plaint and to prove those facts, burden lies upon plaintiff. But then it has to be understood that there is a distinction between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence. In the first sense, the burden is always constant but burden in the sense of adducing evidence shifts from time to time, having regard to evidence adduced or the presumption of fact or law raised in favour of one or the other. On this aspect, more light emanates when we go through Sections 103 and 104 of Act, 1872, which read as under:

"S. 103. Burden of proof as to particular fact.--The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

S. 104. Burden of proving fact to be proved to make evidence admissible.--The burden of proving any fact necessary to be provided in order to enable any person to give evidence of any

other fact is on the person who wishes to give such evidence."

27. In the case of ***Rangammal Vs. Kuppuswami & Anr.12,*** referring to Section 101 of the Evidence Act, it was held that the burden of proving a fact always lies upon the person who asserts the fact and until such burden is discharged, the other party is not required to be called upon to prove his case. The relevant observations made in the judgment are as follows:-

"21. Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of proof.-- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

28. The burden of proof is thus the legal obligation on a party to prove the allegation made by him, and is often associated with the maxim *"Semper necessitas probandi incumbit ei qui agit"* which means the burden of proof is on the claimant.

29. The essential distinction between "burden of proof" and "onus of proof" is legally well settled. The burden of proof lies upon the person who has to prove a fact and it never shifts; however the shifting of onus of proof is a continuous process in the evaluation of evidence. In this regard reference may be had to the judgment in the case of ***A. Raghavamma and another Vs. A. Chenchamma & Anr.13*** wherein it was held as follows:-

"12. ...There is an essential distinction between burden of proof and onus of proof : burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence..."

30. The aforementioned legal position has been discussed in a recent judgment of this Court in the case of ***M/s Triveni Engineering And Industries Ltd. Vs. State of U.P. & Ors.14.***

31. In the instant case the aforementioned burden of proof having not been discharged by the respondent-workman the finding recorded by the Labour Court with regard to the workman having been completed 240 days in a calender year so as to claim entitlement of the protection under Section 6N of the

Act, 1947 is not supported from the records and the same being contrary to the material evidence which is available on record the finding cannot be legally sustained. The respondent-workman having not been able to prove the factum of his continuous service he was not entitled to benefit of the protection of Section 6N of the U.P. Industrial Disputes Act, 1947 and to the reliefs which have been granted by the Labour Court.

32. The award of the Labour Court is thus legally unsustainable and is accordingly set aside.

33. The writ petition is allowed in the aforesaid terms.

(2019)10ILR A 1756

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2019

BEFORE

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

Writ C No. 6200 of 2019

Kribhco Fertilisers Limited ...Petitioner
Versus
Oswal Chemicals and Fertilisers Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Bhanu Bhushan Jauhari.

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh Chauhan, Sri Bhupendra Nath Singh.

A. Service Law - No evidence recorded by the employers - Employer has power to dismiss employee without enquiry in certain cases under special procedure under the standing orders - no justification to hold it incumbent upon the employer to hold a disciplinary enquiry before imposing major punishment - Labour Court did not opine whether power under the said clause was rightfully exercised.

Writ Petition allowed (E-9)

List of Cases Cited: -

1. Mangal Sen Vs St. of U.P. & anr., (1990) 60 FLR 161 (All)

2. Management of Delhi Transport Corp., New Delhi Vs Ram Kumar & anr., 1982 LAB. I.C. 1378

3. St. of U.P. Vs Ganesh Kumar & anr., 2011 (131) FLR 200

4. Daya Chand -1 Vs National Thermal Power Station, 2004(75) DRJ 486

5. Deputy General Manager (SME) & anr. Vs The Presiding Officer, Central Govt. Industrial Tribunal-cum-Labour Court, Chennai, 2014 SCC OnLine Mad 9311

6. M/s Firestone Tyre & Rubber Co. of India (P.) Ltd. Vs Management & ors., (1973) 1 SCC 813,

7. Amar Chakravarty Vs Maruti Suzuki (I) Ltd. (2010) 14 SCC 471

8. Shamsher Singh Vs Pepsu Road Transport Corporation & anr., 2001 SCC OnLine P&H 1055: (2002) 3 SLR 144

9. St. of M.P. Vs Parvez Khan, (2015) 2 SCC 591

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

1. The petitioner, Kribhco Fertilizers Limited, have impugned an award of the Labour Court, U.P., Bareilly, dated

06.09.2018 (published on 22.12.2018) in Adjudication Case no.21 of 2017. By the award aforesaid, the Labour Court has held dismissal from service of eight workmen of the petitioner to be unlawful and illegal, and ordered their reinstatement in services with full back-wages. The eight workmen were dismissed by orders of different dates passed by the petitioner in exercise of powers under Clause 45.0.0 of the Oswal Chemical and Fertilizers Limited, Standing Orders. These Standing Orders have been certified by the competent authority, under the Industrial Employment (Standing Orders) Act, 1946. The aforesaid Standing Orders shall be hereinafter referred to as the Standing Orders. The eight workmen were dismissed by the petitioner without holding inquiry by invoking the Special Procedure in Certain Cases, provided for under Clause 45.0.0 of the Standing Orders. The workmen, who have been dismissed from service, were represented before the Labour Court by the first respondent, Union through their General Secretary, J.B. Singh, who is also one of the dismised workmen. Before this Court also, therefore, the eight workmen have been impleaded through the Employees' Union, called Oswal Chemicals and Fertilizers Limited Karmchari Sangh.

2. It would be appropriate to depict in tabular form the particulars of workmen, who have been dismissed by orders of different dates. The dates of the relative orders of dismissal are also shown. The eight workmen of the petitioner whose interest before this Court is represented by the first respondent, Union, are hereinafter referred to as the "workmen' wherever the reference is collective; individually, they would be referred to by their names. These particulars are depicted thus:

Sr. No.	Name of the Workmen	Designation	Date of Dismissal from Service	Date of Birth
1.	J.B. Singh	Assistant (Secretary of Union)	10.06.2009	13.08.1970
2.	Shamsher Chand	Security Guard	18.06.2009	02.05.1958
3.	Rakesh Mishra	Security Guard	27.06.2009	10.03.1970
4.	Radhey Shyam	Security Guard	26.06.2009	10.11.1954
5.	Jang Bahadur Yadav	Security Guard	16.06.2009	02.11.1972
6.	Vijay Prakash Shukla	Security Guard	26.06.2009	10.01.1958
7.	V.K. Rajpoot	Fireman	16.06.2009	15.10.1972
8.	Sushil Kumar Mishra	Fireman	27.06.2009	10.02.1978

3. The record shows that suo motu action was taken by the State Government to make a reference of an industrial dispute on 10.06.2010, in exercise of powers under Section 4 of the U.P. Industrial Disputes Act, 1947 (for short, the Act), relating to the aforesaid dismissal of the petitioner's workmen. The reference aforesaid was made to the Labour Court, Rampur, where it was registered as Adjudication Case no.32 of 2010. The reference was made in the following terms (in Hindi vernacular):

"क्या सेवायोजक द्वारा अपने श्रमिक श्री जंग बहादुर यादव पुत्र श्री राम नरेश यादव को दिनांक 16.6.2009, श्री बी०पी० शुक्ला पुत्र श्री ब्रह्मदत्त शुक्ला को दिनांक 26.6.09, श्री राधेश्याम सिंह पुत्र श्री एम०पी० सिंह को दिनांक 24.5.09, श्री राकेश मिश्रा पुत्र श्री

आर०के० मिश्रा को दिनांक 27.5.09, श्री जे०बी० सिंह पुत्र श्री बी०के० सिंह को दिनांक 10.6.09, श्री शमशेर सिंह पुत्र श्री दीवान चन्द्र को दिनांक 16.6.09, श्री सुशील कुमार मिश्रा पुत्र श्री सूरजपाल को दिनांक 27.6.09 तथा श्री वी०के० राजपूत पुत्र श्री होती लाल राजपूत की दिनांक 16.6.2009 से सेवायें समाप्त किया जाना उचित एवं वैधानिक है। यदि नहीं तो सम्बन्धित श्रमिकगण क्या वितनाम / अनुतोष पाने का अधिकारी है, एवं अन्य किन विवरणों सहित।"

4. Summons were issued on 17.07.2010 to both parties. It may be emphasized here again that before the Labour Court, the workmen were represented by the first respondent, Union, whose name also figures in the reference order as one party to the industrial dispute. The course of proceedings taken in this case also indicate that much later the case was transferred from the Labour Court, Rampur to the Labour Court, Bareilly under a Government Order 29.08.2017. It was registered afresh before the Labour Court, U.P., Bareilly as Adjudication Case no.21 of 2017.

5. Something needs to be said about the identity of the petitioner also. According to the petitioners' case, the petitioners who are a Company duly incorporated under the provisions of the Companies Act, 1956, were incorporated as M/s. Kribhco Shyam Fertilizers Limited. By that name, the Company was incorporated on 08.12.2005. It is engaged in the manufacturing of Chemical Fertilizers and Agro Products. The said company has its unit, a Urea & Ammonia Manufacturing Plant at Village Pipraula, District Shahjahanpur. The aforesaid company was incorporated with the Registrar of Companies for the National Capital Territory of Delhi and Haryana. Subsequently, the name of Kribhco Shyam Fertilizers Limited was altered to Kribhco Fertilizers Limited. The aforesaid change was brought about with the issue of a certificate of incorporation dated 3rd June, 2017, issued in terms of Rule 29 of the Companies (Incorporation) Rules, 2014. It is, thus, the renamed company aforesaid, and incorporated afresh by that name, who are the petitioners. It also requires mention that another company, Bindal Agro Chemical Limited, was a company duly incorporated under the provisions of the Companies Act, 1956. The company last mentioned was incorporated in the year 1981. It was engaged in the manufacture of chemicals fertilizers and agro products. This company, that is to say, Bindal Agro Chemical Limited had its Urea and Ammonia Manufacturing Plant at Village Pipraula, District Shahjahanpur. This plant has since been purchased by the petitioner. Bindal Agro Chemical Limited changed name to Oswal Chemicals and Fertilizers Limited, in the year 1995, as the petitioners assert. The petitioners further assert that the employees of Oswal Chemicals and Fertilizers Limited formed an Employees' Union in the name of Oswal Chemicals and Fertilizers Limited *Karmchari Sangh*, District Shahjahanpur. After the petitioners purchased the Urea and Ammonia Manufacturing Plant from the erstwhile Bindal Agro Chemical Limited, on 14.08.2006, through a registered sale deed, the Oswal Chemicals and Fertilizers Limited *Karmchari Sangh*, District Shahajahanpur, became privy to the petitioners. It is the aforesaid Employees' Union who are espousing the cause of the eight workmen who are their

members, one of them being their General Secretary. The said Union is impleaded as respondent no.1 to the petition.

6. Reverting back to the dispute, that has given rise to proceedings before the Labour Court, the facts of it all are best discernible from the rival versions of an occurrence dated 03/ 04.06.2009, that took place at the premises of the petitioners, at about 1.30 a.m., with a repeat event at 4.30. It is claimed to be an attack by a mob of the petitioners' workmen on the premises of the manufacturing plant of the company at Pipraula, leading to extensive damage of the company's property. It is also claimed that in the said attack, the residential quarters of its officers were attacked by a riotous mob of employees, led by the Union leaders, that is to say, the leaders of the first respondent, including its office bearers.

7. The rival versions about this occurrence figure boldly in the two written statements, that were filed by the petitioners and the first respondent, espousing the cause of the workmen. The details of pleadings and evidence before the Labour Court filed by both sides would be described a little later in this judgment.

8. According to the case of the workmen, represented by the first respondent, as given out in their written statement is to the effect that the petitioners are a manufacturing establishment engaged in the production of urea and chemical fertilizers. They employ about 350 workmen. The first respondent are an Employees' Union, who are active in the establishment of the petitioners manufacturing plant in order to safeguard the interest of workmen, employed there. The first respondent-Union are affiliated to some All India Organization of Unions, described as the CITU.

9. It is indicated about the workmen individually that Jang Bahadur Yadav was appointed on 04.05.1996 as a Security Guard, V.P. Shukla was appointed on 25.03.1996 also as a Security Guard; likewise, Radhey Shyam was appointed on 08.12.1996 in the same capacity, Rakesh Mishra was appointed as Security Guard on 23.12.1995, whereas J.B. Singh was appointed on 10.04.1997 as a Helper, Shamsher Chandra was appointed on 10.04.2000, again as a Security Guard; Susheel Kumar was appointed on 13.09.2003 as a Fireman, and, V.K. Rajpoot was also appointed as a Fireman, on 15.01.1996.

10. It is first respondent's case that all these workmen were office bearers of the Union's General Body. They would espouse from time to time any just cause of their fellow workmen. It is the further case of the first respondent that on account of the activities of the workmen in raising just demands on behalf of others, that the petitioner management harboured malice and ill-will towards each of them. The petitioners would act with bias vis-a-vis the workmen, and would often harass them. It is the first respondent's further case that the petitioner management wanted to run the establishment in an obdurate and tyrannical fashion, and to that end, it is the petitioners' policy to suppress Union's activities and penalize their leaders. The first respondent-Union had raised certain demands through a letter dated 04.08.2008, related particularly to casual

hands before the petitioners, of which the District Administration and the Labour Department had been given information. The said demands and problems were pending consideration before the petitioners, but no action was taken thereon. In the meanwhile, casual hands and those engaged through labour contractors were not paid wages for a period as long as three months. On that account w.e.f. 29.05.2009, workmen undertook a hunger strike for an indefinite period. The strike was called by casual hands, and the first respondent, in support of those demands had staged a dharna. The petitioner management were desperate about the picketing workmen. The petitioner management for the purpose abating the dharna drafted help of the civil and police administration. It was pleaded by the first respondent before the Labour Court that the Standing Orders have been framed without the consent of the workmen or their Union. The first respondent have castigated the petitioner management of going against the provisions of the Standing Orders, about which they made an ego issue.

11. It is the first respondent's case that while the first respondent, Union and its office bearers were extending their support to the striking casual hands and contract labourers, on 03.06.2009 in the night hours, the civil administration and the police acting at the behest of the petitioners, resorted to illegal action against the striking workmen. They forcibly removed them from site where the hunger strike had been organized in order to bring about a forced dissipation of that strike. In the same sweep of action, Sethpal Singh, Bhagwan Singh, J.B. Singh, V.K. Rajpoot and Jang Bahadur Yadav, were dismissed from service on 10.06.2009, without serving them with a show cause notice, or calling for their explanation, much less holding a domestic inquiry. Shamsher Chandra, V.P. Shukla, Radhey Shyam, Rakesh Mishra and Susheel Mishra, had already been suspended. They were dismissed from service on 18.06.2009, 26.06.2009, 26.06.2009, 27.06.2009 and 27.06.2009, in that order, again without holding any disciplinary inquiry.

12. It has been pleaded on behalf of the workmen by respondent no.1 that the motivated nature of the action taken against them is evident from the fact that they were dismissed from service on ground, amongst others, that the workmen entered the Officers' Colony where they attacked the Officers of the petitioners. Lateron, two workmen, Sethpal Singh and Bhagwan Singh, were reinstated in service, even though the charges levelled against the two reinstated workmen and the workmen are the same. It is pleaded that this action of the petitioners renders the punishment awarded to the workmen void. It is also pleaded that in the charge sheet, dated 14.03.2009, false charges have been levelled against J.B. Singh, who is the General Secretary of the first respondent-Union. Disciplinary inquiry on the basis of the charge sheet dated 14.03.2009 also commenced, but early into the proceedings, the petitioners realized that they would not be able to prove the charges. As such, the inquiry was abandoned. It is also pleaded that through the various letters issued to the workmen, they have been arbitrarily dismissed from service without a proper order being made, and without holding any disciplinary inquiry, or calling for their explanation. The petitioners' action is, thus, in violation of labour laws. It is

also urged by the first respondent that the show cause notice and the dismissal orders issued to the workmen carry charges that are baseless, false and vague. The entire proceedings taken by the petitioners are in violation of the principles of natural justice. It is also the first respondent's case that the petitioners have misused their authority to dismiss the workmen, which they did by resort to breach of faith in the manner that assuring them of reinstatement, they secured letters of apology from the workmen, but went back on the assurance by turning down their letters of apology. It is also said that the conduct of the petitioners renders their action all the more bad, inasmuch as, similarly circumstanced workmen, Sethpal Singh and Bhagwan Singh, have been reinstated in service; the workmen being charged on identical allegations ought to have been reinstated, likewise. It is also pleaded that the workmen ever-since their dismissal have been jobless with no source of income.

13. The petitioners on the other hand put forward their case before the Labour Court through a written statement bearing paper no.15A, wherein it is pleaded that the workmen were employed with the petitioners. It is said that the services of the workmen are governed by the certified Standing Order, that is in force. It is certified under the Industrial Employment (Standing Orders) Act, 1946 by the Additional Labour Commissioner, Bareilly. The workmen have been dismissed from service as a measure of punishment under Clause 45.0.0 (b) and (c) of the Standing Order. Each of the workmen were involved in acts of rioting, damaging the company's property, entering the residential quarters of the Officers of the Company, where they resorted to destruction of property, abusing the Officers and their family members. It is pleaded that there is a prima facie case against the workmen of causing physical harm to Senior Officers and their family members. As such, the company in accordance with Clause 45.0.0 (b) of the certified Standing Orders did not find it to be a fit case to hold a disciplinary inquiry. It is pleaded on behalf of the petitioners that on 04.06.2009, the workmen and their companions congregated at the Gate of the colony, and did not permit any Officer/ Employee to proceed to work. Thereupon, the petitioners called in aid the District Administration who abated the obstruction by the workmen and their companions. It is also the petitioners' case that this act of the workmen led to a dreadful situation because in the absence of Officers and workmen from duty, consequent upon prevention as aforesaid, the unattended industrial plant could have led to any operational disaster.

14. A letter was issued to J.B. Singh and Bhagwan Singh bearing no.7/2009, dated 02.06.2009, by which strike by the employees was announced? The workmen and their companions caused an atmosphere of fear to prevail in the premises of the industrial plant, on account of which no man was prepared to stand witness against them. A First Information Report was lodged against the workmen under Sections 147, 149, 336, 344, 452, 427, 504, 506 IPC, wherein after investigation a charge sheet was filed before the Chief Judicial Magistrate, Shahjahanpur by the police. It was also the petitioners' case before the Labour Court that the workmen and their companions on a widespread scale misbehaved with the Officers and their

family members, that prevented anyone from testifying against them. This led the petitioners to form an opinion that it was not necessary to hold an inquiry against the workmen, and to proceed against them under Clause 45.0.0 of the certified Standing Orders in order to dismiss them from service as a measure of punishment. It was also pleaded that under Clause 37.0.0 of the certified Standing Orders, there is provision for an appeal against punishments awarded. The workmen invoked the aforesaid provision and submitted a mercy appeal to the Managing Director of the petitioners, wherein J.B. Singh and all the other workmen admitted their guilt, requesting reinstatement in service on compassionate grounds. The Appellate Authority after considering all relevant aspects of the matter declined to accept the workmens' appeal, and affirmed the order of punishment.

15. Before the Labour Court, the petitioners and the workmen also filed their rejoinder statements replying to their respective written statements. The respondent-Union filed documentary evidence through a list, paper no.27B(2), whereas the petitioners filed their documents through two lists, papers nos.23B(1) and 42B(1).

16. The respondent-Union examined in support of their case J.B. Singh as their witness. After his deposition-in-chief, he was thoroughly cross-examined by the petitioners' authorized representative. On behalf of the petitioners, one Hitesh Kulshreshtha and another V.K. Shukla tendered their deposition-in-chief on affidavit. These witnesses were cross-examined by the workmens' authorized representative.

17. The Labour Court while rendering the impugned award has elaborately set out the parole evidence of witnesses on both sides about the occurrence, in between the paraphrased version of which, it has considered the different propositions of law urged on both sides, together with the authorities cited. All the various contentions that have been mentioned by the Labour Court in the award impugned do not require attention of record, except those on which the event before the Labour Court has turned.

18. The Labour Court proceeded to its conclusions on the first principal premise that is admitted to both sides: that the petitioners- employers before imposing the major punishment of dismissal from service, did not hold any inquiry into the misconduct imputed to the workmen. It was held that before imposing a major punishment, it was imperative for the petitioners to have undertaken a domestic inquiry; just asking the workmen whether they wanted to apologise and their doing so would not lead to an inference of guilt. In this connection, the Labour Court depended upon an authority of this Court in **Mangal Sen vs. State of U.P. and another1.**

19. The contention of the petitioners' representative before the Labour Court was that the role of J.B. Singh and the seven other workmen, who are his companions, is different from Sethpal Singh and Bhagwan Singh, because J.B. Singh was leading the belligerent mob, wherein the remainder of seven workmen were supporting him; that is not the case with Bhagwan Singh and Sethpal Singh. The Labour Court opined that the occurrence is one dated 03/04.06.2009, in

two events at 1.30 a.m. and 3.15 a.m. In the said occurrence, all the ten workmen have a similar role assigned, with identical allegations against them to found their orders of dismissal. However, Sethpal Singh and Bhagwan Singh, who were involved along with the workmen, were opined by the Labour Court on a perusal of the facts on record to bear a role identical to that of the workmen. It was held that once the petitioners on identical charges against Bhagwan Singh and Sethpal Singh, reinstated them in service, the eight workmen whose cases were referred to the Labour Court's adjudication, present a case on the petitioners' part of practicing a policy of hostile discrimination.

20. It was brought to the notice of the Labour Court, on behalf of the petitioners that the workmen, along with the two reinstated, in the criminal prosecution launched against them, were convicted by the Additional Chief Judicial Magistrate, Shahjahanpur vide judgment and order dated 20.10.2014, and sentenced to various terms for the offences found proved. All of them appealed to the Sessions Judge, where their appeal was allowed in part upholding the conviction, but modifying the sentence to a suspended servitude, by putting the workmen and the two others reinstated, on probation for a period of one year to maintain the peace and be of good behaviour. It was, therefore, urged on behalf of the petitioners that convicted workmen could not be reinstated in service by the petitioners.

21. The Labour Court repelled the aforesaid contention of the petitioners, again on the same premise that if the workmen were convicted offenders, so were the two reinstated ones, Sethpal Singh and Bhagwan Singh. The Labour Court held that there is no provision under the U.P. Industrial Disputes Act, which says that a convicted man cannot be reinstated in service. It was remarked by the Labour Court that the judgment of conviction passed by the Criminal Court would not come to aid of the petitioners, in resisting reinstatement. The Labour Court concluded that charges against the two reinstated employees and the workmen were identical. The fact that Bhagwan Singh and Sethpal Singh were reinstated whereas the workmen were not, reflected a policy of discriminatory treatment by the petitioners. On this finding, the Labour Court held that the various dismissal orders passed against the workmen are not lawful or proper. The Labour Court further awarded that all the eight employees are entitled to be reinstated in service, with continuity and back-wages.

22. Aggrieved, the present writ petition has been filed by the petitioners.

23. Heard Sri Bhanu Bhushan Jauhari, learned counsel for the petitioner and Sri B.N. Singh, learned counsel for the respondent-workman.

24. It is argued by Sri B.B. Jauhari, learned counsel for the petitioners that the impugned award is bad in law on various counts, and is liable to be quashed as an instance of manifestly illegal exercise of powers by the Labour Court. He submits that the petitioners-Employers have exercised their powers to punish under Clause 45.0.0 of the certified Standing Orders, that postulate contingencies where the management can exercise its disciplinary jurisdiction to punish,

without holding a departmental inquiry. It is urged that the Labour Court has not at all examined the issue whether the petitioner-employers exercised their powers on relevant considerations under Clause 45.0.0 *(supra)*, which the Labour Court had to test on the basis of evidence, that was before it, together with all other record. No finding on the said issue has been returned by the Labour Court, in the submission of Sri Jauhari.

25. It has been further submitted that the action taken by the petitioners to punish invoking Clause 45.0.0 is one in keeping with the seriousness of the misconduct committed by the workmen, and going by the nature of duties assigned to them. The fact that for acts of misconduct, in respect of which the workmen were punished by the petitioners under Clause 45.0.0 led to their conviction in the criminal trial also, fortifies the factual foundation, on which the petitioners have proceeded. It is also submitted by the learned counsel for the petitioners that the different treatment meted out to the two workmen who were spared punishment of dismissal is evident from the written statement filed before the Labour Court, where the nature of the job of the workmen, and the two who were not punished, has been detailed to justify the different treatment. It is submitted by the learned counsel for the petitioners that the Labour Court went broadly by the fact that charges against the two workmen who were spared punishment and the workmen were identical, and that all of them were convicted by the Criminal Court. The inference of discriminatory treatment drawn by the Labour Court has missed out on considerations that were differential in the case of the workmen and the two, who have not been punished.

26. It is pointed out that the workmen who have been dismissed are security personnel and firemen, except J.B. Singh, whereas the two spared are assistants, who are office hands. It is pointed out further that the Labour Court has also not considered the fact that of the eight workmen, three, that is to say, Shamsher Chandra, Radhey Shyam and Vijay Prakash Shukla, had already reached the age of superannuation. Details of each of the workmen were available to the Labour Court, in the same manner as mentioned in paragraph 14 of the Writ Petition. The Labour Court without application of mind to these facts with reference to three of the workmen, has awarded reinstatement with full back-wages.

27. It is also argued by Sri Jauhari that the impugned award made by the Labour Court is beyond the scope of reference, inasmuch as, in the reference made, there is absolutely no mention of the fact that reinstatement of the two workmen for the same misconduct, shows discrimination by the petitioners against the workmen. It is urged that unless there was reference in specific terms relating to practice of discrimination, it was not open to the Labour Court to hold dismissal of the workmen unlawful, on the said ground. It is also submitted by the learned counsel for the petitioners that there was a total breakdown of command and control on the date of occurrence, inasmuch as, security personnel and firemen took the law in their own hands by acts of intimidation, violence leading to destruction of property, acts threatening superior officers, their family members and loyal workmen of the petitioners with bodily injury. In those circumstances, it cannot be said that the power under

Clause 45.0.0 was arbitrarily exercised. He has emphasized that discipline is of prime concern to security personnel, as well as personnel in the fire department. The workmen, however, charged with those vital responsibilities grossly misconducted themselves by indulging in acts of violence and destruction, which imminently deserved invocation of Clause 45.0.0 of the Standing Orders. In the circumstances obtaining that were writlarge on the evidence before the Labour Court, it has concluded in manifest error, that the petitioners ought to have conducted an inquiry before punishing the workmen.

28. It is also highlighted by Sri Jauhari that even if for argument's sake it is presumed that the power to punish with dismissal from service, dispensing with inquiry was invoked in error by resort to Clause 45.0.0 *(supra)*, the Labour Court while rendering the impugned award failed to apply its mind to the fact that the workmen have been convicted for the same acts, in a duly constituted criminal trial. It has failed to apply mind to the fact that such convicted workmen were not fit to be reinstated in service; and certainly not with full back-wages. Sri Jauhari has castigated the award of the Labour Court on account of non-consideration of the confirmed conviction of the workmen, while ordering reinstatement with full back-wages as unjustified, arbitrary and illegal. He has further impressed upon this Court that no employer can be forced to reinstate workmen who have been found guilty of offences punishable under Sections 452, 147, 336, 341, 427 and 506 IPC, by a Court of criminal jurisdiction. Taking his submission further on the issue, he urges that these offences involve model turpitude. Men convict of these offences cannot be permitted to work in an industrial establishment. He has argued further that merely because two other convicted men were reinstated, one of whom is still continuing in service, no relief on the basis of "equality before law" could be granted to the workmen. He has emphasized that the time tested principle is that parity cannot be drawn from a wrong. The reinstatement of the two other workmen, who were also subsequently convicted along with the workmen, might be a wrong decision of the petitioners, but that would not entitle the workmen to claim relief pleading it as discrimination.

29. Sri B.N. Singh, learned counsel appearing on behalf of respondent no.1 espousing the workmens' cause has submitted that the workmen were dismissed without conducting a domestic inquiry as provided vide Clause 32a.0.0, and, particularly, Clause 35.0.0 of the Certified Standing Orders. Clause 35.0.0 last mentioned, provides a complete procedure for the imposition of punishment that is a major penalty. The entire procedure according to Sri B.N. Singh has been given a goby, without valid cause or justification. It is urged that Clause 33.0.0 carries a list of acts and omissions numbering 113, that would constitute misconduct, in respect of which disciplinary proceedings may be drawn. There is a complete mechanism for the petitioners to deal with any of those enumerated acts or omissions constituting misconduct, in accordance with Clauses 35.0.0 to 35.7.0, all of which have been arbitrarily ignored to impose a major punishment. It is urged by the learned counsel for the first respondent that there was a continuing agitation to take back the workmen in service, of which the State Government took cognizance, in

order to maintain industrial peace and avoid industrial unrest, once negotiation between the employers and workmen had failed. It was to remedy the aforesaid situation that the Government referred the matter as an industrial dispute to the Labour Court, Rampur, which lateron came to be transferred to the Labour Court at Bareilly.

30. Sri B.N. Singh, learned counsel for the first respondent submits that the Labour Court went into evidence, both oral and documentary, led on behalf of parties and returned a finding that two similarly circumstanced workmen, Sethpal Singh and Bhagwan Singh were reinstated by the petitioners, without assigning any special reasons or peculiar circumstances to do so, whereas the workmen were not. It was, therefore, held by the Labour Court that the workmen were discriminated against. It was also recorded that ten workmen were put on trial for the same acts of misconduct, and all ten were convicted and sentenced to various terms by the learned Additional Chief Judicial Magistrate, Shahjahanpur. On appeal filed by the ten workmen to the Sessions Judge, sentence of imprisonment was modified and all of them were released on probation of good conduct for a period of one year. It is emphasized by the learned counsel that this aspect has been considered by the Labour Court at pages 33 and 34 of the paper book, carrying the impugned award. The fact that the Labour Court has considered this aspect has not been disputed by the petitioners, or shown to be incorrect and based on no evidence. It is, therefore, in the submission of the learned counsel, a finding of fact based on evidence that cannot be disturbed by this Court.

31. It is pointed out that in paragraphs 7, 9, 11, 12, 13, 15, 17 and 19 of the counter affidavit, correct facts have been detailed relating to the incident, that have not been denied in the rejoinder. It is, in addition, urged on behalf of respondent no.1 that the writ petition is not maintainable, as the eight affected workmen who are beneficiaries of the award, have not been impleaded as party respondents to the writ petition. They are necessary parties. In their absence, the writ petition is bad for non-joinder of necessary parties. It has been emphasized much by Sri B.N. Singh, that in paragraph 9 of the counter affidavit, it has been specifically asserted that Sri V.K. Shukla and Sri A.K. Dixit, who were officials of the company, were not residing in the factory premises, but living in the colony at a distance 1 - 2 kilometers. If any incident took place in the colony, away from the precincts or the premises of the factory, it would be an incident outside the place of work, which could not be taken cognizance of as misconduct under the Certified Standing Order. Thus, the hasty action of the management in dismissing the workmen from service, citing an incident that took place outside the factory premises is ultra vires the authority of the management under the Certified Standing Orders. The entire action is mala fide, and amounts to victimization of the workmen. It has been asserted in paragraphs 11 and 12 of the counter affidavit that the petitioner-employers had entered into an agreement with the daily-wages workmens' Union, which was not abided by, by the petitioners. The daily-wages workmen Union and its members were demanding implementation of that agreement, by the Employers. Respondent no.1 had extended support to their cause. It is on that account alone, that the Employers have falsely implicated the workmen, who

are members of the Union, in a false criminal case. It is for the same reason that without any opportunity of hearing, they have dismissed the workmen on different dates, invoking Clause 45.0.0 of the Standing Orders. In doing so, they have acted in violation of Articles 14 and 21 of the Constitution.

32. It is also urged on behalf of respondent no.1 that in para 14 "Ka' "Kha' of the written statement filed by the respondent-Union (at pages 121 and 123 of the writ petition) it is categorically stated that the workmen concerned, Shamsher Singh, V.P. Shukla, Radhey Shyam Singh, Rakesh Kumar Mishra and Susheel Kumar Mishra, were suspended and charge-sheeted by the petitioners after the incident, whereas the other five workmen, including Sethpal Singh and Bhagwan Singh, were not suspended or charge-sheeted ever. However, orders of dismissal from service were passed against each of them. These workmen were allowed to discharge their duties, till the order of dismissal from service came to be made and received salary for the said period of time. It is urged that in meting out this differential treatment, the petitioners' act constitutes unfair labour practice as defined under Section 2(ra) read with Schedule V, Paras 5(a), (b), (c), (d), (g) of the Industrial Disputes Act, 1947.

33. It is also urged on behalf of respondent no.1 that resort to unfair labour practice has been prohibited under Section 25U, and made punishable under Section 25T of the Industrial Disputes Act, 1947. The action of the Employers in suspending and charge sheeting five workmen, while differentially treating five others, who were not disturbed till orders dismissing them from service were passed, besides the act of the petitioners in reinstating Sethpal Singh and Bhagwan Singh, constitutes unfair labour practice on the foot of the discrimination practiced. It is argued as a facet of this submission that Sethpal Singh is an Ex-President of the Union whereas Bhagwan Singh, is the President of the first respondent, Union, in office. There was, thus, no reason to distinguish the case of the workmen, in particular, respondent no.1, who is the General Secretary of that Union, and Bhagwan Singh. The fact that a differential treatment has been meted out, constitutes unfair labour practice, as defined in para 9 of Schedule 9 to the Industrial Disputes Act. It is submitted that discrimination for a fact has been held to have been practiced by the Labour Court on the basis of a conclusion, that is drawn from relevant evidence. The said finding is in no way perverse, but plausible. As such, it calls for no interference by this Court in exercise of jurisdiction under Article 226 of the Constitution. It has been argued further by Sri B.N. Singh, that the Employers have not produced any oral evidence to prove charges before the Labour Court, which was an opportunity available to them to substantiate the misconduct claimed against the workmen. This the petitioners ought to have done, as they have dismissed the workmen from service for acts constituting alleged misconduct, without holding a domestic inquiry. They could, by leading evidence in support of the charges, substantiate the same before the Labour Court. They could have also led evidence to show as to how the case of the Ex-President, Sethpal Singh and President of the first respondent-Union, Bhagwan Singh, was different from that of the workmen. That also was not done.

This abstinence by the Employers leads to a clear inference of victimization of the workmen, as learned counsel submits.

34. It is submitted by the learned counsel for the first respondent that the petitioner-Employers, have taken no plea with regard to loss of faith and confidence. It was never urged on their behalf to be framed as a point, no evidence was led, and no finding was, therefore, recorded by the Labour Court on the issue of loss of faith and confidence. The said issue having not been raised before the Labour court cannot be raised before this Court. In support of his contention on this score, Sri B.N. Singh has placed reliance upon a decision of the Delhi High Court in **Management of Delhi Transport Corporation, New Delhi vs. Ram Kumar and another2**, where speaking for the Division Bench, it was held by Rajindar Sachar, J. (as the Learned Chief Justice then was) in paragraph 12 of the Report, thus:

"13. We must also emphasise that the ipse dixit of the management that it has lost confidence in the workman is not a mantra of charm which can be used at management's pleasure to deny the normal relief of reinstatement to a workman even when the dismissal has been found to be unjustified. The plea of loss of confidence must have some rational relation to the fact that the employee had misused his position of trust and rendered it undesirable to retain him in service. The cases where reinstatement was refused related to the special relationship of a stenographer attached to an employer as in the case of (1970) 1 Lab L J 63 (SC) (Ruby General Insurance Co. vs. Chopra; or Hindustan Steel Ltd. v. A.K. Roy (1970) 1 Lab L J 228: (1970 Lab I C 1166) (SC)) where it was found undesirable to retain a person in service because of the recommendation of the Senior Security Officer based on verification report of the police that it would not be desirable to retain him in service particularly when the workman was employed in a blast furnace, a crucial part of the work with respect to which the workman had been employed. Mr. Malhotra tried to make capital by referring to the past record of the respondent workman from which it appears that he was previously warned or censured for some dereliction of duties. But this record is of no consequence because it is apparent that notwithstanding these warning it was not considered improper or hazardous to continue with the service of the employee. But for the present disciplinary proceeding the employer was apparently satisfied that continuance of the workman was not hazardous or risky for the establishment. If that be so then how can it be urged with any justification that even when the charges have not been established the workman should be penalised by being denied his normal right of reinstatement on the vague and unsubstantiated plea of loss of confidence.

"Loss of confidence in the integrity of an employee should be substantiated by cogent evidence before the Labour Court. If a workman is entitled as a general rule to be reinstated after his wrongful dismissal is set aside stated and on the facts it is not possible to find cogent material on which the establishment can genuinely be considered to have lost confidence in the integrity of the workman, he is entitled to be reinstated." See (1971) 1 Lab L J 233: (1971 Lab I C 1235) (SC), Management of Panitole Tea Estate v. Workmen."

35. Sri B.N. Singh has further placed reliance on a decision of a Division Bench

of this Court in **State of U.P. vs. Ganesh Kumar and another3,** to urge that the punishment of dismissal from service is shockingly disproportionate to the misconduct, particularly, when the workmen in this case at some stage, may be by contrivance of the Management had accepted their guilt, and pleaded for mercy. It is pointed out by Sri Singh that in **State of U.P. vs. Ganesh Kumar and another** *(supra)*, the misconduct charged against the respondent, a Constable with the Provincial Armed Constabulary, 28th Battalion P.A.C., Etawah, was that on being called to Headquarters, he appeared in an inebriated condition. In the medical examination, it was verified that he had consumed alcohol. Accordingly, disciplinary proceedings were initiated against him under Rule 14(1) of the U.P. Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. During inquiry, he accepted his guilt and submitted that he was upset due to the death of two of his brothers, and prayed for mercy. In that case, the Tribunal (which appears to be a reference to the U.P. Public Services Tribunal, from the report of the decision) set aside the punishment of dismissal from service awarded by the Disciplinary Authority, and directed reinstatement in service with 25% back-wages. Upon a writ petition by the Employers challenging the Tribunal's judgment, a Division Bench of this Court went into the question of proportionality of punishment, and after a reference to two other decisions, involving misconduct of a similar kind, in one case by a Constable Driver in the CRPF, held the award to be just and legal. Learned counsel for the first respondent placed reliance on this decision to say that in the totality of circumstances, the petitioners are entitled to extension of the same treatment - if not the same treatment, the same mercy - as that extended to the two similarly circumstanced workmen, Sethpal Singh and Bhagwan Singh. Certain other authorities have also been relied upon by Sri B.N. Singh, on the various grounds that he has urged in support of the award, which shall be duly considered during the course of this judgment.

36. This Court has given a thoughtful consideration to the rival submissions, which on both sides have been advanced by the learned counsel with their usual felicity of expression, and unsparing industry.

37. A perusal of the impugned award does show that the Labour Court has not at all examined the question as to validity of the exercise of disciplinary powers by the petitioners, without holding an inquiry, taking resort to Clause 45.0.0 (b) and (c) of the Standing Orders. A perusal of the various orders of dismissal, compendiously annexed as Annexure 15 to the writ petition, would show that in case of J.B. Singh, the Disciplinary Authority has exercised powers under sub-clause (c) of Clause 45.0.0 last mentioned, whereas in cases of other workmen, the power has been exercised under sub-clause (b) & (c) of Clause 45.0.0 of the Certified Standing Orders. Clause 45.0.0 of the Standing Orders is extracted below:

"45.0.0 SPECIAL PROCEDURE IN CERTAIN CASES:

Not with standing anything contained therein the disciplinary Authority may impose any of the penalties.

(a) If an employee has been convicted on a Criminal charge or conclusions arrived at by a judicial trial.

(b) If the management believes or suspects that an employee particularly on holding a position of confidence, has betrayed that confidence. But such belief or suspicion of the employee should not be a mere whom or fancy. It should be bonafide and responsible.

(c) If an employee has been found guilty of very serious kind of misconduct such as sabotage, firing or attempting murder or manhandling or attempting physical resorts to senior official in industrial premises and on the strength of facts domestic enquiry is not required. The workman who is adjusted by the management on examination of the facts to be guilty of such misconduct is liable to be summarily dismissed."

38. Acts constituting misconduct have been very elaborately detailed in the Certified Standing Orders, in two parts. In Clause 27.0.0 and its various sub-clauses, it has been spelt out about the behaviour & conduct and certain other matters that a workman has to adhere to. In Clause 33.0.0 and its various sub-clauses, numbering a 113 are detailed as specific acts and omissions, that constitute misconduct. Of these, sub-clause (15) of Clause 33.0.0 of the Standing Orders, reads thus:

"33.0.0 ACTS & OMISSIONS CONSTITUTING MISCONDUCT:

Without prejudice to the general meaning of the terms misconduct and indiscipline, the following acts and omissions, shall inter-alia, constitute specific acts of misconducts on the part of a workman.

(15) Assaulting or threatening or manhandling or intimidating or abusing or insulting or behaving in an indisciplined manner with any officer or employee of Establishment or his family members, whether within the establishment or work or estate premises or outside, whether on duty or otherwise for any reason, whatsoever."

(Emphasis by Court)

39. The Labour Court has spontaneously remarked that the Employers ought to have held a domestic inquiry before imposing a major penalty. It was not enough for them to ask whether the workmen wished to apologize, and further that from their letters expressing apologies, hold them to be guilty. The approach of the Labour Court appears to be fundamentally flawed, because on the facts on record, the Employers never resorted to the routine procedure of holding a domestic inquiry, which is otherwise provided for in case a major punishment is to be imposed. The said procedure is provided for under Clause 35.0.0 of the Certified Standing Orders. It is, indeed, a very detailed procedure with all opportunity to the workman to offer his defence, and for him to be heard, before a decision of drastic consequence is taken. Clause 45.0.0 is engrafted as an exception to the normal rule of holding domestic inquiry against a workman, charged with misconduct that may lead to imposition of a major punishment. The first task for the Labour Court, therefore, was to see whether the special procedure envisaged under Clause 45.0.0 was invoked bona fide, and applied to the facts and evidence on record, in terms that it is contemplated under the said Clause.

40. The Labour Court had a reference before it, whether the various orders of dismissal passed against the workmen were lawful and proper. It was, therefore, imperative for the Labour Court

to go into the question whether the power under Clause 45.0.0 of the Standing Orders was rightly invoked and lawfully applied. It is only if the Labour Court concluded that the power was not rightfully invoked, or even if invoked rightly, applied wrongly, would the contingency arise where the Labour Court could hold that it was imperative for the petitioner-Employers to have held a domestic inquiry before the proceeding to impose a major penalty, in accordance with the procedure under Clause 35.0.0 *(supra)*. It is not that, that the attention of the Labour Court was not drawn to the special procedure under Clause 45.0.0, which was invoked in this case.

41. A perusal of the written statement filed before the Labour Court shows that in paragraphs 2, 3 & 4 of the same, it has been clearly asserted that the extraordinary disciplinary powers, under Clause 45.0.0 of the Certified Standing Orders were invoked. The Labour Court, therefore, had to determine whether that power was validly invoked, before it could proceed to conclude that the Employers were under an obligation to hold a domestic inquiry. That finding, as to the domestic inquiry not being held by the petitioner-Employers, would require the Labour Court to negative invocation of powers under Clause 45.0.0 *(supra)*, before dismissal of the workmen could be held illegal on ground of non-holding of a domestic inquiry. Much contrary to this approach, the impugned award betrays that the Labour Court had turned a Nelson's eye to the impact of Clause 45.0.0 of the certified Standing Orders. It has proceeded to conclude against the petitioner-Employers as if that clause never existed, or was never invoked.

42. It is, therefore, left to this Court to see whether Clause 45.0.0 of the Certified Standing Orders was rightly invoked by the petitioner-Employers. There can be little doubt that generally speaking the valid exercise of power of an Employer to dismiss an employee, whose service is protected by a statute (as distinguished from a mere contractual employment governed by the Master-Servant relationship) must be exercised, in accordance with the procedure provided for imposition of a major penalty of that kind. Even if a very detailed procedure is not spelt out under the relevant service rules or regulations, an inquiry to determine the truth of the allegations adhering to the fundamentals of the rules of natural justice would be imperative. Dispensation of the requirement to inquire into the misconduct of a workman or employee is permissible only in the circumstances where statutory service rules or regulations, do provided for that contingency. In case of industrial employment where the workman's tenure is certainly protected by the Industrial Disputes Act, it is the Certified Standing Orders, approved and duly certified by the competent authority applicable to the Employer that serve as service regulations for a workman with all statutory force. This statutory vigour for the Certified Standing Orders of an Employer flows from the Industrial Employment (Standing Orders) Act, 1946. Admittedly, in the present case, the Certified Standing Orders applicable to the petitioners have due approval and enforcement under the Act aforesaid.

43. Before venturing to answer whether one or the other sub-clauses of Clause 45.0.0 of the Certified Standing Orders would justify orders of dismissal for the grave misconduct alleged, being

passed without holding a domestic inquiry, a brief survey of some authorities would be useful. In this context, a decision of the Delhi High Court in **Daya Chand-I vs. National Thermal Power Station4,** is apposite. In that case the employee was employed on security duty by the respondent, National Thermal Power Station on 04.04.1998. He was dismissed without inquiry by the Employers, invoking their powers under Rule 25 of the Standing Orders applicable to them on ground that the Disciplinary Authority, for reasons recorded by it in writing, was satisfied that it was reasonably not practicable to hold an inquiry in the manner provided in the Standing orders. It would be relevant if the provisions of Rule 25 of the Standing Orders, *in re,* **Daya Chand-I** *(supra)* are reproduced (quoted from the report of the judgment *verbatim):*

"25. Special Procedure in Certain Cases--

Notwithstanding anything contained in Standing Order No. 24, the Disciplinary Authority may impose any of the penalties specified in Standing Order No. 23 in any,of the following circumstances:

(i) the workman has been convicted on a criminal charge or on the strength of facts or conclusions arrived at by a judicial trial; or

(ii) where the Disciplinary Authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an enquiry in the manner provided in these Standing Orders; or

(iii) where the Disciplinary Authority is satisfied that in the interest of the security of the Corporation/company, it is not expedient to hold an enquiry in the manner provided in these Standing Orders."

44. The facts in **Daya Chand-I** *(supra)* in sum and substance were that the employee was deputed at the residence of a Director of the Employers, in the Asian Village Residential Complex. It was reported that the employee had indulged in an unnatural act with a child, leaving his post without permission. The child was aged 6 years and resided in the Garage of an adjoining flat, in the same Complex. The employee was allegedly caught red-handed by the child's parents and some neighbours. It was in the context of the aforesaid facts that the employee was served with a show cause notice, asking him why should he not be dismissed from service. He appears to have put in reply and denied. He refuted the allegations in their entirety. The Disciplinary Authority considered the matter and proceeded to inflict punishment of dismissal from service, invoking Rule 25(ii) of the Standing Orders, already mentioned. The Court, in dealing with the challenge, held with reference to the facts of the case, the contentions urged and authority on the point, thus:

"9. Three contentions have been raised by the Counsel for the petitioner at the hearing. The first contention raised was that no case was made out to proceed against the petitioner under Rule 25. The second contention was that there was no material before the authorities to take action and the third contention raised was that the order of termination was passed by the Deputy Manager (P&A). The Competent Authority of the petitioner was the Deputy General Manager who alone was empowered to act as the Disciplinary Authority of the petitioner.

10. The issue as to when an authority can dispense with enquiry has received the attention of Courts from time

to time. Power of the employer to dispense with the enquiry has been upheld by the Courts. However, exercise of this power has been held to be strict and applicable to exceptional circumstances. In the judgment reported as AIR 1985 SC 251, Workmen of Hindustan Steel Ltd. v. Hindustan Steel Limited, Hon'ble Supreme Court held:

"When the decision of the employer to' dispense with enquiry is questioned, the employer must be in a position to satisfy the Court that holding of the enquiry will be either counter-productive or may cause such irreparable and irreversible damage which in the facts and circumstances of the case not be suffered. This minimum re-quirement cannot and should not be dispensed with to control wide discretionary power and to guard against the drastic power to inflict such a heavy punishment as denial of livelihood and casting a stigma without giving the slightest opportunity to the employee to controvert the allegation and even without letting him know what is his misconduct."

11. In a case of sexual misconduct, the Hon'ble Supreme Court in the judgment reported as 1997 (2) SCC 534, Avinash Nagra v. Navodaya Vidyalaya Samiti, held as under:

"It is seen from the record that the appellant was given a warning of his sexual advances towards a girl student but he did not correct himself and mend his conduct. He went to the Girls Hostel at 10 p.m. in the night and asked the Hostel helper, to misguide the girl by telling her that Bio-Chemistry Madam was calling her; believing the statement, she came out of the hostel. She was an active participant in cultural activities. Taking advantage thereof, he misused his position and adopted sexual advances towards her. When she ran away from his presence, he pursued her, to the room where she locked herself inside, he banged the door. When he has informed by her room mates that she was asleep, he rebuked them and took the torch from the room and went away. He admitted his going there and admitted his meeting with the girl but he had given a false explanation which was not found acceptable to an Inquiry Officer, namely, Asstt. Director. After conducting the enquiry, he submitted the report to the Director and the Director examined the report and found him to be not worthy to be a teacher in the institution. The Director has correctly taken the decision not to conduct any enquiry exposing the students and m6desty of the girl and to terminate the services of the appellant by giving one month's salary and allowances in lieu of notice as he is a temporary employee under probation. In the circumstances, it is very hazardous to expose the young girls for tortuous process of cross-examination."

12. Thus, where a disciplinary enquiry is dispensed with on the plea that it was not reasonably practicable to hold one, the Court must be satisfied that it was not a colourable exercise or a mala-fideaction of the employer. The employer was to satisfy the Court that good and objective reasons existed showing both proof of mis-conduct and the reasons for dispensing with the enquiry. This minimum requirement cannot and should not be made to suffer."

45. It must be remarked in connection with **Daya Chand-I** *(supra)* that the case apparently did not involve invoking jurisdiction of the Labour Court, or the Industrial Tribunal, but the event there did turn on an interpretation of Standing Orders applicable to the

Employers' establishment, where there was a provision to dispense with the procedure of holding a domestic inquiry in the exceptional circumstances indicated under Rule 25 of the Standing Orders.

46. *In re,* The **Deputy General Manager (SME), State Bank of India, Chennai and another vs. The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai5,** the issue arose out of an industrial dispute, properly so called that was raised by a workman against the petitioner, State Bank of India, and referred by the appropriate Government to the Adjudication of the Central Government Industrial Tribunal-cum-Labour Court. The Industrial dispute was raised by the workman in the **The Deputy General Manager (SME) and another vs. The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai** *(supra)* challenging an order of removal from service, passed by the Employers. The action by the Employer-Bank was taken after a duly constituted departmental inquiry found the employee guilty on eleven charges, and he was asked to show cause against the findings of the inquiry officer. The Disciplinary Authority ordered the employee's dismissal from service vide order dated 02.12.2005. The departmental Appellate Authority modified the punishment of dismissal into one of removal from service with superannuation benefits, about which the learned Judge has said in the part of his Lordship's judgment setting out facts, 'by showing leniency'. The Industrial Tribunal-cum-Labour Court vide its award dated 15.05.2009 after hearing both parties held the order of punishment to be just and proper, denying relief to the workman. Aggrieved by the aforesaid award of the Tribunal, the employee earlier filed a writ petition to the High Court. In the said writ petition, the employee had contended that the Presiding Officer of the Tribunal was not familiar with Tamil and his mother-tongue is Malayalam. The translated copy of the inquiry proceedings was not available to him. Hence, the High Court taking note of this fact in the earlier writ petition came to a conclusion that the Presiding Officer of the Tribunal could not have applied his mind, given this handicap. The High Court on the earlier occasion, therefore, set aside the award dated 15.05.2009, and remanded the matter to the Tribunal. The Court in that judgment also directed the employee to file English translation of the inquiry proceedings, which were in Tamil. Post-remand, the Tribunal concluded that the inquiry was fair and proper, and that the finding of guilt against the employee relative to charges 1 to 6, 8 and 9, was also lawful and proper. The Tribunal, however, passed an award dated 30.04.2012, ordering the employee to be reinstated in service without back-wages, but with continuity of service and all other benefits. This order was made invoking the powers under Section 11A of the Industrial Disputes Act. It was this determination by the Tribunal that brought the Employers to the High Court in **The Deputy General Manager (SME) and another vs. The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai** *(supra).*

47. It must be remarked at once that this decision though one arising on facts where punishment was awarded by the Employers after a fullfledged inquiry, and

not one by invoking the special procedure dispensing with the requirement of a domestic inquiry, examined the issue regarding course of action to be adopted where no inquiry is held. This venture was undertaken by the Court in the context of examining the powers of the Labour Court under Section 11-A of the Industrial Disputes Act to reduce the punishment awarded, where it is found to be shockingly disproportionate. The principles that would be applied by a Labour Court have been detailed by more or less a reference to the decision of the Supreme Court in **Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd. vs. Management and others6.** The said principles laid down by their Lordships figure in paragraph 19 of the Report, *in re,* **The Deputy General Manager (SME) and another vs. The Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Chennai** *(supra)* thus:

"19. In this regard, it would be appropriate to see some of the decision of the Hon'ble Supreme Court. In (1973) 1 SCC 813 (Workman v. Firestone Tyre and Rubber Co.) the Hon'ble Supreme Court has observed as follows-

26. The powers of the Tribunal when a proper enquiry has been held by an employer as well as the procedure to be adopted when no enquiry at all has been held or an enquiry held was found to be defective, again came up for consideration in Management of Ritz Theatre (P) Ltd. v. Its Workmen [AIR 1963 SC 295: (1962) 2 Lab LJ 498]. Regarding the powers of a Tribunal when there has been a proper and fair enquiry, it was held:

"It is well settled that if an employer serves the relevant charge or charges on his employee and holds a proper and fair enquiry, it would be open to him to act upon the report submitted to him by the enquiry officer and to dismiss the employee concerned. If the enquiry has been properly held, the order of dismissal passed against the employee as a result of such an enquiry can be challenged if it is shown that the conclusions reached at the departmental enquiry were perverse or the impugned dismissal is vindicative or male fide, and amounts to an unfair labour practice. In such an enquiry before the Tribunal, it is not open to the Tribunal to sit in appeal over the findings recorded at the domestic enquiry. This Court has held that when a proper enquiry has been held, it would be open to the enquiry officer holding the domestic enquiry to deal with the matter on the merits bona fide and come to his own conclusion. .....

32. From those decisions, the following principles broadly emerge:

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a Tribunal, the latter has power to see if action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper enquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The enquiry should not be an empty formality.

(3) When a proper enquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence, adduced at the said enquiry, the Tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision

of the employer will be justified only when the findings arrived at in the enquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fide.

(4) Even if no enquiry has been held by an employer or if the enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra.

(5) The effect of an employer not holding an enquiry is that the Tribunal would not have to consider only whether there was a prima facie case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the Tribunal and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective enquiry stands on the same footing as no enquiry.

(6) The Tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only, if no enquiry has been held or after the enquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the Tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic enquiry has been held or the said enquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this Court in Management of Panitole Tea Estate v. Workmens [(1971) 1 SCC 742] within the judicial decision of a Labour Court or Tribunal."

48. There is yet another decision of the Supreme Court on which reliance has also been placed by Sri B.N. Singh, learned counsel for the first respondent. It is their Lordships' decision in ***Amar Chakravarty v. Maruti Suzuki (I) Ltd.7***. In the said decision of their Lordships, the question arose about the onus probandi to prove whether termination of services of the workman was lawful, would lie on which of the parties - Employers or the workman. This question arose in the context of an ongoing proceeding before Labour Court on a reference of an industrial dispute made to it where the Employers had exercised powers, similar to those in the present case dismissing the

workman from service, dispensing with the holding of a domestic inquiry on the ground that it was not reasonably practicable. The Labour Court initially placed the burden on the issue to prove whether the termination of workman's services was lawful, and if not, to what relief he is entitled upon the Employers. At an interlocutory stage of the proceedings, the Labour Court, however, shifted the onus to prove the aforesaid issue from the Management to the workman. At that stage, the workman challenged the order shifting the onus upon him before the High Court, which upheld the Labour Court. In Appeal by Special Leave, their Lordships of the Supreme Court held:

"12. In our opinion, in the light of the settled legal position on the point, the judgment of the High Court is clearly indefensible. Whilst it is true that the provisions of the Evidence Act, 1872 per se are not applicable in an industrial adjudication, it is trite that its general principles do apply in proceedings before the Industrial Tribunal or the Labour Court, as the case may be. (See Municipal Corpn., Faridabad v. Siri Niwas [(2004) 8 SCC 195 : 2004 SCC (L&S) 1062].) In any proceeding, the burden of proving a fact lies on the party that substantially asserts the affirmative of the issue, and not on the party who denies it. (See Anil Rishi v. Gurbaksh Singh [(2006) 5 SCC 558], SCC p. 561, para 9). Therefore, it follows that where an employer asserts misconduct on the part of the workman and dismisses or discharges him on that ground, it is for him to prove misconduct by the workman before the Industrial Tribunal or the Labour Court, as the case may be, by leading relevant evidence before it and it is open to the workman to adduce evidence contra. In the first instance, a workman cannot be asked to prove that he has not committed any act tantamounting to misconduct.

13. In Karnataka SRTC [(2001) 5 SCC 433] relied upon by the learned counsel for the appellant, a Constitution Bench of this Court affirmed the decision of this Court in Shambhu Nath Goyal v. Bank of Baroda [(1983) 4 SCC 491 : 1984 SCC (L&S) 1], wherein the issue for consideration was as to at what stage, the management is entitled to seek permission to adduce evidence in justification of its decision to terminate the services of an employee. It was held that the right of the employer to adduce additional evidence, in a proceeding before the Labour Court under Section 10 of the Act, questioning the legality of the order terminating the service must be availed of by the employer by making a proper request at the time when it files its statement of claim or written statement.

14. It was observed that: (Karnataka SRTC case [(2001) 5 SCC 433] , SCC p. 441, para 15)

"15. ... "16. ... The management is made aware of the workman's contention regarding the defect in the domestic enquiry by the written statement of defence filed by him in the application filed by the management under Section 33 of the Act. Then, if the management chooses to exercise its right it must make up its mind at the earliest stage and file the application for that purpose without any unreasonable delay.' [As observed in Shambhu Nath Goyal v. Bank of Baroda, (1983) 4 SCC 491, p. 506, para 16.] "

15. Similarly, in Firestone Tyre & Rubber Co. [(1973) 1 SCC 813 : 1973 SCC (L&S) 341] this Court observed that: (SCC p. 828, para 32)

"32. (4) Even if no enquiry has been held by an employer or if the

enquiry held by him is found to be defective, the Tribunal in order to satisfy itself about the legality and validity of the order, had to give an opportunity to the employer and employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action, and it is open to the employee to adduce evidence contra."

(emphasis supplied by us)

(See also United Bank of India v. T.N. Banks Deposit Collectors Union [(2007) 12 SCC 585 : (2008) 2 SCC (L&S) 529]; Engg. Laghu Udyog Employees' Union v. Labour Court and Industrial Tribunal [(2003) 12 SCC 1 : 2004 SCC (L&S) 974].)"

49. These authorities have mostly laid down law in the context of exercise of powers by the Labour Court under Section 11-A of the Act. Though that is not the specific plea raised here, but that could be involved in any case where the Labour Court is seized of a reference involving dismissal from service. However, that is not the principal issue to be examined in this matter. What has to be seen here is whether the Management were entitled to exercise powers, given the facts and circumstances of the case to dispense with the procedure of holding a domestic inquiry, in accordance with the Standing Orders, and take resort to special procedure in Clause 45.0.0 of the Standing orders. This Court thinks that cases where power to dispense with inquiry on one or the other ground, if provided under the Standing Orders in exceptional cases is exercised, would render it imperative that evidence be recorded before the Labour Court. In that case, in the nature of things, no application seeking permission to lead evidence, or a case made out to that effect in pleadings may be required. This is so because in the very nature of the power exercised, there is no evidence recorded by the Employers, in the formal sense of the term wherever inquiry is dispensed with. The evidence is certainly there, but not led either on behalf of the Employers or in defence by the workmen. The power exercised by the Employers is by invocation of a special procedure to dispense with inquiry, as in the present case. Therefore, the Labour Court ought to require parties to lead evidence in a matter like the present one. The parties in their own interest must take the opportunity to do so. It is gratifying to note that in the present case, the parties and the Labour Court adopted that course and evidence on both sides has been led. This course is all the more necessary because given the nature of proceedings where no domestic inquiry is held, there would be scanty material, if any, available to the Labour Court to record its conclusion whether the power to dispense with inquiry under the Standing Orders has been rightfully exercised. In the event it has been rightfully exercised, the law laid down by their Lordships in the **Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd.** *(supra)*, which requires such opportunity to be given by the Tribunal where no inquiry is held would be attracted. The principles enumerated in sub-paras (4), (5), (6), (7) and (8), *in re,* **Workmen of M/s Firestone Tyre and Rubber Co. of India (P.) Ltd.** *(supra)* are relevant.

50. The Labour Court in this case had all the documentary evidence filed before it led by the petitioner-Employers and also by the first respondent, on behalf of the workmen. There was also oral evidence led by the Employers, including

the deposition-in-chief by EW-2, V.K. Shukla, Joint General Manager (Personnel and Industrial Relations) of the petitioner-Company. He is one of the complainants regarding the incident of violence that took place in the night of 03/04.06.2009, which too is on record and proved by EW-1, Hitesh Kulshreshtha, Additional General Manager (HR) with the petitioner-Company. The said complaint has been marked as Ex. E5. Also, on record is another complaint about the same incident by Sri A.K. Dixit, another senior official of the petitioner-Company, both addressed to the Vice President (Works) of the petitioner-Company. Both the complaints are about rioting with arms and deadly weapons by the workmen, carrying a graphic account of the occurrence where a violent mob laid siege to the Officers' colony and ravaged it. Sri V.K. Shukla in his deposition-in-chief (on affidavit) dated 04.08.2015, filed before the Labour Court has testified about the occurrence involving the workmen, as under:

"दिनांक 03 व 04 जून 2009 की रात्रि में लगभग 1:30 बजे श्री जे0बी0 सिंह, 50-60 परिचित / अपरिचित, व्यक्तियों / कर्मचारियों की भीड़ की अगुवाई करते हुए, डी टाइप बलाक में स्थित मेरे निवास स्थान, डी-7, कृभको श्याम नगर, ग्राम व पोस्ट पिपरोला, तहसील सदर, जिला शाहजहांपुर (उ0प्र0) पर आये। उक्त भीड़ में श्री जे0बी0 सिंह यादव, श्री बी0पी0 शुक्ला, श्री राधेश्याम, श्री राकेश मिश्रा, श्री शमशेर चन्द्र (सुरक्षा विभाग), श्री सुशील कुमार मिश्रा तथा श्री बी0के0 राजपूत (फायर एवं सेफ्टी विभाग), श्री सेठ पाल सिंह, मैकेनिकल विभाग, श्री भगवान सिंह, टेक्नीकल विभाग के कर्मचारीगण भी उक्त भीड़ में शामिल थे। मेरे घर के पास पहुंचकर भीड़ में उपस्थित लोगों ने सर्वप्रथम नारेबाजी की तथा डी टाइप बलाक के कई कमरों की बिजली काट दी। वहां पर उपस्थित जनसमुदाय ने प्रतिष्ठान के प्रबन्धकगण, खासकर मुझे तथा मेरे परिवारीजन को भद्दी-भद्दी गालियां देने लगे। उपर्युक्त वर्णित कर्मचारीगण, प्रतिष्ठान के प्रबन्धकगण, खासकर मुझे तथा मेरे परिवार जन को भद्दी-भद्दी गालियां तो देते रहे, साथ ही मेरे घर के मुख्य द्वार के अन्दर घुस आये तथा सीढ़ी पर चढ़कर, निवास स्थान के अन्दर, जाने वाले, दरवाजे को तोड़ने लगे। इन्होने लकड़ी के दरवाजे के सामने लगे हुए, जाली के दरवाजे को तोड़ डाला, परन्तु लकड़ी के दरवाजे को नहीं तोड़ सके। ये लोग रात्रि की उक्त बेला में, लगभग 1/2 घंटे तक नारेबाजी करने, धमकी देने, गाली-गलौज करने, घर में अनाधिकृत घुसने तथा दरवाजे को तोड़ने के काम में लिप्त रहे। लगभग आधे घण्टे के उपरान्त भीड़ में उपस्थित सभी व्यक्ति डी टाइप ब्लाक से वापस चले गये।

इसके उपरान्त, दिनांक 3/4 जून, 2009 की रात्रि की प्रात: बेला में लगभग 03:15 बजे, पुन: उपर्युक्त वर्णित कर्मचारीगण 50-60 परिचित/ अपरिचित, व्यक्तियों/ कर्मचारियों की भीड़ की अगुवाई करते हुए पुन: डी टाइप ब्लाक में आये। वहां आते ही नारेबाजी करने लगे, अफसरों तथा उनके परिवार जन का नाम लेकर भद्दी-भद्दी गालियां देते रहे। श्री ए0के0 दीक्षित, तत्कालीन महाप्रबन्धक तथा अधोहस्ताक्षरी बी0के0 शुक्ला, तत्कालीन उपमहाप्रबन्धक (कार्मिक एवं औद्योगिक सम्बन्ध) के घर में घुसे। घर के बेड रूम, ड्राइंग रूम तथा अन्य कमरों के खिड़कियों के शीशे पत्थरों तथा गमलों से मार-मार कर तोड़ डाले। श्री ए0के0 दिक्षित जी के घर के सामने खड़ी की गयी उनकी व्यक्तिगत कार को बुरी तरह से तोड़ा। भीड़ में उपस्थित लोग यह भी कर रहे थे कि, कि आग लगा दो। उक्त समय उग्र भीड़ में से बन्दूक/ कट्टा से गोली की आवाज सुनाई दी। लगभग 20-30 मिनट तक ये लोग, इस घृणित कार्य को करते रहे, इसके

उपरान्त डी0 टाइप ब्लाक से वापस चले गये। इनके इस कृत्य से डी टाइप में रहने वाले अधिकारियों व उनके परिवारजन, खासकर श्री ए0के0 दीक्षित, तथा अधोहस्ताक्षरी बी0के0 शुक्ला तथा परिवारजन के जान-माल का खतरा उत्पन्न हो गया था। डी टाइप ब्लाक में रहने वाले अधिकारी व परिवारजन को बहुत गहरा सदमा लगा तथा बहुत दिनों तक जान माल के लिए भयभीत रहे।

दिनांक 04 जून 2009 की प्रात: लगभग 4:30 बजे से 5:30 बजे के मध्य, उपर्युक्त वर्णित कर्मचारीगण की अगुवीई में, लगभग 150-200 परिचित/ अपरिचित व्यक्ति/ कर्मचारी ने, कृभको श्यामनगर, के मुख्य द्वार के आवागमन को घेराव करने के उपरान्त बाधित कर दिया। कालोनी के मुख्य द्वार के पास खड़े किये गये ट्रैक्टर को, इन लोगों ने, गेट के सामने, रोड पर, खड़ा करके, ट्रैक्टर के पहियों की हवा निकाल दिया। कालोनी में, बिक्री हेतु, आने वाले दूध, सब्जी तथा आवश्यक वस्तुओं को कालोनी में नहीं आने दिया। दूध वालों के, दूध को जबरदस्ती जमीन पर गिराया, बीमार व्यक्तियों को गेट के बाहर इलाज कराने हेतु, नहीं जाने दिया। प्रात: 6:00 बजे की पाली में अपने काम पर जाने वाले अधिकारियों व कर्मचारियों को प्रतिष्ठान में, नहीं जाने दिया। हमारा प्रतिष्ठान केमिकल प्रतिष्ठान की श्रेणी में आता है। प्रतिष्ठान में अमोनिया गैस का उत्पादन/ भण्डारण, क्लोरीन, नैफ्ता, नैचुरल गैस, जैसे अत्यधिक ज्वलनशील पदार्थों का प्रचुर मात्रा में तथा उनका उपयोग/ बर्ताव किया जाता है। उक्त दिन, इनके द्वारा अधिकारियों/ कर्मचारियों के काम पर जाने से रोकने के कारण, अधिकारी/ कर्मचारी उपर्युक्त वर्णित अत्यधिक ज्वलनशील पदार्थों का रख-रखान नहीं कर पाये। ऐसे में, इन लोगों ने प्रतिष्ठान के न केवल कर्मचारी तथा उनके परिजन वरन् प्रतिष्ठान के पास में निवासरत ग्रामवासियों के जीवन को भी कुछ समय के लिये असुरक्षित कर दिया था। यदि कोई दुर्घटना घटित होती तो उसका खामियाजा बहुत ही भयावह हो सकता था।"

(Emphasis by Court)

51. This witness was cross-examined on behalf of respondent no.1. Likewise is the very detailed deposition-in-chief of Hitesh Kulshreshtha, who proved as many as 42 documents exhibited on behalf of the petitioners, carrying every detail of the violent episode at the hands of the mob commanded by the workmen. Hitesh Kulshreshtha was cross-examined by the defence representative on 23.08.2015 thoroughly, which too is on record.

52. In presence of so much evidence, it was certainly no justification for the Labour Court to have said in a single sentence that it was incumbent upon the petitioners to have held a domestic inquiry before imposing a major punishment. A reading of the award shows that the Labour Court was well aware of all the evidence that was before it, but did not choose to go into the said evidence itself to find out the truth or otherwise of the charges. It also did not look into that evidence to opine whether powers under Clause 45.0.0 were rightfully exercised by the Employers to dispense with the inquiry. This Court has looked into evidence, not to assess the worth of it with reference to veracity of the charges, which the Labour Court alone could have done. The said authority would lie with the Inquiry Officer and the Disciplinary Authority, in the event an inquiry were held. In the absence of an inquiry being conducted, the power to determine the worth of the charges would lie with the Labour Court. It has not exercised those powers.

53. Nevertheless, this Court can certainly look into that evidence for the limited purpose to find out whether the petitioners rightfully dispensed with the otherwise mandatory requirement under the Standing Orders to hold an inquiry, by invoking Clause 45.0.0. This Court may remark at once that under Clause 45.0.0, be it sub-clause (b) or (c), the specific ground that it is not reasonably practicable to hold an inquiry, does not find place. At the same time, sub-clause (c) of Clause 45.0.0, empowers the petitioners to hold a workman guilty and to summarily dismiss him without inquiry, if he is found by the Management (on evidence available with them) to be guilty of very serious kind of misconduct such as sabotage, firing or attempting murder or manhandling or attempting physical resorts to senior official in industrial premises. Sub-Clause (b) on the other hand provides that an employee, particularly one holding a position of confidence, if believed or suspected by the Management to have betrayed the confidence, can be penalized (by any of the prescribed penalties). But, such belief or suspicion should not be one based on mere whim or fancy. It should be a bonafide opinion responsibly held.

54. It is not the first respondent's case, either before this Court or was it the part of the dispute referred to the Labour Court that Clause 45.0.0, or any of its sub-clauses are in any way ultra vires the U.P. Industrial Disputes Act, or violative of any other fundamental right of the workmen, or otherwise violative of the Constitution.

55. On the evidence that has been placed on record before the Labour Court, this Court is of clear opinion that the petitioners lawfully exercised their power to dispense with the domestic inquiry against the workmen, who had commanded a mob to manhandle high ranking officials of the petitioners in the unearthly hours of the night, misbehaved with their families, damaged their official residences, and a private car of one of the officials. Much more than that the workmen by their act as would appear from the evidence of V.K. Shukla, Joint General Manager (Personnel and Industrial Relations) of the petitioners, by laying the siege to the entrance of the industrial plant, prevented officers and workmen from proceeding to their allotted duty stations in time. It has been emphasized that the petitioners' plant is a chemical plant, that handles dangerous chemicals including Ammonia. A little delay in an employee or officer reaching his assigned station, could have led to an industrial disaster with widespread ramification in the locale, endangering human life. Bearing in mind all this evidence, while this Court may not or cannot hold the charges to be proved, it is certainly of opinion that powers under Clause 45.0.0, sub-Clauses (b) and (c) were rightfully exercised by the petitioner-Management.

56. The other submission of Sri B.N. Singh, learned counsel for the respondent in support of the impugned award is founded on the reasoning, which has served as basis for the Labour Court to reach its conclusions. It is about the discriminatory treatment given to the workmen represented by respondent no.1, who are eight in numbering, vis-a-vis, the other two, that is to say, Sethpal Singh and Bhagwan Singh, who have been reinstated, though identically charged. Sri B.N. Singh, learned counsel emphasized

that by the time the matter was before the Labour Court, the two reinstated workmen, like the workmen, had also been convicted by the Criminal Cour; the case of the workmen is, therefore, absolutely at par with the two reinstated workmen, leading to a clear inference of hostile discrimination.

57. In this regard, Sri B.N. Singh has placed reliance upon the decision of the Punjab and Haryana High Court in **Shamsher Singh vs. Pepsu Road Transport Corporation and another8,** where it was a case relating to the petitioner, a Works Manager and another Jagjit Singh Pannu, the Depot Manager, being charged with misappropriation and misuse of the Corporation's moneys. Both were found guilty of gross misconduct and lack of integrity. While the petitioner's services in that case were terminated with immediate effect, Pannu was awarded punishment of stoppage of two increments, with cumulative effect. In these circumstances, Bakhshish Kaur, J. held thus:

"12. The findings recorded by the punishing authority holding the petitioner responsible and guilty of act complained of do not call for interference because allegations of misappropriation, etc., are proved but the only point under consideration is whether on the point of sentences, he has been discriminated against Jagjit Singh Pannu? Since both were held guilty for misappropriation and misuse and exceeding the power regarding purchases, etc., therefore, the penalty imposed upon the petitioner for dismissal from service, amounts to discrimination as against the other, who was awarded lesser punishment. It would therefore amount to denial of justice. In this context, my attention has been drawn to Sengara Singh v. State of Punjab, [1983 (2) L.L.N. 691], and Swinder Singh v. Director, State Transport, Punjab Chandigarh, [1988 (7) S.L.R. 112].

13. The order imposing severe penalty of dismissal from service is arbitrary. The object of Art. 14 of the Constitution is to ensure fairness and equality of treatment. In the sphere of public employment, this means that any action taken by the employer against an employee must be fair, just and reasonable which are the components of "fair treatment," as held in Delhi Transport Corporation v. D.T.C. Mazdoor Congress, [1991 (1) L.L.N. 613].

14. Considering the facts and circumstances of the case, I am of the view that the treatment meted out to the petitioner by imposing major penalty of dismissal suffers from the vice of arbitrary action. It would, therefore, tantamount to denial of equality enshrined under Art. 14 of the Constitution."

58. Sri B.B. Jauhari, learned counsel appearing for the petitioners has submitted that no parity can be claimed from an inherent wrong. He has placed reliance upon a decision of the Supreme Court in **State of M.P. vs. Parvez Khan9,** where the respondent's claim to appointment on compassionate basis to the Madhya Pradesh Police was refused on ground that he was involved in two criminal cases. The Superintendent of Police declined the claim. The respondent challenged the order by way of a writ petition before the High Court on the ground that in the first case he was acquitted on 31st January, 2007, and, in the second, he was discharged on account of compounding of the offence. Learned Single Judge, who heard the writ petition

dismissed it, but on appeal, a Division Bench reversed the judgment holding that since the respondent was acquitted, he could not be considered unsuitable. It was also indicated that no reason has been given as to why after acquittal in the criminal case, the respondent was still considered as unsuitable. The Division Bench directed consideration of the case afresh. Apart from answering other issues relating to a prosecution involving moral turpitude and the right to be considered for appointment to Government service, the Court dealt with a plea also raised by the respondent, based on parity. It was pointed out that two other candidates, similarly circumstanced as the respondent, whose name finds place in paragraph 10 of the report, were recruited to Government service. Against one one of them, three criminal cases were registered prior to recruitment, but he was acquitted, either on the basis of compromise or giving him the benefit of doubt. Similarly, the other candidate who was recruited to the police, and whose name also finds place in paragraph 10 of the report, was tried in a criminal case, but acquitted before appointment, extending him either the benefit of doubt, or on the basis of compounding. The petitioner urged that he was similarly circumstanced, and ought not to be refused appointment, particularly, in view of guidelines of the Madhya Pradesh Government of 5th June, 2003, that required an independent view to be taken where a candidate has concealed information about the pendency of a trial against him, and not where there is no such concealment, like his case. Their Lordships repelled the said submission holding thus in paragraph 14 of the report:

"14. The plea of parity with two other persons who were recruited can also not help the respondent. This aspect of the matter was also gone into by this Court in Mehar Singh [Commr. of Police v. Mehar Singh, (2013) 7 SCC 685 : (2013) 3 SCC (Cri) 669 : (2013) 2 SCC (L&S) 910] and it was held: (SCC p. 704, para 36)

"36. The Screening Committee's proceedings have been assailed as being arbitrary, unguided and unfettered. But, in the present cases, we see no evidence of this. However, certain instances have been pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality (Fuljit Kaur [*Fuljit Kaur v. State of Punjab, (2010) 11 SCC 455]*). It is not meant to perpetuate illegality or fraud because it embodies a positive concept. If the Screening Committee which is constituted to carry out the object of the comprehensive policy to ensure that people with doubtful background do not enter the police force, deviates from the policy, makes exception and allows entry of undesirable persons, it is undoubtedly guilty of committing an act of grave disservice to the police force but we cannot allow that illegality to be perpetuated by allowing the respondents to rely on such cases. It is for the Commissioner of Police, Delhi to examine whether the Screening Committee has compromised the interest of the police force in any case and to take remedial action if he finds that it has done so. Public interest demands an in-depth examination of this allegation at the highest level. Perhaps, such deviations from the policy are responsible for the spurt in police excesses. We expect the Commissioner of Police, Delhi to look

into the matter and if there is substance in the allegations to take necessary steps forthwith so that policy incorporated in the Standing Order is strictly implemented."

59. It is well known and elementary that a plea of discrimination cannot be negatively oriented. No parity can be claimed from a wrong on the plea of violation of Article 14. If that were permitted, it would lead to perpetuation of a wrong, and its repetition, which is certainly not, even remotely the idea behind the guarantee under Article 14. This being so, even if two workmen, that is to say, Sethpal Singh and Bhagwan Singh have been reinstated, though similarly circumstanced like the workmen represented by respondent no.1, no parity can be claimed on that basis. Even otherwise, it has been pointed out, and rightly so that the case of the workman and the two others reinstated, are distinguishable. All the seven workmen represented by respondent no.1, except J.B. Singh were employed either as guards or as firemen. The two reinstated were assistants with office jobs, or assignment nowhere connected to security. The seven men dismissed from service were either security guards or firemen. Both were integral part of the security system of the petitioner's establishment. The conduct of the seven workmen, other than J.B. Singh, in indulging in acts of the kind that the petitioner-Employers have found against them, would send the entire security establishment asunder. A security personnel turning a cause of threat to life and property of those whom he is assigned to guard and protect, is very different from the case of any other workman. So far as J.B. Singh is concerned, he was seen to be commanding the mob and exhorting them to violence. There is evidence about it. In the circumstances, there is no foundation to hold that there was any hostile discrimination practiced by the petitioners in reinstating the two workmen, whose case is distinguishable from the others, represented by respondent no.1. The findings of the Labour Court, therefore, that the workmen were entitled to reinstatement on ground of parity with Sethpal Singh and Bhagwan Singh, does not commend itself to this Court. The Labour Court has also remarked that Sethpal Singh and Bhagwan Singh were also convicted like the workmen. Of these two workmen who were reinstated, one is said to have superannuated, and it must be emphasized that even if reinstatement of the two men was a wrong, no parity can be claimed to replicate the wrong. There is then also this feature that when the two workmen, Bhagwan Singh and Sethpal Singh were reinstated considering the nature of their duty, and whatever role of theirs was found by the Management in the occurrence, there was no conviction recorded against any of the workmen charged, including the eight represented by respondent no.1, here. However, by the time the Labour Court decided to pass the impugned award, that is principally founded on practice of double standard by the petitioners in reinstating two workmen while denying that benefit to the other eight, a judgment of conviction had been passed against all the workmen by a Court of competent criminal jurisdiction. The Labour Court failed to take this into account at all, while passing the impugned award. The Labour Court has also based its award on the reasoning that mere conviction by a Court of Criminal Jurisdiction is not a relevant ground under

the U.P. Industrial Disputes Act in considering reinstatement of a workman. This finding is also based on fallacious reasoning. Conviction in a criminal case, that too, relating to acts of vandalism and assault on the property of the petitioner-Employers and their officials is always a relevant consideration that any employer would bear in mind. It is relevant under Clause 45.0.0. of the Standing Orders. It is not necessary that it should find express mention in the U.P. Industrial Disputes Act, or for that matter in any other statute to enable the petitioners to exercise that power. In the totality of circumstances, this Court is of opinion that the impugned award cannot be sustained and is liable to be quashed.

60. In the result, the writ petition succeeds and is **allowed.** The impugned award dated 06.09.2018 (published on 22.12.2018) passed by the Labour Court, U.P., Bareilly in Adjudication Case no.21 of 2017, is hereby **quashed.** There shall be no order as to costs.

(2019)10ILR A.1785

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ- C No. 6196 of 2019

M/s Kushang Security and House Keeping Pvt. Ltd. ...Petitioner
Versus
Presiding Officer Central Government Industrial Tribunal Cum Labour Court and Anr. ...Respondents

Counsel for the Petitioner:
Sri Virendra Singh.

Counsel for the Respondents:
Sri Sachindra

A. Employees Provident Funds and Miscellaneous provisions Act, 1952 - Section 7-I (2) - EPF is a special law-limitation of filing an Appeal is 60 days and further extended only for a specified period of 60 days and no further.

Held: - Even if the provisions of the Limitation Act may be held to have not been expressly excluded the principle of implied exclusion would apply in terms of the nature of the subject matter, the purpose and the scheme of the Act. The provisions contained under the Limitation Act, 1963 would therefore not be applicable for seeking extension of time beyond the statutory time period of 60 days from the date of issue of the notification/order, extendable by a further period of 60 days, upon the Tribunal being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. The maximum period for filing the appeal would be thus 120 (60+60) days from the date of the issuance of the notification/order which is sought to be challenged. (Para 33)

Writ Petition dismissed (E-9)

List of Cases Cited: -

1. Lotus Chemicals Pvt. Ltd. Vs Asst. Provident Fund Commissioner, (Compl.), Rourkela, 2018 (157) FLR 440 (Ori.H.C.)

2. M/s Port Shramik Co-operative Enterprises Ltd. Vs Employees Provident Fund Org., 2018 (156) FLR 363 (Cal.H.C.)

3. Asst. Regional Provident Fund Commissioner, Meerut Vs Employees Provident Fund Appellate Tribunal & ors., 2006 (108) FLR 35 (Del.H.C.)

4. Commissioner of Sales Tax, U. P., Lucknow Vs M/s Parson Tools & Plants, Kanpur, (1975) 4 SCC 22

5. Dr. A.V. Joseph Vs Asst. Provident Fund Commissioner & anr. 2009 (122) FLR 184 (Ker.H.C.)

6. C.B. Sharma Vs Employees' Provident Funds Appellate Tribunal & ors.2012 (135) FLR 637(P.&H.H.C.)

7. Saint Soldier Modern Senior Secondary School Vs Regional Provident Fund Commissioner, 2014 (142) FLR730 (Del.H.C.)

8. Bihar Shiksha Pariyojna Parishad Vs Regional Provident Fund Commissioner, Employees' Provident Fund Org. & anr., 2017(155) FLR 657(Pat.H.C.)

9. Bihar St. Industrial Development Corp. Vs Employees Provident Fund org. & anr., 2017(154) FLR 88(Pat.H.C.)

10. Bihar State Industrial Development Corporation Vs. Employees' Provident Fund Organization, Patna and another, 2017 (154) FLR 534 (Pat.H.C.)

11.Commissioner of Customs & Central Excise Vs Hongo India Pvt. Ltd. & anr., (2009) 5 SCC 791

11. Patel Brothers Vs St. of Assam & ors., (2017) 2 SCC 350

12. Hukumdev Narain Yadav Vs Lalit Narain Mishra, (1974)2 SCC 133

13. St. of H. P. & ors. Vs Tritronics India Pvt. Ltd., 2018 SCC OnLine HP 757

14. Bengal Chemists & Druggists Association Vs Kalyan Chowdhury, (2018) 3 SCC 41

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Virendra Singh, learned counsel for the petitioner and Sri Jagdish Pathak, learned counsel for the respondent no. 2.

2. The present petition has been filed seeking quashing of the order dated 4.2.2019 passed by the Presiding Officer, Central Government, Industrial Tribunal cum Labour Court, Kanpur in an appeal preferred under Section 7-I of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (Act No. 19 of 1952), (hereinafter referred to as 'the EPF Act') registered as Appeal No. A.T.A. (Misc.) No.03/19. The petitioner has also sought to challenge the earlier order of levy of damages under Section 14-B and interest under Section 7-Q of the EPF Act dated 19.10.2015 passed by the Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Kanpur (in short 'APFC').

3. The records of the case indicate that the petitioner establishment, having Registration No. UP/39140 had failed to pay the provident fund dues for the period 08.09.2012 to 31.12.2014. A Quantification Notice No. 180510 dated 10.1.2015 was issued, and after several opportunities being granted to the petitioner which were not availed, the APFC passed an order (Levy Order No. 174530) dated 19.10.2015 in respect of the remittance for the period 09/12 to 12/2014 levying an amount of Rs.1,33,282/-as damages under Section 14-B and an amount of Rs.1,89,937/- as interest under Section 7-Q of the EPF Act. An order dated 22.5.2017 levying damages and interest for a subsequent period was also passed against the petitioner establishment.

4. The petitioner establishment preferred an appeal under Section 7-I of the EPF Act, registered as Appeal No.

A.T.A. (Misc.) No.03/19, against the two orders dated 19.10.2015 and 22.05.2017 referred to above. The appellant also prayed for stay of the operation of the aforementioned orders as well as notices dated 4/11.01.2017, 09.10.18 and 19.11.18.

5. Objections were filed by the APFC Kanpur (respondent in the appeal) strongly opposing the maintainability of the appeal and submitting that the appeal was highly belated and that the validity of two separate orders could not be challenged in a joint appeal. On the question of limitation reliance was placed upon the judgments in the case of **Lotus Chemicals Pvt. Ltd. Vs. Asst. Provident Fund Commissioner, (Compl.), Rourkela1 and M/s Port Shramik Co-operative Enterprises Ltd. Vs. Employees Provident Fund Organization2.**

6. The Presiding Officer upon a consideration of the facts of the case came to the conclusion that both the appeals preferred were highly belated and the challenge raised to two separate orders dated 19.10.2015 and 22.05.2017 by means of a single appeal was not permissible and further that legality of the three notices could not be examined in the appeal. Accordingly, it came to the conclusion that neither the appeal could be admitted nor any relief could be granted and the appeal was disposed vide order dated 04.02.2019. Aggrieved against the aforementioned order, the present petition has been filed.

7. Heard learned counsel for the parties and perused the records.

8. The sole contention of the counsel for the petitioner is that the dismissal of the appeal in terms of the order dated 04.02.2019, on the ground of delay is wholly illegal, and that the delay in filing of the appeal ought to have been condoned in the interest of justice.

9. Counsel appearing for the respondent no. 2 APFC has supported the order passed in appeal by submitting that the levy of damages under Section 14-B and interest under Section 7-Q had been made after due notice and opportunity to the petitioner establishment and that the appeals being beyond the statutory period of limitation have rightly been rejected.

10. The sole ground which has been raised in the present writ petition is with regard to the question of limitation in filing of the appeal under the provisions of EPF Act.

11. The question which thus falls for consideration is as to whether the time limit granted in terms of the statutory provisions under the EPF Act and the rules made thereunder with regard to filing of an appeal can be extended beyond the period prescribed by granting benefit of the provisions of Section 5 of the Limitation Act, 1963.

12. In order to appreciate the rival contentions the relevant statutory provision with regard to filing of appeal under Section 7-I of the EPF Act may be adverted to.

"7-I. Appeals to Tribunal. - (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or

sub-section (4), of Section 1, or Section 3, or sub-section (1) of Section 7-A, or Section 7-B(except an order rejecting an application for review referred to in sub-section (5) thereof), or Section 7-C, or Section 14-B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

13. The power to make rules including the power to make rules in respect of the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal is provided for under Section 21 of the EPF Act. The relevant provision is being extracted below :-

"21. Power to make Rules- (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

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

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(b) the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal."

14. In exercise of powers conferred under sub-section (1) of Section 21 of Act No. 19 of 1952 "The Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997" have been made. The procedure including the time period for filing an appeal is provided under Rule 7 of the aforementioned Rules, 1997.

"7. Fee, time for filing appeal, deposit of amount due on filing appeal.-- (1) Every appeal filed with the Registrar shall be accompanied by a fee of Rupees five hundred to be remitted in the form of Crossed Demand Draft on a nationalized bank in favour of the Registrar of the Tribunal and payable at the main branch of that Bank at the station where the seat of the said Tribunal situate.

(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal:

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days:

Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal (a Demand Draft payable in the Fund and bearing) 75 per cent of the amount due from him as determined under Section 7-A:

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O."

15. A plain reading of the aforementioned statutory provisions indicates that in terms of sub-section (2) of Section 7-I every appeal under sub-section (1) is to be filed in such form and

manner, within such time and is to be accompanied by such fees, as may be prescribed. Further, Rule 7 of the Rules, 1997 provides that the appeal may be preferred within 60 days from the date of issue of the order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

16. It is seen that the initial period for filing of appeal is 60 days which can be extended by the EPF Appellate Tribunal for another 60 days only when there is sufficient cause and not otherwise. In this regard, reference may be made to the judgment in the case of **M/s Port Shramik Co-operative Enterprise Ltd. Vs. Employees Provident Fund Organisation2**. The relevant observations made in the judgment are as follows :-

"3.....The period of limitation for filing an appeal against an order passed under Section 7-A or Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act is 60 days. If the appellant satisfies the Tribunal that it was prevented by sufficient cause from not filing the appeal within the said period of 60 days, in appropriate case, the Tribunal has the power to condone the delay of another 60 days. Thus, even if the Tribunal wanted to condone the delay it could not condone it beyond a period of 60 days."

17. In the case of **Assistant Regional Provident Fund Commissioner, Meerut Vs. Employees Provident Fund Appellate Tribunal and others3,** an appeal to the Appellate Tribunal was filed after 165 days from the date of the order of the EPF Authority and the delay was condoned by the Appellate Authority in view of the provisions under Section 5 of the Limitation Act, 1963. Upon a challenge being raised the order condoning the delay was set aside and it was held that when the period of 60 days was provided under Rule 7 (2) and a further period of 60 days for condoning the delay is allowed under the proviso to the said rule only then that much period could be condoned. It was held that applicability of Section 5 of the Limitation Act was specifically excluded. The relevant observations made in the judgment are as follows :-

"8.....On behalf of the Assistant Provident Fund Commissioner before the Tribunal, a preliminary objection was raised to the effect that the appeal is barred by time. The appeal was preferred after more than 160 days and the Tribunal had no jurisdiction to condone the delay beyond 60 days. The appeal was presented on 11.1.1999 though the order dated 10.7.1998 was received by the appellant on 20.7.1998. Thus it took 165 days in preferring the appeal. In view of the provisions contained in Section 7-I(2) of the Act read with Rule 7(2) of the Rules, the appeal was required to be preferred within 60 days to the Tribunal. It was submitted that the Tribunal on being satisfied that the appellant was prevented by sufficient cause in preferring the appeal within the prescribed period of 60 days, may extend the said period by a further period of 60 days and thus in all the appeal was required to be preferred maximum within a period of 120 days and not beyond that. Section 7-I (2) of the Act reads as under:

"An appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed."

9. Rule making authority under Section 21 is entitled to make rules to carry out the provisions of this Act by issuing a notification in the Official Gazette. Sub-clause (b) of sub-section (2) of Section 21 reads as under:

"....the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal....."

10. Rule 7(2) reads as under:

"Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order prefer an appeal to the Tribunal :

Provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days."

11. It is in view of the aforesaid provisions, it was contended that the appeal was hopelessly time barred and after the period of 60 days granted for preferring an appeal, if there is a delay of 60 days then such delay can be condoned and no further.

12. The Tribunal expressed an opinion that the power of the Tribunal to condone the delay under Section 5 of the Indian Limitation Act, 1963, is not curtailed by the Legislature..Therefore, the provisions under the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997, only to condone a delay of 60 days is ultra vires and is void. Therefore, it held that the Tribunal has jurisdiction to condone any delay, if it is satisfactorily explained...

13. Learned counsel for the Company submitted that sub-clause (b) of sub-section (1) of Section 21 provides the rule making authority to prescribe time limit within which an appeal shall be filed before the Tribunal. Legislature only authorized the rule making authority to make a provision for prescribing a period for preferring an appeal, however, the rule also provided a further period of 60 days by proviso to sub-rule (2) of Rule 7 of the Rules. In view of this, it was contended that proviso is ultra vires the provisions contained in the Act. It was further submitted that if the proviso is ultra vires the provisions contained in the Act, then the Limitation Act, 1963 will apply. In the submission of learned counsel for the Company, the Tribunal has rightly held that the law of limitation is applicable. It was submitted that Section 7-I of the Act, if read it becomes very clear that sub-section (2) of Section 7-I also refers such time within which the appeal is to be filed.

14. The Act is a labour legislation wherein provision is made for provident funds to be deposited by the employer. Section 7-D to 7-H provide for the Appellate Tribunal, the term of the office of the Presiding Officer of Tribunal, salary, allowances and other terms and conditions of Presiding Officer and the staff of the Tribunal. Section 7-I provides for appeals to the Tribunal. The Chapter further provides procedure before the Tribunal, assistance of a legal practitioner, right of hearing or rectification of an order, finality of orders of the Tribunal, deposit of amount due on filing an appeal, transfer of cases, the

manner of recovery, recovery certificate, validity of the certificate and such other things. It provides penalties, offences by companies, enhanced punishment in certain cases and offences under the Act to be cognizable. It also provides the Court which shall try the offences. Thus a special mechanism is indicated in the Act itself.

15. With a view to see that the proceedings are disposed of as early as possible, it was left by the Legislature to fix "such time" for preferring an appeal. Section 21(2)(b) refers to the time within which an appeal shall be filed and in view of this it was submitted that in absence of any power, it was not open to prescribe a specific period for condonation of delay in sub-rule (2) of Rule 7 of the Act in exercise of the powers conferred under sub-section (1) of Section 21 of the Act.

16. The Legislature left it open to the rule making authority to prescribe time for preferring an appeal. However, at the same time the rule making authority while prescribing the period of limitation for preferring an appeal also provided a period during which if there is a delay, the same can be condoned if the Tribunal is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. However, the limitation was placed that that can be done if there is a delay of a further period of 60 days.

17. In our opinion, it cannot be said that the rule making authority has exceeded its limit while prescribing the period of limitation. Like the provisions in other statutes for condoning the delay, the rule making authority thought it fit to provide some period if there is a sufficient cause and the Tribunal is satisfied that the applicant was prevented from preferring the appeal on such cause to extend the period of limitation. This provision is an enabling provision. It does not take away the right of a person of preferring an appeal but on the contrary it enables a party who could not prefer an appeal within the prescribed period for sufficient reasons. However, at the same time, keeping in mind that that provision is made for a weaker section, disputes must be resolved at the earliest, therefore, restricted the period, i.e. that if the delay is of 60 days then to that extent delay can be condoned. Therefore, in our opinion, the provision cannot be said to be ultra vires of the provisions of the Act as the provision for condonation of delay is made to help the litigant who might be facing genuine difficulties. It is difficult to say that the proviso to sub-rule (2) of Rule 7 is bad. If that is declared as bad or ultra vires Section 7-I or Section 21(1)(b) of the Act, it can be said that the period of limitation prescribed is bad for want of not providing extended period in case of difficulty.

18. It is required to be noted that in case of Delta Impex v. Commissioner of Customs, decided on 13.2.2004, this Court had an occasion to examine the question raised by the applicant which reads as under:

"Whether the provision of Section 128 of the Customs Act, 1962 completely bars the Commissioner (Appeals) from condoning the delay beyond the period of 30 days even in a deserving case and that despite the order made by the Commissioner (Appeals) is it incumbent upon the Tribunal to consider the appeal on merits?"

19. There also it was submitted that considering the provisions contained in section 29(2) of the Indian Limitation

Act, 1963 (hereinafter referred to as 'the Limitation Act') read with section 5 thereof, irrespective of the fact that the matter was under the Customs Act, the appellate authority ought to have condoned the delay, examined the matter on merits and it could not have dismissed the appeal on the ground that the Commissioner (Appeals) can only condone the delay, if an appeal is presented within a period of 30 days after the statutory period of 60 days in view of section 128 of the Act.

20. In case of Collector of C.E. Chandigarh v. Doaba Co-operative Sugar Mills, Supreme Court pointed out that the authorities functioning under the Act are bound by the provision of the Act. If the proceedings are taken under the Act by the Department, the provisions of limitation prescribed in the Act will prevail. In the case of Miles India Limited v. Assistant Collector of Customs, the Court observed that the Customs Authorities acting under the Act were not justified in disallowing the claim as they were bound by the period of limitation provided there in the relevant provisions of the Customs Act, 1962.

21. The Court in the aforesaid case pointed out that the period of limitation prescribed by the Act for filing an application being different from the period prescribed under the Limitation Act, by virtue of Section 29(2) of the said Act, it shall be deemed as if the period prescribed by the different Act is the period prescribed by the schedule to the Limitation Act. However, it would be difficult to say that section 5 of the Limitation Act is intended to be made applicable in view of the proviso to section 128 of the Customs Act.

22. The Court is required to examine the scheme of the special law, and the nature of the remedy provided therein. Considering these aspects, the Court will have to find out whether the Legislature intended to provide a complete code by itself which along should govern the matters provided by it. On examination of the relevant provisions, if it becomes clear that the provisions of section 5 of the Limitation Act are necessarily excluded, then the said provisions cannot be called in aid to supplement the provisions of the Act. It is open to the Court to examine whether and to what extent the nature of the provisions contained in the Limitation Act in comparison with the scheme of the special law are excluded from operation. When a specific period is provided and a further period of 60 days by way of extended period only then that much period can be condoned.

23. In the instant case, a separate period of limitation is provided, as also the period for which delay can be condoned. The Legislature was aware about the provisions contained in section 5 of the Limitation Act, yet with an intention to curb the delay in labour matters, Legislature left it to the Rule making authority to make a provision for limitation. Rule making authority under the Statute has specifically provided that after the statutory period, if there is delay of 60 days, on showing sufficient grounds for delay of 60 days, that can be condoned. Thus applicability of section 5 of the Limitation Act is specifically excluded.

24. The expression "expressly excluded" in sub-section (2) of section 29 of the Limitation Act means an exclusion by express words, i.e. by express reference and not exclusion as a result of logical process of reasoning. In the instant case, there is no question of implied

exclusion but, it specifically provides a different period of limitation, as also the period during which, if delay has occurred, it could be condoned.

25. With regard to the applicability of sections 4 to 24 of the Limitation Act (inclusive) one will have to refer to sub-section (2) of section 29 of the Limitation Act, 1963. It specifically states that these provisions shall apply only so far as and to the extent to which, they are not expressly excluded by special or local law. Reading the language of Rule 7 of the Rules and section 5 of the Limitation Act, it is very clear that extension of time for a period 60 days only can be condoned subject to satisfaction and not beyond that. From an examination of Rule 7 of the Rules, it is very clear that section 5 of the Limitation Act is expressly excluded as a specific provision is made in Rule 7.

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38. In the instant case, there is clear intention of the Legislature for asking the rule making authority to prescribe the time during which an appeal shall be filed. When the time is to be prescribed, it is open for the rule making authority to prescribe extended period also. If the extended period is provided, the provisions would not become bad or ultra vires the provisions contained in the Act, as it is only an enabling provision.

39. It is also clear that an opinion was expressed before the Legislature, that in the opinion of the Government the provision should be made for granting provident fund facilities not only to the employees in industrial establishments, but also to the employees in commercial and other undertakings. An assurance was given that the Government would take appropriate measures. It is thereafter the Act came to be enacted. Reading the provisions contained in the Act, it covers large number of employees. Employer, as indicated in the Act, has to make contributions to the fund in the manner indicated in section 6. Section 7-A of the Act empowers the authority to decide a dispute about the applicability of the Act if raised and to determine the amount due from any employer, as indicated in sub-clause (b) of sub-section (1) of section 7-A of the Act. The officer empowered to conduct an inquiry under sub-section (2) of section 7-A of the Act in this behalf having the powers as are vested in Code under the Civil Procedure Code, 1908 for trying a suit in respect of the matters indicated therein. How the order is to be reviewed is indicated under section 7-B. Section 7-C refers to determination of escaped amount. An order made by authority was challenged before the Appellate Tribunal known as "Employees Provident Funds Appellate Tribunal". Thus it is a special statute to determine the liability of employer to make his contribution and to pass further orders by the authorities which are to be examined by the Tribunal in case of an appeal. It is in this background the provisions of the Act are to be examined.

40. Considering the language of the Act and the rules, the Scheme, which is meant for weaker section and from the intention of the Legislature, it is clear that the Legislature left it to the Rule making authority to prescribe the time by specifically referring that an appeal under sub-section (1) shall be filed within such time as also specifically referring in section 21 about the form and the time within which an appeal shall be filed. It is clear that the Legislature left it to the Rule

Making Authority to prescribe total period during which an appeal can be filed, which includes extended period. This being an enabling provision and in consonance with the provision contained in the Act cannot be said to be ultra vires the provisions contained in the Act."

18. In the aforementioned case of **Assistant Regional Provident Fund Commissioner, Meerut** (supra) reference was made to the judgment in the case of **Mohd. Ashfaq Vs. State Transport Appellate Tribunal U.P. and others4**, where in the context of the provisions under the Motor Vehicles Act, 1939, it was held as follows :-

"8.....This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-section (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days....."

19. Similar observations were made in the case of **The Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. M/s Parson Tools and Plants, Kanpur5**, wherein it was stated as follows :-

"22. Thus the principle that emerges is that if the Legislature in a special statute prescribes a certain period of limitation for filing a particular application thereunder and provides in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only upto a specified time-limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Limitation Act."

20. Rule 7 (2) of the Rules, 1997 again came up for consideration in the case of **Dr. A.V.Joseph Vs. Assistant Provident Fund Commissioner and another6** and it was held that the maximum period for filing an appeal is only 120 days from the date of the impugned order. The relevant observations made in the judgment are as follows :-

"10. Section 7-I(2) of the Act provides that every Appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Rule 7(2) of the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 states that any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal. The 'first proviso' thereunder further stipulates that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the Appeal within the prescribed period, extend the said period by a further period of 60 days. In short, the maximum period for filing the Appeal

is only 120 days from the date of the impugned proceedings/order (60+60). When the statute confers the power on the Authority to condone the delay only to a limited extent, it can never be widened by any Court contrary to the intention of the law makers...."

21. In the case of **C.B.Sharma Vs. Employees' Provident Funds Appellate Tribunal and others7,** the appeal filed nine months after the date of the order passed by the Commissioner was dismissed and the challenge raised to the order passed by the Tribunal was turned down with the following observations :-

"9. In terms of the rule, period of 60 days has been provided for filing the appeal before the Tribunal. For sufficient reasons the Tribunal can extend the period for further 60 days. Once the petitioner undisputedly had the knowledge of the order passed by the Commissioner on 16.2.2009, the appeal filed nine months thereafter had rightly been dismissed by the Tribunal as time barred."

22. The question as to whether the Appellate Tribunal was vested with any power to condone the delay in filing the appeal beyond the prescribed period again came up for consideration in the case of **Saint Soldier Modern Senior Secondary School Vs. Regional Provident Fund Commissioner8** and it was held that there was no such power with the Appellate Tribunal. The observations made in the judgment are as follows :-

"8. A perusal of the section 7-I of the Act and Rule 7 of the Rules would reveal that the time period for filing an appeal is within 60 days from the date of issue of the notification/order, provided, the Tribunal, if satisfied that for certain sufficient cause, the appeal could not be preferred within the period of 60 days, then, the period to file appeal can be extended to 60 days thereafter. Suffice to state, the provision does not vest any power with the Tribunal to condone a delay beyond that period.....

9. From the above decision of the Supreme Court, even in the case in hand, it is clear from the provisions of the Act, which is a special statute, a certain period of limitation is prescribed for filing the appeal. In the eventuality, the appeal is not filed within the said period, the power to condone the delay is for a further period of 60 days and no more....."

23. A similar view was again taken in the case of **Lotus Chemicals Pvt. Ltd. Vs. Assistant Provident Fund Commissioner, (Compl.) Rourkela1,** wherein it was held as follows :-

"8.....The procedure for filing of appeal has been provided under the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997, wherein it has been provided under Regulation 7(2) that the appeal may be filed within 60 days from the date of issuance of notification/order, provided that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring appeal within the prescribed period, may extend the said period by a further period of 60 days, meaning thereby the appeal is to be filed before the appellate Tribunal within a maximum period of 120 days subject to its condonation and beyond that it cannot

be extended. It is settled that if any legislation has been provided, it has to be followed in its strict sense and if there is specific time period framed in the legislation to entertain an appeal, the authorities concerned are not supposed to extend that period by assuming the power conferred under the Limitation Act, 1963. Here in the instant case, the maximum period of filing an appeal is 60 days, subject to its condonation for a further period of 60 days, hence the condonation is only to be done for maximum period of 60 days, which suggests that the provision of Limitation Act, 1963 will not be applicable.

9. It is settled position of law that the court of law or the Tribunal is supposed to follow the statutory provision and it cannot be interpreted, if there is no ambiguity and it is settled that the things is to be done as per the statutory provision, hence applying the said principle, it is the considered view of this Court that the Tribunal has not committed any error in passing the order under Section 7-I by rejecting it, since appeal was preferred after delay of 260 days, hence the Tribunal is having no power to condone the said delay period, in view of the provision of Rule 7 of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 as discussed herein above."

24. Reiterating a similar view, in the case of B**ihar Shiksha Pariyojna Parishad Vs. Regional Provident Fund Commissioner, Employees' Provident Fund Organzation and another9,** it was held that condonation of delay has to be considered within the purview of the statutory provision and the provisions of the Limitation Act cannot be imported or made applicable into the EPF Act and the Rules, 1997. The relevant observations made in the judgment are extracted below :-

"18. Thus, in view of the fact that the limitation is prescribed by specific Rule 7(2) of 'the Rules' as also in view of the ratio laid down by the Supreme Court in Commissioner of Customs and Central Excise v. Hongo India Private Limited & Anr. (supra) and M/s. Patel Brothers v. State of Assam & Ors. (supra), condonation of delay has also to be considered within the purview of the statutory provision and the provisions of the Limitation Act cannot be imported or made applicable into 'the Act' and 'the Rules'. In that view of the matter, no illegality can be found with the order impugned passed by the Tribunal."

25. A similar view has been taken in the case of **Bihar State Industrial Development Corporation Vs. Employees Provident Fund Organization and another10 and again in Bihar State Industrial Development Corporation Vs. Employees' Provident Fund Organization, Patna and another11.**

26. The question with regard to condonation of delay by applying Section 5 of the Limitation Act, 1963, in the context of filing an appeal and reference under the Central Excise Act, came up for consideration in the case of **Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and another12,** and taking into consideration that the Central Excise Act is a special law and a complete code by itself, it was held that the time limit prescribed for making a reference thereunder is absolute and unextendable

by the Court under Section 5 of the Limitation Act, 1963. The relevant observations made in the judgment are as follows:-

"30. In the earlier part of our order, we have adverted to Chapter VI-A of the Act which provides for appeals and revisions to various authorities. Though Parliament has specifically provided an additional period of 30 days in the case of appeal to the Commissioner, it is silent about the number of days if there is sufficient cause in the case of an appeal to the Appellate Tribunal. Also an additional period of 90 days in the case of revision by the Central Government has been provided. However, in the case of an appeal to the High Court under Section 35-G and reference application to the High Court under Section 35-H, Parliament has provided only 180 days and no further period for filing an appeal and making reference to the High Court is mentioned in the Act.

31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd, (2008) 3 SCC 73. The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35-H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. CCE [(2008) 3 SCC 70] concluded that: (Punjab Fibres Ltd. case [(2008) 3 SCC 73] , SCC p. 75, para 8)

"8. ... the High Court was justified in holding that there was no power for condonation of delay in filing reference application."

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.

33. Even otherwise, for filing an appeal to the Commissioner, and to the Appellate Tribunal as well as revision to the Central Government, the legislature has provided 60 days and 90 days respectively, on the other hand, for filing an appeal and reference to the High Court larger period of 180 days has been provided with to enable the Commissioner and the other party to avail the same. We are of the view that the legislature provided sufficient time, namely, 180 days for filing reference to the High Court which is more than the period prescribed for an appeal and revision.

34. Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29(2) would be attracted, what we have to determine is whether the

provisions of this section are expressly excluded in the case of reference to the High Court.

35. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law which here in this case is the Central Excise Act. The nature of the remedy provided therein is such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, is to be judged not from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court.

36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act.

37. In the light of the above discussion, we hold that the High Court has no power to condone the delay in filing the "reference application" filed by the Commissioner under unamended Section 35-H(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days and rightly dismissed the reference on the ground of limitation."

27. The principle of implied exclusion of the Limitation Act by a special law was reiterated in the case of **Patel Brothers Vs. State of Assam and others13,** where in the context of the provision for filing a revision under the Assam Value Added Tax Act, 2003 it was held that even if there exists no express exclusion in the special law, the court has right to examine the provisions of the special law to arrive at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act. The judgment of the High Court rendered in the case of **Patel Brothers Vs. State of Assam and others14** was affirmed. The relevant observations made in the judgment are as follows :-

"22. The High Court has rightly pointed out the well-settled principle of law that: (Patel Bros. case [Patel Bros. v. State of Assam, 2016 SCC OnLine Gau 124], SCC OnLine Gau para 19)

"19. ... "the courts cannot interpret a statute the way they have developed the common law "which in a constitutional sense means judicially developed equity". In abrogating or modifying a rule of the common law the

courts exercise "the same power of creation that built up the common law through its existence by the Judges of the past". The court can exercise no such power in respect of statutes. Therefore, in the task of interpreting and applying a statute, Judges have to be conscious that in the end the statute is the master not the servant of the judgment and no Judge has a choice between implementing the law and disobeying it.' [Ed.: See Principles of Statutory Interpretation, 14th Edn., p. 26 by Justice G.P. Singh.] "

What, therefore, follows is that the court cannot interpret the law in such a manner so as to read into the Act an inherent power of condoning the delay by invoking Section 5 of the Limitation Act, 1963 so as to supplement the provisions of the VAT Act which excludes the operation of Section 5 by necessary implication".

28. On the point of implied exclusion of the Limitation Act by a special law reference may be had to an earlier judgment in the case of **Hukumdev Narain Yadav Vs. Lalit Narain Mishra15,** wherein while examining whether the Limitation Act would be applicable to the provisions of the Representation of the People Act, it was observed as follows :-

"17.... what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

29. The aforementioned legal position has been reiterated in the case of the State of **Himachal Pradesh and others Vs. Tritronics India Private Ltd.16,** where the issue involved was as to whether a revision under the Himachal Pradesh Value Added Tax Act, 2005 which was beyond the period of limitation prescribed under the statute could be entertained by applying Section 5 of the Limitation Act, and it was stated as follows :-

"28..... taking into consideration the fact that Himachal Pradesh Value Added Tax Act, 2005, is a complete code in itself, which, in other words, is both a substantive as well as a procedural law and as there is no provision contained in the Act, making the provisions of Limitation Act applicable to the proceedings which are to originate from the Act, we hold that this Court has no inherent power to condone the delay in entertaining a Revision Petition which stands filed beyond the period of limitation prescribed in the Act."

30. In a recent judgment in the case of **Bengal Chemists and Druggists Association Vs. Kalyan Chowdhury17,**

it was held in the context of the Companies Act, 2013, that the limitation for filing an appeal to the Appellate Tribunal which is 45 days under Section 421 (3) plus additional 45 days grace period in terms of its proviso, are mandatory in nature and no further time can be granted beyond this total period.

31. In view of the foregoing discussion, the legal position which emerges that in terms of Section 7-I (2) every appeal is to be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Rule 7 (2) of the Rules, 1997 provides for filing of the appeal within 60 days from the date of issuance of the order. The first proviso thereunder further stipulates that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

32. It is thus seen that the EPF Act is a special law providing for institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments and in terms of the rules framed thereunder a certain period of limitation for filing an appeal having been provided for in clear terms and a further provision having been made for extension of such period only upto a specified time period and no further, the Appellate Tribunal would have no jurisdiction to treat within limitation, an appeal filed before it beyond such maximum time limit specified in terms of the statutory rules.

33. Moreover, in terms of the scheme and the intent of the provisions contained in the EPF Act it is seen that the legislature intended it to be a complete code by itself. As a consequence, even if the provisions of the Limitation Act may be held to have not been expressly excluded the principle of implied exclusion would apply in terms of the nature of the subject matter, the purpose and the scheme of the Act. The provisions contained under the Limitation Act, 1963 would therefore not be applicable for seeking extension of time beyond the statutory time period of 60 days from the date of issue of the notification/order, extendable by a further period of 60 days, upon the Tribunal being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. The maximum period for filing the appeal would be thus 120 (60+60) days from the date of the issuance of the notification/order which is sought to be challenged.

34. It is a well settled principle of statutory interpretation that where the statute confers power on the authority to condone the delay only to a limited extent the same cannot be stretched or extended beyond what has been provided under the statute.

35. In the instant case, when the time limit is prescribed by the rule making authority for filing an appeal and also the extended period has been provided, and no further extension thereof has been envisaged or contemplated, the Appellate Authority could not have granted any further extension. In view of the aforesaid, the order passed by the Appellate Authority recording its conclusion that the appeal was filed beyond the statutory period of limitation, cannot be faulted with.

36. Counsel for the petitioner has not been able to dispute the aforementioned legal position.

37. No other argument was raised.

38. The writ petition is accordingly held to be devoid of merits and is accordingly dismissed.

(2019)10ILR A 1801

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2019

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 16842 of 2014

Madhaw Asharam Chairitable Trust Hanuman Mandir & Anr. ...Petitioners
Versus
Shri Shamshul Khuda Khan...Respondent

Counsel for the Petitioners:
Sri Vijay Shankar Singh, Sri Pankaj Dwivedi.

Counsel for the Respondent:
S.C., Sri Hriyada Narain Mehrotra, Sri Maha Prasad, Sri Nitin Sharma, Sri Syed Farman Ahmad Naqvi, Sri S. Faizan Ahmad, Sri Utpal Chatterji.

A. Code of Civil Procedure - Order XVI Rule 17 - amendment sought at the stage of appeal - changing the nature of the case, application for amendment rightly rejected.

Held :- In the case at hand, the court below upon due consideration of the facts of the case has come to the conclusion that the amendment which was being sought, at the stage of appeal, would have the effect of changing the very nature of the case, and the application for amendment having been rejected for the said reason, the order passed by the Trial Court cannot be faulted with. (Para 19)

B. In view of the authoritative pronouncement made in the case of Radhey Shyam & Anr. Vs. Chhabi Nath & Ors. 3 judicial orders passed by civil courts are not amenable to a writ of certiorari under Article 226, and for this reason also the writ petition which has been filed against a judicial order passed in a pending civil appeal, would fail. (Para 20)

Writ Petition rejected (E-9)

List of Cases Cited: -

1. M. Revanna Vs Anjanamma & ors., (2019)4 SCC 332

2. Vijay Hathising Shah & anr. Vs Gitaben Parshottamdas Mukhi & ors., (2019) 5 SCC 360

3. Radhey Shyam & anr. Vs Chhabi Nath & ors., (2015) 5 SCC 423

4. Chander Kanta Bansal Vs Rajinder Singh Anand, (2008) 5 SCC 117

5. Revajeetu Builders & Developers Vs Narayanaswami & Sons & ors., (2009) 10 SCC 84

6. Vijay Hathising Shah & anr. Vs Gitaben Parshottamdas Mukhi & ors., (2019) 5 SCC 360

7. Hari Narayan Vs Shanti Dev, S.C.C. Revision Defective No.49/2019

8. Ma Shew Mya Vs Maung Mo Hnaung, AIR 1922 PC 249

(Delivered by Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. Heard Sri Pankaj Dwivedi, Advocate holding brief of Sri Vijay Shankar Singh, learned counsel for the

petitioners and Sri Utpal Chatterji, learned counsel appearing for the legal representatives of the sole respondent (deceased).

2. Counsel for the parties have agreed that the petition may be disposed of at the stage of admission.

3. By means of the present petition filed under Article 226 of the Constitution of India a writ in the nature of certiorari has been sought for quashing the order dated 04.12.2013 passed by the Additional District Judge, Meerut in Civil Appeal No.14 of 2011 whereby the amendment application (Application No.94Ka) has been rejected.

4. The order impugned records that the amendment sought at the stage of appeal would have the effect of changing the very nature of the suit and for the said reason the amendment application has been rejected.

5. Contention of the counsel for the petitioners is that by means of the amendment application a typographical error was sought to be rectified and as such the same ought to have been allowed in the interest of justice.

6. Sri Utpal Chatterji, learned counsel for the legal heirs of the sole respondent submits that the amendment which was being sought at the stage of appeal would change the very nature of the suit and as such the same has rightly been rejected by the court below. Moreover, it is submitted that in view of the proviso to Order XVI, Rule 17 the amendment was not permissible in the absence of the petitioners being able to show that in spite of due diligence they could not have raised the matter before the commencement of trial. Reliance in this regard has been placed on the judgments in the case of ***M. Revanna Vs. Anjanamma & Ors.1, Vijay Hathising Shah & Anr. Vs. Gitaben Parshottamdas Mukhi & Ors.2.***

7. It is further submitted that the present petition filed under Article 226 of the Constitution against a judicial order would not be maintainable in view of the law laid down in the case of ***Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.3.***

8. The rival contentions which fall for consideration relate to the scope of the powers of the Court to allow amendment of pleadings under Order VI Rule 17 of the Civil Procedure Code, 19084.

9. The purpose and object of rules relating to pleadings being to decide the real controversy between the parties and not to punish them for their negligence, the provisions relating to the amendment of pleadings are usually to be liberally construed with a view to promoting the ends of justice and not for defeating them, and consequently the courts generally allow all amendments that may be necessary for determining the real question in controversy between the parties.

10. The proviso to Rule 17 under Order VI, as inserted by the Code of Civil Procedure (Amendment) Act, 2002, however, restricts and curtails the power of the court to allow amendment of pleadings by enacting that no application for amendment is to be allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence, the party could not have

raised the matter before the commencement of the trial.

11. The proviso to Rule 17, as per the Amendment Act, 2002, has introduced the "due diligence" test, which requires that the court must be satisfied that in spite of "due diligence" the party could not discover the ground pleaded in the amendment. The term "due diligence" has been specifically used so as to provide a test for determining whether to exercise the discretion in situations where amendment is being sought after commencement of the trial.

12. The object of introducing the proviso to Rule 17 was considered in the case of ***Chander Kanta Bansal Vs. Rajinder Singh Anand5,*** and it was held as follows:-

"11. ...The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

12. With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy leading to protest all over the country. Thereafter, the Rule was restored in its original form by amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise.

13. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.

x x x x x

15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial...."

13. The provisions contained under Order VI Rule 17 proviso as introduced in the year 2002 again came up for consideration in the case of ***J. Samuel Vs. Gattu Mahesh & Ors.6*** wherein the principles relating to allowing amendments under Order VI Rule 17 were reiterated and the object of the proviso and the meaning and significance of "due diligence" of the parties seeking amendment was also stated. The observations made in the judgment in this regard as follows:-

"18. The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

"...no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an

anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

x x x x x

23. ...The entire object of the amendment to Order VI Rule 17 as introduced in 2002 is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of other's case. It also helps checking the delays in filing the applications. [Vide Aniglase Yohannan v. Ramlatha [(2005) 7 SCC 534], Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N. [(2006) 12 SCC 1], Chander Kanta Bansal v. Rajinder Singh Anand [(2008) 5 SCC 117], Rajkumar Gurawara v. S.K. Sarwagi and Co. (P) Ltd. [(2008) 14 SCC 364], Vidyabai v. Padmalatha [(2009) 2 SCC 409 : (2009) 1 SCC (Civ) 563] and Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512 : (2010) 4 SCC (Civ) 239]."

14. Reference may also be had to the judgment in the case of ***Revajeetu Builders and Developers Vs. Narayanaswami and Sons & Ors.7*** wherein some of the important factors which may be kept in mind while dealing with an application filed under Order VI Rule 17 have been enumerated in the following terms:-

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit

mala fide, worthless and/or dishonest amendments."

15. In a recent judgment in the case of ***M. Revanna Vs. Anjanamma & Ors.1,*** it has been held that after commencement of trial amendment of pleadings is not permissible except under conditions stated in the proviso and the burden is on the person seeking the amendment after commencement of trial to show "due diligence" on his part as contemplated under the proviso. The relevant observations in the judgment are as follows:-

"7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."

16. A similar view was taken in the case of ***Vijay Hathising Shah & Anr. Vs. Gitaben Parshottamdas Mukhi & Ors.2*** wherein the order passed the High Court setting aside the order of the Trial Court rejecting the amendment application was held to be unsustainable and the order of the Trial Court was restored. The observations made in the judgment are as follows:-

"9. In our view, the trial court was right in rejecting the application. This we say for more than one reason. First, it was wholly belated; second, Respondent 1-plaintiff filed the application for amendment of the plaint when the trial in the suit was almost over and the case was fixed for final arguments; and third, the suit could still be decided even without there being any necessity to seek any amendment in the plaint. In our view, amendment in the plaint was not really required for determination of the issues in the suit."

17. The aforementioned legal position has been reiterated in a recent judgment of this Court in the case of ***Hari Narayan Vs. Shanti Devi8.***

18. As regards the question as to whether an amendment can be allowed when it introduces a totally different or a new case, it is relevant to reiterate the legally settled position that leave to amend would be refused if it introduces a totally different, new and inconsistent case or changes the fundamental character of the suit. Reference in this regard may be had to the judgment of the Privy

Council in the case of ***Ma Shew Mya Vs. Maung Mo Hnaung9:-***

"...All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject-matter of the suit."

19. In the case at hand, the court below upon due consideration of the facts of the case has come to the conclusion that the amendment which was being sought, at the stage of appeal, would have the effect of changing the very nature of the case, and the application for amendment having been rejected for the said reason, the order passed by the Trial Court cannot be faulted with.

20. As regards the other objection raised by the respondent with regard to the maintainability of the writ petition under Article 226 of the Constitution, it may be noted that in view of the authoritative pronouncement made in the case of ***Radhey Shyam & Anr. Vs. Chhabi Nath & Ors.3*** judicial orders passed by civil courts are not amenable to a writ of certiorari under Article 226, and for this reason also the writ petition which has been filed against a judicial order passed in a pending civil appeal, would fail. The relevant observations made in the aforementioned judgment of ***Radhey Shyam*** *(supra)* are as follows:-

"25. It is true that this Court has laid down that technicalities associated with the prerogative writs in England have no role to play under our constitutional scheme. There is no parallel system of King's Court in India and of all other courts having limited jurisdiction subject to supervision of King's Court. Courts are set up under the Constitution or the laws. All courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. Writ jurisdiction is constitutionally conferred on all High Courts. Broad principles of writ jurisdiction followed in England are applicable to India and a writ of certiorari lies against patently erroneous or without jurisdiction orders of tribunals or authorities or courts other than judicial courts. There are no precedents in India for High Courts to issue writs to subordinate courts. Control of working of subordinate courts in dealing with their judicial orders is exercised by way of appellate or revisional powers or power of superintendence under Article 227. Orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts. While appellate or revisional jurisdiction is regulated by statutes, power of superintendence under Article 227 is constitutional. The expression "inferior court" is not referable to judicial courts, as rightly observed in the referring order in paras 26 and 27 quoted above.

26. The Bench in Surya Dev Rai v. Ram Chander Rai [(2003) 6 SCC 675] also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in

Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565], Ouseph Mathai v. M. Abdul Khadir [(2002) 1 SCC 319], Shalini Shyam Shetty v. Rajendra Shankar Patil [(2010) 8 SCC 329 : (2010) 3 SCC (Civ) 338] and Sameer Suresh Gupta v. Rahul Kumar Agarwal [(2013) 9 SCC 374 : (2013) 4 SCC (Civ) 345]. In Shalini Shyam Shetty this Court observed: (SCC p. 352 paras 64-67)

"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time-honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

x x x x x

29. Accordingly, we answer the question referred as follows:

29.1. Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction under Article 226."

21. Counsel for the petitioners has not been able to dispute the aforementioned legal position and has also not been able to point out any material error or illegality in the order passed by the court below so as to warrant interference.

22. It has also been pointed out that the sole respondent has died on 07.01.2018 and no steps have been taken by the petitioners to cause the legal representatives of the deceased respondent to be made a party in the proceedings.

23. The petition thus lacks merit and is accordingly dismissed.

(2019)10ILR A 1809

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2019

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Writ C- No. 35741 of 2018

Raghuraj alias Ruggan & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajai Shankar Pathak, Sri Prateek Tyagi.

Counsel for the Respondents:
C.S.C., Sri Mahesh Narain Singh, Sri Pankaj Kumar Srivastava, Sri Uday Pratap Singh, Sri Kundan Rai.

A. U.P. Consolidation of Holding Act, 1953 - Section 28, 52-A -While deciding Application u/s 28-Consolidator's report to be read and matched with the UP-CH Forms 41 and 45. If no ingress and egress for a plot-provisions of section 52-A of the Act to apply.

Writ Petition allowed (E-9)

(Delivered by Hon'ble Siddhartha Varma, J.)

1. This writ petition has been filed against the order dated 19.7.2018 passed by the Additional District Magistrate (Administration), Meerut in proceeding under section 28 of the U.P. Land Revenue Act, 1901 and against the order dated 4.10.2018 passed by the Additional Commissioner (Judicial)-4th, Meerut Region, Meerut.

2. The respondent no.5 filed an application under section 28 of the U.P. Land Revenue Act before the District Magistrate, Meerut and prayed that in the map, the land which had been shown as a chak marg in between his plot nos.502 and 564 and which was running from North to South be removed from the final maps. The petitioners were arrayed as respondents in the case. They filed their objection to the application filed by the respondent no.5 on 26.3.2015 and a report was called for by the Additional District Magistrate from the Consolidator who submitted his report on 13.3.2015. This report was also objected to by the petitioners. However, when the respondent no.3 on 27.3.2015 accepted the report dated 13.3.2015, the petitioners preferred a Revision which was allowed

on 8.7.2015 and the matter was remanded back to the Additional District Magistrate. Thereafter, the respondent no.3-the Additional District Magistrate once again passed the impugned order dated 19.7.2018 which was affirmed by the Revisional Court on 20.7.2018. Hence, the instant writ petition.

3. Learned counsel for the petitioners has contended that when the respondent no.5 had prayed for the removal of the chak marg which had been shown in the map then he had infact tried to get the chak marg running over plot no.501 removed. He has stated that the road which ran over plot no.576 was connected by the petitioners' plot on plot no.523 by the chak marg which ran over plot no.501. Learned counsel has submitted that the consolidation proceedings were completed in the year 1961 and since then the petitioners had been using the chak road over plot No.501 to reach their plot no.523. Learned counsel for the petitioners has submitted that when the application of the respondent no.5 was taken up and the Consolidator had given his report on 13.3.2015, in his report, the Consolidator had categorically stated that there was one plot no.501 which though had an area of 0.708 hectares was on the spot showing to be having an area of 0.1056 hectares and, therefore, the Consolidator had by his report suggested that the excess land from the plot no.501 be removed and the plot nos.502 and 564 be given the excess land. Here, learned counsel for the petitioners, therefore, submitted that the plot no.501 and the road over it even as per the report of the Consolidator definitely were in existence. Learned counsel further submitted that the Consolidator in his cross-examination had stated that he had not made any spot inspection and that the Consolidator, even though had found that the plot no.501 had some additional land, he definitely did not say that the plot no.501 had to be totally removed. In paragraphs Nos.14, 25, 32 and 33 of the writ petition, which will be reproduced in this judgment, it has also been stated by the petitioners that they had no other chak marg other than the one which was being sought to be removed from plot no.501, to approach their plot no.523. Paragraphs 14, 25, 32 and 33 of the writ petition are being reproduced hereasunder :-

"14. That the Consolidator in its cross-examination in chief has categorically stated that there is no way to reach the petitiones' plot no.523 except to the Chak-Road No.501 which is situated in the eastern side of Plot No.502 and western side of plot n o.564 of respondent no.5. He further stated that during the consolidation proceedings it is necessary to provide a Chak-Road for all chak-holders to reach their plots in Khasra No.523 except to the disputed Chak-Road there is no other Chak-Road.

.....

25. That the petitioners are owner of Plot No.523 and except the Chak-Road No.501 there is no other way or Chak-Road to reach them to their plot.

.....

32. That the respondent nos.2 and 3 while passing the impugned orders did not consider the fact that the petitioners are using Chak-Road No.501 since the last consolidation proceedings to reach their Plot No.523 and the respondent no.5 never objected them.

33. That it is further important to state here that a bricks-made road is also constructed over the Chak-Road No.501 which is situated in between the

Plot No.s502 and 564 which ends to the Plot No.523 of the petitioners and a Pakki Nali is also constructed on both sides of the said Chak Road. Not only this, a Puliya is also constructed on the said Chak-Road by the Gram Sabha fund."

4. Learned counsel for the petitioners has stated that the respondents in paragraphs 16, 23, 27 and 28 have replied to the contents of paragraphs 14, 25, 32 and 33 of the writ petition but have not denied the fact that the chak marg which existed on plot no.501 alone was the road which connected the petitioners' plot no.523 with the rasta on plot no.576. Paragraphs 16, 23, 27 and 28 of the counter affidavit are being reproduced hereasunder :-

"16. That the contents of paragraph no.14 and 15 of the writ petition are not admitted and denied. The petitioner is trying to carve out a Chak Road in the absence of there is any Chak Road mentioned in revenue record. There is no any Chak Road in the revenue record and true copy of the revenue record is being filed herewith and marked as **Annexure No.CA-1** to this counter affidavit.

.....

23. That the contents of paragraph no.25 of the writ petition are not admitted and denied and the petitioners are easily going to their field.

.....

27. That in reply to the contents of paragraph no.32 of the writ petition it is submitted that anyhow or the other petitioners are trying to grab the land of the petitioners.

28. That the contents of paragraph no.33 of the writ petition are not admitted and denied. The petitioners are trying to create a Road unnecessary which does not find the place in the revenue record."

5. Learned counsel for the petitioners submitted that even though in the objection they had not taken the plea that the rasta on plot no.501 was the plot over which the chak marg was running and which connected the rasta in plot no.576 and the plot no.523 but in fact they had always meant that there was a chak marg connecting the rasta and plot no.576 and their own plot at plot no.523.

6. Learned counsel for the petitioners has, in the Supplementary Rejoinder Affidavit filed on 5.4.2019, brought on record a Supplementary Affidavit which they had filed before the Revisional Court on 20.8.2018 that in fact the chak marg was running over as plot no.501 and, therefore, learned counsel for the petitioners submitted that the petitioners always meant that the chak marg on plot no.501 be not removed. Learned counsel also relied upon **2017 (134) RD 758 : Ram Kumar vs. Additional Commissioner, Meerut Mandal & Ors. and 2017 (137) RD 163 : Ashfaq Ahmad vs. Additional Commissioner (Administration) & Ors.** and has stated that not only had the Consolidator's report to be read in its right perspective while deciding the application under section 28 but his report had also to be matched with the UP CH Forms 41 and 45. Learned counsel further states that in case this Court finds that no rasta was there which would provide for the ingress and egress from plot no.523, then this Court may direct the Collector to apply the provisions of section 52-A of the U.P. Consolidation of Holdings Act, 1953 to provide for a chak road. Since learned

counsel referred to section 52-A of the U.P. Consolidation of Holdings Act, the same is being reproduced here as under :-

"52-A. Special provisions for Chak Roads or *Chak* Guls

.-- (1) In the case of a unit in relation to which a notification under sub-section (1) of Section 52 has been issued before the commencement of the Uttar Pradesh Consolidation of Holdings (Amendment) Act, 1970, the Collector may, if he is of opinion that there exists no provisions or inadequate provisions of Chak Roads or Chak Guls in the unit and shall, if a representation in that behalf be not less than ten per cent of the total number of tenure-holders is made to him within six months of the said commencement, proceed to take action under sub-section (2), anything to the contrary contained in Section 52 notwithstanding.

(2) The Collector shall cause a notice of the proposal to take action under this section and also of the representation, if any, received under sub-section (1) to be given in the unit by beat of drum and in such other manner, if any, as he thinks fit, and direct any Consolidation Officer to inspect the locality and take reasonable steps to ascertain the wishes of the tenure-holders, or, as the case may be, of such of them as have not joined in the representation, and to make such other inquiry into the matter as he thinks fit.

(3) Such Consolidation Officer shall make a report to the Collector on the advisability or otherwise of drawing up a plan making provision or, as the case may be, more adequate provision for Chak Roads or Chak Guls in the unit, and the Collector on being satisfied after considering such report that it is necessary or expedient so to do, shall cause a draft plan to be prepared.

(4) The Assistant Consolidation Officer shall thereupon, after ascertaining informally the wishes of as many tenure-holders of the unit as he considers practicable, prepare a draft plan in the prescribed form proposing such provision or additional provision of Chak Roads or Chak Guls as may be necessary. In preparing the draft plan the Assistant Consolidation Officer shall have regard to the following principles, namely:--

(a) That as far as practicable, provision of Chak Roads and Chak Guls should be made primarily by utilising land vested in the Gaon Sabha and secondarily out of land held by those tenure-holders whose Chaks are connected with the proposed Chak Roads or Chak Guls, and in the last resort, out of any other land;

(b) The re-arrangement of Chaks should be made only to the extent it is really necessary for making provision of Chak Roads and Chak Guls with the minimum possible dislocation in the Consolidation Scheme already confirmed.

.....
....."

7. earned counsel for the respondents, however, submitted that the map had been corrected on the basis of the report of the Consolidator and also on the various revenue records which included Form-41 and Form-45.

8. Learned counsel appearing for the respondent no.5, however, in reply stated that the petitioners, only to grab some land on the spot, had dishonestly got carved out a chak road which ran between plot nos.502 and 564. Learned counsel further submitted that the petitioners had for the first time here in the writ petition stated that plot no.501 was the plot on which the chak marg ran. Learned

counsel, therefore, submitted that there was nothing wrong in the removal of the chak marg which had wrongly and illegally been carved out from plot nos.502 and 564. Learned counsel vehemently relied upon the report of the Consolidator and submitted that the impugned orders were not to be interfered with.

9. Having heard learned counsel for the petitioners, learned Standing Counsel, learned counsel for the respondent no.5 and the learned counsel for the Gaon Sabha, the Court is of the view that when the Consolidator had found that there was a plot being plot no.501 and only some area of it had been increased then the plot no.501 had to be placed somewhere in the map. The Court also finds that averment of the petitioners that there was a road which connected the road situate on plot no.576 with their plot no.523 has not been categorically denied by the respondent no.5 in his counter affidavit.

10. The scheme of consolidation definitely lays down that the land which was for the public purposes had to be vested in the Gaon Sabha. If plot no.501 was connecting the road running on plot no.576 and the petitioners' plot no.523, then that road had also to exist on the spot. The Consolidator had found that there was a rasta over plot no.501. However, it has also been found that somehow that area of that rasta had increased and, therefore, it had suggested for a proper reduction of the area. Basing on this report, two orders have been passed. A perusal of the two orders shows that there was no definite finding as to whether plot no.501 connected the rasta on plot no.576 with plot no.523 or not. While passing the two orders, the Additional District Magistrate and the Commissioner have not looked into the final consolidation map and have relied, for their findings, only on the report of the Consolidator alone. The authority which passes the order can always depend upon certain reports but it cannot pass orders solely on the reports. The Additional District Magistrate when was confronted with the objection of the petitioners that there was only one rasta which connected plot no.523 with the rasta running on plot no.576, then even a local inspection was advisable. A definite finding ought to have been arrived at by the Additional District Magistrate and also by the Revisional Court, independent of the report of the Consolidator as to whether the map required a correction or not. This Court also finds from the perusal of paragraph nos.14, 25, 32 and 33 of the writ petitioner which have not been categorically denied in the counter affidavit that the petitioners were having a rasta which connected their plot no.523 with the rasta in plot no.576. An impression is also created that there was no other rasta which would have given an outlet for a person cultivating plot no.523.

11. Under such circumstances, the order dated 19.7.2018 passed by the Additional District Magistrate (Administration), Meerut and the order dated 4.10.2018 passed by the Additional Commissioner (Judicial), 4th, Meerut Region, Meerut are quashed. The Collector, Meerut shall once again decide the application filed by respondent no.5 afresh within a period of one month from the date of presentation of a certified copy of this order and after looking into the report of the Consolidator and after matching the report with Form-41 and Form-45 give a definite conclusion as to

whether a road existed in between the petitioners' plot no.523 and the rasta in plot no.576.

12. In the event the Collector finds that there is no rasta on the map and if he finds that that there is no ingress and egress for the petitioners from plot no.523 then he shall apply the provisions of section 52-A of the U.P. Consolidation of Holdings Act, 1953 and carve out a chak road.

13. With these observations, the writ petition is finally allowed.

(2019)10ILR A 1814

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ C- No. 107 of 2019

Anurag Srivastava & Ors. ...Petitioners
Versus
National Highway Authority of India Through Its Chairman & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shyam Narain Rai, Sri Prashant Mishra, Sri Ravi Kant.

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Neeraj Dube.

A. National Highway Act, 1956 - Section 3G (3) - Acquisition - Non-compliance of procedure - Gazette notification shows that notice is issued under section 3D not under section 3G - Averment in pleading that it is by mistake instead of section 3G, section 3D has been published, is not acceptable in the absence of corrigendum - Impugned award held to be passed without following procedure prescribed u/s 3G(3) of the Act. (Para 20, 23 & 26)

B. National Highway Act, 1956 - Procedure of acquisition - Effect of violation - Under scheme of Act, notification has to be published in three stages - First u/s 3A(2), second u/s 3D(2) and third u/s 3G(3) - Initial two notice issued, but no third stage notice has been brought on record - Prescribed procedure not followed. (Para 21, 22 & 26)

Held :-The scheme of the amendment brought by the Act 16 of 1997, whereby Sections 3A to 3J have been inserted in the Act, 1956, clearly shows that the notification has to be published at three stages: first, under Section 3A(2) declaring intention to acquire the land and inviting objections; secondly, under Section 3D(2) for declaration to the effect that the land should be acquired and on such declaration the land vests absolutely in the Central Government; and thirdly, under Section 3G(3) a public notice is required to be published in two local newspapers inviting the claims from all the persons interested in the land.

Writ Petition allowed (E-1)

Case relied on :-

Sharda Yadav Vs U.O.I. & ors. (Writ-C No. 30046 of 2014, decided on 18/07/2014).

Case referred :-

Whirlpool Corp. Vs Registrar of Trade Marks Mumbai & ors. (1998) 8 SCC 1.

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

1. The petitioners have instituted this writ proceedings aggrieved by an award dated 19th September, 2018 passed

by the second respondent in respect of their land which has been acquired under the provisions of the National Highways Act, 1956 .

2. The facts are these: the petitioner no. 3 along with her two sons, namely, Anurag Srivastava and Arvind Srivastava, petitioner nos. 1 and 2 respectively, are the owners of Plot Nos.257, 448 and 450 situated in Village Babura Bhairodayal, Tehsil Lalganj, District Mirzapur. They claim that they have residential house over Plot Nos. 448-Kha and 450. The residential house of the petitioners has a garden with various varieties of trees planted in it. Their residential house is adjacent to the main road. The petitioners claim that they are not using Plot Nos. 448, 257 and 450 for any agricultural purpose. Plot Nos. 448 and 450 were chak out during the consolidation proceedings due to their non-agricultural usage. It is stated that over Plot No. 257 the petitioners have constructed a permanent building, which is used as servant quarter and for keeping animals i.e. cows, buffaloes, etc.

3. The respondent no. 1, the National Highway Authority of India2, has undertaken a project for widening of National Highway No. 7, from 98.640 Kms. to 140.265 Kms. in district Mirzapur (Varanasi- Hanumana Section). In this regard a notification under Section 3A of the Act, 1956 was published in the Gazette of India, Extraordinary, on 15th January, 2018. The petitioners' Plot Nos. 257, 448 and 450 admeasuring 0.0236, 0.0450 and 0.0260 hectares respectively were included in the said notification declaring the intention to acquire the land shown in the notification. The said notification was published in two newspapers, namely, 'Dainik Jagran' and 'Times of India' on 03rd February, 2018. Later the notification under Section 3D of the Act, 1956 was published on 02nd April, 2018.

4. The grievance of the petitioners is that the respondents in hot haste without proceeding in accordance with the provisions of Section 3G(3) of the Act, 1956 proceeded to determine the compensation and passed an award dated 19th September, 2018. It is stated that no publication was made in any newspaper inviting objections from the persons and the petitioners whose land was being acquired and they have not been paid adequate compensation.

5. It is averred in the writ petition that without giving any opportunity of hearing to the petitioners their land has been acquired that too without determining the adequate compensation for the land of the petitioners. The petitioners claim that ignoring the valuation of the land, which is more than Rs.6,500/- per square meter as per the circle rate prepared by the District Magistrate, a meager amount of compensation at the rate of Rs.218/- per square meter has been awarded. It is stated that the petitioner's land has been treated to be agricultural land ignoring the evidence that a pucca house is standing over it and the land is being used for non-agricultural purposes and it is located within a short distance from the road. The petitioners have brought on the record the photographs to demonstrate that a permanent structure is existing over the acquired land.

6. A counter affidavit has been filed on behalf of the first respondent. The

stand taken by the respondent is that the petitioners' land has been acquired for the public interest. It is stated that on the plots of the petitioners there are trees. It is further stated that in the revenue record no land has been mentioned as non-agricultural land. The land in question has been acquired for the construction of four lane and a joint survey has been made on the acquired land of the petitioners by Study Point Samiti, Lucknow and employees of the tehsil. The compensation awarded to the petitioners is said to be adequate.

7. In reply to the averments made in Paragraph-12 of the writ petition that without publishing any notice under the provisions of Section 3G(3) of the Act, 1956 the respondents have proceeded to determine the compensation, a vague and evasive reply has been made in the counter affidavit. However, a supplementary counter affidavit has been filed on behalf of the first respondent, wherein it has been mentioned that inadvertently in the notification dated 29th April, 2018 instead of Section 3G(3) the provision has been mentioned as 3D(1) and it was a mistake.

8. We have heard Sri Ravi Kant, learned Senior Advocate, assisted by Sri Shyam Narain Rai, learned counsel for the petitioners, and Sri Neeraj Dube, learned counsel for the first respondent-NHAI.

9. Learned counsel for the petitioners submitted that no notice under Section 3G(3) of the Act, 1956 has been published and the authorities have determined the compensation without inviting objection. The notice under Section 3G(3) of the Act, 1956 is mandatory, hence the entire proceeding for determining the compensation has caused serious prejudice to the interest of the petitioners. It was urged that the compensation awarded to the petitioners is totally inadequate and upon erroneous assumption, therefore, it is arbitrary exercise of power. Learned counsel for the petitioners has placed reliance on a judgment of a Division Bench of this Court in the case of **Sharda Yadav v. Union of India and others, Writ-C No. 30046 of 2014,** decided on 18th July, 2014.

10. Sri Neeraj Dube, learned counsel for the first respondent, submitted that the notice under Section 3G(3) of the Act, 1956 was published on 29th April, 2018, but by mistake in the notice Section 3D was mentioned.

11. We have considered the submissions advanced by learned counsel appearing for the parties and perused the record.

12. Indisputably, the petitioners are owners of Plot Nos. 257, 448 and 450, which have been acquired by the first respondent for widening of National Highway. The Act, 1956 has been enacted to provide for the declaration of certain highways to be national highways and for matters connected therewith. By the Act 16 of 1997, Sections 3, 3A, 3B, 3C, 3D, 3E, 3F, 3G, 3H, 3I and 3J have been inserted in the Act, 1956. Section 3A empowers the Central Government to declare its intention to acquire any land, which is required for the building, maintenance, management or operation of a national highway or part thereof, for public purpose. A notification is published in the official gazette declaring

the intention to acquire such land. Sub-section (2) of Section 3A provides that in the notification a brief description of the land is also to be mentioned. In addition to the official gazette, as per sub-section (3) of Section 3A the notice is also to be published in two local newspapers. Section 3B empowers the authorities to make inspection, survey, measurement, valuation, set out boundaries, etc. Section 3C gives an opportunity to the land owners to file their objection within twenty-one days from the date of publication of the notification under sub-section (1) of Section 3A. The objection, so made, is considered by the competent authority and after giving an opportunity the competent authority can either allow or disallow the objections. Section 3D provides that if after the notification published under sub-section (1) of Section 3A no objection is received by the competent authority within the specified period or where the objection has been filed and it has been disallowed by the competent authority, a report shall be submitted by the competent authority to the Central Government, which shall declare by notification in the official gazette that the land should be acquired for the purpose mentioned in sub-section (1) of Section 3A. Sub-section (2) of Section 3D provides that after publication of declaration in this section i.e. Section 3D(1), the land vests in the Central Government free from all encumbrances. Section 3E says that once the land is vested in the Central Government and the amount determined by the authority under Section 3G has been deposited, the competent authority may issue a notice to the owner, who is in possession, to surrender or deliver the possession to the competent authority or any person duly authorized by it. Section 3F gives a right to the authority to carry out maintenance, management or building of the national highways.

13. Under Section 3G the compensation is determined in respect of the land which is acquired. Sub-section (3) of Section 3G provides that before proceeding to determine the amount the competent authority shall give a public notice in two local newspapers, one of which will be in a vernacular language, inviting claims from all persons interested in the land to be acquired.

14. Since the present dispute is in respect of the requirement of publication of notice, Sections 3D and 3G of the Act, 1956, which are relevant for the purpose, are extracted below:

"3D. Declaration of acquisition.--(1) *Where no objection under sub-section (1) of section 3C has been made to the competent authority within the period specified therein or where the competent authority has disallowed the objection under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of section 3A.*

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 3A for its acquisition but no declaration under sub-

section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 3A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority."

*"**3G. Determination of amount payable as compensation.**-- (1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.*

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent. of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration--

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

15. From a simple reading of Sections 3D and 3G of the Act, 1956 it is evident that the purposes of publication of the notice in both the sections i.e. Sections 3D and 3G are entirely different.

Under Section 3D there is a declaration of acquisition and after the notification is made in the official gazette, the land vests absolutely in the Central Government free from all encumbrances. After acquiring the land, the next step is determination of compensation. Section 3G(3) again requires that before proceeding to determine the compensation, the competent authority shall give a public notice in two local newspapers, one in vernacular language, inviting claims from all persons interested in the land to be acquired. Sub-section (4) of Section 3G clearly provides that the notice shall give the particulars of the land and an opportunity is to be afforded to the land owner to appear in person or by his agent or by a legal practitioner before the competent authority before determining the compensation.

16. In the present case, in Paragraph-10 of the writ petition the petitioners have made the following averments:

"10. That in hot haste without proceeding in accordance with the provisions of Section 3G(3) of the Act of 1956, the respondents have proceeded to determine the compensation by means of an Award dated 19.9.18. It is stated that no publication was made in any newspapers inviting objections from persons and the petitioners whose land was being acquired for proper valuation of his land which was being acquired against the valuation of their land proposed by the respondents so that adequate compensation be determined and paid to them. There was no publication in any newspapers or any local newspaper notifying the petitioners or persons whose land was being acquired of the date, time and place where the objections had to be made against the proposed valuation which was being made by the respondents of the land sought to be acquired for expansion of the National Highway by means of notification dated 15.01.2018 and 03.02.2018."

17. The first respondent in its counter affidavit has denied the said statement and has made an evasive reply. In Paragraph-11 of the counter affidavit it is stated that a gazette notification under Section 3D(2) [/kkjk 3?k] mi/kkjk (2)] was made on 02nd April, 2018 and thereafter under Section 3G(3) before determination of compensation the notice has been published in two newspapers in 'Amar Ujala' and 'Indian Express' on 29th April, 2018, which have been brought on record as CA-1 to the counter affidavit. Paragraph-11 of the counter affidavit reads as under:

"11. That the contents of paragraph 10 of the writ petition are not admitted. It is further stated that the notification no. 1316 of the acquire land of village Babura Bhairav Dayal published in the Gazette under Section 3D on 2.4.2018, thereafter under Section 3G(3) of NH Act before determination of the compensation notice has been published in two newspaper Amar Ujala and India Express on 29.4.2018. A true copy of the Gazette notification published on 29.04.2018 is being filed for kind perusal of this Hon'ble Court as ***Annexure No. CA-1*** *to this affidavit."*

18. From a perusal of Paragraph-11 of the counter affidavit it is clear that no specific reply has been given with regard to issue raised by the petitioners that no

notice was published under Section 3G(3).

19. Later a supplementary counter affidavit has been filed by the first respondent wherein it has been admitted that by mistake in the notice under Section 3G(3), Section 3D has been mentioned. Paragraphs-3 and 4 of the supplementary counter affidavit are reproduced hereunder:

"3. That the under Section 3D(1) of the NH Act, 1956 Gazette notification has been published on 2.4.2018, thereafter under provision of 3G(3) of the Act notification has been published in two newspaper Amar Ujala and Indian Express on 29.4.2018, but due to mistake of the publication it has been shown in the newspaper Section 3D(1) instead of 3G(3) of the Act.

4. That in para 11 of the main counter affidavit (sworn on 24.02.2019) correct provision of Section 3G(3) of NH Act 1956 has been mentioned in accordance with which publication in two local newspaper is done. However, in the notification dated 29.4.2018 instead of mentioning correct provision of 3G(3), the provision has been mentioned as 3D(1). Accordingly this Supplementary Counter affidavit taken on record treating part of para 11 of the main counter affidavit."

20. From a perusal of Paragraph-11 of the counter affidavit it is evident that an incorrect statement has been made that notice under Section 3G(3) of the Act, 1956 was published. In support of the said statement the respondents have brought on the record a gazette notification as CA-1 to the counter affidavit. A perusal of the said gazette notification shows that it is a notice under Section 3D and not under Section 3G as mentioned in Paragraph-11 of the counter affidavit. Later a supplementary counter affidavit has been filed explaining that in the gazette notification it has been wrongly shown as Section 3D. In fact, it should be Section 3G(3). We are of the opinion that the said explanation cannot be accepted. From a perusal of the aforesaid pleadings we are constrained to observe that the officers of the NHAI have tried to evade the issue and it was not fair on their part to give an evasive and vague reply in their counter affidavit. The NHAI is a statutory authority and it is not expected from it to conduct itself like an ordinary litigant. It was its duty to place the correct facts before the Court fairly. In the supplementary counter affidavit it has been admitted that by mistake instead of Section 3G(3), Section 3D has been mentioned.

21. The scheme of the amendment brought by the Act 16 of 1997, whereby Sections 3A to 3J have been inserted in the Act, 1956, clearly shows that the notification has to be published at three stages: first, under Section 3A(2) declaring intention to acquire the land and inviting objections; secondly, under Section 3D(2) for declaration to the effect that the land should be acquired and on such declaration the land vests absolutely in the Central Government; and thirdly, under Section 3G(3) a public notice is required to be published in two local newspapers inviting the claims from all the persons interested in the land.

22. It is admitted case that only two notices have been published under Sections 3A and 3D of the Act, 1956. No other notice has been brought on the

record by the authorities along with the counter affidavit.

23. As regards the averment that in the gazette notification by mistake in stead of Section 3G Section 3D has been published, it is not acceptable. If there was a mistake in the publication in two newspapers on 29th April, 2018, the respondents ought to have issued a corrigendum. No such step has been taken to correct the mistake.

24. A Division Bench of this Court in the case of **Sharda Yadav (supra)** has considered the similar facts. In that case also, the notice under Section 3G was not issued. The Court held as under:

"Having considered the submissions raised, we find that there is a statutory obligation for publishing the notice in two newspapers for the purpose of award of compensation under Section 3-G of the Act. The petitioner has categorically stated in paragraph 20 of the writ petition that no such notice was ever published nor any opportunity was given to the petitioner to file any objections.

Sri Mehrotra submits that the notification dated 3.11.2011 should be considered to be a notification published in the newspaper under Section 3-G of the Act.

We are afraid that the said notification is a notification under Section 3-D and is not a notification under Section 3-G of the Act. The averment contained in paragraph 28 of the counter affidavit is, therefore, misleading. The respondents, therefore, have not complied with a statutory provision containing the principles of natural justice engrafted in the Act itself. It is settled law that if an act requires to be performed after publication of the notice in the newspaper then it is not a mere formality and the matter relating to award of compensation dealing with substantive right of a tenure holder cannot be defeated by delivering the award without complying with the aforesaid provision. Once it is held that the award is in violation of principles of natural justice then it is not necessary for this Court to relegate the petitioner to the remedy under the 1996 Act. The award itself being contrary to the provisions of Section 3-G and in contravention thereof, we have no hesitation to hold that the said act of the authority was in complete disregard of the statutory provisions resulting in violation of principle of natural justice. The question, therefore, availing of any alternative remedy by the petitioner on the facts of this case does not arise and we are supported in our view by the law pronounced by the Apex Court in the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, reported in 1998 (8) SCC Page 1.***

The award which has been rendered in relation to the agricultural land of the petitioner is clearly in violation of Section 3-G of the Act as the award itself also nowhere recites that any such notice was published in the newspaper as required in the said provision. Consequently, the impugned award dated 30.4.2013 to the said extent is quashed."

25. We find that the facts of this case are squarely covered by the law laid down by the co-ordinate Bench decision of this Court in **Sharda Yadav (supra)**. Similar argument was raised in that case also that notice under Section 3D be treated as notice under Section 3G. In the present case, it is admitted case of the

respondents that by mistake in the notice under Section 3G(3), Section 3D was mentioned but no corrigendum has been issued. Moreover, the respondents have not brought on the record the notice dated 29th April, 2018 in spite of filing a supplementary counter affidavit.

26. For all the reasons mentioned above, we find that the award dated 19th September, 2018 passed by the second respondent under Section 3G of the Act, 1956 has been passed without following the procedure prescribed under Section 3G(3) of the Act, 1956, hence it is quashed to the said extent. We grant liberty to the petitioners to file objection in terms of Section 3G(3) of the Act, 1956 before the competent authority in respect of their +claim that a construction is in existence and their land is non-agricultural. The competent authority shall consider their objections and pass the award in accordance with law after furnishing opportunity to the petitioners. The said exercise be undertaken expeditiously, preferably within four months from the date of communication of this order.

27. Accordingly, the writ petition is allowed. No order as to costs.

(2019)10ILR A 1822

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2019

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ C No. 23471 of 2019

Santu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents.

Counsel for the Petitioner:
Sri R.P.S. Chauhan

Counsel for the Respondents:
C.S.C., Sri Arun Kumar Srivastava

A. U.P. Zamindari Abolition and Land Reforms Act,1950 - Section 331(3) read with Order 43 Rule 1 C.P.C. - order rejecting recall application on the ground of delay is appealable under Order 43 Rule 1 CPC before the Board of Revenue-Alternative remedy available.

Writ Petition rejected (E-9)

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Shri R.P.S. Chauhan, learned counsel for the petitioner and Shri Arun Kumar Srivastava for the Gaon Sabha, respondent no.5 as also learned Standing Counsel for the State-respondents.

2. The instant writ petition has been filed seeking a writ of certiorari for quashing the order dated 10.04.2019 passed by the Additional Commissioner (Judicial) Bareily Division, Bareilly refusing to condone the delay in filing a restoration application for recall of an order dated 27.01.2010, whereby an appeal filed by the petitioner had been dismissed for default.

3. The petitioner filed a suit under Section 229B of the U.p Zamindari Abolition and Land Reforms Act for declaration claiming on the basis of a registered will executed in his favour by one Nanuki.

4. The trial Court dismissed the suit vide judgement and decree dated 19.12.2005.

5. The petitioner preferred an appeal, which was dismissed for default on 27.01.2010.

6. A belated restoration application accompanied by an application under Section 5 of the Limitation Act was filed on 21.01.2011.

7. The First appellate Court vide order dated 10.04.2019 refuseD to condone the delay of 1 year seven months in filing the restoration application, on the ground that the delay had not been properly explained. As a consequence thereof, the restoration application has also been dismissed. Hence, this writ petition.

8. The question for consideration in this writ petition is whether , the petition, is maintainable or whether it is barred by existence of a statutory alternative remedy.

9. It is not in issue that the provisions of the Civil Procedure Code are applicable to the proceedings under Section 229B of the U.P. Zamindari Abolition and Land Reforms Act.

10. The petitioner preferred an appeal before the Additional Commissioner (Judicial) Bareilly Division, Bareilly, which was dismissed for default. This order necessarily was one under Order 41 Rule 19 C.P.C. The same Rule 19 provides that a restoration application for recall of the order dismissing the appeal. This belated application has been rejected by the impugned order.

11. The order rejecting the recall application on the ground of delay in my considered opinion, is necessarily appealable under Order 43 Rule 1(t). The impugned order therefore, is necessarily appealable before the Board of Revenue.

12. With regard to the above, petitioner in the writ petition has stated that an appeal was filed before the Board of Revenue but the registry refused to accept the same.

13. The averment made is a bald averment not supported by any material on record to show that an appeal was actually preferred before the Board of Revenue was not accepted by the registry. In any case, the averment is that it was refused orally. The bald allegation, in my considered opinion, cannot be accepted.

14. The additional averment made in the same paragraph of the writ petition is that the appeal preferred by the petitioner was maintainable under Section 207 Sub-section 2 (c) of the Revenue Code, 2006.

15. However, this contention cannot be accepted because Section 209 (b) creates a bar against appeals being preferred in certain circumstances. It clearly prohibits an appeal against an order granting or rejecting an application for condonation of delay under Section 5 of the Limitation Act, 1963. The appeal allegedly sought to be preferred by the petitioner was therefore, entirely barred by Section 209(b).

16. However, this Court is constrained to hold that the provisions of U.P. Revenue Code, 2006 are not attracted to the case at hand, in view of Section 231 of the Code itself, which reads as follows -

"231. *Applicability of the Code to pending proceedings -(1) Save as otherwise expressly provided in this Code, all cases pending before the State Government or any revenue court*

immediately before the commencement of this Code, whether in appeal, revision, review or otherwise, shall be decided in accordance with the provisions of the appropriate law, which would have been applicable to them had this Code not been passed.

(2) ....."

17. The suit filed by the petitioner was one under Section 229B of the U.P. Zamindari Abolition and Land Reforms Act. Therefore, even the subsequent proceedings arising therefrom would be governed by the provision of the U.P.Zamindari Abolition and Land Reforms Act despite its repeal and enforcement of the U.P. Revenue Code, 2006.

18. Sub-section 3 of Section 331 of the U.P. Zamindari Abolition and Land Reforms Act provides for an appeal from amongst others, also against an order of the nature, mentioned in Order 43 Rule 1 C.P.C. Therefore, the petitioner has a statutory alternative remedy of an appeal against the order impugned and for this reason alone, the instant writ petition is not liable to be entertained.

19. Even if for the sake of argument, it is accepted that an appeal will not lie against the order impugned, the petitioner definitely has the remedy of a revision before the Board of Revenue under Section 339 of the U.P. Zamindari Abolition and Land Reforms Act.

20. The statutory alternative remedy available to the petitioner has not been availed.

21. Therefore, this writ petition is dismissed on the ground of availability of a statutory alternative remedy.

(2019)10ILR A 1824

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 42861 of 2014

Shahzad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Shesh Kumar, Sri Sunil Dubey.

Counsel for the Respondents:
C.S.C., Sri P.K. Singh, Sri Pradeep Kumar Singh.

A. Urban Land (Ceiling and Regulation) Act, 1976 - No material to show the voluntary or forceful possession of the vacant land u/s 10(5) and 10 (6) - Petitioner also did not receive compensation - State not authorised to handover the land to the development authority - proceeding initiated under Act, 1976 stood lapsed.

Held:- In the present case, we have found that the petitioners are still in possession and the State has not taken possession in accordance with law, hence, we are of the view that the State had no authority to handover the possession to the Saharanpur Development Authority. The Development Authority has not brought on the record any document or evidence that they have raised any construction over the surplus land of the petitioners which was transferred by the State to Development Authority. Thus, in absence of any averment or the documents to the said fact, we have to hold that petitioners are still in possession. (Para 39)

Writ Petition allowed (E-9)

List of Cases Cited: -

1. St. of U. P. Vs Hari Ram, (2013) 4 SCC 280

2.SLP (C) No. 16582 of (2014) decided with SLP (C) No. 38922 of (2013), St. of U.P. & anr. Vs Vinod Kumar Tripathi & ors.

3. Ram Chandra Pandey Vs St. of U.P., (2010) (82) AIR 136

4. St. of U.P. Thru Secy Avas Avam Shahri Niyojan Vs Ruknuddin & ors. in Writ C No.54830 of (2011)

5. Lalji Vs St. of U.P. & 2 ors., (2018) (5) ADJ 541

6. St. of U.P. & anr. Vs Nek Singh, (2010) (81) AllLR 456.

7. St. of Assam Vs Bhaskar Jyoti Sharma & ors. (2015) (5) SCC 321

8. Shiv Ram Singh Vs St. of U.P. & ors. (2015) (5) AWC 4918.

9. Gopi Ram Vs St. of U.P. & ors.

10. Gajanan Kamlya Patil Vs Addl. Collector & Comp. Auth. & ors, JT (2014) (3) SC 211

11. Rajendra Kumar Vs Kalyan, JT (2000) (8) SC 359

12. Ratiram Vs St. of U.P & ors., (2018) (4) ALB 338

13. St. of U.P. & anr. Vs Nek Singh, (2010) LawSuit(All) 3581 : (2010) (81) AllLR 456

14. St. of U.P. Vs Doon Udhyog (P) Ltd, (1999) (4) AWC 3324

15. St. of U.P. Vs Hart Ram, (2005) (60) AllLR 535

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J. & Hon'ble Rohit Ranjan Agarwal, J.)

1. Petitioners have preferred this writ petition under Article 226 of the Constitution of India for issuance of writ of certiorari to quash the order dated 5.5.2014 passed by the Collector, Saharanpur whereby the petitioners' representation has been rejected holding that in revenue record, the name of the Government has been mutated and his land has been legally declared surplus and possession has been taken under the provisions of Urban Land (Ceiling & Regulation) Act, 1976 (for short, the 'Act, 1976').

2. A brief reference to the factual aspects would suffice.

3. The petitioners claim that they are the owners of the Khasra Nos. 431, 33, 312, 490, 504, 505, 507/1 and 421/1 situated at Village Dabki Junardar, Tehsil and District- Saharanpur. The proceedings were initiated under the provisions of the Act, 1976 to declare their surplus land. The competent authority vide order dated 13.12.1978 declared petitioners' land admeasuring 11293.607 sq.mt., surplus. It is stated that said order was passed ex-parte and it was not implemented as he is still in possession. The petitioners' father came to know about said order on 27.2.2002 when he found that name of State has been recorded in the revenue papers (khatauni). Against the order dated 13.12.1978, he filed an appeal. In the meantime Urban Land (Ceiling and Regulation) Repeal Act, 1999 (for short, the 'Act 15 of 1999') came in to force and the Act 33 of 1976 Act was repealed. Under Section 4 of the Act, 15 of 1999, all legal proceedings were abated subject to Section 3 of the Act. Petitioners' claim that since they are continued to be in possession hence, in this case,

proceedings stood abated in terms of Section 3(2)(a) of the Act. It is stated that they have not received any compensation. It is also stated that when respondents started interfering in possession of the petitioners, they preferred a Writ Petition being Civil Misc. Writ Petition No.30434 of 2002. During the pendency of the said writ petition, father of the petitioners unfortunately died on 13.8.2003. The aforesaid writ petition was finally disposed of on 23.3.2012 leaving it open to the petitioners to make a representation before the Collector, Saharanpur for redressal of their grievance. A copy of the judgment of this Court is on record as Annexure 3 to the writ petition.

4. The petitioners, in compliance thereof submitted a detailed representation to the Collector, Saharanpur on 4.4.2012, a copy of the said representation is on record as Annexure 4 to the writ petition. It appears that an enquiry was initiated in respect of the status of the land and Tehsildar, Saharanpur submitted a report dated 20.4.2012 addressed to the Sub Divisional Magistrate, Saharanpur, (new number) wherein, he submitted that on Khasra No.35 Area 0.7030 hectares. On the spot, the wheat crop was found on the said land and one sikmi kastkar (share cropper) of the petitioner is cultivating and his crop was found in the land in question.

5. From the record, it appears that in the said enquiry, the revenue authorities have got the statement of the sikmi kastkar (share cropper). In the said enquiry, statements of three other persons namely Mohd. Imran, Shahzad and Bindu was recorded, their statement is part of the record. The S.D.O also in his report dated 28.4.2012 has submitted that petitioners are in physical possession of the land. It appears that Collector asked the S.D.O to submit a fresh report. In the subsequent report dated 25.5.2012, the same S.D.O. submitted that in the records Saharanpur Development Authority's name is recorded, but petitioners are in actual possession. On the basis of the above report, the Collector by impugned order has rejected the claim of the petitioners.

6. A counter affidavit has been filed by the respondent nos.1 & 2. The stand taken by the State authorities is that statement under Section 6(1) of the Act, 1976 was submitted by Yaseen, petitioners' father on 14.8.1976, which was registered as Ceiling Case No.3771 of 1976. After due enquiry, a draft statement was prepared and issued to petitioners' father on 30.8.1978 whereby 12204.68 sqr.mtr of land in Khasra Plot Nos.431,311,315, 490, 504, 505, 506, 507/1,551 and 621/2 was proposed to be surplus.

7. It is stated that since no objection was filed, therefore, on the basis of the aforesaid draft statement, the proposed area was declared as surplus by an order dated 13.12.1978 by the Prescribed Authority. The aforesaid order is said to be served upon the petitioners, on 14.6.1979 pursuant to which a notification under Section 10(1) of the Act, 1976 was published in the official gazette on 27.10.1979 and notification under Section 10(3) was published on 20.2.1990. It is further averred that a notice under Section 10(5) of the Act was also issued in the name of Yaseen, the original tenure holder by affixing the same on door of the house of the petitioner on 5.7.1993. Thereafter, the possession of the plots in dispute was taken over by the authorized

officials of the Urban Ceiling Department, and the possession was handed over to the Saharanpur Development Authority by order of the District Magistrate. A copy of the possession memo has also been brought on record as Annexure 4 to the counter affidavit.

8. The Development authority, respondent no.3 has also filed a counter affidavit wherein the same facts have been reiterated. In regard to the possession, it is stated in Para 7 of the counter affidavit that possession of the declared surplus land was obtained on behalf of the State Government on 27.7.1993, a copy of the possession memo has been brought on record as Annexure No.C.A. 4 & C.A. 5 of the affidavit and on the same day viz. on 27.7.1993, the possession has been handed over to the Saharanpur Development Authority. It is stated in the counter affidavit that the alleged cultivatory possession of the agent of the petitioners over the disputed surplus land is illegal and unauthorized, as such benefits of Repeal Act, 1999 are not attracted in favour of the petitioners.

9. We have heard Sri Shesh Kumar, learned Counsel for the petitioner, Sri D.K. Tiwari & Sri Mohan Srivastava, learned Standing Counsel and Sri P.K. Singh, learned Counsel for Saharanpur Development Authority.

10. Sri Shesh Kumar, learend Counsel for the petitioners submits that no notice under Section 10(5) was issued to the petitioners and they have not voluntarily surrendered the possession. Petitioners are still in physical cultivatory possession over the land and they have submitted that from the report of the Tehsildar and the S.D.M., it is evident that they have found that petitioners are in the cultivatory possession of the land.

11. Sri Shesh Kumar, learned Counsel for the petitioner has drawn our attention to the statement of sikmi khastkar (share cropper) of the petitioners recorded by the Revenue Authorities, who had stated that they have sown wheat crop on behalf of the petitioners. Both the authorities in their report have categorically recorded that petitioners are still in possession. It is further stated that in the impugned order, the District Magistrate's finding in regard to the possession of petitioners over the land is perverse. He has completely ignored those reports which are on the record.

12. He further submitted that in view of Section 3 & 4 of the Repeal Act, 1999, the proceedings against the petitioner stood lapsed as on the date of the enforcement of the amended Act, the petitioner was in the physical possession over the land in question. He has placed reliance upon the judgment of Apex Court in case of State of ***Uttar Pradesh v. Hari Ram, (2013) 4 SCC 280, Special Leave Petition (C) No. 16582 of 2014 decided with Special Leave Petition (C) No. 38922 of 2013, State of U.P. and another v. Vinod Kumar Tripathi and others, on*** *19th January, 2016,* ***Ram Chandra Pandey Vs. State of U.P., 2010 (82) AIR 136, State of U.P. Thru Secy Avas Avam Shahri Niyojan v. Ruknuddin and others in Writ C No.54830 of 2011, Lalji Vs. State of U.P. & 2 Others, 2018 (5) ADJ 541, State of U.P. and another Vs. Nek Singh, 2010 (81) AllLR 456.***

13. Learned Standing Counsel submits that the possession has been taken by the representative of the Collector on

27.7.1993, a copy of the possession memo is on record as Annexure 4 to the counter affidavit filed by the respondent nos.1 & 2. He further submits that the land has been handed over to the Saharanpur Development Authority on the same day, which is in the possession of the land. The learned Standing Counsel has placed reliance on a judgment of the Apex Court in the case of ***State of Assam Vs. Bhaskar Jyoti Sharma & Others 2015 (5) SCC 321*** that has been followed by a Division Bench of this Court in the case of ***Shiv Ram Singh Vs. State of U.P. & Others 2015 (5) AWC 4918.***

14. Sri P.K. Singh, learned Counsel for the Saharanpur Development Authority has adopted the submission of learned Standing Counsel.

15. We have heard learned Counsel for the parties and perused the material on record.

16. Before adverting to the submission of learned Counsel for the parties, it would be advantageous to consider the some of the provisions. Chapter III of the Act, 1976 deals with the ceiling of vacant land. Section 6 provides that every person holding vacant land in excess of the ceiling limit shall file a statement before the competent authority giving the detail about the location, extent, value and such other particulars as may be prescribed under the Act regarding all vacant land held by him. Section 8 provides that a draft statement shall be prepared regarding vacant land, it shall be prepared on the basis of the statement submitted by the person and on the basis of enquiry which the competent authority made deems it fit. Sub-section 3 of Section 8 provides that the draft statement prepared by the competent authority shall be served on the person concerned calling upon him to file any objection, if any, within 30 days. After considering his objection, a final statement is preferred by the competent authority, and if, he has excess of the ceiling limit, the land is declared surplus and a notification is published under sub-section 1 of Section 10 of the Act. The said notification is published for the information of the general public in the Financial Gazette. The objection is indicated from all the interested persons in such vacant land. Sub-section 2 of Section 10 provides that after considering the objection filed by the interested person, the competent authority shall pass an order regarding the vacant land. Under Sub-section 3 of Section 10, a notification published in the Official Gazette and the excess land declared be deemed to have been acquired by the State Government and it shall be deemed to have been vested in the State Government free from all encumbrances.

17. Sub-section 5 of Section 10 provides that after the land is vested in the State Government, a notice in writing is issued to a person who may be in possession of it to surrender or deliver possession to the State Government or to any person duly authorized by the State Government within thirty days of the service of the notice.

18. Sub-section 6 of Section 10 lays down that if after service of notice under Sub-section 5 of Section 10, a person refuses or fails to comply the order, the competent authority may take possession of the vacant land. For the said purpose, he can use force also as may be necessary. Sub-section 5 and Sub-section 6 of Section 10 read as under :-

"(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary."

19. In the meantime, the Parliament enacted ***''The Urban Land (Ceiling and Regulation Repeal Act, 1999 (for short Act 15 of 1999)'.*** Section 4 of the Act, 1999 provides regarding the abatement of legal proceedings under the Principal Act pending immediately before the commencement of Act, 15 of 1999 (18th March, 1999). Section 3 and Section 4 of the Act read as under :-

***"3. Saving.**-- (1) The repeal of the principal Act shall not affect--*

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

4. ***Abatement of legal proceedings.--****All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate:*

Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

20. The petitioners case is that the entire proceedings under the Act, 33 of 1976 stood abated in view of Section 3(2) as he is still in possession. The petitioners' claim that the possession was never taken by the State authority and they are still in physical possession of the land and they are cultivating their agricultural holding till date. When the State authorities had

earlier threatened to dispossess them, they preferred a Writ Petition No.30434 of 2002 which was disposed of by this Court on 23.3.2012 by giving them liberty to file a representation before the the District Magistrate, Saharanpur who shall decide it by a speaking order. In compliance thereof, they submitted a representation before the District Magistrate. He also filed some documents to indicate his physical possession over the excess land which has been declared surplus.

21. The perusal of the record shows that the District Magistrate, Saharanpur called a report from the concerned review authority regarding the physical possession of the land. The Tehsildar visited the land in question and found that crop of the wheet was sown. On 19.4.2012, he recorded a statement of Tahir Hasan, Imran, Shahjad and Bindu. All the aforesaid persons had made a statement that the land in question is owned by the petitioner no.1 and he has given the land to them on "batai' and they are cultivating the land on behalf of the petitioner and getting the share in the crop. A copy of their statement is on record.

22. The Tehsildar in his report dated 21.4.2012, addressed to the S.D.M, Saharanpur has clearly stated that the plot no.35/0.703 hectare is recorded in the name of the petitioner no.1 and 2, son of Yaseen. He found that in the disputed land, there was a wheat crops. On the basis of the said report, the S.D.M., Saharapur submitted a report to the District Magistrate, Saharanpur on 28.4.2012 wherein he has recorded that earlier Khasra No.431, 311, 312, 490, 504, 505, 507, 551, 421/2 and 421/2, after the consideration proceedings, their number have been changed by the order of the C.O. dated 16.3.1979 and the new number is 35 which is also recorded in CH Form-41. The said report is Annexure no.7 to the writ petition. It appears that the District Magistrate, Saharanpur again asked the S.D.M to submit a fresh report. In his report dated 24.5.2012, the S.D.M., Saharahpur has reiterated that the petitioners are in physical possession, however, since the land has been vested in the State Government, hence on the basis of the documents, it appears that the Saharanpur Development Authority is in possession however, physical possession is still with the petitioners, which is illegal.

23. On the basis of these reports, the District Magistrate, Saharapur has rejected the representation of the petitioners. We find that the findings recorded by the District Magistrate is perverse. The statement recorded by Tehsildar and his report as well as the first report of the S.D.M., Saharanpur dated 28.4.2012 clearly demonstrates the physical possession of the petitioners. The subsequent report dated 24.5.2012, the same S.D.M., Saharanpur has recorded that the physical possession of the petitioner are illegal and on the basis of the vesting of the land in State Government, the Saharanpur Development Authority shall be deemed to be in possession. This Court in its order dated 23.4.2012 had directed the District Magistrate, Saharanpur to consider the issue of the physical possession and the Court has also recorded the submission of the petitioners that no compensation was paid to them.

24. From the perusal of the order of the District Magistrate, it is evident that

he has assumed that Saharanpur Development Authority has taken possession merely on the ground that a notification under Section 10(1) and 10(3) was issued, and, thus the land stood vested in the State Government. Petitioners, in the writ petition, has clearly stated that they are still in possession of the land. The possession memo was on record.

25. From the perusal of the record, it appears that pursuant to the notice issued to the petitioner under Section 10(5), they have not voluntarily surrendered the possession. There is no document on record to indicate that the petitioners had voluntarily surrendered possession to the State Government. In the Counter affidavit, a general and vague statement has been made regarding taking over the possession. In the affidavit, no date has been mentioned when the possession under Section 10(5) was taken. In the possession memo, there is no signature to the petitioners or their father. In case, petitioners have not given voluntarily possession, then a notice under Sub-section (6) of Section 10 should have been issued. The State Government has not taken stand that any notice was issued under Section 10(6). The petitioners in paragraph no.24 of the writ petition have averred that notice under Section 10(5) or 10(6) was not issued to them and the said statement of the fact has not been specifically denied. The relevant part of Para 19 is extracted :-

"19. That the contents of paragraph No.24 of the writ petition are not admitted as stated, hence denied. The suitable reply has already been given in the preceding paragraphs of this counter affidavit."

26. A perusal of the said reply does not show that pursuant to the notice issued under Section 10(5), petitioners had given voluntarily possession to the State Government. It is not the stand of the State that when the petitioners fail to give the possession, the State has taken it forcibly. In fact no notice under Section 10(6) was issued to take forcible possession. There is no material on record to indicate that the forcibly possession was taken from the petitioners and on the same day, it is alleged that the possession was handed over to the Saharanpur Development Authority.

27. From the material on record, we are not satisfied that the possession of the vacant land was taken from the petitioners in terms of the procedure of Section 10(5) and 10(6). Petitioners in their representation before the Collector has clearly stated that they or their father have not received any compensation for their land and they are also requested that spot inspection be made. The expectation of the petitioners are that they have not received any compensation has not been dealt with by the District Magistrate in his impugned order.

28. The question arises that on the date of enforcement of the Repeal Act, 1999, whether the petitioners were in physical possession or not. The petitioners have denied the fact regarding the voluntarily surrender to the State Government under Section 10(6), in fact during the enquiry when the Tehsildar has made the visit of the land, it was found that the petitioners were in cultivatory possession over the land through his sikmi khastkar (share cropper). The statement of all the sikmi khastkar (share cropper) have been recorded by the Revenue

Authorities and is part of the record. We find that the State Government has completely ignored those facts which goes to prove beyond doubt regarding the possession of the land over the land in dispute.

29. It is pertinent to mention that the State Government in exercise of its power conferred upon Section 35 of the Act, 1976 has framed " The Uttar Pradesh Urban Land Ceiling (Taking of possession payment of amount and allied matters) Directions, 1983 (Directions issued by the State Government under Section 35 of the Act, 1976)." The said directions reads as under :-

"35. Power of State Government to issue orders and directions to the competent authority.-- *The State Government may issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to the powers and duties of the competent authority and thereupon the competent authority shall give effect to such orders and directions."*

1. Short title, application and Commencement -These directions may be called the Uttar Pradesh Urban Land Ceiling (Taking of Possession Payment of Amount and Allied Matters Directions, 1983)

2. The provisions contained in this direction shall be subjected to the provisions of any directions or rules or orders issued by the Central Government with such directions or rules or orders.

3. They shall come into force with effect from the date of publication in the Gazette.

2. Definitions:-

3. Procedure for taking possession of vacant Land in excess of Ceiling Limit-(1) The Competent Authority will maintain a register in From No.ULC -1 for each case regarding which notification under sub-section (3) of Section 10 of the Act is published in the Gazette.

4. (2) an order in Form No.ULC-II will be sent to each land holder as prescribed under sub-section (5) of Section 109 of the Act and the date of issue and service of the order will be entered in Column 8 of Form No.ULC-1.

(3) On possession of the excess vacant land being taken in accordance with the provisions of sub-section (5) or sub-section (6) of Section 10 of the Act, entries will be made in a register in Form ULC-III and also in Column 9 of the Form No.ULC-1. The Competent Authority shall in token of verification of the entries, put his signatures in column 11 of Form No.ULC-1 and Column 10 of Form No.ULC-III.

Form No.ULC-1 Register of Notice u/s 10-(3) and 10(5)

1	2	3	4	5	6	7	8
	Serial No. of Register of Receipt Serial No.of Register of Taking Possession	Case number	Date of Notification u/s 10(3)	Land to be acquire-d village Mohali	Date of taking over possession	Remarks	Signature of competent Authority

Form No. ULC-II

Notice order u/s 10(5) (See clause (2) of Direction (3)

In the Court of Competent Authority

U.L.C. .....

No..... Date .....

Sri/Smt.....To .....

In exercise of the powers vested un/s 10(5) of the Urban Land Ceiling and Regulation Act, 1976 (Act No.33 of 1976, you are hereby informed that vide Notification No..... dated ..... under section 10(1) published in Uttar Pradesh Gazette dated... following land has vested absolutely in the State free from all encumbrances as a consequence Notification u/s 10(3) published in Uttar Pradesh Gazette dated ..... Notification No..... dated .... With effect from ..... you are hereby ordered to surrender or deliver the possession of the land to the Collector of the District Authorised in this behalf under Notification No.324/II-27-U.C.77 dated February 9, 1977, published in the gazette, dated March 12, 1977, within thirty days from the date of receipt of this order otherwise action under sub-section (6) of Section 10 of the Act will follow.

Description of Vacant Land

Location	Khasra number identification	Area	Remarks
1	2	3	4

Competent Authority

.....

.....

Dated.....

Copy forwarded to the Collector ..... with the request that action for immediate taking over of the possession of the above detailed surplus land and its proper maintenance may, kindly be taken an intimation be given to the undersigned along with copy of certificate to verify.

Competent Authority .....

....."

30. We further find from the material on record that there is no document to indicate that how the possession of the petitioners has been handed over by the State Government to Saharanpur Development Authority. In the counter affidavit of Saharanpur Development Authority, it is mentioned that the possession has been taken from the petitioner on 27.7.1993 and on the same day, State Government has handed over possession to Saharanpur Development Authority. The relevant part of the Paragraph 9 is extracted below :-

"9. That it is noteworthy that the aforesaid surplus land was subsequently transferred to Saharanpur Development Authority on 27.7.1993 for utilization in its development scheme. Accordingly much prior to the enforcement of Urban Land Ceiling Repeal Act, 1999 the said surplus land has under the actual physical possession of the answering respondent S.D.A."

31. Supreme Court in case of **Hari Ram (supra)** had occasion to deal with this, some issue regarding the vesting of the land in the State, the Apex Court has held that land shall vest in the State Government only when the procedures laid down under the law has been followed. The Court has interpreted the word "vested" which find place in the

statutory provision under Sub-section 5 & 6 of Section 10, the Court has observed that for taking possession the de jure possession is not sufficient unless there is a de facto possession also. The relevant part of the observation of the Apex Court are herein under :-

"27. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in hands of few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words 'acquired' and 'vested' have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary Surrender

28. The 'vesting' in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The court in Maharaj Singh v. State of UP and Others (1977) 1 SCC 155, while interpreting Section 117(1) of U.P. Zamindari Abolition and Land Reform Act, 1950 held that 'vesting' is a word of slippery import and has many meaning and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The court in Rajendra Kumar v. Kalyan (dead) by Lrs. (2000) 8 SCC 99 held as follows:

"We do find some contentious substance in the contextual facts, since vesting shall have to be a "vesting" certain. "To vest, generally means to give a property in." (Per Brett, L.J. Coverdale v. Charlton. Stroud's Judicial Dictionary, 5th edn. Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorization cannot however but be termed to be a contingent event. To "vest", cannot be termed to be an executor devise. Be it noted however, that "vested" does not necessarily and always mean "vest in possession" but includes "vest in interest" as well."

29. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

30. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified

in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub- section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

31. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorized by the State Government.

32. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) to Section 10, there is no necessity of using the expression "where any land is vested" under sub- section (5) to Section 10. Surrendering or transfer of possession under sub-section (3) to Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) to Section 10 to surrender or deliver possession. Subsection (5) of Section 10 visualizes a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession."

32. The judgment of the Apex Court in the case of **Hari Ram (supra)** has been followed by the Division Bench of this Court in case of **Gopi Ram Vs. State Of U.P. And Others,** wherein same issue came up for consideration before the Division Bench. The Division Bench considering the fact in pursuance of 1976, Rules and held that State Government has delegated its power to Collector to take possession. Since the State has delegated its power to the Collector, therefore, the Collector has no authority to delegate its power upon any of revenue authority. The relevant part of the judgment reads as under :-

"From the facts, discussions, pleadings of the parties and from perusal of the original record, we are satisfied that actual physical possession of the land was never taken by the State Government. There is no material existing on the original record to demonstrate that possession was taken over by the State Government or any person duly authorised by it or by the competent authority. Once the State Government itself never came in possession over the land in dispute there does not arise any question of transferring possession of the said land in favour of the Agra Development Authority.

The State having failed to demonstrate that actual physical possession of the land declared surplus was taken over at any point of time prior to 18.3.1999 when the Repeal Act came

into force in the State of Uttar Pradesh, subsequent alleged transfer in favour of the Agra Development Authority is a mere paper transaction inasmuch as the State Government when itself did not obtain actual physical possession could not have transferred the same.

In the facts and circumstances, the petitioner is entitled to get benefit of the Repeal Act, 1999 and the writ petition deserves to be allowed.

Accordingly, writ petition succeeds and stands allowed. "

33. The issue with regard to peaceful possession and forceful possession in terms of sub-sections (5) and (6) of Section 10 of the Act, 1976 has been elaborately considered again by the Supreme Court in the case of ***Gajanan Kamlya Patil v. Addl. Collector & Comp. Auth. & ors, JT 2014 (3) SC 211.*** The Supreme Court followed its earlier judgment in the ***Rajendra Kumar v. Kalyan, JT 2000 (8) SC 359***. The relevant part of the judgment of Gajanan ***Kamlya Patil (supra)*** is extracted below:

13. We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the Appellants. Consequently, we are inclined to allow this appeal and quash the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC Act. The above reasoning would apply in respect of other appeals as well and all proceedings initiated against the Appellants, therefore, would stand quashed."

34. A Division Bench in case of **Ratiram Vs. State of U.P and others, 2018 (4) ALB 338** in respect of Saharanpur Development Authority has rejected the contention of the State and the Saharanpur Development Authority regarding their claim that they have taken possession of the vacant land. The relevant part of the judgment reads as under :-

"8. The 'Dakhalnama' a certified copy whereof has been produced before us does not even bear the signatures of any attesting witness. We find this to be a lapse and patent illegality the benefit whereof has to be given to the land holder in view of the Division Bench judgment in the case of Mohd. Islam and 3 others v. State of U.P. and 2 others, Writ Petition No. 15864 of 2015 decided on 4th December, 2017. It was also a case of District-Saharanpur. We extract paragraph Nos. 44 to 47 of the said judgment which are as under:

"44. Since, in the present case, neither factum of taking actual physical possession by Competent Authority under Ceiling Act has been fortified by placing any document nor factum of possession of Development Authority at any point of time has been shown, therefore, argument advanced by learned Standing Counsel on the basis of State of Assam (supra) will not help.

45. Viewed from the above exposition of law we find in the present case that no such exercise of issuing notice under Section 10(6) of the Act, 1976 and thereafter execution of memo on the spot had taken place which is mandatory for ceiling authorities as admittedly the original tenure-holder and then his successors had never voluntarily surrendered the possession of land. In the absence of voluntary surrender of possession of surplus land, the authorities were required to proceed with forcible possession. The document of possession memo would not by itself evidence the actual taking of possession unless it is witnessed by two independent persons acknowledging the act of forcible possession. As discussed above in the earlier part of this. judgment we are not able to accept the alleged possession memo worth calling a document as such in the absence of certain requisites, nor does it bear the details of witnesses who signed the document. It bears mainly signatures of Chackbandi Lekhpal, a person taking possession and then the document has been directed to be kept on file. This is no way of taking forcible possession nor, a document worth calling possession memo. A mere issuance of notification under Section 10(3) and notice under Section 10(5) regarding delivery of possession does not amount to actual delivery of possession of land more especially in the face of the fact that the tenureholder had in fact not voluntarily made surrender of possession of surplus land and no proceeding under Section 10(6) had taken place.

46. Since, we have held that possession memo dated 20.06.1993 is not a possession memo and is a void document for want of necessary compliance under Section 10(6) of the Act, 1976, the petitioners are entitled to the benefit under Section 4 of the Repeal Act, 1999 that came into force w.e.f. 20.03.1999.

47. We may also place on record that respondents claim that possession of land in question was handed over to Saharanpur Development Authority pursuant to Government Order dated 29.12.1984 but here also we find that no material has been placed on record to show that any such actual physical possession was handed over to Saharanpur Development Authority and the said authority is in de facto possession of land in dispute. Except bare averment made in the counter-affidavit respondent have not chosen to place anything on record to support the stand that de facto possession over land in dispute is that of Saharanpur Development Authority. Therefore even this stand has no legs to stand and is rejected."

35. After the Repeal Act came into force, the word 'possession' under Sections 10(5), 10(6) of the Act, 1976 and sub-section (2) of Section 3 of the Repeal Act fell for consideration before a Division Bench of this Court in **State of U.P. and another v. Nek Singh, 2010 LawSuit(All) 3581 : 2010 (81) AllLR 456.** In Nek Singh (supra) the Division Bench followed the judgments of earlier Division Benches of this Court in **State of**

U.P. v. Doon Udhyog (P) Ltd, 1999 (4) AWC 3324 and State of U.P. v. Hart Ram, 2005 (60) AllLR 535, and held as under:

"[9] Otherwise also, the statutory benefit of the Repealing Act is also available to the landholder-respondent in the fact-situation of the matter, as the taking of the "possession" in the present case was neither de jure nor de facto. The term "possession" as per sections 3 and 4 of the Repealing Act and section 10(6) of the U.L.C.R. Act means and implies the lawful "possession" after "due compliance of the statutory provisions". In State of U.P. v. Doon Udhyog (P) Ltd., 1999 4 AWC 3324, a Division Bench of this Court has held that where possession has been taken, its legality is to be decided on merits. Similarly, another Division Bench of this Court in State of U.P. v. Hart Ram, 2005 (60) AllLR 535, has held that "in case possession is purported to be taken under section 10(6) of the Act, still Court is required to examine whether 'taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under section 10(5) or 10(6) of the Act is unlawful or vitiated in law, then such possession will have no recognition in law and it will have to be ignored and treated as of no legal consequence"..."

36. A Division Bench of this Court in **Lalji (supra)**, after considering the judgment of the Supreme Court in **Hari Ram (supra)** and **State of Assam v. Bhasker Jyoti Sharma and others, (2015) 5 SCC 321**, has held as under:

"[29]. Faced with a situation where respondents could not place even an iota of evidence showing actual physical possession of disputed land by respondent, learned Standing Counsel sought to rely upon Supreme Court judgment in State of Assam Vs. Bhasker Jyoti Sharma & Ors. 2015 (5) SCC 321 and contended that irrespective of any defect in notice under Sections 10(5) or 10(6) of Act, 1976, if possession has been taken in any manner, Repeal Act 1999 will have no application.

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[37]. We may also mention at this stage that except bare averment that disputed land was transferred to ADA by competent Authority, no material has been placed on record about transfer of possession to ADA and infact nothing has been placed on record even to show that de facto possession of land in dispute before or after Repeal Act, 1999 is with ADA. ADA has also not placed on record anything to show that land in dispute is in its actual physical possession and in absence thereof, we had no occasion to require petitioner to prove, how de facto possession of land in dispute came in the hands of ADA. With regard to possession of land in dispute, except bare averments, nothing has been placed on record. It appears that respondents were under impression that once notification under Section 10(3) has been issued, land in dispute vested in 'State' and thereafter, irrespective of fact whether actual physical possession is taken by respondents or not, land owner would cease to have any right and Repeal Act, 1999 will have no application though this assumption on the part of respondents, as we have already discussed, stood negated by Court in State Vs. Hari Ram."

37. As regards the case of **Shiv Ram Singh (supra),** the petitioner therein had

challenged the order passed by the District Magistrate holding that the possession of the land declared surplus has been taken on 25th June, 1993, hence he was not entitled to the benefit of the provisions of Section 3 of the Repeal Act. In the said case, the notice under Section 10(1) was issued on 15th May, 1985, thereafter on 02nd June, 1986 a notification under Section 10(3) was issued and published in the official gazette, and on 25th February, 1987 a notice under Section 10(5) of the Act, 1976 was issued. The respondents-State had taken a stand that the possession was taken on 25th June, 1993 pursuant to the notice dated 25th February, 1987 i.e. prior to enforcement of the Repeal Act and in the revenue record the name of the State was mutated. The petitioner therein had earlier approached the Court by means of Writ Petition No. 47279 of 2002 claiming that he is still in possession over the land which was declared surplus, hence after the Repeal Act the possession cannot be taken over from him. The said writ petition was disposed of by this Court by issuing a direction upon the District Magistrate to consider his representation. The District Magistrate after furnishing opportunity to the petitioner by an order dated 10th May, 2007 held that the possession has already been taken on 25th June, 1983, hence the petitioner would not be entitled to the benefit of the Repeal Act. The petitioner challenged the said order of the District Magistrate after two years in July, 2009. In the meantime in the year 2008 the construction of a Sewage Treatment Plant (STP) for treating 210 MLD of sewage was commenced. The Jal Nigam, in whose favour the land was transferred, filed a counter affidavit in the said writ petition and took the stand that by the time the writ petition was filed, nearly 65% of the work had been completed at a cost of Rs.73 crores and the petitioner was fully aware of the said facts but he did not file the writ petition for two years. In the light of those peculiar facts the Court did not examine the issue of actual possession as the possession was taken prior to 1999 and the District Magistrate after affording opportunity to the petitioner has recorded a finding that the possession was taken on 25th June, 1993.

38. We have carefully gone through the judgment of **Shiv Ram Singh (supra)** and we find that the said judgment is distinguishable for the reasons recorded above.

39. In the present case, we have found that the petitioners are still in possession and the State has not taken possession in accordance with law, hence, we are of the view that the State had no authority to handover the possession to the Saharanpur Development Authority. The Development Authority has not brought on the record any document or evidence that they have raised any construction over the surplus land of the petitioners which was transferred by the State to Development Authority. Thus, in absence of any averment or the documents to the said fact, we have to hold that petitioners are still in possession.

40. For all the reasons recorded above, we are of the view that in view of amended Act, 1999, proceedings initiated under the Act, 1976 stood lapsed, State authority shall not interfere in their possession and they will correct the entries in revenue record accordingly.

41. Thus we are of the view that the order dated 5.5.2014 passed by Collector, Saharanpur is illegal, which is set aside.

42. Present petition stands **allowed.**

43. No order as to costs.

(2019)10ILR A 1840

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2019

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ C No. 9731 of 2019

M/s Mahesh Industries Pvt. Ltd & Ors. ...Petitioners
Versus
The Kaur Vysya Bank Ltd. ...Respondent

Counsel for the Petitioners:
Sri Manu Khare.

Counsel for the Respondent:
Sri Maneesh Mehrotra, Sri D.K. Pathak, Sri Rahul Tyagi, Sri Shashank Pathak.

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 13(2) - upon expiry of 60 days from the date of notice u/s 13(2) and objections u/s13 (3A) have been rejected - secured creditor empowered to take possession.

B. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2002 - Rule 8(1) - notice under Rule 8 is repository and sufficient evidence of possession taken.

Held: - As this Court reads section 13 and Rule 8, it finds no scope for introducing the concept of a notice evidencing an intent of taking possession or apprising the borrower of the proposed date of taking over of possession. (Para 13)

C. The Division Bench in Krishnegowda appears to have found the imperative of a prior notice being issued in order to provide an opportunity to the borrower to discharge the liability of the secured creditor. However, in the considered view of this Court, the view so taken clearly misses the point that the Section 13 (2) notice has already apprised the borrower of the obligation to discharge the liability as claimed by the secured creditor. It is only consequent to a failure on his part to discharge the liability or where his objections are considered and rejected that the provisions of Section-13 (4) are attracted. (Para 12)

Writ Petition rejected (E-9)

List of Cases Cited: -

1. Standard Chartered Bank Vs Noble Kumar & ors, (2013) 9 SCC 620

2. K R Krishnegowda & anr. Vs Chief Manager/Authorised Officer, Kotak Mahindra Bank, (2012) AIR (Kar.)116

3. Nobel Kumar & Hindon Forge Pvt. Ltd. & anr. Vs St. of U.P., (2019) 2 SCC 198

4. Mardia Chemicals Ltd. Vs UOI, (2004) 4 SCC 311

5.NCML Industries Ltd. Vs Debt Recovery Tribunal, AIR 2018 Allahabad 131

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Manu Khare, learned counsel for the petitioners and Sri D.K. Pathak, learned Senior Advocate assisted by Sri Rahul Tyagi and Sri Shashank Pathak, appearing for the respondent Bank.

2. This petition impugns an order dated 30 January 2019 passed by the Debt Recovery Tribunal, Allahabad **[DRAT]** on an appeal preferred by the respondent Bank under Section 18 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as the "2002 Act"]. The appeal itself was directed against an order dated 19 May 2018 passed by the DRT, Lucknow [DRT] allowing a Securitisation Application filed by the petitioners here. The DRT by its order of 19 May 2018 while allowing the Securitisation Application set aside the possession notices dated 12, 19 and 26 July 2017 issued under Rule 8 of the **Security Interest (Enforcement) Rules, 2002** [hereinafter referred to as the **"2002 Rules"]** as also the demand notice of 19 April 2017 referable to Section 13(2) of the 2002 Act.

3. The facts on which there is no dispute are as follows. The petitioner Nos. 1, 4 and 5 are the original borrowers. The petitioner Nos. 2 and 3 are the guarantors. The respondent Bank is stated to have granted various credit facilities to the petitioners from time to time. In order to secure the credit facilities so sanctioned and disbursed, equitable mortgages were also created in respect of properties situate at Meerut, Karnal, NOIDA and Gandhidham (Gujarat). The loan account of the petitioners was classified as a non performing asset on 31 March 2017. The respondent Bank on 19 April 2017 issued a notice under Section 13(2) of the 2002 Act calling upon the petitioners to repay a sum of Rs. 92,41,11,057.49 along with interest thereon at the rate of 14.55% per annum. Since the terms of the notice under Section 13(2) were not complied with, the Bank proceeded to issue possession notices on 12, 19 an 26 July 2017 evidencing the taking over of possession in terms of Section 13(4) of the 2002 Act. After taking symbolic possession, the respondent Bank issued a sale notice dated 11 August 2017 but the auction sale could not materialise for want of bidders. Aggrieved by the possession notices issued as well as the notice of sale, the petitioners filed a Securitisation Application before the DRT on 1 September 2017. It was this Securitisation Application which was allowed by the DRT on 19 May 2018 and formed subject matter of challenge laid by the Bank before the DRAT. The DRAT in terms of its impugned order of 30 January 2019 has proceeded to record that despite the notice under Section 13(2) of the Act having been duly served, no objections were preferred as a consequence of which the respondent Bank proceeded to issue the possession notices. It further noted that although requisite details of service of the notice under Section 13(2) of the Act had been duly brought on record by the Bank before the DRT, no objection was raised by the petitioners here to the same. The DRAT has further found that the three possession notices were duly affixed on the premises of the secured assets and that the requirements of Rule 8 of the 2002 Rules complied with. Referring to the decision of the Supreme Court in **Standard Chartered Bank Vs. Noble Kumar and others1,** the DRAT held that after issuance of the demand notice under Section 13(2) of the 2002 Act and on a failure of the debtors to liquidate the dues as claimed, it is open to the secured creditor to take symbolic or physical possession without issuing any prior or further notice. It essentially held that there is no legal requirement of issuance of a notice before proceeding to take possession. While dealing with the issue of compliance with Rule 8, it has significantly recorded that the petitioners did not deny the receipt, publication and

affixation of the possession notices. Having recorded the conclusions as aforesaid, it proceeded to allow the appeal of the respondent Bank and set aside the order of the DRT dated 19 May 2018.

4. Sri Manu Khare, learned counsel appearing in support of the present petitioners has addressed the following two contentions. His first submission was that the respondent Bank was obliged in law to issue a notice to the petitioners indicating its intent of taking over physical possession of the secured assets. According to Sri Khare, the respondent Bank was obliged to place the petitioners on notice of the date when possession of the secured assets was intended to be taken after the expiry of the period specified in the notice issued under Section 13(2) of the 2002 Act. According to Sri Khare this is clearly a requirement which flows from the provisions made in Section 13(4) of the 2002 Act read with Rule 8 of the 2002 Rules. This submission rests solely upon a decision rendered by a Division Bench of the Karnataka High Court in **K R Krishnegowda and another Vs. Chief Manager/Authorised Officer, Kotak Mahindra Bank** 2. Sri Khare has pressed in aid the following observations as appearing in paragraphs 13 and 14 of the report.:-

"13. On a conspectus reading of sub-section (4) of section and section with rule 8, the question that would arise is, as to the stage at which notice under rule 8 would have to be issued, as the contention of counsel for the respondent is that the notice regarding possession would be issued after an order under section is passed and possession is taken and before sale. When once there is non-compliance of the demand made under sub-section (2) of section , steps could be initiated under sub-section (4) by taking possession of the secured asset. The question is, as to whether the borrower ought to know as to when exactly possession of the secured asset would be taken, when once the demand under sub-section (2) of section is not complied with by the borrower. Having regard to sub-section (13) read with sub-section (2) of section would imply that the receipt of notice under sub-section (2) results in a virtual attachment of the secured asset. If the demand made in sub-section (2) of section is not complied with and the representation as well as the objections filed by the borrower are also not accepted and communicated to the borrower, then in that case, steps could be initiated under sub-section (4) of section . Having regard to the fact that sub-section (6) of section enables a secured creditor to transfer the secured asset after taking possession would imply that the possession of the secured asset vests with the secured creditor prior to any such transfer. The procedure for taking possession or control of the secured asset by the secured creditor is envisaged in section after the date mentioned in the possession notice at which stage, it is not necessary to actually inform or indicate to the borrower, the taking of possession by the secured creditor. Section in fact does not prescribe an opportunity of hearing the borrower before an order is passed with regard to taking of possession. But we have held that if possession has to be taken by the secured creditor, then in that event, the borrower must be informed or intimated about the taking of possession, more precisely, the actual date on which possession would be taken over from the borrower by the secured creditor which would have to be indicated to the former.

It is in this regard, that in so far as immovable property, is concerned, sub-rules (1) and (2) of rule 8 prescribe notices or intimation to the borrower in two ways : (i) by delivery of possession notice; and (ii) by newspaper publication, clearly indicating the date on which possession of the secured asset would be taken by the secured creditor. If on the date indicated in the possession notice, the secured creditor is unable to take possession of the secured asset, then in that case, recourse may be had to section 14 of the Act, at which stage a further, notice to the borrower is not envisaged, under the said section.

14. Therefore, what emerges is the mandatory requirement under the Act read with the Rules, that in order to enable the borrower to know the date on which possession would be taken by the secured creditor, sub-rules (1) and (2) of rule 8 would have to be complied with by issuance of notices indicating the date on which possession would be taken. There is another purpose for issuing the notice prior to taking possession and that is, to enable the borrower to discharge the liability to the secured creditor. Also a person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower can pay the secured creditor, so much of the money as is sufficient to pay the secured debt as per clause (d) of sub-section (4) of section 13 read with sub-section (5) thereof. We have also borne in mind the fact that on an application being filed under section 14 of the Act before the Magistrate, there is no provision for issuance of notice to the borrower before an order to take possession is issued. We are, therefore, of the considered view that before initiating action under sub-section (4) of section 13 of the Act, the issuance of notice as per sub-rules (1) and (2) of rule 8 has to be complied with indicating the date on which possession of the property would be taken from the borrower by the secured creditor. If on the said date possession of the secured asset cannot be taken or it is not surrendered by the borrower, then the secured creditor can take recourse to section 14 of the Act and take possession of the secured immovable property, of course, we hasten to add that the notices issued under sub-rules (1) and (2) of rule 8 cannot be assailed per se as the purpose of issuance of such notices is only to indicate the date of taking possession." (emphasis supplied)

5. The second submission which was canvassed for the consideration of the Court by Sri Khare related to the validity of the possession notices issued by the respondent Bank. In this respect, it was contended that the notices under Rule 8 were published in the Business Standard and Economic Times which were not leading newspapers having sufficient circulation in the locality concerned. Sri Khare argued that the two newspapers were generally read by a specific class of readers and were not liable to be recognised as newspapers having sufficient circulation in the locality. Sri Khare also drew the attention of the Court to the averments made in a supplementary affidavit to assert that the papers did not enjoy wide circulation. It was further contended that the respondent Bank had failed to prove that the possession notices had been duly affixed on the premises of the secured assets thus violating the mandatory provisions of Rule 8(1) and (2) of the 2002 Rules.

6. Countering the submissions, Sri Pathak, leaned Senior counsel appearing

for the respondent Bank, has submitted that as is evident from the recordal of facts by the DRAT, the petitioners did not dispute that the notice under Section 13(2) of the 2002 Act despite being duly served was not responded to. Sri Pathak has sought to highlight the fact that despite the Bank having brought on record evidence of due service of the notice under Section 13(2) of the Act as well as those under Rule 8, these aspects were neither denied nor the averments made in that respect controverted by the petitioners. Sri Pathak has further submitted that the DRT committed a gross illegality in setting aside the notice under Section 13(2) of the 2002 Act dated 19 April 2017 when that did not even form subject matter of challenge in the Securitisation Application preferred by the petitioners. Sri Pathak has further highlighted and underlined the fact that the petitioners had conceded the due service of the possession notices and consequently it was not permissible for them to contend before this Court that the provisions of Rule 8 had not been complied with.

7. Turning to the contentions as urged on behalf of the petitioners of a prior notice being issued before the taking of possession, Sri Pathak submitted that the decision in **Krishnegowda** pales into insignificance in light of the subsequent judgments rendered by the Supreme Court in **Nobel Kumar** and **Hindon Forge Private Limited and another Vs. State of U.P.3** Sri Pathak contends that once the statutory period prescribed under Section 13(2) comes to an end or when the Bank has decided and rejected the objections, if any, preferred by the debtor which ever be later, it is open to the secured creditor to take possession of the secured assets complying with the provisions made in Rule 8. Sri Pathak submits that neither Section 13(4) of the 2002 Act nor Rule 8 of the 2002 Rules contemplates or envisages a prior notice being given apprising the debtors of the proposed date of taking of possession. Sri Pathak has consequently urged that the order of the DRAT is liable to be upheld and the instant writ petition dismissed. It is these rival submissions which consequently fall for determination.

8. The principal and underlying theme of the contention addressed by the petitioners with respect to a prior notice appears to be a perceived requirement in law of a notice being issued after the expiry of 60 days of the Section 13(2) notice and the taking over of possession under Section 13(4). As noticed above, the petitioners have sought to canvass that before the taking of possession under Section 13(4), the secured creditor is obliged to apprise the debtor of its intent and the date of taking over possession. This submission rests entirely on the decision of the Karnataka High Court rendered in **Krishnegowda**. In **Krishnegowda**, their Lordships took the view that the debtor must be informed and intimated of the intent of taking over possession. This prior notice was considered as a requirement flowing from a construction of Rule 8 on the basis of which their Lordships held that the borrowers would be enabled to discharge the liability of the secured creditor. It was in that backdrop that **Krishnegowda** held that before initiating action under Section 13(4), the issuance of a notice under Rule 8 had to be complied with by indicating the date on which possession of the properties would be taken from the borrower by the secured creditor. This

Court, with due respect, finds itself unable to sustain or follow the line of reasoning as adopted for the following reasons.

9. In terms of Section 13(2) of the 2002 Act, the secured creditor is required to place the borrower on notice of his liability to discharge the outstanding in an account which has been classified as a non performing asset. In case the borrower fails to comply with that demand within 60 days from the date of the notice, the secured creditor becomes legally entitled to exercise all or any of the rights enumerated in sub-section (4) of Section 13. The taking of possession of the secured assets including the right transfer it by way of lease, assignment or sale is one of the measures specified in sub-section (4). The Legislature by virtue of Amending Act 1 of 2013 had inserted Sub-section (3A) enjoining the secured creditor to consider and decide any representation or objection that the borrower may chooses to make in respect of the notice issued under Section 13(2). This legislative amendment was principally introduced in light of the decision rendered by the Supreme Court in **Mardia Chemicals Ltd. Vs. Union of India 4.** If one bears in mind the various stages of the proceedings under Section 13 of the Act, it is manifest that the action of enforcement of a security interest created in favour of the creditor commences with the notice issued under Section 13(2). The statute constructs a window of 60 days within which a borrower is entitled to respond to the notice and show cause why he is not liable to pay the amounts as claimed by the secured creditor. By virtue of the provisions made in sub-section (3A), the representation or objection that may be chosen to be made has to necessarily be decided by the secured creditor and a decision thereon communicated within a period of 15 days from the receipt of such representation or objection. The secured creditor is statutorily empowered to take recourse to one or more of the measures specified in Sub-section (4) only thereafter. The provisions of sub-section (4) come into play and the secured creditor is empowered to enforce the measures specified therein only when a debtor fails to discharge his liability in full or where the representation or objection made has come to be rejected. It is therefore evident that upon the expiry of 60 days from the date of the notice under Section 13(2) and once the objections, if any, preferred under sub-section (3A) have been rejected, the statute in unambiguous terms empowers the secured creditor to take possession.

10. The taking of possession is governed by the provisions made in Rule 8 of the 2002 Rules. Rule 8(1) prescribes that the authorised officer shall take possession by delivery of a possession notice prepared in accordance with the format prescribed in Appendix IV. The possession notice prescribed in Appendix IV carries the recital of the fact that despite the expiry of 60 days of the notice under Section 13(2), the borrower has failed to repay the amount. It also records the consequential fact of the authorised officer having taken possession of the secured assets in exercise of powers conferred under Section 13(4). On a conjoint reading of Section 13 and Rule 8, it is therefore, manifest and abundantly clear that no notice is envisaged in law to intervene the Section 13(2) notice and the possession notice issued under Rule 8(1). This is evident from a plain construct of the scheme of the 2002 Act when it

empowers the creditor to enforce a measure specified in sub-section (4) upon a failure of the borrower to discharge the liability. The borrower, it becomes relevant to note, is already made aware by the statute of the measures which are likely to be enforced in case he fails to discharge the liability within 60 days of the notice under Section 13(2) or where the objections, if any, preferred against that notice come to be rejected and a decision thereon communicated to him. On a plain reading of the provisions of the 2002 Act, therefore, this Court finds no requirement or obligation on the creditor to intimate the borrower of the proposed date of taking of possession. The Division Bench in **Krishnegowda** appears to have found the imperative of a prior notice being issued in order to provide an opportunity to the borrower to discharge the liability of the secured creditor. However, in the considered view of this Court, the view so taken clearly misses the point that the Section 13(2) notice has already apprised the borrower of the obligation to discharge the liability as claimed by the secured creditor. It is only consequent to a failure on his part to discharge the liability or where his objections are considered and rejected that the provisions of Section 13 (4) are attracted. The statute, neither on its plain language nor in its intendment, contemplates a further notice intervening those issued under sub sections (2) and (4) of Section 13. Regard must also be had to the fact that the notice under Rule 8 itself is the repository and evidence of possession having been taken.

11. In **Noble Kumar,** the Supreme Court was called upon to consider the validity of a decision rendered by the Madras High Court which had held that the guarantor must make an attempt to take possession of the asset under Section 13(4) before invoking the provisions of Section 14 of the 2002 Act. Dealing with the correctness of that view the Supreme Court made the following pertinent observations:

"26. It is in the above-mentioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17.

27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale etc. and

appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower. Therefore, the borrower is always entitled to prefer an "appeal" 15 under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available."

12. Dealing with the provisions comprised in Rule 8, it held as follows:-

"35. Therefore, there is no justification for the conclusion that the receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by secured creditor taking possession of the secured asset without the intervention of Court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1 (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2 (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinize the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14 (1)(A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3 (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under Clause (ii) above.

36.4. In any of the three situations, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets,, and other subsequent rules from the Security Interest (Enforcement) rules, 2002, shall apply."

13. As is evident from the construction of Rule 8 as expounded by the Supreme Court in **Noble Kumar,** the provisions of that Rule itself embody the procedure to be followed by a secured creditor seeking to take possession without the intervention of the Court. It is therefore evident that a possession notice effected in accordance with the provisions of Rules 8(1) and (2) is sufficient evidence in itself of possession having been taken by the creditor. The act of taking over of possession in terms of the statutory provisions made in the 2002 Act and the 2002 Rules is complete the moment the possession notice is delivered and published in accordance therewith. It is therefore, clear that no obligation, statutory or otherwise, stands placed upon the creditor to apprise the borrower of its intent of taking possession. As this Court reads Section 13 and Rule 8, it finds no scope for introducing the concept of a notice evidencing an intent of taking possession or apprising the borrower of the proposed date of taking over of possession.

14. Regard must also be had to the fact that possession under the 2002 Act can be both constructive as well as actual. A Full Bench of this Court in **NCML Industries Ltd Vs. Debt Recovery Tribunal5** had taken the view that possession under the provisions of the 2002 Act has to necessarily be recognised as actual physical possession. The correctness of that decision fell for consideration before the Supreme Court in **Hindon Forge.** Dealing with the issues raised, the Supreme Court held as under:-

"25. When we come to Section 13(4)(a), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by Rule 8. Under Section 38 of the Act, the Central Government may make Rules to carry out the provisions of the Act. One such Rule is Rule 8. Rule 8(1) makes it clear that "the authorised officer shall take or cause to be taken possession". The expression "cause to be taken" only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected Under Sub-rule (1) of Rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under Sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in Section 13(6) of the Act.

There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a Section 13(2) notice, Section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given Under Rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

26. Section 19, which is strongly relied upon by Shri Ranjit Kumar, also makes it clear that compensation is receivable Under Section 19 only when possession of secured assets is not in accordance with the provision of this Act and Rules made thereunder. The scheme of Section 13(4) read with Rule 8(1) therefore makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking "possession" Under Section 13(4). This being the case, it is clear that Section 13(6) kicks in as soon as this is done as the expression used in Section 13(6) is "after taking possession". Also, it is clear that Rule 8(5) to 8(8) also kick in as soon as "possession" is taken Under Rule 8(1) and 8(2). The statutory scheme, therefore, in the present case is that once possession is taken Under Rule 8(1) and 8(2) read with Section 13(4)(a), Section 17 gets attracted, as this is one of the measures referred to in Section 13 that has been taken by the secured creditor under Chapter III."

15. As is evident from the extracts of the decision in Hindon Forge reproduced herein above, the delivery of a possession notice together with its affixation on the property and its publication was recognised as one of the modes of taking of possession under Section 13(4). Dealing further with the nature of possession contemplated under the Act, their Lordships held as under:-

"32. Another argument that was raised by learned senior Counsel for the Respondents is that the taking of possession under Section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in Section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under Rule 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with Rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under Rule 8(1) and 8(2) at a future point

in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected."

16. It was further observed:-

"35. We now come to some of the decisions of this Court. In **Transcore v. Union of India and Anr.,** (2008) 1 SCC 125, this Court formulated the question which arose before it as follows:

"1. A short question of public importance arises for determination, namely, whether withdrawal of OA in terms of the first proviso to Section 19(1) of the DRT Act, 1993 (inserted by amending Act 30 of 2004) is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act", for short)."

To this, the answer given is in paragraph 69, which is as follows:

"69. For the above reasons, we hold that withdrawal of the OA pending before DRT under the DRT Act is not a precondition for taking recourse to the NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein."

Thereafter, the Court went on to discuss whether recourse to take possession of secured assets of the borrower in terms of Section 13(4) of the Act would comprehend the power to take actual possession of immovable property. In the discussion on this point in paragraph 71 of the judgment, learned Counsel on behalf of the borrowers made an extreme submission which was that the borrower who is in possession of immovable property cannot be physically dispossessed at the time of issuing the notice under Section 13(4) of the Act so as to defeat adjudication of his claim by the Debts Recovery Tribunal Under Section 17 of the Act and that therefore, physical possession can only be taken after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules. This submission was rejected by stating that the word "possession" is a relative concept and that the dichotomy between symbolic and physical possession does not find place under the Act. Having said this, the Court went on to examine the 2002 Rules and held:

"74. ... Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession Under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver Under Order 40 Rule 1 Code of Civil Procedure. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer Under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate Under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well

settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

If the whole of paragraph 74 is read together with the extracted passage, it becomes clear that what is referred to in the extracted passage is the procedure provided by Rule 8(3). It is clear that the authorised officer's powers, once possession is taken under Rule 8(3), include taking of steps for preservation and protection of the secured assets which is referred to in the extracted portion. Thus, the final conclusion by the Bench, though general in nature, is really referable to possession that is taken under Rule 8(3) of the 2002 Rules. Whether possession taken under Rule 8(1) and 8(2) is called symbolic possession or statutory possession, the fact remains that Rule 8(1) and Rule 8(2) specifically provide for a particular mode of possession taken under Section 13(4)(a) of the Act. This cannot be wished away by an observation made by this Court in a completely different context in order to repel an extreme argument. This Court was only of the opinion that the extreme argument made, as reflected in paragraph 71 of the judgment, would have to be rejected. This judgment therefore does not deal with the problem before us: namely, whether a Section 17(1) application is maintainable once possession has been taken in the manner specified Under Rule 8(1) of the 2002 Rules.

37. In **Canara Bank v. M. Amarender Reddy and Anr.,** (2017) 4 SCC 735, this Court after referring to **Mathew Varghese v. M. Amritha Kumar and Ors.,** (2014) 5 SCC 610, which held that the 30-day period mentioned Under Rule 8(6) is mandatory, then held:

"14. The secured creditor, after it decides to proceed with the sale of secured asset consequent to taking over possession (symbolic or physical as the case may be), is no doubt required to give a notice of 30 days for sale of the immovable asset as per Sub-rule (6) of Rule 8. However, there is nothing in the Rules, either express or implied, to take the view that a public notice Under Sub-rule (6) of Rule 8 must be issued only after the expiry of 30 days from issuance of individual notice by the authorised officer to the borrower about the intention to sell the immovable secured asset. In other words, it is permissible to simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of such secured asset by inviting tenders from the public or by holding public auction. The only restriction is to give thirty days' time gap between such notice and the date of sale of the immovable secured asset."

Though there was no focused argument on the controversy before us, this Court did recognise that possession may be taken over Under Rule 8 either symbolically or physically, making it clear that two separate modes for taking possession are provided for Under Rule 8.

38. Similarly, in ITC Limited v. Blue Coast Hotels Ltd. and Ors. AIR 2018 SC 3063, this Court held:

"43. As noticed earlier, the creditor took over symbolic possession of

the property on 20.06.2013. Thereupon, it transferred the property to the sole bidder ITC and issued a sale certificate for Rs. 515,44,01,000/- on 25.02.2015. On the same day, i.e., 25.02.2015, the creditor applied for taking physical possession of the secured assets Under Section 14 of the Act.

44. According to the debtor, since Section 14 provides that an application for taking possession may be made by a secured creditor, and the creditor having ceased to be a secured creditor after the confirmation of sale in favour of the auction purchaser, was not entitled to maintain the application. Consequently, therefore, the order of the District Magistrate directing delivery of possession is a void order. This submission found favour with the High Court that held that the creditor having transferred the secured assets to the auction purchaser ceased to be a secured creditor and could not apply for possession. The High Court held that the Act does not contemplate taking over of symbolic possession and therefore the creditor could not have transferred the secured assets to the auction purchaser. In any case, since ITC Ltd. was the purchaser of such property, it could only take recourse to the ordinary law for recovering physical possession.

45. We find nothing in the provisions of the Act that renders taking over of symbolic possession illegal. This is a well-known device in law. In fact, this Court has, although in a different context, held in M.V.S. Manikayala Rao v. M. Narasimhaswami AIR 1966 SC 470] that the delivery of symbolic possession amounted to an interruption of adverse possession of a party and the period of limitation for the application of Article of the Limitation Act would start from such date of the delivery."

17. Their Lordships then proceeded to notice the amendments introduced in Rule 8 by way of a Notification dated 17 October 2018 to hold that the legislative amendments clarified that possession can be both constructive or physical. The view taken by the Full Bench of this Court in **NCML Industries** was consequently set aside. It must be borne in mind that the concept of symbolic or constructive possession was recognised as being an existing facet and legally accepted device to disrupt the possession of the debtor. This was so recognised in the earlier decisions rendered by the Supreme Court and noticed in **Hindon Forge.** The view of the Full Bench of this Court in **NCML Industries** of the 2002 Act envisaging only actual physical possession was overruled. The concept of symbolic possession would consequently be liable to be recognised as being an integral component of the 2002 Act existing independently of the clarificatory amendments introduced in 2018. It therefore follows that once the possession under Section 13(4) can be both symbolic or actual, the need of a prior notice as canvassed on behalf of the petitioners here is clearly untenable. It may only be additionally noted that the view taken in **Krishnegowda** has neither been affirmed nor the procedure enunciated therein recognised in either Noble Kumar or **Hindon Forge.** The Court consequently finds itself unable to sustain the line of submission addressed on behalf of the petitioners on this issue. The contention stands rejected.

18. The Court then turns to the correctness of the contention addressed with respect to the possession notices issued under Rule 8. At the very outset, it must be underlined that the DRAT in its impugned order has categorically recorded that the petitioners did not deny

the receipt, publication and affixation of the possession notices. It has specifically dealt with the mode and manner of publication and affixation in paragraph 10 of its order assailed in this petition. The recitals as appearing in paragraph 10 of the impugned order have not been questioned by the petitioners either in the writ petition or by learned counsel appearing on their behalf in his oral submissions. It was also not denied before this Court that the materials brought on record by the respondent Bank before the Debt Recovery Tribunal as well as the DRAT evidencing a compliance with the provisions of Rule 8 were not controverted or denied by the petitioners. Sri Khare, while candidly admitting the receipt of notices under Rule 8, sought to explain the concession made before the DRAT stating that notwithstanding the same, the petitioners were entitled to assail the notices on the ground of being non compliant with the provisions made in that Rule.

19. Insofar as the question of affixation of the possession notices is concerned Sri Khare drew the attention of the Court to the averments made in paragraph 32 of the writ petition. In that paragraph, the petitioners assert that affixation has not been proved as only a few photographs were annexed. According to the petitioners, it was incumbent upon the respondent Bank to further disclose the details of the persons appearing in the photographs as well as to place on the record their individual statement with regard to service. Suffice it to note that the respondent Bank had duly brought on record the possession notices which were affixed on the premises of the secured assets. These notices have been enclosed by the petitioners themselves along with the writ petition. However, and at the cost of repetition, it becomes necessary to observe that although all these details were brought on record before the DRT as well as the DRAT, the petitioners neither controverted nor questioned the same. The Court deems it apposite to also note that although in the Securitisation Application, it was alleged that the notices had not been served upon the petitioners, before the DRAT the receipt and affixation of the possession notices was conceded. Once the petitioners chose not to deny the receipt and affixation of these notices, there was no obligation on the Bank to further prove and establish a fact on which there was no dispute. In view thereof, and once the receipt, publication and affixation of the possession notices was admitted or to put it differently not denied by the petitioners, there was no obligation on the respondent Bank to prove affixation by way of further visual or documentary evidence.

20. The submission with respect to the possession notices being published in the Business Standard and Economic Times is also noticed only to be rejected. Suffice it to note that in the supplementary affidavit, it is asserted that the English version of the Business Standard has a circulation of 7954 and its Hindi version of 2858. Similar allegations have been made with regard to its edition in circulation in Noida, Meerut and Gujarat. This information is derived by the deponent of that affidavit ".....as per information available on the website". There is no disclosure of the details of the website from which these figures have been derived. Insofar as the averments made in paragraphs 5 and 6 are concerned although certain figures have been disclosed, the source from which these

figures were collated are not even mentioned. The assertions made in paragraphs 4, 5 and 6 of this affidavit have been sworn on personal knowledge and as per the deponent "*on the basis of information available on website, having link of the Business Standard"* as stated in paragraph 7 of that affidavit. It is thus evident that the assertions made in this affidavit are devoid of material particulars and remain unsubstantiated. The Court consequently finds itself unable to either countenance or accept the submissions addressed in this regard.

21. On an overall conspectus of the aforesaid facts, this Court is of the considered view that the instant writ petition lacks merit and that the challenge to the impugned order must necessarily fail.

22. The writ petition is consequently **dismissed.**

(2019)10ILR A 1854

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ C No. 16942 of 2019 connected with Writ C No. 16951 of 2019, 16956 of 2019 and 16960 of 2019

Sushil Kumar Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Rahul Jain.

Counsel for the Respondents:
C.S.C.

A. Indian Stamp Act, 1899 - Section 56 (1-A), Section 57 & Section 56 (1-A) - confers right of appeal only to party to the lis - Petitioner not party, therefore appeal not maintainable and consequently, application u/s 57 of the Act-for making reference not maintainable.

Writ Petition rejected (E-9)

Held:- A plain reading of Section 56 (1-A) clearly suggests that it is only those who are party to the lis have been conferred the right of appeal and, therefore, in the opinion of the Court, the appeal on behalf of the petitioner against the order dated 02.11.2018 passed by the Assistant Commissioner (Stamp), Meerut was not maintainable as petitioner was not a party in proceeding under Section 47-A of the Act, 1899 before Assistant Commissioner (Stamp), Meerut. Since appeal on behalf of petitioner was not maintainable, therefore, in the opinion of the Court, application under Section 57 of the Act, 1899 on behalf of petitioner was also not maintainable. (Para 26)

B. Under the scheme of the Act, there is nothing from which it can be inferred that the words 'otherwise coming to its notice' used in Section 57 (1) of the Act, 1899 can be stretched to such an extent so as to include within its periphery any person and not only the persons who are party to the lis. (Para 29)

List of Cases Cited: -

1. Akhlaq Vs St. of U.P. & ors. (2019) (3) ADJ 378.

2. Raymond Ltd. & anr. Vs St. of C.H. & ors. AIR (2007) SC 2854

3. Northern Plastics Ltd. Vs Hindustan Photo Films MFG Co. Ltd. (1997) 4 SCC 452

4. Ayaaubkhan Noorkhan Pathan Vs St. of

M.H. & ors. AIR (2013) SC 58

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

1. Heard learned counsel for the parties.

2. The issue involved in the bunch of petition is as to whether a stranger or third party can be said to be an aggrieved person by an order passed by competent authority in a proceeding under Section 47-A of the Indian Stamp Act, 1899 (hereinafter referred to as 'Act, 1899') and has locus- standi to maintain an application under Section 57 of the Act, 1899 in the context of word 'otherwise coming to its notice' used in Section 57 (1) of the Act, 1899, and on such an application being filed, whether the Chief Controlling Revenue Authority is under obligation to make reference to the High Court.

3. For the convenience, the facts are delineated from Writ - C No. 16942 of 2019.

4. The case of the petitioner is that he is the owner and in possession of Khasra No.2765 (1 bigha 3 biswa), 2767 (6 bigha 1 biswa and 1 kothi), 2768 (3 biswa), 2769 (4 biswa), 2770 (3 bigha 5 biswa) in total 10 bigha and 17 biswa or 27439.65 square meters of land. One Mr. Deep Chand Jain, Vijai Kumar Jain (S/o Deep Chand Jain), Gopi Chand Jain and Akshay Kumar Jain (S/o Gopi Chand Jain) also had share in the aforesaid khasra. According to the petitioner, a family settlement was entered into between the parties on 08.05.1977 in which 7941.06 square meter of the land in the south came to the share of Deep Chand Jain, Vijay Kumar Jain, Gopi Chand Jain, and Akshay Kumar Jain. After the death of Deep Chand Jain and Vijay Kumar Jain, the aforesaid portion was inherited by Smt. Vaishalya Jain widow of late Vijay Kumar Jain and his sons Atul Kumar and Sanjay Jain. The petitioner was given 19498.60 square meter in the north of the aforesaid khasra as per the settlement.

5. The further case of the petitioner is that Smt. Vaishalya Jain and her son after long span of time of family settlement expressed their desire that they are entitled to more share in the aforesaid plots and Smt. Vaishalya Jain and Sanjay Jain illegally without having any title sold an area of 0.2386 hectare in favour of respondent no.3 Ravindra Kumar Tyagi by registered sale deed executed on 21.07.2015 which in fact was given to the petitioner under family settlement deed dated 08.05.1977.

6. From the pleadings in the writ petition, it appears that petitioner has obtained an exparte decree of injunction dated 28.04.2017 with respect to the land for which sale deed has been executed, and the said decree has been put in execution by filing Case No. 615 of 2015.

7. It transpires from the record that a case No. 225 of 2017-18 (computerized No. D-2017115203148) was registered on the report of sub-Registrar dated 11.11.2016 for deficiency of stamp duty against respondent no.3. The Assistant Collector (Stamp)/Collector (Stamp), Meerut determined the stamp deficiency at Rs.50,290/- by order dated 02.11.2018 on the basis of report dated 21.12.2017 submitted by Assistant Inspector General Registration, Meerut, .

8. The respondent no.3 feeling aggrieved by order dated 02.11.2018

passed by Assistant Commissioner (Stamp), Meerut in Case No. 225 of 2017-18 (computerized No. D-2017115203148) preferred statutory appeal before Deputy Commissioner (Stamp) Meerut Division, Meerut which was numbered as Case No. 02385 of 2018 (computerized no. C201811000002385).

9. The petitioner, though, was not a party before the Assistant Commissioner (Stamp), Meerut preferred statutory appeal No.C201911000000162 challenging the order dated 02.11.2018 in Case No. 225 of 2017-18 (computerized No. D-2017115203148) wherein he contended that respondent no.3 in collusion with respondents authorities have evaded huge stamp duty. The petitioner in the said appeal also preferred an application in the month of March, 2019 under Section 57 of the Act, 1899 seeking reference to the High Court on the following questions:-

"1. क्या जिलाधिकारी महोदय द्वारा निर्धारित सर्किल रेट अंकन ९०००/- रुपये प्रति वर्ग मीटर होने के पश्चात् सब रजिस्ट्रार मेरठ को उससे कम दर पर स्टाम्प की गड़ना करने का अधिकार प्राप्त हैं, या नहीं?

२. क्या प्रश्नगत संपत्ति की दर जिलाधिकारी महोदय द्वारा निर्धारित सर्किल रेट के अनुसार ९०००/- प्रति वर्ग मीटर होती हैं या नहीं?

३. क्या भूमि आबादी की होने व नगरपालिका के ३५० मीटर परिधि के अंदर होने के कारण शासनदेश के अनुपालन में आबादी की दर देय थी या नहीं?

४. क्या एक ही ज़मीन के दो अलग अलग दरों के गड़ना करके बैनाम निष्पादित करके रजिस्ट्रार महोदय द्वारा त्रुटि की गयी हैं?

10. According to petitioner, the land in question is an abadi land within the urban area and, therefore, stamp duty in respect of aforesaid land is chargeable @ Rs. 9000 per square meter applicable to residential land whereas the stamp duty @ Rs. 8,000/- per square meter applicable to the agricultural land was paid by the respondent no.3. Thus, respondent no.3 has evaded huge stamp duty by paying the stamp duty applicable to the agriculture land treating the land in question as agriculture land.

11. The appeal of the petitioner was connected with the appeal of respondent no.3 and both the appeals came to be decided by the Deputy Commissioner (Stamp), Meerut Division, Meerut by order dated 15.03.2019 whereby the appellate authority affirmed the order of the Assistant Commissioner (Stamp), Meerut and dismissed the appeal of the respondent no.3 as well appeal of the petitioner. While dismissing the appeal of the petitioner, the appellate authority recorded a finding that application under Section 57 of the Act, 1899 has been filed by the petitioner only for the purpose of delay in disposal of appeal and accordingly, the appellate authority has rejected the application dated 13.03.2019/14.03.2019 of the petitioner under Section 57 of the Act, 1899. The appellate authority further held that though petitioner has contended in the appeal that the order of the Assistant Commissioner (Stamp), Meerut is against the settled principles of law and without application of judicial mind but the appellant/petitioner could not establish on record that the order of the Assistant Commissioner (Stamp), Meerut dated 02.11.2018 is not as per law. Accordingly, on merit also the appellate authority found that case of petitioner is not sustainable in law, and consequently, it dismissed the appeal of the petitioner.

12. The petitioner in the present petition has challenged the order of the appellate authority dated 15.03.2019 only

to the extent by which his application under Section 57 of the Act, 1899 has been rejected which is also evident from the prayer made by the petitioner in the writ petition which is extracted herein below:-

"Issue a writ order or direction in nature of certiorari quashing the part of order dated 15.03.2019 where by the application under section 57 of the Indian Stamp Act, 1899 has been dismissed by respondent no.2 (Annexure-1)"

13. Challenging the aforesaid order, learned counsel for the petitioner contends that appellate court has erred in law in rejecting the application of the petitioner on the ground that the petitioner in order to delay the disposal of appeal has filed the application under Section 57 of the Act, 1899 without appreciating the facts on record which clearly establishes that it was a case of evasion of heavy stamp duty by the respondent no.3 and a clear case of reference under Section 57 was made out, and therefore,the appellate authority was bound to refer the matter to the Chief Controlling Revenue Authority, who under Section 57 of the Act, 1899 was under obligation to refer the questions framed in the said application to the High Court.

14. He further submits that Section 57 of the Act, 1899 envisages two modes to make reference. The first one is provided under Section 56(2) of the Act, 1899 and second is by virtue of words 'otherwise coming to its notice' used in Section 57(1) of the Act, 1899. According to the petitioner, he derives his locus to file application for reference from the words 'otherwise coming to its notice' in Section 57 (1) of the Act, 1899 and thus, he contends that anybody who finds a case of evasion of stamp duty can bring to the notice of Chief Controlling Revenue Authority by filing application under Section 57 of the Act, 1899, and once it has come to the notice of Chief Controlling Revenue Authority that there is evasion of stamp duty and there is substantial question of law, an obligation is imposed upon the Chief Revenue Controlling Authority to refer the matter to the High Court. Thus, the submission of learned counsel for the petitioner is that an application of petitioner under Section 57 of the Act, 1899 was maintainable, and the appellate authority has erred in dismissing the application of petitioner under Section 57 of the Act, 1899. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgement of this Court in the case of ***Akhlaq Vs. State of U.P. & Others 2019(3) ADJ 378.***

15. Rebutting the aforesaid submission, learned Additional Chief Standing Counsel contends that petitioner is not an aggrieved person and as such he has no locus standi to file an application under Section 57 of the Act, 1899. According to him, the words 'otherwise coming to its notice' used in Section 57 (1) of the Act connotes only those who are party to the proceeding meaning thereby that besides the State Authority, the person against whom stamp duty is imposed is also provided a remedy under Section 57 (1) of the Act, 1899 for reference of his case to the High Court if any substantial question of law is involved. He further submits that the words "otherwise coming to its notice' is to be interpreted in the context of the scheme of the Act and legislature has taken due care to protect the interest of

the State from evasion of stamp duty as right of appeal is also provided to the Government under Section 56(1-A) of the Act, 1899 and thus, the words "otherwise coming to its notice' cannot be stretched to an extent to bring within its compass the person who is not a party to lis. In support of his aforesaid submission, he has placed reliance upon the judgement of Apex Court in the case of ***Raymond Ltd. & Another Vs. State of Chhatisgarh and Others AIR 2007 SC 2854.***

16. He further submits that petitioner is not a bona fide litigant inasmuch as it is clear from the pleadings in the writ petition that petitioner has obtained some exparte injunction decree against respondent no.3, and to settle his personal score, he has preferred the appeal against the order dated 02.11.2018 and filed application under Section 57 in the said appeal. He submits that it is settled principles of law that a person who is espousing a cause of public interest should not have any personal interest in espousing the said cause, and in the present case, it is evident from the pleadings in the writ petition that the petitioner has personal grievance against respondent no.3, therefore, the appeal as well as application under Section 57 of the Act, 1899 preferred by the petitioner was not bona fide and deserves to be dismissed on this ground also.

17. I have considered the rival submissions of the parties and perused the record of the case.

18. Before adverting to the rival submissions of the parties, it is pertinent to have glance at Sections 56 and 57 of the Act, 1899 which are extracted herein below:-

*"**56 Control of and statement of case to Chief Controlling Revenue Authority**-(1) The powers exercisable by a Collector under Chapter IV and Chapter V and under clause (a) of the first proviso to section 26 shall in all cases be subject to the control of the Chief Controlling Revenue-authority.*

(1-A) Notwithstanding anything contained in any other provisions of this Act, any person including the Government aggrieved by an order of the Collector under Chapter IV, Chapter V or under clause (a) of the first proviso to Section 26 may, within sixty days from the date of receipt of such order, prefer an appeal against such order to the Chief Controlling Revenue Authority, who shall, after giving the parties a reasonable opportunity of being heard consider the case and pass such order thereon as he thinks just and proper and the order so passed shall be final:

Provided that no application for stay or recovery of any disputed amount of stamp duty including interest thereon or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one-third of such disputed amount:

Provided further that where the Chief Controlling Revenue Authority passes an order for the stay of recovery of any stamp duty, interest thereon or penalty or for the stay of the operation of any order appealed against and such order results in the stay of recovery of any stamp duty, interest thereon or penalty, such stay order shall not remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the Collector concerned for the payment of the outstanding amount].

(2) If any Collector, acting under section 31, section 40 or section 41,

feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue-authority.

…

57. Statement of case by Chief Controlling Revenue-authority to High Court. -- (1) *The Chief Controlling Revenue-authority may state any case referred to it under section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon, --*

[(a) if it arises in a State, to the High Court for that State;

[(b) if it arises in the Union territory of Delhi, to the High Court of Delhi;

[(c) if it arises in the Union territory of Arunachal Pradesh or Mizoram, to the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur and Tripura)];

(d) if it arises in the Union territory of the Andaman and Nicobar Islands, to the High Court at Calcutta; and

(e) if it arises in the Union territory of the [Lakshadweep], to the High Court of Kerala];

(ee) if it arises in the Union territory of Chandigarh, to the High Court of Punjab and Haryana;

[(f) if it arises in the Union territory of Dadra and Nagar Haveli, to the High Court of Bombay.]

*(2) Every such case shall be decided by not less than three Judges of the High Court 1*** to which it is referred, and in case of difference the opinion of the majority shall prevail."*

19. Section 56 (1-A) provides appeal by any person including the Government aggrieved by an order of the Collector under Chapter IV, Chapter V or under clause (a) of the first proviso to Section 26 to the Chief Controlling Revenue Officer. Thus, the legislature has taken due care to safeguard the interest of the State in case of evasion of stamp duty by conferring the power of appeal upon the Government against the order of Collector under the chapter IV & V or clause (a) of first proviso to Section 26.

20. Further, as per Section 56(2) if the Collector, acting under section 31, section 40 or section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw a statement of the case and refer it with his own opinion for the decision of Chief Controlling Revenue Authority. Thus, Section 56(2) postulates another mode of determination of the amount of duty chargeable on any instrument by Chief Controlling Revenue Authority in case of any doubt about the amount of duty chargeable on the said instrument.

21. Section 57(1) envisages two modes when the Chief Controlling Revenue Authority can make reference to the High Court. Firstly, if any case is referred to him by the Collector under Section 56(2), and the secondly the cases which 'otherwise coming to its notice'. In the context of the present case, one of the pertinent question which arises for consideration is as to whether the appeal under Section 56(1-A) by the petitioner against the order dated 02.11.2018 passed by Assistant Commissioner (Stamp), Meerut in Case No. 225 of 2017-18 (computerized No. D-2017115203148) was maintainable and if not, whether the application under Section 57 of the Act, 1899 could be filed by the petitioner in an

appeal which was not maintainable on his behalf.

22. To appreciate the question as to whether the appeal could be filed by the petitioner against the order of the Assistant Commissioner (Stamp), Meerut dated 02.11.2018, it would be useful to refer the judgement of the Apex Court in the case of ***Northern Plastics Ltd. Vs. Hindustan Photo Films MFG Co. Ltd. (1997) 4 SCC 452.*** In the said case, appellant (Northern Plastics Ltd.) was allowed by the order passed by the Assistant Collector of Customs, Bombay dated 05.06.1989 whereby he agreed with the notings made by the Assistant Collector of Customs, Bombay dated 31.05.1989 recommending the release of the imported goods to the appellant on payment of full custom duty. The aforesaid order was challenged by one M/s Hindustan Photo Films MFG Co. Ltd. (hereinafter referred to as 'HPF') and also by Union of India in several legal proceedings. However, having not succeeded in those proceedings, HPF and Union of India preferred separate appeals challenging the order dated 05.06.1989 passed by the Assistant Collector of Customs, Bombay before the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as 'CEGAT') under Section 129-A of the Customs Act, 1962 (hereinafter referred to as 'Act, 1962'). The CEGAT held the appeals preferred by the HPF as well as Union of India not maintainable on the ground that they do not fall within the ambit of words 'any person aggrieved' used in Section 129-A of the Act, 1962, and consequently, it dismissed both the appeals. The HPF as well as Union of India preferred two writ petitions against the order of CEGAT dismissing the appeal, and the High Court allowed the writ petition of HPF as well as Union of India holding that appeal on behalf of HPF as well as Union of India was maintainable.

23. Feeling aggrieved by the judgement of the High Court in the two writ petitions, the appellant (Northern Plastics Ltd.) preferred Special Leave Petition before the Apex Court. The Apex Court after considering the scheme of the Act, 1962 affirmed the order passed by the CEGAT holding appeal of Union of India and the HPF not maintainable. The Apex Court also held that principle underlying in respect of concept of locus standi in public interest litigation filed before Apex Court under Article 32 of Constitution of India or under Article 226 of Constitution of India before High Court cannot be imported for deciding the right of appeal under the statutory provisions contained in the Customs Act, 1962. The Apex Court further held that only those permitted by the statute to prefer appeal can exercise the right of appeal subject to the conditions regarding filing of such appeals. Paragraphs 8 and 9 of the aforesaid judgement are being extracted herein below:-

"8. At the outset it must be kept in view that appeal is a creature of statute. The right to appeal has to be exercised by persons permitted by the statute to prefer appeals subject to the conditions regarding the filing of such appeals. We may in this connection usefully refer to a decision of four learned judge of this Court in the case of The Anant Mills Co. Ltd. etc. etc. v. State of Gujarat & others etc. etc. [AIR 1975 SC 1234 = (1975) 2 SCC 175]. In that case Khanna, J., speaking for the Court had to

consider the question whether the provision of statutory appeal as per Section 406(2)(e) of the Bombay Provincial Municipal Corporation Act, 1949 which required the appellant to deposit the disputed amount of tax before appeal could be entertained could be said to be in any way violative of Article 14 of the Constitution of India. Repelling the aforesaid challenge to the vires of the said provision the following pertinent observations were made in para 40 of the Report :

"...The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to the section provided that '.....no appeal shall lie against an order under sub-section (1) of Section 46 unless the tax had been paid'. Such conditions merely regulate the exercise of the right of appeal so that the same is not abused difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for discharge of that liability or the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it ....."

9. It has also be noted that the wider concept of locus standi in public interest litigation moved before this Court under Article 32 of the Constitution of India which itself is a fundamental right or under Article 226 before High Courts which also offers a constitutional remedy cannot be imported for deciding the right of appeal under the statutory provisions contained in the Customs Act. Whether any right of appeal is conferred on anyone against the orders passed under the Act in the hierarchy of proceedings before the authorities has to be judged from the statutory settings of the Act and not before them. Therefore, in our view, the High Court in the impugned judgment had erred in drawing the analogy from the more elastic concept of locus standi under Article 32 of Article evolved by this Court by its decisions on the subject. It is also to be appreciated that the decision of this Court in Bar Council of Maharashtra v. M.V. Dabholkar etc. etc. AIR 1975 SC 2092 was based on an entirely different statutory scheme. For judging the competence and locus standi of the Union of India or the HPF for moving appeals before CEGAT against the order of Additional Collector of Customs passed under Section 122 of the Act the answer must be found from within the four corners of the Act itself."

24. In paragraph 10 of the judgment of ***Northern Plastics Ltd. (supra),*** the Apex Court held that the only the parties

to proceedings before the Adjudicating Authority i.e. Collector of Customs could prefer such an appeal to the CEGAT. Relevant portion of paragraph 10 of the aforesaid judgement is being extracted herein below:-

10.... "In the light of this statutory scheme, therefore, it is not possible to agree with the contention of learned counsel for the contesting respondents that sub-section (1) of Section 129-A entitles any and every person feeling aggrieved by the decision or order of the Collector of Customs as an adjudicating authority, to prefer statutory appeal to the Appellate Tribunal. Neither the Central Government, through Industries Department, nor the rival company or industry operating in the same field as the importer can as a matter or right prefer an appeal as 'person aggrieved' is wider than the phrase 'party aggrieved'. But in the entire context of the statutory scheme especially sub-section (3) of Section 129-A it has to be held that only the parties to the proceedings before the adjudicating authority Collector of Customs could prefer such an appeal to the CEGAT and the adjudicating authority under S.122 can prefer such an appeal only when directed by the Board under Section 129-D(1) and not otherwise. It is easy to visualise that even a third party may get legitimately aggrieved by the order of the Collector of Customs being the adjudicating authority if it is contended by such a third party that the goods imported really belonged to it and not to the purported importer or that he had financed the same and, therefore, in substance he was interested in the goods and consequently the release order in favour of the purported importer was prone to create a legal injury to such a third party which is not actually arraigned as a party before the adjudicating authority and was not heard by it. Under such circumstances such a third party might perhaps be treated to be legally aggrieved by the order of the Collector of Customs as an adjudicating authority and may legitimately prefer an appeal to the CEGAT as a 'person aggrieved'. That is the reason why the Legislature in its wisdom has used the phrase 'any person aggrieved' by the order of Collector of Customs as adjudicating authority in Section 129-A(1). But it order to earn a locus standi as 'person aggrieved' other than the arraigned party before the Collector of Customs as an adjudicating authority it must be shown that such a person aggrieved being third party has a direct legal interest in the goods involved in the adjudication process. It cannot be a general public interest or interest of a business rival as is being projected by the contesting respondents before us....."

25. Further in paragraph 12 of the judgment of ***Northern Plastics Ltd. (supra),*** Apex Court repelled the contention of Union of India that appeal on behalf of Union of India was maintainable as it has to subserve a larger public interest. Relevant portion of paragraph 12 of the aforesaid judgement is being extracted herein below:-

".....12. So far as the Union of India is concerned we may proceed on the basis that it may have to subserve a larger public interest by raising the present dispute and may legitimately feel aggrieved by the order of the Additional Collector of Customs. But even if it is so, the statutory procedure laid down by the Parliament in its wisdom for enabling the

challenge to the adjudication order of the Collector of Customs by way of appeals or revisions, to which we have made a mention, has got to be followed in such an eventuality......"

26. Now, in the case in hand, it is evident that Section 56 (1-A) of the Act, 1899 confers the right of appeal to those aggrieved by the order of the Collector passed under Chapter IV, Chapter V or under clause (a) of the first proviso to Section 26 or to the Government. A plain reading of Section 56 (1-A) clearly suggests that it is only those who are party to the lis have been conferred the right of appeal and, therefore, in the opinion of the Court, the appeal on behalf of the petitioner against the order dated 02.11.2018 passed by the Assistant Commissioner (Stamp), Meerut was not maintainable as petitioner was not a party in proceeding under Section 47-A of the Act, 1899 before Assistant Commissioner (Stamp), Meerut. Since appeal on behalf of petitioner was not maintainable, therefore, in the opinion of the Court, application under Section 57 of the Act, 1899 on behalf of petitioner was also not maintainable.

27. The present controversy can also be viewed from one more perspective i.e. whether any application preferred by any person to the Chief Controlling Revenue Authority under Section 57 of the Act, 1899 would fall within the word 'otherwise' which entitles him for reference under Section 57 of the Act, 1899. In this regard it is pertinent to notice the judgement of Apex Court in the case of ***Raymond Ltd. & Another (supra)*** relied upon by the learned counsel for the respondents wherein Apex Court while interpreting Section 56(4) inserted by way of State amendment held that revisional power conferred under Section 56(4) of the Act, 1899 is to be exercised by the Board of Revenue either on its own motion or on application of 'any party'. The Apex Court further held that the word 'any party' implies both parties to the lis. Paragraph 16 of the aforesaid judgement is being extracted herein below:-

"16. It is true that Sub-section (2) of Section 56 of the Act does not refer to Section 32 but the same, in our opinion, was not necessary. Sub-section (4) of Section 56 was inserted by way of a State Amendment. The intention of the legislature in inserting the said provision is clear and explicit as by reason thereof a power of revision has been conferred upon the highest authority of Revenue in the State, viz., Board of Revenue. The revisional power is to be exercised by the Board of Revenue either on its own motion or on an application by any party. The term "any party" used in the said provision is of some significance. By reason of the said provision, not only the State but also the person who had filed an application under Section 31 of the Act, thus, may file a revision application before the Board of Revenue. The terms "any party", therefore, implies both the parties to the lis and not the party filing an application under Section 31 of the Act alone. The revisional power is to be exercised by the Board so as to enable it to satisfy itself in regard to the amount with which the instrument is chargeable with duty. The revisional proceeding has a direct nexus with determination of an instrument being charged with duty and not the endorsement made thereupon at a subsequent stage."

28. Even in the case of ***Banarsi Das Ahluwalia Vs. The Chief Controlling***

Revenue Authority, Delhi, the Apex Court held that the person against whom any order of Revenue Authority imposing penalty or deficient stamp duty is passed, and if it involves substantial question of law, he has remedy under Section 57 of the Act, 1899 to approach the Chief Controlling Revenue Authority for referring the case to the High Court. Relevant portion of aforesaid judgement is being extracted herein below:-

".....It also must now be taken as settled that that duty is not affected by the question whether the case is pending before the Authority or not. The principle underlying the decision is that sec. 57 affords a remedy to the citizen to have his case referred to the High Court against an order of a revenue authority imposing stamp duty and/or penalty provided the application involves a substantial question of law and imposes a corresponding obligation on the authority to refer it to the High Court for its opinion. Such a right and obligation cannot be construed to depend upon any subsidiary circumstance such as the pendency of the case before the Authority....."

29. Thus, the principles underlined in the aforesaid judgement unambiguously suggests that any person aggrieved by the order of the Revenue Authority can approach the Chief Controlling Revenue Authority under Section 57 of the Act, 1899 for reference of his case to the High Court if it involves substantial question of law, and the Chief Controlling Revenue Authority is under obligation to refer the case to the High Court. Under the scheme of the Act, there is nothing from which it can be inferred that the words 'otherwise coming to its notice' used in Section 57 (1) of the Act, 1899 can be stretched to such an extent so as to include within its periphery any person and not only the persons who are party to the lis.

30. The judgement of this Court in the case of ***Akhlaq (supra)*** relied upon by the learned counsel for the petitioner has been rendered by this Court in the case of fair price shop matter by placing reliance upon the judgement of Apex Court in the case of ***Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra & Others AIR 2013 SC 58,*** and this Court held that complainant has right to approach the High Court under Article 226 of the Constitution of India to challenge the order passed by the appellate authority restoring the licence of the original licence holder. In this regard it is also worth mentioning that this Court in the aforsaid case has failed to notice the judgement of the Apex Court in the case of ***Northern Plastics Ltd. (supra)*** wherein Apex Court has clearly held that the right of appeal is statutory right and can be availed only by those who are conferred the right of appeal under the statute itself and not by any one else.

31. Further, the Apex Court in the case of ***Ayaaubkhan Noorkhan Pathan (supra)*** which has been relied upon by this court in the case of ***Akhlaq (supra)*** has also reiterated the principles that the person who is not a party to the lis has no right to challenge an action. In the said case, the respondent no.5 in the Special Leave Petition before the Apex Court has questioned the validity of the caste certificate issued in favour of appellant (Ayaaubkhan Noorkhan Pathan). The High Court allowed the writ petition of respondent no.5 holding that respondent

no.5 has locus-standi to question the legality of caste certificate issued in favour of appellant (Ayaaubkhan Noorkhan Pathan). The Apex Court reversed the judgement of the High Court and held that respondent no.5 has no locus to challenge the caste certificate of the appellant (Ayaaubkhan Noorkhan Pathan). Paragraph 23 of the aforesaid judgement is being extracted herein below:-

"23. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus-standi to raise any grievance whatsoever. However, in the exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo-motu, in such respect.

32. Thus, for the reasons given above, the judgement of this Court in the case of ***Akhlaq (supra)*** does not come in aid of the petitioner. Accordingly, considering the fact that legislature has provided sufficient safeguard in case if there is any evasion of stamp duty by permitting the Government to prefer appeal under Section 56(1-A) of the Act, 1899, and further in case of any doubt regarding the chargeability of stamp duty under Section 31, Section 40 or Section 41, the Collector can refer the matter to the Chief Controlling Revenue Authority, in the opinion of the Court, the submission of learned counsel for the petitioner that the present is a case of evasion of heavy stamp duty which has been brought to the notice to Chief Controlling Revenue Authority by the petitioner and the Chief Controlling Revenue Authority is obliged to refer the matter to the High Court is devoid of merit and is rejected. Further, in the scheme of the Act, the words "otherwise coming to its notice' used in Section 57 of the Act gives remedy to the private party also who is one of the party to the lis to refer its case to the High Court in case it involves substantial question of law.

33. The petitioner even otherwise is not a bona-fide litigant for the reason that some family dispute is pending between the parties, and the petitioner as is evident from the pleadings in the writ petition has obtained an ex-parte decree of injunction. Thus, it is evident that the petitioner in order to espouse his personal cause, had preferred the appeal against the order of the Assistant Collector (Stamp)/Collector (Stamp), Meerut and filed an application under Section 57 of the Act, 1899 for reference to the High Court. Since, the petitioner is not a bona fide litigant and in fact has opted the remedy of appeal in order to settle his personal score, therefore, it is not a fit case of exercise of extra ordinary power by this Court under Article 226 of Constitution of India.

34. Thus, in the light of the above observations and discussions, all the four writ petitions are not maintainable and consequently, ***dismissed***. There shall be no order as to cost.

(2019)10ILR A 1866

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 4400 of 2019 connected with 38 others

M/s G.S. Convent School ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Sharma.

Counsel for the Respondents:
C.S.C., Sri Ram Bilas Yadav, Sri Yatindra.

A. Constitution of India - Art. 21 A - Right of Children to Free and Compulsory Education Act, 2009 - Legislature partly redeemed a promise made by the nation on the fateful midnight of August 1947 - Promise can be redeemed in full measure only by a faithful implementation of the legislative and Constitutional mandate. (Para 12)

B. Right of Children to Free and Compulsory Education Act, 2009 - Is a reflection of National vision, national will and national organization - Is an authoritative guide to the nature of the rights of the children, duties of the State authorities as well as the obligations of educational institutions. (Para 15 & 20)

C. Constitution of India - Art. 21 A - Right of Children to Free and Compulsory Education Act, 2009 - Scheme under therein has education and welfare of the child at its core-Every other activities revolves around this centre and all other activities subserve this noble object-It contemplate establishment of temple of learning called school not enterprises for profit called literacy kiosks or education shops. (Para 135)

D. Importance of Education - Education is supreme act of nation building and paramount activities of civilizational progress -It's purpose is to produce enlightened citizens. (Para 41)

E. Right of Children to Free and Compulsory Education Act, 2009 - Purpose of Educational institutions-All children have different aptitude but the same potentiality - The purpose of an educational institutions is to unlock the immense and diverse possibility in each child- Acknowledgement and awakening of the latent potentiality in each child is mandated in this Act. (Para 42 & 45)

F. Right of Children to Free and Compulsory Education Act, 2009 - Commercialization of Education - Education lie full prospect of national building, but it also offers possibility of private profiteering - Opportunity of nation building cannot be approached with minds of dishonest traders-Future of many cannot be jeopardized for benefit of the few-Legislature while enacting RCFCE Act, 2009, was conscious of the law laid down by Supreme Court against commercialization of education - Mushrooming schools without proper infrastructure are the blatant example of profiteering in education. (Para 58, 60 & 61)

G. Right of Children to Free and Compulsory Education Act, 2009 - Necessity of playground Scheme of the RCFCE Act, 2009 unequivocally mandates that playground and school building shall be part of one campus - In case school building and playground are situated in separate plots of land which are not compact or contiguous, school will not satisfy the criteria of barrier free access. (Para 77, 78 & 79)

H. Right of Children to Free and Compulsory Education Act, 2009 -

Section 18 - Commence with negative phrase namely, 'no school' and further uses the word 'shall' while requiring the school to obtain certificate of recognition from competent authority - These features establish that the provisions are mandatory in nature. (Para 66, 67 & 69)

I. Uttar Pradesh Right of Children to Free and Compulsory *Education Rules, 2011* - GOs. dated 08.05.2013 and 11.01.2019 - Inconsistence with and in violation of Art. 21A and RCFCE Act, 2009 - Ultra vires - Writ of mandamus - he provisions of UPRCFCE Rules, 2011 and of held ultra vires, discriminatory and violative of Art. 14 of the Constitution of India - Writ of Mandamus with necessary directions issued. (Para 95, 103, 114, 116 & 155)

Writ Petitions decided (E-1)

Cases relied on: -

1. Ashoka Thakur Vs U.O.I. & ors. (2008) 6 SCC 1.

2. Apple Grove School Vs U.O.I. & ors. 2019 (3) ADJ 874.

3. St. of Haryana Vs Raghubir Dayal (1995) 1 SCC 133.

4. Sharif-Ud-Din Vs Abdul Gani Lone (1980) 1 SCC 403.

5. Vikas Trivedi Vs St. of U.P. & ors. (2013) 2 UPLBEC 1193.

6. Avinash Mehrotra Vs U.O.I & ors. (2009) 6 SCC 398.

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

Introduction

1. The writ petitions in this bunch have been instituted by various schools and school managements. One set of writ petitions pray for grant of government aid. The second set of petitions pray for grant of recognition to the schools from the U.P. Basic Shiksha Parishad (U.P. Board of Primary Education).

Submissions of the counsels

2. The learned counsels for the petitioners submit that the petitioners claim the reliefs in the writ petitions by virtue of the rights conferred by Article 21A of the Constitution of India read with the Right of Children to Free and Compulsory Education Act, 2009, the Rules framed thereunder and the judgement of the Hon'ble Supreme Court in the case of ***State of U.P. v. Pawan Kumar Dwivedi,*** reported at ***(2014) 9 SCC 692*** and the judgment of this Court in ***Paripurna Nand Tripathi Vs. State of U.P.,*** reported at ***2015 (3) ADJ 567.*** Learned counsels for the petitioners also pressed the Government Order dated 08.05.2013 and the Government Order dated 11.01.2019 in aid of their claims. Some counsels admit the schools lack playgrounds. But the requirement for playgrounds has been waived in the Government Order dated 08.05.2013. The need to have a playground in the school premises is optional in the Government Order dated 11.01.2019. As per the Government Order dated 11.01.2019 the playground need not be in the name of the school, nor is it required to be in the school premises. It is contended that the petitioners satisfy the criteria for affiliation and grant of aid posited by the Government Order dated 08.05.2013 and the Government Order dated 11.01.2019. Grant of government aid and recognition respectively, on the foot of the Government Order dated 08.05.2013 and Government Order dated 11.01.2019 as are applicable to the respective cases.

3. Sri Neeraj Tripathi, learned Additional Advocate General assisted by Sri Shashank Shekhar, learned Additional Chief Standing Counsel for the respondent-State would contend that the

rights of the institutions are governed and regulated by the the Right of Children to Free and Compulsory Education Act, 2009 read with The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011. They further submit that the Government Orders dated 08.05.2013 and 19.01.2013 prescribe the mandatory criteria which need to be satisfied before the institutions can claim government aid or demand recognition.

4. I have heard the learned counsel for the parties.

5. On the face of it, the prayers made in the writ petitions are innocuous and orders were passed routinely by this court to decide the representations of the petitioners for grant of aid or recognition as the case may be. I too was inclined to dispose of these writ petitions on similar lines. However, some facts were troubling.

6. Admittedly, many petitioners' schools do not have playgrounds. While others do not have playgrounds in the school premises or in their names. This deficiency as stated earlier, is defended on the strength of the Government Orders dated 08.05.2013 and 11.01.2019 respectively. However, this inadequacy does not seem to be consistent with the Right of Children to Free and Compulsory Education Act, 2009 and Article 21A of the Constitution of India.

7. Thus, in the course of arguments, fault lines were exposed in the respective cases of the petitioners and the Government Orders. These facts necessitated a more searching enquiry of the issues at hand.

8. It is important to be simple but dangerous to be simplistic. The issues may look innocuous on the surface but the provisions carry distant consequences. Avoiding an in depth consideration of the issues would amount to an abdication of judicial functions by this Court.

9. The State was given adequate opportunity to state their defence in regard to absence of playgrounds in schools in the Government Order dated 08.05.2013 and the vague provisions for playgrounds in the Government Order dated 11.01.2019 and reconcile the same to Article 21A of the Constitution of India, the Right of Children to Free and Compulsory Education Act, 2009. The respondents were also called upon to enter details of implementation of the Right of Children to Free and Compulsory Education Act, 2009. Counter affidavits of the respondents are in the record and have been perused.

10. The ceaseless quest for knowledge is a salient feature of Indian civilization. The position of knowledge in Indian civilization is in ways distinct from the endeavours of other civilizations. Hellenic thought is founded on reason while Middle Eastern philosophy rests on revelation. Indian quest for knowledge, while always embracing reason and not denying revelation, insists on realization as it goal.

11. The constant war against ignorance was a consistent preoccupation of the founding fathers of modern India. Eradication of ignorance in all forms and educating all young Indians by all means, is the avowed object of the Indian Parliament in promulgating Article 21A of the Constitution and enacting the Right of Children to Free and Compulsory Education Act, 2009. Literacy may equip

one for livelihood but education empowers all for life. The legislature chose education over literacy.

12. By promulgating Article 21A of the Constitution of India and enacting the Right of Children to Free and Compulsory Education Act, 2009, the legislature partly redeemed a promise made by the nation on the fateful midnight of August 1947. But the promise can be redeemed in full measure only by a faithful implementation of the legislative and constitutional mandate.

13. Best legislation and most noble intentions of the legislature can be thwarted by indifferent application of the law or defeated by poor implementation of the enactments. In the instant case, the stakes are too high and the intention too sacrosanct for the authorities to fail the legislature.

14. An education system manifests the reach of human vision, the power of human will, and the efficacy of human organization to regulate and alter the course of evolution of human society and the destiny of human beings.

15. The promulgation of the Right of Children to Free and Compulsory Education Act, 2009 is a reflection of national vision, national will and national organization. The implementation of the Right of Children to Free and Compulsory Education Act, 2009, is the test of national vision, national will and national organization.

Responsibility of Courts (Ashoka Thakur v. Union of India and others, reported at 2008 (6) SCC 1)

16. The Courts have a special responsibility to uphold and implement the fundamental right to education under Article 21A of the Constitution and the Right to Education Act, 2009. In the scheme of the fundamental rights guaranteed under the Constitution, the Hon'ble Apex Court seated the right to education conferred by Article 21A of the Constitution at the summit. While holding so, the Hon'ble Supreme Court in the case of ***Ashoka Thakur vs. Union of India and others,*** *reported at* ***2008(6) SCC 1*** also emphasized the special duties of the judiciary in implementing the aforesaid right. The Hon'ble Supreme Court in ***Ashoka Thakur (supra)*** held thus:

"482.....It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education. "

17. Article 21A of the Constitution of India, being the pivot on which the controversy hinges is extracted hereunder for ease or reference.

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

18. The statement of objects and reasons of the Right of Children to Free and Compulsory Education Act, 2009 manifests the legislative intent. The objects and reasons of the Right of Children to Free and Compulsory Education Act, 2009 are as follows:

"STATEMENT OF OBJECTS AND REASONS *-The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education.*

2. Article 21A, as inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, provides for free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such manner as the State may, by law, determine.

3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008, is proposed to be enacted which seeks to provide,--

(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

(b) "compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

(c) "free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance redressal mechanism.

4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

5. It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in article 21-A of the Constitution.

6. The Bill seeks to achieve this objective."

19. Certain amendments were made in the Right of Children to Free and Compulsory Education Act, 2009 by amending Act No.30 of the 2012. Regard has to be paid to the statement of objects and reasons of the Amendment Act, 2012, which is as under:

Amendment Act 30 of 2012- Statement of Objects and Reasons.- *Consequent upon the enactment of the Constitution (Eighty-sixth Amendment) Act, 2002, the Right of Children to Free and Compulsory Education Act, 2009 which provides for free and compulsory education to all children of the age of 6 to 14 years was enacted.*

2. Clause (d) of section 2 of the aforesaid Act of 2009 defines the expression "child belonging to disadvantaged group" to mean a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economic, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification. However, children with disabilities, even though disadvantaged, are not specifically included in that clause. Children with disabilities constantly experience barriers to the enjoyment of basic rights, and to their inclusion in society. It is, therefore, proposed to include children with disabilities in the definition of "child belonging to disadvantaged group" with a view to ensuring that their specific needs are given precedence in the elementary education system in the country, and enable them, over time, to participate as full and equal members of the community in which they live. Secondly, the proviso to sub-section (2) of section 3 of the Act states that "a child suffering from disability, as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1995 (Act 1 of 1996) shall have the right to pursue free and compulsory elementary education in accordance with the provisions of Chapter V of the said Act"It has been pointed out that Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1995, does not cover children with cerebral palsy, mental retardation, autism and multiple disabilities, who are covered under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1992 (44 of 1999). Accordingly, it is proposed that children with cerebral palsy, mental retardation, autism and multiple disabilities are also explicitly covered under the Right of Children to Free and Compulsory Education Act, 2009.

3. Sections 21 and 22 of the Right of Children to Free and Compulsory Education Act, 2009 provides for the constitution and functions of the School Management Committee and preparation of school development plan by the School Management Committee. However, unaided schools, not receiving any kind of aid or grants from the appropriate Government or local authority to meet their expenses, are exempted from constituting School Management Committees. Article 30 of the Constitution provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of

their choice. It is, therefore, proposed to amend section 21 of the aforesaid Act so as to provide that the School Management Committees constituted under sub-section (1) of section 21 of the aforesaid Act in respect of minority institutions shall function only in an advisory capacity. It is also proposed to amend section 22 of the Act so as to provide that the functions envisaged under the said section 22 for School Management Committees would not apply to minority institutions.

4. The Bill seeks to achieve the above objects."

Scheme of the Right of Children tFree and Compulsory Education Act, 2009

20. The scheme of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as 'the Act of 2009), is an authoritative guide to the nature of the rights of the petitioners, the rights of the children, the duties of the State authorities as well as the obligations of educational institutions. The scheme of the Right of Children to Free and Compulsory Education Act, 2009 is considered in the succeeding paragraphs.

21. Section 1(4) of the Right of Children to Free and Compulsory Education Act, 2009 confers rights upon the Children without diluting the mandate of Articles 29 and 30 of the Constitution of India. Section 1(4) reads as under:

"1(4) Subject to the provisions of articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education."

22. Section 2 contains the definition clauses. Section 2(a) defines appropriate government as under:

"2(a) "appropriate Government" means--

(i) in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;

(ii) in relation to a school, other than the school referred to in sub-clause

(i), established within the territory of--

(A) a State, the State Government;

(B) a Union territory having legislature, the Government of that Union territory;"

23. Sections 2 (c), 2(d), 2(e) and 2(ee) give the definition of child and children of the different groups and categories. The provisions of Sections 2(c), 2(d), 2(e) and 2(ee) state thus:

"2(c) "child" means a male or female child of the age of six to fourteen years;

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

(e) "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;

[(ee) "child with disability" includes,--

(A) a child with "disability" as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);

(B) a child, being a person with disability as defined in clause (j) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999);

(C) a child with "severe disability" as defined in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999).]"

24. The other clauses of Sections 2(f), 2(h), 2(l), 2(m), 2(n), 2(o), 2(p) and 2(q), which are relevant, speak as follows:

"2(f) "elementary education" means the education from first class to eighth class;

(h) "local authority" means a Municipal Corporation or Municipal Council or Zila Parishad or Nagar Panchayat or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the school or empowered by or under any law for the time being in force to function as a local authority in any city, town or village;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "Schedule" means the Schedule annexed to this Act;

(n) "school" means any recognised school imparting elementary education and includes--

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;

(o) "screening procedure" means the method of selection for admission of a child, in preference over another, other than a random method;

(p) "specified category", in relation to a school, means a school known as Kendriya Vidyalaya, Navodaya Vidyalaya, Sainik School or any other school having a distinct character which may be specified, by notification, by the appropriate Government;

(q) "State Commission for Protection of Child Rights" means the State Commission for Protection of Child Rights constituted under section 3 of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006). "

25. Chapter II of the Right of Children to Free and Compulsory Education Act, 2009 vests the right of the compulsory education in all children between the ages of 6 to 14 years. Sections 3 and 4, which create the entitlement, are extracted hereunder:

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

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

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

Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe

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

4. Special provisions for children not admitted to, or who have not completed, elementary education.-- *Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age:*

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

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

26. Chapter III is critical to the controversy and deals with the duties of the appropriate government, local authorities and parents. Understanding the duties of appropriate government and local authorities provide the insight into the obligations cast by the legislature upon various authorities to achieve the goal set out by the Right of Children to Free and Compulsory Education Act, 2009. Sections 6, 7, 8 and 9 being particularly relevant to the instant controversy are stated below:

"6. Duty of appropriate Government and local authority to establish school.--*For carrying out the provisions of this Act, the appropriate Government and the local authority shall establish, within such area or limits of neighbourhood, as may be prescribed, a school, where it is not so established, within a period of three years from the commencement of this Act.*

7. Sharing of financial and other responsibilities.--(1) *The Central Government and the State Governments shall have concurrent responsibility for providing funds for carrying out the provisions of this Act.*

(2) The Central Government shall prepare the estimates of capital and recurring expenditure for the implementation of the provisions of the Act.

(3) The Central Government shall provide to the State Governments, as grants-in-aid of revenues, such percentage of expenditure referred to in sub-section (2) as it may determine, from

time to time, in consultation with the State Governments.

(4) The Central Government may make a request to the President to make a reference to the Finance Commission under sub-clause (d) of clause (3) of article 280 to examine the need for additional resources to be provided to any State Government so that the said State Government may provide its share of funds for carrying out the provisions of the Act.

(5) Notwithstanding anything contained in sub-section (4), the State Government shall, taking into consideration the sums provided by the Central Government to a State Government under sub-section (3), and its other resources, be responsible to provide funds for implementation of the provisions of the Act.

(6) The Central Government shall--

(a) develop a framework of national curriculum with the help of academic authority specified under section 29;

(b) develop and enforce standards for training of teachers;

(c) provide technical support and resources to the State Government for promoting innovations, researches, planning and capacity building.

***8. Duties of appropriate Government.**--The appropriate Government shall--*

(a) provide free and compulsory elementary education to every child:

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school.

Explanation.--The term "compulsory education" means obligation of the appropriate Government to--

(i) provide free elementary education to every child of the age of six to fourteen years; and

(ii) ensure compulsory admission, attendance and completion of elementary education by every child of the age of six to fourteen years;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) provide infrastructure including school building, teaching staff and learning equipment;

(e) provide special training facility specified in section 4;

(f) ensure and monitor admission, attendance and completion of elementary education by every child;

(g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(h) ensure timely prescribing of curriculum and courses of study for elementary education; and

(i) provide training facility for teachers.

***9. Duties of local authority.**--Every local authority shall--*

(a) provide free and compulsory elementary education to every child:

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) maintain records of children up to the age of fourteen years residing within its jurisdiction, in such manner as may be prescribed;

(e) ensure and monitor admission, attendance and completion of elementary education by every child residing within its jurisdiction;

(f) provide infrastructure including school building, teaching staff and learning material;

(g) provide special training facility specified in section 4;

(h) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(i) ensure timely prescribing of curriculum and courses of study for elementary education;

(j) provide training facility for teachers;

(k) ensure admission of children of migrant families;

(l) monitor functioning of schools within its jurisdiction; and

(m) decide the academic calendar."

27. The provisions under Chapter IV pertain to responsibilities of schools. The schools while claiming their rights under the Right of Children to Free and Compulsory Education Act, 2009 cannot be blind to their obligations created by the statute. The said provisions which merit consideration are extracted below:

"12. Extent of school's responsibility for free and compulsory education.--*(1) For the purposes of this Act, a school,--*

(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in

clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

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

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

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

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

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

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

28. Sections 18 and 19 control the spirit of the Right of Children to Free and Compulsory Education Act, 2009 and the substance of the instant controversy. The provisions set the standards and norms including the infrastructure requirements for schools to obtain recognition. The consequences of breach of infrastructure requirements are set forth with clarity. The imperative terms of the provisions will be discussed later. The provisions have to be read in conjunction with Section 36 of the Right of Children to Free and Compulsory Education Act, 2009.

***18. No School to be established without obtaining certificate of recognition.--(**1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed.*

(2) The authority prescribed under sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner, and

subject to such conditions, as may be prescribed:

Provided that no such recognition shall be granted to a school unless it fulfils norms and standards specified under section 19.

(3) On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition:

Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognised school, shall be admitted:

Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.

(4) With effect from the date of withdrawal of the recognition under sub-section (3), no such school shall continue to function.

(5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

***19. Norms and standards for school.**--(1) No school shall be established, or recognised, under section 18, unless it fulfils the norms and standards specified in the Schedule.*

(2) Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the Schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfil the norms and standards within the period specified under sub-section (2), the authority prescribed under sub-section (1) of Section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of the recognition under sub-section (3), no such school shall continue to function.

(5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues."

***36. Previous sanction for prosecution.**--No prosecution for offences punishable under sub-section (2) of section 13, sub-section (5) of section 18 and sub-section (5) of section 19 shall be instituted except with the previous sanction of an officer authorised in this behalf, by the appropriate Government, by notification. "*

29. Schools of specific categories under the Right of Children to Free and Compulsory Education Act, 2009 have to constitute the school management committee under Section 21 of the Right of Children to Free and Compulsory Education Act, 2009. Section 21 read as under:

***21. School Management Committee.**--(1) A school, other than a school specified in sub-clause (iv) of clause (n) of section 2, shall constitute a School Management Committee consisting of the elected representatives of the local authority, parents or*

guardians of children admitted in such school and teachers:

Provided that at least three-fourth of members of such Committee shall be parents or guardians:

Provided further that proportionate representation shall be given to the parents or guardians of children belonging to disadvantaged group and weaker section:

Provided also that fifty per cent. of Members of such Committee shall be women.

(2) The School Management Committee shall perform the following functions, namely:--

(a) monitor the working of the school;

(b) prepare and recommend school development plan;

(c) monitor the utilisation of the grants received from the appropriate Government or local authority or any other source; and

(d) perform such other functions as may be prescribed.

[Provided that the School Management Committee constituted under sub-section (1) in respect of,--

(a) a school established and administered by minority whether based on religion or language; and

(b) all other aided schools as defined in sub-section (ii) of clause (n) of section 2, shall perform advisory function only.]"

30. The duties of teachers and their responsibilities towards the students are described in Section 24 of the Right of Children to Free and Compulsory Education Act, 2009. Section 24 is reproduced below:

"24. Duties of teachers and redressal of grievances.--(1) *A teacher appointed under sub-section (1) of section 23 shall perform the following duties, namely:--*

(a) maintain regularity and punctuality in attending school;

(b) conduct and complete the curriculum in accordance with the provisions of sub-section (2) of section 29;

(c) complete entire curriculum within the specified time;

(d) assess the learning ability of each child and accordingly supplement additional instructions, if

any, as required;

(e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and

(f) perform such other duties as may be prescribed.

(2) A teacher committing default in performance of duties specified in sub-section (1), shall be liable to disciplinary action under the service rules applicable to him or her:

Provided that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher.

(3) The grievances, if any, of the teacher shall be redressed in such manner as may be prescribed. "

31. Chapter V of the Right of Children to Free and Compulsory Education Act, 2009 contains the provisions pertaining to curriculum and evaluation procedure. These are germane to the controversy. Sections 29 and 30 of the Right of Children to Free and Compulsory Education Act, 2009 is extracted hereunder:

*"**29. Curriculum and evaluation procedure.**--(1) The curriculum and the evaluation procedure for elementary education shall be laid down by an academic authority to be specified by the appropriate Government, by notification.*

(2) The academic authority, while laying down the curriculum and the evaluation procedure under sub-section (1), shall take into consideration the following, namely:--

(a) conformity with the values enshrined in the Constitution;

(b) all round development of the child;

(c) building up child's knowledge, potentiality and talent;

(d) development of physical and mental abilities to the fullest extent;

(e) learning through activities, discovery and exploration in a child friendly and child-centered manner;

(f) medium of instructions shall, as far as practicable, be in child's mother tongue;

(g) making the child free of fear, trauma and anxiety and helping the child to express views freely;

(h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same."

*"**30. Examination and completion certificate.**--(1) No child shall be required to pass any Board*

examination till completion of elementary education.

(2) Every child completing his elementary education shall be awarded a certificate, in such form and

in such manner, as may be prescribed. "

32. Chapter VI of the Right of Children to Free and Compulsory Education Act, 2009 provides for the protection of rights of children. The agencies have been created to ensure an eternal vigilance over the state of education of the children, redressal of grievances and implementation of the Right of Children to Free and Compulsory Education Act, 2009. The provisions contained in Chapter VI reveal the legislative intent to ensure that the legislative goals are not defeated by executive inaction or apathy. The relevant provisions of Sections 31, 32 and 34 of the Right of Children to Free and Compulsory Education Act, 2009 are stated below:

***31. Monitoring of child's right to education.**--(1) The National Commission for Protection of Child Rights constituted under section 3, or, as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), shall, in addition to the functions assigned to them under that Act, also perform the following functions, namely:--*

(a) examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;

(b) inquire into complaints relating to child's right to free and compulsory education; and (c) take necessary steps as provided under sections 15 and 24 of the said Commissions for Protection of Child Rights Act.

(2) The said Commissions shall, while inquiring into any matters relating to child's right to free and

compulsory education under clause (c) of sub-section (1), have the same powers as assigned to them respectively under sections 14 and 24 of the said Commissions for Protection of Child Rights Act.

(3) Where the State Commission for Protection of Child Rights has not been constituted in a State, the appropriate Government may, for the purpose of performing the functions specified in clauses (a) to (c) of sub-section (1), constitute such authority, in such manner and subject to such terms and conditions, as may be prescribed.

32. Redressal of grievances.--(*1) Notwithstanding anything contained in section 31, any person having any grievance relating to the right of a child under this Act may make a written complaint to the local authority having jurisdiction.*

(2) After receiving the complaint under sub-section (1), the local authority shall decide the matter within a period of three months after affording a reasonable opportunity of being heard to the parties concerned.

(3) Any person aggrieved by the decision of the local authority may prefer an appeal to the State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of section 31, as the case may be.

(4) The appeal preferred under sub-section (3) shall be decided by State Commission for Protection of Child Rights or the authority prescribed under sub-section (3) of section 31, as the case may be, as provided under clause (c) of sub-section (1) of section 31.

34. Constitution of State Advisory Council.--*(1) The State Government shall constitute, by notification, a State Advisory Council consisting of such number of Members, not exceeding fifteen, as the State Government may deem necessary, to be appointed from amongst persons having knowledge and practical experience in the field of elementary education and child development.*

(2) The functions of the State Advisory council shall be to advise the State Government on implementation of the provisions of the Act in an effective manner.

(3) The allowances and other terms and conditions of appointment of Members of the State Advisory Council shall be such as may be prescribed."

33. Section 38 of the Right of Children to Free and Compulsory Education Act, 2009 vests rule making power in the appropriate government to make rules to carry out the provisions of the Right of Children to Free and Compulsory Education Act, 2009.

"38. Power of appropriate Government to make rules.--*(1) The appropriate Government may, by notification, make rules, for carrying out the provisions of this Act.*

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may

provide for all or any of the following matters, namely:--

(a) the manner of giving special training and the time-limit thereof, under first proviso to section 4;

(b) the area or limits for establishment of a neighbourhood school, under section 6;

(c) the manner of maintenance of records of children up to the age of fourteen years, under clause (d) of section 9;

(d) the manner and extent of reimbursement of expenditure, under sub-section (2) of section 12;

(e) any other document for determining the age of child under sub-section (1) of section 14;

(f) the extended period for admission and the manner of completing study if admitted after the extended period, under section 15;

(g) the authority, the form and manner of making application for certificate of recognition, under sub-section (1) of section 18;

(h) the form, the period, the manner and the conditions for issuing certificate of recognition, under sub-section (2) of section 18;

(i) the manner of giving opportunity of hearing under second proviso to sub-section (3) of section 18;

(j) the Other functions to be performed by School Management Committee under clause (d) of sub-section (2) of section 21;

(k) the manner of preparing School Development Plan under sub-section (1) of section 22;

(l) the salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of section 23;

(m) the duties to be performed by the teacher under clause (f) of sub-section (1) of section 24; (n) the manner of redressing grievances of teachers under sub-section (3) of section 24;

(o) the form and manner of awarding certificate for completion of elementary education under sub-section (2) of section 30;

(p) the authority, the manner of its constitution and the terms and conditions therefor, under sub-section (3) of section 31;

(q) the allowances and other terms and conditions of appointment of Members of the National Advisory Council under sub-section (3) of section 33;

(r) the allowances and other terms and conditions of appointment of Members of the State Advisory Council under sub-section (3) of section 34.

(3) Every rule made under this Act and every notification issued under sections 20 and 23 by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

(4) Every rule or notification made by the State Government under this Act shall be laid, as soon as may be after it is made; before the State Legislatures."

34. In exercise of powers under Section 38 of the Right of Children to Free and Compulsory Education Act, 2009, the Government of India framed the Right of Children to Free and Compulsory Education Rules, 2010 (hereinafter referred to as 'the Central Rules of 2010'). The Government of Uttar Pradesh also framed the U.P. Right of Children to Free

and Compulsory Education Rules, 2011 (hereinafter referred to as 'the U.P. Rules of 2011'). The U.P. Rules of 2011 also merit reference in light of the controversy at hand. The definition clauses in Rule 1 are reproduced hereunder:

*"**2. Definitions**.- (1) In these rules, unless the context otherwise requires;*
(a) "Act" means the Right of Children to Free and Compulsory Education Act, 2009;

(b) "Anganwadi" means an Anganwadi Centre established under the Integrated Child Development Services Scheme of the Ministry of Women and Child Development of the Government of India;

(c) "Appointed date" means the date of commencement of the Act i.e. April 1, 2010;

(d) "Chapter", "section" and "Schedule" means respectively Chapter, section of, and Schedule to, the Act;

(e) "Form" means a form given in the Appendix to these rules;

(f) "Neighbourhood" means a population area specified in Rule 4;

(g) "Pupil cumulative record" means record of the progress of the child based on comprehensive and continuous evaluation;

(h) "School Mapping" means planning school location to overcome social barriers and geographical distance;

(i) "Specify Norms" means the norms and standards specified schedule to the Act;

(j) "Zila Shiksha Adhikari" means a District Level Officer in Department of Basic Education or Department of Secondary Education, as the case may be.

(2) Words and expressions used in these rules not defined but defined in the Act shall have the same meanings respectively assigned to them in the Act."

35. Rule 5 provides for duties of the State Government and the local authorities.

*"**5. Duties of State Government and local authority (Sections 8 and 9).-** (1) A child attending a school of the State Government or local authority referred to in sub-clause (i) of Clause (n) of Section 2 of the Act a child attending a school referred to in sub-clause (ii) of Clause (n) of Section 2 of the Act in pursuance of Clause (b) of sub-section (1) of Section 12 of the Act and a child attending a school referred to in sub-clauses (iii) and (iv) of Clause (n) of Section 2 of the Act in pursuance of Clause (c) of sub-section (1) of Section 12 of the Act shall be entitled to free text books each year and uniform once in each year:*

Provided that a child with disability shall also be provided free special learning, support material and equipments.

Explanation - In respect of the child admitted in pursuance of Clause (b) of sub-section (1) of Section 12 and a child admitted in pursuance of Clause (c) of sub-section (1) of Section 12, the responsibility of providing the free entitlement shall be of the school referred to in sub-clause (ii) of Clause (n) of Section 2 and of sub-clauses (iii) and (iv) of Clause (n) of Section 2, respectively.

(2) For the purposes of determining and establishing neighbourhood schools, the local authority (Gram Panchayat/ Nagar Nigam/ Nagar Palika/Nagar Panchayat, as the case may be) shall undertake

school mapping, and identify all children, including children in remote areas, children with disability, children belonging to disadvantaged group, children belonging to weaker section and children referred to in Section 4, least by 31st March and every year.

(3) The local authority shall be responsible to ensure that no child is subjected to caste, class, religious or gender abuse or discrimination in the school.

(4) The local authority shall ensure that a child belonging to a weaker section and a child belonging to disadvantaged group is not segregated or discriminated against in the classroom, during mid day meals, in the play grounds, in the use of common drinking water and toilet facilities, and in the cleaning of toilets or classrooms.

6. Maintenance of records of children by local authority [Section 9(d)].- *(1) The local authority (Gram Panchayat/Nagar Nigam/Nagar Palika/Nagar Panchayat, as the case may be) shall maintain a record of all children, in its jurisdiction, through a survey, from their birth till they attain 14 years of age.*

(2) A unique identity number shall be allotted to each child by the Zila Shiksha Adhikari to ensure and monitor enrolment, attendance, learning achievement and completion of elementary education of every child.

(3) The record, referred to in sub-rule (1), shall be-

(a) updated annually;

(b) maintained transparently, in the public domain, and used for the purposes of ensuring and monitoring admission, attendance and completion of elementary education by every child residing within its jurisdiction.

(4) The record, referred to in sub-rule (1) shall, in respect of every child, be maintained on the prescribed format including the following detail-

(a) name, sex, date of birth, place of birth;

(b) parents' or guardians' name, address, occupation;

(c) pre-primary school /Anganwadi centre where the child attends (up to the age of 6 years);

(d) elementary school where child is admitted;

(e) present address of the child;

(f) class in which the child is studying;

(g) for children between age of 6-14 years, if education is discontinued in the territorial jurisdiction of the local authority, the cause of such discontinuance;

(h) whether the child belongs to the weaker section within the meaning of Clause (e) of Section 2 of the Act;

(i) whether the child belongs to a disadvantaged group within the meaning of Clause (d) of Section 2 of the Act;

(j) details of children requiring special facilities or residential facilities on account of migration and sparse population, age appropriate admission and disability.

(5) The local authority shall ensure that the names of all children enrolled in the schools under its jurisdiction are publicly displayed in each school.

(6) The Zila Shiksha Adhikari shall ensure that the information referred to in sub-rule (4) is displayed and updated on the district website."

36. Responsibilities of the schools to admit children belonging to weaker

sections and disadvantaged groups and right to claim expenditure from the State Government are stated in Rules 7 and 8. The same read as under:

7. Admission of children belonging to weaker section and disadvantaged group (Section 12(l)(c). *- (1) The schools referred to in sub-clauses (iii) and (iv) of Clause (n) of Section 2 shall ensure that children admitted in pursuance of Clause (c) to Section 12(1) shall not be segregated from the other children in the classrooms nor shall their classes be held at places and timings different from the classes held for the other children.*

(2) The schools referred to in sub-clauses (iii) and (iv) of Clause (n) of Section 2 shall ensure that children admitted in pursuance of Clause (c) to Section 12(1) shall not be discriminated from the rest of the children in any manner pertaining to entitlements and facilities such as textbooks, library and Information, Communication and Technology (ICT) facilities, extra-curricular activities and sports.

[(3) The areas or limits of neighbourhood specified in Rule 4(1)(c) shall apply to admissions made in pursuance of clause (c) of sub-section 12(1):

Provided that the school may, for the purposes of filling up the requisite percentage of seats for children referred to in clause (c) of Section 12(1), extend these limits with the prior approval of the State Government.]

(4) The local authority (Gram Panchayat/Nagar Nigam/Nagar Palika/Nagar Panchayat, as the case may be) shall maintain a namewise list and record of all children belonging to weaker section and disadvantaged group, studying in private and specified category schools under its jurisdiction.

8. Admission of children and reimbursement of per child expenditure by the State Government [Sections 12(l)(b) and (c) and 12(2). *- (1) The process of admission of children referred to in Clauses (b) and (c) of Section 12(1) shall be totally transparent. The detail of such children applying for admission shall be maintained by the school regularly, which shall include the name, address, sex, caste, date of birth of the child and the name, address, occupation and monthly income of father/ mother/ guardian, detail of whether child belongs to weaker section or disadvantaged group. Such information shall be made public through website. Out of the total applicants, all the children who applied for admission, but not admitted for whatsoever reason, shall he informed in writing with the reason thereof. It shall also be binding for the school to follow the process of admission prescribed by the State Government from time to time.*

(2) The total annual recurring expenditure incurred by the State Government, from its own funds, and funds provided by the Central Government and by any other authority on elementary education in respect of all schools established, owned or controlled by it or by the local authority, divided by the total number of children enrolled in all such schools as on 30th September, shall be the per child expenditure incurred by the State Government.

Explanation-For the purpose of determining the per child expenditure, the expenditure incurred by the State Government or local authority on schools referred to in sub-clause (ii) of Clause (n) of Section 2 and the children enrolled in such schools shall not be included.

(3) Every school referred to in sub-clause (iv) of Clause (n) of Section 2 shall maintain a separate bank account in respect of the amount received by it as reimbursement under sub-section (2) of Section 12.

(4) Every school referred to in sub-rule (3) seeking reimbursement, shall provide the list of children, with their unique identity number and details of item wise expenditure incurred by the school with all requisite details along with evidence on the form, prescribed by the Director of Education (Basic) by 31st October of every year:

Provided that where such schools are already under obligation to provide free education to a specified number of children on account of it having received any land, building equipment or other facilities either free of cost or at a concessional rate, such schools shall not be entitled for reimbursement to the extent of such obligation.

(5) The Zila Shiksha Adhikari after necessary verification will transfer the amount of reimbursement due in the account referred to in sub-rule (3) and shall make the information public through website.

(6) If at any stage, the school is found having sought and received reimbursement on the basis of concealment of facts or wrong claim, it will have to deposit twice the amount so received, in the Government exchequer with action for withdrawal of recognition of the school and proceeding under the relevant sections of Indian Penal Code, and the amount shall be recoverable by the Collector as arrears of land revenue."

37. Rules 11 and 12 relate the recognition and withdrawal of recognition to the schools. These lie at the heart of the controversy. Rules 11 and 12 read as under:

11. Recognition to school (Section 18). *- (1) Every school, other than a school established, owned or controlled by the Central Government, State Government or local authority, established before the commencement of the Act shall make a self-declaration in Form-1 to the concerned Zila Shiksha Adhikari, who shall be the authorised officer, regarding its compliance or otherwise with the norms and standards specified in the Schedule and fulfilment of the following conditions, namely-*

(a) the school is run by a society registered under the Societies Registration Act, 1860 (21 of 1860) or a public trust constituted under any law for the time being in force;

(b) the school is not run for profit to any individual, group or association of individuals or any other persons;

(c) the school conforms to the values enshrined in the Constitution;

(d) the school building or structures or the grounds are used only for the purposes of education and skill development;

(e) the school is open to inspection by any officer authorised by the State Government, or local authority;

(f) the school furnishes such reports and information as may be required by the Zila Shiksha Adhikari/Director of Education or any other authorised officer from time to time and complies with such instructions of the State Government/local authority as may be issued to secure the continued fulfilment of the condition of recognition or the removal of deficiencies in working of the school.

(2) Every self-declaration received in Form-I shall be placed by the Zila Shiksha Adhikari in public domain through website within fifteen days of its receipt.

(3) The Zila Shiksha Adhikari shall conduct on site inspection of such schools which claim in Form-I to fulfil the norms, standards and the conditions mentioned in sub-rule (1) within three months of the receipt of the self-declaration.

(4) After the inspection referred to in sub-rule (3) is carried out, the inspection report shall be placed by the Zila Shiksha Adhikari in public domain and schools found to be conforming to the norms, standards and the conditions shall be granted recognition by the Zila Shiksha Adhikari in Form II, within a period of 60 days from the date of inspection.

(5) The list of schools which do not conform to the norms, standards and conditions mentioned in sub-rule (1) shall be prepared and made public by the Zila Shiksha Adhikari through a notification mentioning the deficiencies and shall be displayed on website. Such schools may request the Zila Shiksha Adhikari for an on site inspection for grant of recognition anytime within the next two years.

(6) Schools, which do not conform to the norms, standards and conditions mentioned in sub-rule (1) even after three years from the commencement, of the Act, shall cease to function.

(7) Every school, other than a school established, owned or controlled by the Central Government, State Government or local authority, established after the commencement of the Act shall conform to the norms, standards and conditions mentioned in sub-rule (1) in order to qualify for recognition.

(8) Every Zila Shiksha Adhikari shall maintain a register of recognised schools and allot a number to every such school.

12. Withdrawal of recognition to school [Section 18(3)]. *- (1) Where the Zila Shiksha Adhikari on his own motion, or on any representation received from any person, has reason to believe, to be recorded in writing, that a school recognised under Rule II, has violated one or more of the conditions for grant of recognition or has failed to fulfil the norms and standards specified in the Schedule, he shall act in the following manner-*

(a) issue a notice to the school specifying the violations of the condition of grant of recognition and seek its explanation within one month;

(b) in case the explanation is not found to be satisfactory or no explanation is received within the stipulated time period, the Zila Shiksha Adhikari shall cause can an inspection of the school, to be conducted by a Committee of three members comprising of Government representatives and one educationist. The Committee shall make due inquiry and submit its report, along with its recommendations for continuation of recognition or its withdrawal, within a period of 20 days of such inspection to the Zila Shiksha Adhikari. The Committee referred to above shall be constituted by the District Magistrate and the District Magistrate shall have power to change the members of the Committee.

(2) The Zila Shiksha Adhikari, on the basis of the recommendations of the Committee shall send letter within 10 days seeking explanation from the concerned school and give 30 days time for submitting the explanation and after due examination of the explanation

received or in case the explanation is not received then on the basis of records /documents, send his recommendations to the State Education Department within a period of one month thereafter:

Provided that the District Magistrate shall have the authority to get the recommendation of the Committee to be re-examined before its submission to the State Education Department.

(3) The State Education Department, shall, on the basis of the recommendations referred to in sub-rule (2), take decision within 30 days of the receipt of the recommendations and convey it to the Zila Shiksha Adhikari,

(4) The Zila Shiksha Adhikari shall, on the basis of the decision of the State Education Department, pass a speaking order canceling the recognition granted to the school within 7 days from the receipt of the decision. The order of derecognition shall be operative from the immediately succeeding academic year and shall specify the neighbourhood schools to which the children of the derecognised schools shall be admitted.

(5) The order made under sub-rule (4) shall be conveyed to the respective local authority and shall be placed in the public domain through display on website."

38. Duties of the teachers stated in Rule 19 are as under:

***19. Duties to be performed by teachers [Section 24(l)(f)]**. - A teacher shall-*

(a) be accountable to respective local authority and School Management Committee in regard to maintain regularity arid punctuality in attending school, regular teaching, regular correction of the written work of the students and completion of entire curriculum within the specified time;

(b) monitor the regular attendance, learning ability and progress of every child in school thereof, share students' performance with parents on a regular basis;

(c) cooperate " in managing the affairs of School Management Committee, when required;

(d) help the local authority for admission of all children in school, as required, within the jurisdiction of local authority;

(e) shall maintain a file containing the pupil cumulative record for every child to check child's understanding of knowledge and his or her ability to apply the same and for continuous evaluation, and on the basis of which shall award the completion certificate.

(2) In addition to the duties mentioned in sub-rule (1) and the functions specified in Clauses (a) to (e) of sub-section (1) of Section 24, a teacher shall perform the following duties assigned to him or her-

(a) participation in training programmes;

(b) participation in curriculum formulation, and development of syllabi, training modules and textbook development;

(c) cooperate in internal and external school assessment initiatives.

(3) The appointing authority of teachers shall incorporate duties mentioned in Section 24(1) of the Act and responsibility as laid down in Rules 19(1) and (2) above, in the service rules of the teachers as conditions of service. The service rules shall also provide for consideration of outcomes of internal and external school assessments as conducted

under Rules 22(3-a) and (3-b) in deciding rewards and punishments as well as career growth of teachers."

39. The curriculum and the creation of academic authorities is made in part VII, Rule 22.

22. Academic Authority (Section 29). *- (1) For the purpose of Section 29 the State Council of Educational Research and Training shall lay down the curriculum and evaluation procedure for elementary education.*

(2) The State Council of Educational Research and Training while laying down the curriculum and evaluation procedure, shall perform following functions-

(a) formulate the relevant and age appropriate syllabus and textbooks and other learning material;

(b) develop in-service teacher training design; and

(c) prepare guidelines for putting into practice continuous and comprehensive evaluation.

(3) The State Council of Educational Research and Training through internal and external organisations shall design and implement a process of holistic school quality assessment on a regular basis-

(a) Performance of schools shall be assessed independently at least once a year through a departmental assessment and mandatorily every two years through an assessment conducted by as external agency. For the annual independent assessment the State Council of Educational Research and Training shall constitute an appropriate question bank on the basis of which the District Institute of Education and Training shall conduct an assessment on a random sample basis for each blockwise to the District Magistrate and Zila Basic Shiksha Adhikari by last week of December every year.

(b) External agency for the purpose could be, inter alia, drawn from amongst Faculty of Education Department of various Universities and Colleges, various Research Institutes, reputed National Level Organisations/Non-Government Organisation involved in Basic Education. Detailed terms of references be drawn and results be furnished within six months from the assignment of the assessment by the external agency. The report shall be published as a State Level School and Learning Assessment Report.

Parametres for the external biennial assessment will, inter alia be as follows-

- Students' learning achievement levels;

- Availability and use of textbooks, teacher guides and teaching learning materials in classroom teaching;

- Opportunity to students for individual and group work;

- Regular correction of the written work by the teachers;

- Teachers' punctuality in attending schools and regularity in conduct of teaching learning;

- Sharing of students' performance with parents on a regular basis;

- Observation of teachers ability to teach and conduct classroom;

- Percentage coverage of annual curriculum.

The report shall, inter alia, furnish the outcomes of the school assessment districtwise in descending order to the State Government State Council of Educational Research and

Training and Sarva Shiksha Abhiyan Programme, for relevant action thereafter and will furnish blockwise outcomes of the assessment to the District Magistrate and Zila Basic Shiksha Adhikari for remedial action."

40. The creation of State Commission for Protection of Child Rights and manner of furnishing complaints are stated in Rules 24 and 25. Rules 24 and 25 read as under:

*"**24. Performance of functions by the State Commission for Protection of Child Rights (Section 31).-** (1) Till such time as the State Government sets up the State Commission for Protection of Child Rights, it shall constitute an interim authority known as the Right to Education Protection Authority (REPA).*

(2) The Right to Education Protection Authority (REPA) shall consist of the following, namely-

(a) a Chairperson who is a person of high academic repute or has been a High Court Judge or has done outstanding work for promoting the rights of children; and

(b) two members, or whom at least one shall be a woman, from the following areas, from amongst persons of eminence, ability, integrity, standing and experience in-

(i) education;

(ii) child health care and child development;

(iii) juvenile justice or care of neglected or marginalised children or children with disability;

(iv) elimination of child labour or working with children in distress;

(v) child psychology or sociology; or

(vi) educational or administrative management.

(3) The National Commission for Protection of Child Rights Rules, 2006 shall, so far as pertains to the terms and conditions, mutatis mutandis apply to the Right to Education Protection Authority (REPA).

(4) All records and assets of the Right to Education Protection Authority (REPA) shall be transferred to the State Commission for Protection of Child Rights immediately after its Constitution.'

(5) In performance of its functions, the State Commission for Protection of Child Rights or the Right to Education Protection Authority (REPA), as the case may be, may also act upon matters referred to it by the State Advisory Council.

(6) The State Government shall consist a Cell in the State Commission for Protection of Child Rights or the Right to Education Protection Authority (REPA) as the case may be, which may assist the Commission or the Right to Education Protection Authority (REPA) in performance of its functions under the Act.

***25. Manner of furnishing complaints before the State Commission for Protection of Child Rights (Section 31)**. - (1) The State Commission for Protection of Child Rights or the Right to Education Protection Authority (REPA) as the case may be, shall set up a child help line, accessible by letter/telephone/SMS and which would act as the forum for aggrieved child or guardian to register complaint regarding violation of rights under the Act, in a manner that records his/her identity but does not disclose it.*

(2) Initially a complaint shall be made to Village Education Committee/Ward Education Committee through its member-secretary. After decision of Village Education Committee/Ward Education Committee, appeal may be made to block level Assistant Basic Shiksha Adhikari/Nagar Shiksha Adhikari, as the case may be. Second appeal may be made to Zila Panchayat under Section 10 for matters related to rural area and to Municipality under Section 10-A for matters related to urban area of the Uttar Pradesh Basic Education Act, 1972.

All complaints shall be monitored by Uttar Pradesh Basic Shiksha Parishad through transparent and prompt action online mechanism."

Education-General

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

(Thomas Jefferson)

41. The legislative concept of education distilled from the scheme of the Right of Children to Free and Compulsory Education Act, 2009 is stated in the succeeding paragraphs. Education is the supreme act of nation building and the paramount activity of civilizational progress. When education has flourished, societies have prospered. The purpose of education is to produce enlightened citizens. An enlightened citizenry is the strongest bulwark of the rule of law and holds the real promise of future achievements. Education is the iron clad assurance against a decay of any civilization or fall of any nation.

42. True education nurtures individual excellence and fosters social responsibilities. All children have different aptitudes but the same potentialities. The purpose of an education system is to unlock the immense but diverse possibilities in each child.

43. Education is a holistic process, which engages human life at different levels, physical, intellectual, social and moral. Education develops an integrated personality by honing intellectual skills, exercising physical abilities, and enhancing social interface.

Concept of education under the Right of Children to Free and Compulsory Education Act, 2009:

44. The approach of the legislature to education is multifaceted and not unifocal. Section 29 of the Right of Children to Free and Compulsory Education Act, 2009 underscores the fact that the legislative approach is global.

45. The acknowledgment and awakening of the latent potentiality in each child is mandated in the Right of Children to Free and Compulsory Education Act, 2009. The provisions clearly show the legislative intent to develop a culture of learning through the activities, discovery and exploration in a child centered manner. Thus creating an educational culture where a child develops a rational process of thinking.

46. The legislature was acutely aware of pit-falls of obsession with scholastic achievements to the exclusion of all other aspects of human personality and growth. Scholastic achievements and training have due importance in the statute. The emphasis made by the

legislature "to the all around development of the child" has to be given due weight.

Environment Consciousness & Education

47. The mandate of Section 29 to bring the academic curriculum in conformity with "the values enshrined in the Constitution," "all around development of the child," "building up of child's knowledge, potentiality and talent, "comprehensive and continuous evaluations of child", "understanding of knowledge and his or her ability to apply the same" highlights legislative purpose. Education as contemplated under the Act should not only foster individual excellence but also cultivate social responsibility.

48. Environmental degradation poses a mortal threat to planet. Many forms of life have disappeared, while others stand on the brink of extinction. Human race bears the entire blame for environmental degradation. Human race has to shoulder full responsibility for nurturing the environment back to health and discharge its duties for protection of the environment. Knowledge of the environment, understanding of environmental issues and readiness to contribute to protection of the environment has to form part of any concept of education.

Sports and Education.

"From the solemn gloom of the temple children run out to sit in the dust,
God watches them play and forgets the priest."

(Rabindranath Tagore)

49. Section 29(2) (a) and (d) of the Right of Children to Free and Compulsory Education Act, 2009, needs further attention. The legislative purpose is not far to seek.

50. Sports and various regimes of physical activities are integral to education. Sporting infrastructure is indispensable for learning in schools. Sporting activities strengthen nerves and sinews, and enhance physical and mental strength. Sports develop camaraderie, instill discipline and imbibe leadership tenets. Sports ensure good health and foster character qualities which contribute to the overall growth of the personality. The diverse individual and social skills learnt on the sports field always endure to the benefit of an individual and cumulatively to the strength of a nation. Emotional intelligence is sharpened more in an open play-field than in an enclosed classroom.

51. Yuval Noah Harari in his book "Sapiens" after referencing various studies and scientific researches states that "playing is the mammalian way of learning social behaviour."

52. The spirit of the game imbibed while playing the game has a critical role in developing the personality of a person.

53. At the intersection of the life and law, literature at times shows the way. The enduring importance of sports, was best brought out in the poem Vitai Lampada. A tense situation, faced up in a critical school cricket match, imparts lessons which hold one in good stead to deal with dire challenges, in later life.

54. The team spirit imbibed on sports field, is for all times. The lessons

learnt, for persevering, in the face of adverse situations, are seared in one's soul. The exhortations of one's teammates, are etched in one's memory forever. And even beyond that, the legacy is left for generations to follow. So, "play up, play up, play the game."

55. The importance of sports in education was emphasized by this Court in ***Apple Grove School Vs. The Union of India and others,*** reported ***2019 (3) ADJ 874 thus***:

"18. The schools of today are the cradle of Indian leadership of tomorrow. The schools of today owe it to the future generations to provide the best infrastructure and facilities to ensure that they nurture excellence. Education is not only about learning from books in an enclosed classroom, but it is equally about imbibing sterling character traits in open playfields. The importance of sports and playgrounds to develop strength, mental and physical is too obvious to be stated. Education is not about cramming but learning. Education is about honing intellectual abilities, developing sterling character traits and building physical strength. An integrated and all around development of the human personality and spirit is the essence of education. Sports play a paramount role in all these endeavours. If sporting activities are integral to education, playing fields are indispensable to schools. In fact many are persuaded by the view with good reason, that the Battle of Waterloo was won on the playing fields of Eton."

56. The various provisions of the Right of Children to Free and Compulsory Education Act, 2009, relating to promotion of sports, integrate sports into curriculum of the schools. The obligation cast on the authorities, and the schools, to create an environment for overall development including the "physical abilities of a child", is reflected in the provisions of the Right of Children to Free and Compulsory Education Act, 2009.

57. The provisions of the Right of Children to Free and Compulsory Education Act, 2009 relating to infrastructure, also create sports facilities. Promotion of sports by the schools, and creation of infrastructure for sports, in the schools, are clearly mandatory under the Right of Children to Free and Compulsory Education Act, 2009.

Commercialization of Education.

58. In education lie full prospects of nation building, but education also offers great possibilities of private profiteering. Opportunities of nation building cannot be approached with the minds of dishonest traders. Acts of nation building cannot be compromised by yielding to expediency or short term gains. The future of the many cannot be jeopardized for the benefit of the few.

59. The courts long upheld the right to education and were simultaneously alerted to the vagaries of profiteering in education. The courts have consistently and firmly set their face against the commercialization of education or profiteering in education.

60. The legislature while enacting the the Right of Children to Free and Compulsory Education Act, 2009 was conscious of the law laid down by the

Hon'ble Supreme Court against commercialization of education. It was also cognizant of readiness of school managements to compromise the interests of students in their consuming quest for profits.

61. Mushrooming schools without proper infrastructure are the blatant examples of profiteering in education. The legislative response to the malady of commercialization of education was equal to the menace.

School Infrastructure under the Right of Children to Free and Compulsory Education Act, 2009

62. The provisions regarding minimum infrastructure requirements other facilities in schools stated in the earlier part of the judgment, will now be construed.

63. Sections 18 and 19 of the Right of Children to Free and Compulsory Education Act, 2009, Schedule of the Right of Children to Free and Compulsory Education Act, 2009, Rule 11 and Form I of the U.P. Rules, Form 2 Rule 11(4) of the U.P. Rules and also Rules 15 read with Form I of the Central Rules, 2010 and Rule 15 of the Central Rules are directly in issue. Section 30(6) of the Right of Children to Free and Compulsory Education Act, 2009 would also assist interpretation of the provisions relating to infrastructure.

64. Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 contemplates that after the commencement of the Act no school shall be established without obtaining a certificate of a recognition from the competent authority. The norms and standards for establishing the schools are provided in Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 and duly specified in the Schedule.

65. The words employed by the legislature, in the aforesaid provisions as well as the Schedule, provide the first and most reliable guide to the intent of the legislature. The legislative purpose discussed in the preceding part of the judgment shall also assist in determining the nature of the provisions.

66. The rules of interpretation of statutes are well well by judicial authority. In this regard, the law laid down by the Hon'ble Supreme Court in the case of ***State of Haryana Vs. Raghubir Dayal,*** reported at ***(1995) 1 SCC 133*** and in the case of ***Sharif-Ud-Din Vs. Abdul Gani Lone,*** *reported at* ***(1980) 1 SCC 403*** are instructed. The Full Bench of this Court in the case of ***Vikas Trivedi Vs. State of U.P. and others***, reported at ***(2013) 2 UPLBEC 1193*** also delineated the rules of statutory interpretation with clarity. These authorities shall guide the enquiry into the mandatory nature or otherwise of the provisions in issue.

67. Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 commences with the negative phrase namely, "no school", and further uses the word "shall" while requiring the schools to obtain a certificate of recognition from the competent authority. Similarly, the proviso to Section 18(2) of the Right of Children to Free and Compulsory

Education Act, 2009 also commences with a negative words "no such recognition" and also employs the word "shall" while requiring a school to fulfill norms and standards specified in Section 19 of the Right of Children to Free and Compulsory Education Act, 2009.

68. The consequences of contravention of preconditions of infrastructure for recognition are also provided in Section 18 of the Right of Children to Free and Compulsory Education Act, 2009. Contravention of the said provisions is on the pain of withdrawal of recognition. Section 18(5) of the Right of Children to Free and Compulsory Education Act, 2009 is a penal provision which contemplates imposition of fine upon the erring institution.

69. Section 36 of the Right of Children to Free and Compulsory Education Act, 2009 states that violations of Section 18(5) and Section 19(5) of the Right of Children to Free and Compulsory Education Act, 2009 are offences for which prosecution can be instituted with the previous sanction of the officer authorized in this behalf by the appropriate government by notification. These features establish that Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 is mandatory in nature.

70. Section 19 of the Schedule stands on a similar footing. Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 also employs negative words "no school" at the commencement of the provision. The word "shall" has also been used. Section 19(1) of the Right of Children to Free and Compulsory Education Act, 2009, states that no school shall be established or recognized under Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 unless it fulfills the norms and standards specified in the Schedule of the Right of Children to Free and Compulsory Education Act, 2009.

71. The provision provides a time-frame to pre-established schools to fulfill the infrastructural norms in the Schedule at their own expenses.

72. Sub-Section (3) of the Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 describes the consequences which flow from failure of a school to fulfill the prescribed norms and standards under Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 as well as the Schedule of the Right of Children to Free and Compulsory Education Act, 2009. Schools can violate the norms and standards prescribed under the Act on the pain of withdrawal of recognition. Section 19(5) of the Right of Children to Free and Compulsory Education Act, 2009 is a penal provision which contains consequences of running unrecognized institutions and has to be read with Section 36 of the Right of Children to Free and Compulsory Education Act, 2009.

73. The reasons for which Section 18 of the Right of Children to Free and Compulsory Education Act, 2009 has been held mandatory apply to Section 19 of the Act as well. Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 is mandatory.

74. The Schedule of the Right of Children to Free and Compulsory

Education Act, 2009 which is relatable to Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 provides for the mandatory norms and standards for a school, including the requirements for infrastructure. The relevant part of the Schedule can be quoted with profit to take the discussion forward. Serial nos.2 and 7 of the schedule being relevant to the issue is extracted hereunder:

Sl. No.	*Item*	*Norms and Standards*
2	*Building*	*All-weather building consisting of--* *(i) at least one class-room for every teacher and an office-cum-store-cum-Head teacher's room;* *(ii) barrier-free access;* *(iii) separate toilets for boys and girls;* *(iv) safe and adequate drinking water facility to all children;* *(v) a kitchen where mid-day meal is cooked in the school;* *(vi) Playground;* *(vii) arrangements for securing the school building by boundary wall or fencing.*
7	*Play material, games and sports equipment*	*Shall be provided to each class as required.*

75. Under the Schedule of the Right of Children to Free and Compulsory Education Act, 2009, the building means and includes the playground in the school premises.

76. The Schedule of the Right of Children to Free and Compulsory Education Act, 2009 envisages that the playground is a part of the building of the school. The requirement of "barrier free access" also under the Schedule of the Right of Children to Free and Compulsory Education Act, 2009, is complied with only if the playground, the building and other infrastructure in a school are a part of one contiguous or compact plot of land and form part of one composite campus. Similarly, the purpose of perimeter demarcation by boundary wall or fencing can be fulfilled only when the playground, building and other infrastructure are located in one campus.

77. In case the school building and the playgrounds are situated in separate plots of land which are not compact or contiguous, but separated by land which is not part of the school campus, the school will not satisfy the criteria of barrier free access. It will render futile the provision of barricading the perimeter boundary. The Schedule being relatable to Section 19 of the Right of Children to Free and Compulsory Education Act, 2009 is also a mandatory provision.

78. The provisions relating to norms and standards of infrastructure under the Right of Children to Free and Compulsory Education Act, 2009 are mandatory. Further, a playground is also a mandatory and an integral part of a school under the Right of Children to Free and Compulsory Education Act, 2009. The scheme of the Right of Children to Free and Compulsory Education Act, 2009 unequivocally mandates that the playground, and the school building shall be part of one campus which shall be constituted in a contiguous land area or a compact of land.

79. Playgrounds are essential to education like classrooms, laboratories, libraries. A school cannot be visualized without classrooms, just so, a school is incomplete without a playground.

80. The consequences of a playground which was not part of one

compact campus or a contiguous land area of the school, came up squarely for consideration before this Court in the judgment rendered in the case of ***Apple Grove School v. The Union of India and others,*** *reported at* ***2019 (9) ADJ 692.***

81. In Apple ***Grove School (supra)*** the importance of situating the playground and the school buildings in one compact and contiguous of plot was stated thus:

"19. The Court notices the fact that massive unplanned urban development has diminished open spaces and playgrounds for the coming generations. Similarly in the rush for profits school managements make the first compromises with play-fields. Sports and all that it offers by way of learning takes a back seat.

20. The playground will serve its purpose only if there is contiguity between school buildings and the playground. The playground and the school building should be part of one compact and contiguous land area. In case the playground and the school buildings/academic blocks are situated in plots of land which are separated by other plots or residential areas or roads, the access of the students to the play field from the academic blocks will not be free. The playground will play its part and make its contribution only if the access of the students to the playground is free and unimpeded. Young students should be able to run with gay abandon to the play field during their sports classes or after their academic classes without any impediment and kick the ball soaring into the sky. In case the students have to pass through the residential areas, traffic snarls, labyrinth of streets to access the playground, the purpose of a play field would be defeated.

21. Students should have a "walk in" or rather a "run in" access to the playground."

82. This Court in the case of ***Apple Grove School (supra)*** has found that the playground which is not situated in the school campus is of no avail to the children. The scheme is not workable. Such playground does not serve the purpose of a playground, but is an eye-wash by the management, to obtain recognition of the institution.

83. Seen in light of the law laid down in ***Apple Grove School (supra),*** a playground which is not a part of the contiguous land area or a compact piece of land where the rest of the infrastructure of the school including school buildings stand, would render the scheme of the Right of Children to Free and Compulsory Education Act, 2009 unworkable. In fact, a playground so situated would negate the purpose of the playground.

Declarations & Inspections under the Right of Children to Free and Compulsory Education Act, 2009

84. The Form-1, which is part of appendix to The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011, is relatable to sub-rule (1) of rule 15 of the Central Rules, 2010. The Form-1 pertains to the self declaration-cum-application for grant of recognition of schools. The parts of the Form-1, which are relevant, are extracted hereunder:

"Appendix
FORM-I

[See sub-rule (1) of Rule 11]

Self Declaration-Cum-Application For Grant of Recognition of School

The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011

C. Nature and area of School

1	*Medium of Instruction*	
2	*Type of School (Specify entry & exit classes)* *(a) Boys/Girls/Co-education* *(b) Aided/Unaided* *(c) Primary/Upper primary*	
3	*If aided, the name of agency and percentage of aid*	
4	*If School Recognised*	
5	*If so, by which authority Recognition number*	
6	*Does the school has its own building or is it running in a rented building.* *(Relevant documents for evidence of proof to be enclosed)*	
7	*Whether the school buildings or other structures or the grounds are used only for the purposes of education and skill development?*	
8	*Total area of the school*	
9	*Built in area of the school (with building plan)*	

F. Other Facilities

1	*Whether all facilities have barrier free access*	
2	*Teaching Learning Material (Attach list)*	
3	*Sports & Play equipments (Attach list)*	
4	*Facility of books in Library* *Books (No. of books) (Attach list)* *Periodical/Newspapers*	
5	*Type and number of drinking water facility*	
6	*Sanitary Conditions* *(i) Type of W.C. & Urinals* *(ii) Number of Urinals/Lavatories separately for boys* *(iii) Number of Urinals/Lavatories separately for girls*	

85. The Form-I in the appendix of the U.P. Rules, is entirely congruent to the Form-I in the appendix to the Right of Children to Free and Compulsory Education Rules, 2010 framed by the Central Government.

86. The Form-I also contemplates existence of playground. The details of the total area of the school and built up area with building plan are required to be provided by the school.

87. Form-II, which is part of appendix of the U.P. Rules of 2011 also merits consideration. Rule 11 (4) of the U.P. Rules, 2011 as seen earlier contemplates a physical on-site inspection of the schools premises by the District Education authorities.

88. The prescribed format of the inspection report of the District Education Officer is in Form-II in the appendix of The Uttar Pradesh Right of Children to Free and Compulsory Education Rules of 2011. The Form-II is reproduced below:

Form II

***[See sub-rule (4) of Rule** 11]*

Gram :
E-mail :
Phone :
Fax :

Office of the Zila Shiksha Adhikari (Name of District/State)
No.

Dated :
The Manager,

Sub.-Recognition Certificates for the school under sub-rule (4) of Rule 11 of the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 for the purpose of Section 18 of Right of Children to Free and Compulsory Education Act, 2009.

Dear Sir/Madam,

With reference to your application dated and subsequent correspondence with the school/inspection in this regard, I convey the grant for provisional recognition to the (Name of the school with address) for Class.....to Class.....for a period of three years w.e.f.....to.....

The above sanction is subject to fulfilment of following conditions-

1. The grant for recognition is not expendable and does not in any way imply any obligation to recognize/affiliate beyond Class VIII.

2. The school shall abide by the provisions of Right of Children to Free and Compulsory Education Act, 2009 (Annexure I) and the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 (Annexure II).

3. The school shall admit in Class I, to the extent of % of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. Provided, further that in case of pre-primary classes also, this norm shall be followed.

4. For the children referred to in Paragraph 3, the school, if covered under Section 12(2) of the Act, shall be reimbursed accordingly. To receive such reimbursements school shall provide a separate bank account.

5. The society/school shall not collect any capitation fee and subject the child or his or her parents or guardians to any screening procedure.

6. The school shall not deny admission-

(a) to any child for lack of age proof;

(b) on the ground of religion, caste or race, place of birth or any of them.

7. The school shall ensure that,-

(i) no child admitted shall be held back in any class or expelled from school till the completion of elementary education in a school;

(ii) no child shall be subjected to physical punishment or mental harassment;

(iii) no child is required to pass any board examination till the completion of elementary education;

(iv) every child completing elementary education shall be awarded a certificate as laid down under Rule 23;

(v) inclusion of students with disabilities/special needs as per provision of the Act;

(vi) the teacher performs its duties specified under Section 24(1) of the Act; and

(vii) the teachers shall not engage himself or herself for private teaching activities.

8. The school shall follow the syllabus on the basis of curriculum laid down by the appropriate authority.

9. The school shall enroll students proportionate to the facilities available in the school as prescribed in the Section 19 of the Act.

10. No unrecognised classes shall run within the premises of the school or outside in the same name of school.

11. The school is run by a society registered under the Societies Registration Act, 1860 (21 of 1860) or a

public trust constituted under any law for the time being in force.

12. The school is not run for profit to any individual, group or association of individuals or any other persons.

13. The accounts should be audited and certified by a Chartered Accountant and proper accounts statements should be prepared as per rules. A copy each of the Statements of Accounts should be sent to the Zila Shiksha Adhikari every year.

14. The recognition Code Number allotted to your school is..... This may please be noted and quoted for any correspondence with this office.

15. The school furnishes such reports and information as may be required by the Director of Education/Zila Shiksha Adhikari from time to time and complies with such instructions of the State Government/local authority as may be issued to secure the continued fulfilment of the condition of recognition or the removal of deficiencies in working of the school.

16. Renewal of Registration of Society, if any, be ensured.

17. The School Management/Trust and staff shall abide by the directions of the State Government issued from time to time.

18. Other conditions as per Annexure 'III' enclosed.

Yours faithfully,
Zila Shiksha Adhikari"

89. The distinction, between the prescribed format of the inspection report, to be submitted by the Education Officer, under the Central Rules, 2010, and the Zila Shiksha Adhikari, under the Uttar Pradesh Rules of 2011, stands out.

90. Item number 8 of the prescribed format of inspection in Form-II under the Central Rules of 2010 is extracted under:

Form-II

"8. The school shall maintain the standards and norms of the school as specified in section 19 of the Act. The facilities reported at the time of last inspection are as given under:-

Area of school campus
Total built up area
Area of play ground
No. of class rooms
Room for Headmaster-cum-Offic-cum-Storeroom
Separate toilet for boys and girls
Drinking Water Facility
Kitchen for cooking Mid Day Meal
Barrier free Access
Availability of Teaching Learning Material/Play Sports Equipments/Library"

91. The aforesaid item, is conspicuous by its absence, in the prescribed format, of the report of the Zila Shiksha Adhikari in Central Rules of 2010. Evidently, Form II under the U.P. Right of Children to Free and Compulsory Education Rules, 2011, provides for a less thorough inspection report, to be submitted by the District Shiksha Adhikari, as compared to, a more comprehensive and targeted report, to be submitted by the competent official, under the Central Rules, 2010.

92. Form-II in the appendix, of the U.P. Right of Children to Free and Compulsory Education Rules, 2011, dilutes the infrastructure requirements, by easing the standards of the inspection

report, contemplated in sections 18 and 19 and Rule 11 (4) of the U.P. Right of Children to Free and Compulsory Education Rules, 2011.

93. The State authorities, cannot escape the reckoning, with the strict and mandatory standards of infrastructure, contemplated under the Right of Children to Free and Compulsory Education Act, 2009. As seen earlier, the standards of infrastructure, including the requirement of playgrounds, are mandatory, and cannot be deviated from.

94. The physical inspection of the schools, has to be thorough, and the inspection report, has to be meticulous. The inspection report needs to implement the mandate of the Right of Children to Free and Compulsory Education Act, 2009.

95. The Form-II under the U.P. Right of Children to Free and Compulsory Education Rules, 2011 is inconsistent with the provisions of Section 19 read with Rule 11 (4) of the U.P. Right of Children to Free and Compulsory Education Rules, 2011 in so far as it does not provide for details of various infrastructural requirements as provided under the Item No.8 of the Form-II of the Rules, 2010 framed under the Central Rules.

Constitutionality of the Government Order dated 08.05.2013

96. The Government Order dated 08.05.2013 references the Right of Children to Free and Compulsory Education Act, 2009 and The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011. The Government Order records that the same is issued to effectuate the purpose of the Right of Children to Free and Compulsory Education Act, 2009 and the U.P. Right of Children to Free and Compulsory Education Rules, 2011.

97. Some of the petitioners-Institution have been granted recognition in pursuance of the criteria laid down in the Government Order dated 08.05.2013. The Government Order dated 08.05.2013 provides the infrastructure requirements of schools. The relevant provisions of the Government Order dated 08.05.2013 regarding specifications of the college building as well as playgrounds are extracted hereunder:

*"2. **विद्यालय भवन**- मान्यता के लिये प्राथमिक के प्रत्येक कक्षानुभाग में प्रति छात्र 09 वर्ग फीट की दर से स्थान उपलब्ध होना चाहिए, परन्तु कक्षा- कक्ष का क्षेत्रफल 180 वर्ग फीट से कम नहीं होनी चाहिए, जिससे बच्चे कक्षा में शैक्षणित गतिविधिया सुविधापूर्ण ढंग से संचालित कर सकें। विद्यालय के अनुसार उपबल्ध हो। विद्यालय में पुस्तकालय एवं वाचनालय भी होना चाहिए।*

3. प्रधानाध्यापक, कार्यालय तथा स्टाफ के लिये अलग-अलग कक्ष उपलब्ध होना चाहिए।

4. छात्र/छात्राओ तथा अध्यापक/अध्यापिकाओं के पृथक-पृथक मूत्रालय एवं शौचालय की समुचित व्यवस्था होनी चाहिए।

5. विद्यालय में पीने के स्वच्छ (जीवाणु रहित) पानी की समुचित व्यवस्था होनी चाहिए।

6. विद्यालय भवन का वाह्य रंग सफेद होना चाहिए।

*8. **क्रीड़ा स्थल**- खेलकुद के लिये यथासम्भव विद्यालय परिसर में या विद्यालय परिसर के समीप क्रीड़ा स्थल उपलब्ध होना चाहिए जहाँ कबड्डी, बालीवॉल, बैडमिन्टन, बास्केट बॉल, खो-खो आदि जैसे खेलो हेतु निर्धारित स्थान की व्यवस्था अनिवार्य रुप से होना चाहिए, जिसका उपयोग विद्यालय के छात्र/छात्राएं कर सकते हैं।*

***विशेषः**- बालिका विद्यालयों के लिए क्रीड़ा स्थल की छूट दी जा सकती है। इसी प्रकार घनी आबादी वाले नगर क्षेत्र में बालकों के विद्यालयों में जहां स्थानाभाव हो, क्रीड़ा स्थल की छूट दी जा सकती है। क्रीड़ा स्थल के अभाव में किसी विद्यालय को भी मान्यता से वंचित नहीं किया जा सकता है।"*

98. The provisions relating to the school building are inadequate, inasmuch as, they do not contain any requirement of natural light and air ventilation. There are no provisions relating to light in the classroom, as well as cooling system, in the classrooms for summer seasons. Natural light, and a well ventilated classrooms, are essential for a healthy environment, which promotes learning and is conducive to good health of the students.

99. The Government Order dated 08.05.2013 contemplates a playground which has sufficient area to accommodate a badminton court or basketball court or volleyball court and a sport like kabaddi. Games like badminton, basketball, volley-ball are played in courts of a small area. Such courts are not playgrounds within the meaning of the Right of Children to Free and Compulsory Education Act, 2009. The size of a playground should be big enough to accommodate field sports like football, cricket, hockey and an outer track around the perimeter for athletic events. The playground should also have, sufficient space to plant shady trees, and other flora on the outer periphery. The playgrounds are also used for morning assemblies where the entire school assembles at one time. The playgrounds also hosts annual sporting events and other national festivals like Independence Day and Republic Day.

100. If the intention of the legislature to promote sports and to ensure all around development of children and to integrate sports in education is to be achieved, the size of the sports field has to be big enough to accommodate the said features. The reduced size of a play-field in the Government Order dated 08.05.2013 makes the statutory requirement of a playground illusory.

101. The most noteworthy feature in the Government Order dated 08.05.2013 is the special provision dispensing with the requirement of a playgrounds. The requirement of a playground for girls schools, as well for schools, in areas where the population density, is high, is completely waived. Above all, it is also provided that in the absence of a playground, no institution shall be denied recognition.

102. Time spent in schools cannot be in likeness of life on the conveyor belt. The purpose of schools is to humanize life and not to mechanise existence.

103. The preceding construction of the scheme of the Right of Children to Free and Compulsory Education Act, 2009 and Article 21A of the Constitution of India establishes that Clause 8 of the Government Order dated 08.05.2013 is in flagrant violation of the provisions of

Right of Children to Free and Compulsory Education Act, 2009 as well as Article 21A of the Constitution of India. The Government Order dated 08.05.2013 is ultra vires the provisions of the Right of Children to Free and Compulsory Education Act, 2009 as well as Article 21A of the Constitution and the U.P. Right of Children to Free and Compulsory Education Rules, 2011.

104. The Government Order dated 08.05.2013 is consequently found to be unconstitutional and illegal and void ab initio. The consequences will follow.

105. The recognition granted to various schools under the Government Order dated 08.05.2013 does not vest any right in such institutions. Such institutions cannot claim any accrued right on the foot of a Government Order which is illegal, unconstitutional, and void ab initio.

106. As we shall see in the later part of the judgment, these schools shall be granted time to become compliant with the infrastructure norms made in conformity with the Right of Children to Free and Compulsory Education Act, 2009.

107. The Government Order dated 08.05.2013 records that the aforesaid Government Order is being issued in consequence to the Right of Children to Free and Compulsory Education Act, 2009, The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 as well as the judgments of the Hon'ble Supreme Court as well as this Court. It is ironical that after referencing the aforesaid provisions of law and judgments of various Courts, the Government Order flagrantly flouts the mandate of the Constitution, the Right of Children to Free and Compulsory Education Act, 2009 and judgments of the courts.

Constitutionality of the Government Order dated

11.01.2019

108. The Government Order dated 08.05.2013 was superseded by the Government Order dated 11.01.2019. The Government Order dated 11.01.2019 created a fresh set of guidelines for minimum infrastructure required for recognition of the Institutions to all the provisions. The parts of the Government Order dated 11.01.2019 relevant to the controversy, are extracted hereunder:

*"(17) **प्राथमिक एवं उच्च प्राथमिक स्तर की कक्षाओं की मान्यता:**- उपर्युक्त शर्तों को पूरा करने के साथ-साथ निम्नलिखित शर्तों को पूरा करना अनिवार्य होगा:-*

*(क) **भवन:**- विद्यालय सोसाइटी का आवश्यकतानुसार उपयुक्त निजी भवन होने पर ही मान्यता के लिए विचार किया जा सकता है। मान्यता के लिये उन्हीं प्रकरणों पर विचार किया जायेगा जहाँ पर महायोजना/ सेक्टर प्लान में भू-उपयोग विद्यालय के नाम अंकित होगा। विद्यालय का मानचित्र संगत प्राधिकारी से स्वीकृत होना अनिवार्य होगा।*

(ख) विद्यालय प्रबन्धतंत्र द्वारा विद्यालय भवन के सम्बन्ध में संबंधित सहायक अभियंता से भवन नेशनल बिल्डिंग कोड के मानकों के अनुरुप होने का प्रमाण-पत्र प्राप्त किया जायेगा। विद्यालय में नेशनल बिल्डिंग कोड के अनुरुप भवन की गुणवत्ता सुनिश्चित की जायेगी। विद्यालय प्रबन्धतंत्र द्वारा निरीक्षण हेतु मुख्य विकास अधिकारी के समक्ष निर्धारित प्रारुप पर आवेदन किया जायेगा। मुख्य विकास अधिकारी द्वारा भवन निर्माण का निरीक्षण लोक निर्माण विभाग, सिंचाई विभाग, नगर विकास विभाग एवं ग्रामीण अभियन्त्रण विभाग के सहायक अभियन्ता से अनिम्न अधिकारी द्वारा कराया

जायेगा। निरीक्षणकर्ता अधिकारी को यह भी सुनिश्चित करना होगा कि विद्यालय भवन की छत एवं दीवारों के निर्माण में पूर्ण मजबूती है और भवन में धूप एवं ठंड से बचाव की पर्याप्त व्यवस्था की गयी है। कक्षा-कक्ष हवादार एवं रोशनीयुक्त है। एक मंजिल से अधिक ऊँचे भवन की सीढ़ियां एवं रैम्प, जो निकास मार्ग के रुप में प्रयुक्त हो रही हों, अद्यतन नेशनल बिल्डिंग कोड में निर्धारित मानक के अनुसार बनायी गयी हो, ताकि आकस्मिकता की स्थिति में बच्चों के निकास में किसी प्रकार की बाधा उत्पन्न न हो।

(ग) दिव्यांग बच्चों की विद्यालय में सुगम पहुँच हेतु भारत सरकार/राज्य सरकार द्वारा समय-समय पर निर्गत अद्यतन शासनादेशों एवं मार्गदर्शी सिद्धान्तों का पूर्णतः अनुपालन भी सुनिश्चित किया जायेगा। विद्यालय भवन की मजबूती, सुरक्षा एवं रख-रखाव का पूर्ण उत्तर दायित्व प्रबन्धतंत्र का होगा।

(घ) विद्यालय में अग्नि शमनयंत्र मानक के अनुसार स्थापित कराया जाना होगा।

*(ङ) **कक्षा-कक्ष का मानकः**- मान्यता के लिये प्राथमिक एवं उच्च प्राथमिक के प्रत्येक कक्षानुभाग में प्रति छात्र 09 वर्ग फीट की दर से स्थान उपलब्ध होना चाहिए, परन्तु कक्षा-कक्ष का क्षेत्रफल 180 वर्ग फीट से कम नहीं होना चाहिए अर्थात् प्रत्येक कक्षा-कक्ष में कम से कम 20 बच्चों के बैठने की व्यवस्था अनिवार्य रुप से होनी चाहिए, जिससे बच्चे कक्षा में शैक्षणिक गतिविधियां सुविधापूर्ण ढंग से संचालित कर सकें। विद्यालय में उतने ही छात्र/छात्राओं को प्रवेश दिया जाय, जिनके बैठने की समुचित व्यवस्था निर्धारित मानक के अनुसार उपलब्ध हो।*

(च) विद्यालय मे पुस्तकालय एवं वाचनालय भी होना चाहिये।

(छ) प्रधानाध्यापक, कार्यालय तथा स्टाफ के लिये अलग-अलग कक्ष उपलब्ध होना चाहिए।

(ज) छात्र/छात्राओं तथा अध्यापक/अध्यापिकाओं के पृथक-पृथक मूत्रालय, शौचालय एवं हाथ साफ करने की समुचित व्यवस्था होनी चाहिए।

(झ) विद्यालय में पीने के स्वच्छ (जीवाणु रहित) पानी की समुचित व्यवस्था होनी चाहिए।

*(ञ) **क्रीड़ा स्थलः**- खेलकूद के लिए विद्यालय परिसर में या विद्यालय परिसर के समीप पर्याप्त क्रीड़ा स्थल उपलब्ध होना चाहिए, जिसका उपयोग विद्यालय के छात्र/छात्राओं कर सकते हों।"*

109. The criteria for the school building in the Government Order dated 11.01.2019 contains a provision for natural light and ventilation. However, specific technical requirements regarding cross ventilation and natural light are lacking. Specific technical details for provisioning the classrooms with natural light and ventilation have to be given to make the provision fruitful. Experience tells us that any vague criteria for grant of recognition is prone to abuse, and the students are always at the receiving end. The school managements benefit from such provisions to the detriment of the students.

110. The criteria relating to the playground, has also undergone a change, in the Government Order dated 11.01.2019. However, a closer look at the provision in the Government Order, shows that, it is only a window dressing of the earlier provision. The amendments are superficial if not an eyewash. The validity of the amended provision, melts like cheap make up, under the arc light of judicial scrutiny.

111. The provision 17(ञ), which provides for a playground is silent, on the dimensions of the playgrounds. As stated earlier, without specific dimensions of the playgrounds, the purpose of the playground will stand defeated. The Government Order dated 08.05.2013 shows that even a badminton court passes for a playground.

112. There are other offending features in the provision 17(ञ). Clause

17(अ) in the Government Order dated 11.01.2019 provides that the playground should be available either in the premises of the educational institutions or close to the educational institution.

113. The Clause 17(अ) is vague and also renders illusory, the statutory requirement of a playground in a school. As seen earlier playgrounds which are not located in the premises containing the school building violates the provisions of the Right of Children to Free and Compulsory Education Act, 2009.

114. In the light of the preceding discussion, the provision 17(अ) in the Government Order dated 11.01.2019 is violative of Article 21A of the Constitution of India and the Right of Children to Free and Compulsory Education Act, 2009 and The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011.

115. The provision in 17(अ) of having an option of a playground which is not in the school premises is also unworkable and contrary to the law laid down by this Court in the case of **Apple Grove School (supra).**

116. There is another aspect to this issue. The provisions for various high schools and intermediate schools which are recognized by the State Government as well as the colleges under the U.P. State Universities Act are required to have a playground which is situated in the same campus where the school or college building stands. There is no concept of a playground which is located at a separate place from the college campus. The provision and the Government Order dated 11.01.2019 is discriminatory and violative of Article 14 of the Constitution of India. The children between the ages of the 6 to 14 years cannot be put in a class separate from students of higher age groups in regard to the right to enjoy a playground in the school campus.

117. The Clause 17(अ) of the Government Order dated 11.01.2019 is violative and ultra vires the Article 14 of the Constitution of India.

118. The Clause 17(अ) of the Government Order dated 11.01.2019 cannot stand and is quashed.

119. As in the case of the Government Order dated 08.05.2013, the recognition granted to those institutions on the foot of the criteria laid down in the Government Order dated 11.01.2019 does not confer any vested rights upon the aforesaid institutions. The provision is void ab initio.

120. The recognition granted to schools in pursuance of the aforesaid Government Orders dated 08.05.2013 and 11.01.2019 would also be void ab initio.

121. Running educational institution on the foot of Government Orders which are unconstitutional and void ab initio, does not vest any rights in such institutions.

122. The rights of such institutions in similar circumstances were adjudicated by this Court in ***Apple Grove School (supra)*** as follows:

"35. The argument is made only to be rejected. The long continuance of

affiliation despite violation of the affiliation bye-laws does not accumulate any credit of equity in favour of the petitioner. On the contrary, the institution has incurred a debt which it cannot repay. The debt of students who went through the process of schooling without the experience of a play field. The debt of childhoods lost because of denial of opportunities to develop a love for the outdoor life and understanding comradeship through sporting activities. The considerations of the future of the young students of India is invaluable and cannot be weighed in balance with the immediate quest for profit of the petitioner.

36. The right of an educational institution to seek affiliation from a board of education subserves and is subservient to the right of education of the children."

123. As we shall see in the later part of the judgment, these schools shall be granted time to become compliant with the infrastructure norms made in conformity with the Right of Children to Free and Compulsory Education Act, 2009.

124. Some documents changed the course of human history, while can others alter the course of human evolution.

125. The Constitution of India has changed the course of Indian history. The constitutional values influence and animate our working as a nation.

126. The Government Orders dated 08.05.2013 and 11.01.2019 on the contrary threaten to change the course of evolution of human species. Children of succeeding generations who grow up without the benefit of play-fields will lose the concept of sports and games. Sports will become a distant memory which was indulged by ancient ancestors.

The case of disappearing playgrounds in Uttar Pradesh

127. This Court notices the fact that due to unregulated construction, unplanned colonies and multi-storied complexes made in violation of building bye laws and city master plans, the neighbourhood play fields have simply disappeared. Public parks and play-fields for children are most vulnerable to encroachment.

128. Untold damage has been caused by constructions which are not part of the master plan of the towns and cities and failure of the authorities to incorporate play-fields in various neighbourhoods.

129. The state of playgrounds in Uttar Pradesh is a fast moving narrative of disappearing play-fields. Unregulated and illegal construction, aided by the executive apathy, if not collusion of officials of Development Authorities, and other competent authorities, has caused irreversible damage, to the future of our children and the environment. Gaon Sabha lands are also depleted by the familiar pattern of illegal constructions coupled with the official inaction if not connivance.

130. Lands on which unauthorized constructions have been made cannot be reclaimed for planned urban development within a real time frame. The lands which could have been used as playgrounds are hence simply not available. Land resources are shrinking fact as they are

being rapidly consumed by illegal constructions. The situation demands urgent action. It is met with crumbling complacency. Playgrounds have been lost on a dramatic scale and decision makers have not woken up.

131. The last nail has been driven in the coffin of playgrounds by the Government Orders dated 08.05.2013 and 11.01.2019.

132. One may visualize the routine of a young child who does not have any neighbourhood play-field. The child goes to a school and spends the day in an enclosed classroom, as the school lacks a play-field. The child for a better part of his life has been denied his right to play in an open field. The adverse consequences on the growth and personality of a child are not far to seek.

133. Children are born into this world where their future is damaged beyond repair through no fault of theirs. Children also suffer the consequences of the Government Orders which decide their future made by those who would not be a part of. All in all, the damage caused to the playgrounds has been ruthless. It cannot be business as usual. It is time for the courts to define the statutory responsibility and for the authorities to accept responsibility and current failure.

134. The situation is alarming but not beyond redemption, urgent action has to be taken to save the situation. The State authorities have to be alerted to their statutory duties. More important the State authorities have to be held accountable to their statutory obligations.

135. The scheme of the Article 21A of the Constitution and the Right of Children to Free and Compulsory Education Act, 2009 has the education and welfare of the child at its core. Every other activity revolves around this centre and all other authorities subserve this noble object. Schools cannot be treated like fail safe cottage industries, which require minimum investments and provide assured returns. Article 21A of the Constitution and the Right of Children to Free and Compulsory Education Act, 2009 contemplate establishment of temples of learning are called schools and not enterprises for profit called literacy kiosks or education shops.

Infrastructure-II

136. The need for school reforms was in the cognizance of the legislature, it is in the consciousness of the public, but has to be put in the conscience of the State Government.

137. The elements of the schools under the Right of Children to Free and Compulsory Education Act, 2009 including elevation, architecture, ventilation lighting provisions, playgrounds, and so on, as provided under the Act, have to be in such balance as to promote the welfare of the child, nurture the simple joys of childhood, and foster learning in a child friendly environment. The whole ecology of the school campus should promote the said aims. Unscientific architecture, over-crowded class-rooms, unsatisfactory ventilation and lighting, absent playgrounds, and other infrastructural and aesthetic inadequacies exact too much damage on the children. In such an eco system, children lose their importance and simple joys of childhood diminish in significance. The open glimpse of blue

skies, the place under the sun, and love of environment are not only the pleasures of childhood, but the foundation on which the edifice of the nation stands. The schools though built in the present have to be planned for the future. The extra human dimension of schools is what is envisaged in the Right of Children to Free and Compulsory Education Act, 2009 and has to be accomplished by creating the appropriate infrastructure and ecology in the schools.

Norms and Inspection of Infrastructure.

138. During the course of the arguments, the learned counsel for the respondent-Basic Shiksha Parishad informed that the inspections in terms of the Right of Children to Free and Compulsory Education Act, 2009 of all the schools, which have been granted recognition by the Board (Parishad), have not been conducted in terms of the aforesaid provisions of the Right of Children to Free and Compulsory Education Act, 2009.

139. As stated earlier, the criteria and norms for the infrastructure have to be recreated. They have to be more specific and meticulously laid down to achieve the object of the Right of Children to Free and Compulsory Education Act, 2009. The inspections have to be more thorough to effectuate the purpose of the Right of Children to Free and Compulsory Education Act, 2009.

140. General technical requirements of building plans/building bye laws, elevation, ventilation, light requirements, color scheme options and so on have to be provided by town planners, architects, engineers and experts in the field in collaboration with educationists.

141. Technical aspects of the inspection like college of the school building, provisioning of ventilation, natural light, and other construction infrastructure have to be made in the presence of the qualified engineers of the State of U.P.

Requirements of Building Plan

142. The requirements of building infrastructure regard to fire safety measures engaged the attention of the Hon'ble Supreme Court in the case of ***Avinash Mehrotra v. Union of India and others,*** reported at ***2009(6) SCC 398.*** The Hon'ble Supreme Court in ***Avinash Mehrotra (supra)*** co-relating the nature of infrastructure to the quality of education in the context of Article 21A of the Constitution of India held thus:

34.....Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. We reached a similar conclusion, on the comprehensive guarantees implicit in the right to education, only recently in our opinion in Ashoka Kumar Thakurv. Union of India [(2008) 6 SCC 1] .

35.The Constitution likewise provides meaning to the word "education" beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings.

36. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it

extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.

43. Many States have already begun implementation. The most forward-thinking States have enacted and enforced the National Building Code in their schools. Often these States have also created, empowered and funded a State-wide emergency response office. The coordinated efforts and concentration of knowledge in these administrative units make States better able to prepare for emergencies, as much as to respond once the problem has started. For example, the State of Gujarat has established such an emergency management office. Having already settled building codes and other large issues, the State can focus on other aspects of emergency management. With the assistance of outside experts, Gujarat recently created a colouring book to teach children how to respond to emergencies.

47. In view of what happened in Lord Krishna Middle School in District Kumbakonam where 93 children were burnt alive and several similar incidences had happened in the past, therefore, it has become imperative to direct that safety measures as prescribed by the National Building Code of India, 2005 be implemented by all government and private schools functioning in our country. We direct that:

(i) Before granting recognition or affiliation, the State Governments and Union Territories concerned are directed to ensure that the buildings are safe and secure from every angle and they are constructed according to the safety norms incorporated in the National Building Code of India.

(ii) All existing government and private schools shall install fire extinguishing equipments within a period of six months.

(iii) The school buildings be kept free from inflammable and toxic material. If storage is inevitable, they should be stored safely.

(iv) Evaluation of structural aspect of the school may be carried out periodically. We direct that the engineers and officials concerned must strictly follow the National Building Code. The safety certificate be issued only after proper inspection. Dereliction in duty must attract immediate disciplinary action against the officials concerned.

(v) Necessary training be imparted to the staff and other officials of the school to use the fire extinguishing equipments."

Locus

143. Both the sets of petitioners claim relief on the foot that they satisfy the requirements of norms and standards of infrastructure posited in the Government Order dated 08.05.2013 and the Government Order dated 11.01.2019. The nature of the rights of the petitioners have to be determined. Similarly, the statutory duties of the authorities have to be clearly defined. These are prerequisites to be determined before this Court can grant or deny the relief sought.

144. The Government Orders dated 08.05.2013 and 11.01.2019, consequently arise for consideration in the instant controversy. This necessitated an enquiry into the validity thereof. This line of

enquiry has been undertaken in the earlier part of the judgment. The enquiry has found that the Government Order dated 08.05.2013 and the Government Order dated 11.01.2019 are violative of Article 21A of the Constitution read with the Right of Children to Free and Compulsory Education Act, 2009 read with The Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 framed thereunder.

145. The Government Orders create a protected zones for certain vested interest namely, the school managements. These provisions directly benefit the aforesaid schools managements to the detriment of the students.

146. The category of citizens, who will be directly affected by the aforesaid Government Orders, are the children of the State of U.P. In a technical sense only the children are the parties aggrieved by the aforesaid Government Orders.

147. There is a huge pressure of demand for schools in the State. In this situation the parents or guardians are desperate and even vulnerable. The children on their part have no understanding of their rights and lack control over their environment. The parents and children have apparently submitted to fate accompli. Inaction of parents and innocence of children cannot become the basis of denial of rights of children conferred by the Article 21A of the Constitution and the Right of Children to Free and Compulsory Education Act, 2009.

148. The silence of the child is loud enough for the Constitution to hear. The constitutional mandate of this Court is to interpret the law, uphold the rights of citizens and compel performance of statutory duties.

149. In such a situation, even in the absence of a formal challenge to offending the provisions of the Government Orders by an aggrieved party, the same can be duly construed and if required quashed by the Court. The contrary course is not a lawful option. The Court cannot mandamus the authorities to decide representations and enforce rights made on the foot of illegal and unconstitutional Government Orders.

Evaluation procedure

150. The creation of a proper curriculum and evaluation procedure is also a central feature of the Right of Children to Free and Compulsory Education Act, 2009. Section 29 of the Right of Children to Free and Compulsory Education Act, 2009 discloses that while scholastic achievements an endeavours have retained their pride of place, the emphasis is also made in the provision on "all around development" including "physical abilities" to the fullest extent. These provisions can be brought to fruition only when such activities are conducted and due credits are given to the children for the same. Such evaluation should depict the development of mental and physical abilities and potentialities of a child.

151. Appropriate Government Orders in this regard have to be taken out by the State and implemented at the levels of the schools.

152. Activities like Scouts and Guides and NCC may be encouraged at

school level. Yoga may also be given as an option for children to learn apart from encouraging sports. Music, painting, among other extra curricular activities also may have a place in the curriculum.

153. The activities to ensure overall development of the child have to be part of the evaluation of children and due credits need to be given.

Conclusion

154. In the wake of preceding narrative and the record of the respondents authorities, this Court was minded to convert the petitions into a public interest litigation to monitor the implementation of the Right of Children to Free and Compulsory Education Act, 2009, in light of the law laid down by the Hon'ble Supreme Court in the case of ***Ashok Thakore (supra).*** However, the Court was persuaded by the submissions of Sri Neeraj Tripathi, learned Additional Advocate General, assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel, who stated with honest conviction that the State Government accords highest priority to imparting quality education to the children of the State and shall make all endeavours to implement with sincerity the provisions of the Right of Children to Free and Compulsory Education Act, 2009 and the directions of this Court. Solemn statements by senior most law officers of the State made at the Bar, have to be given full weight by the Courts.

155. The matter is accordingly remitted to the State Government and a writ of mandamus is issued to the Additional Chief Secretary, Basic Education, Government U.P. Lucknow and the authorities mentioned hereunder to execute the following directions:

I. The respondents authorities shall create norms for recognition as well as for grant of government aid to schools consistent with this judgment;

I-A. The norms for recognition and grant of government aid to schools shall include the playgrounds of appropriate size and require mandatory plantation of trees and flora in the school campus for grant of recognition as well as government aid;

I-B. The norms for recognition and grant of government aid to schools shall also include detailed building bye-laws and architectural requirements after taking inputs from urban planers, architects, educationists and other experts and in conformity with this judgment;

II. The exercise of creating the infrastructure norms mentioned above for recognition of schools and grant of government aid shall be completed within a period of five months from today;

III. The procedures and details of inspection of the schools shall also be created afresh in light of the directions in this judgment;

IV. The applications of all the petitioners and all other pending applications for recognition and grant of aid shall be considered after creation of the norms in accordance with the said norms and in light of directions of Hon'ble Supreme Court in ***Pawan Kumar Dwivedi (supra)*** and this Court in ***Paripurna Nand Tripathi (supra).*** Even in matters where the application for grant of recognition or for government aid has been rejected for any reason, the same shall be considered afresh along with all pending applications;

V. The Government Orders regarding evaluation norms and directions for providing safe transportation, weight of school bags, shall also be issued and implemented;

VI. The Chief Secretary, State of U.P. shall constitute a committee of various departments to ensure concert in functioning and coordination in implementation of the provisions of the Right of Children to Free and Compulsory Education Act, 2009 and directions in this judgment. Appropriate authority shall also regularly interface with the Government of India for grant of funds in terms of the provisions of the Right of Children to Free and Compulsory Education Act, 2009;

VII. The said committee shall submit a compliance report to the Chief Secretary on the state of implementation of the provisions of the Right of Children to Free and Compulsory Education Act, 2009 and the directions in this judgment, on a six monthly basis;

VIII. The Chief Secretary, State of U.P., shall issue appropriate directions from time to time to the said committee and ensure that the provisions of the Right of Children to Free and Compulsory Education Act, 2009 and directions in this judgment, are implemented rigorously and on a time bound basis;

IX. A website shall be created by the State Government at the state level as well as the district level under the caption "Saakshar Pradesh Shashakt Desh" (साक्षर प्रदेश शशक्त देश), which shall upload the progress of implementation of these directions, and the provisions of the Right of Children to Free and Compulsory Education Act, 2009, details of schools in various neighbourhoods, inspections made by the State Authorities, and other data as may be deemed appropriate on an up to date basis;

X. The existing schools which were granted affiliation under the Government Order dated 08.05.2013 and the Government Order dated 11.01.2019, shall be granted time till the end of the next academic session i.e. till 31.03.2021 to comply with the above said requirements and new norms for grant of recognition and government aid;

XI. After 31st March, 2021, the State Government shall proceed in accordance with law against the said schools, which fail to fulfill the new infrastructure requirements and norms. (This shall not apply to ongoing proceedings against non-compliant schools). However, at all times, the welfare of the students shall be protected and arrangements for admission to alternative schools shall be made in regard to children from schools which are not compliant with the norms for recognition and grant of aid.

156. The writ petitions are decided finally.

(2019)10ILR A 1912

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Special Appeal No. 435 of 2008

Pancham Ram Yadav
...Petitioner-Appellant
Versus
The U.P. Co-Operative Federation Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Chandan Kumar.

Counsel for the Respondents:
C.S.C., Sri Ram Gopal Tripathi, Sri V.C. Tripathi.

A. Service Law - U.P. Co-operative Societies Employees Service Regulation, 1975: Regulation 84; U.P. Co-operative Federation Limited Karamchari Seva Niyamawali, 1980: Rule 83

The Single Judge while relying on the judgment of Single Judge passed in *Satya Narain Vs Praband Nideshak and ors* dispensed the appellant from service and ordered for recovery of pecuniary loss caused from the embezzlement of money, thereby awarding identical set of two punishments which are awarded simultaneously.

The Division Bench in *Virendra Kumar Gupta vs. State of U.P. and ors* without taking note of the judgment of Single Judge of *Satya Narain (Supra)* emphasized that Regulation 84 of the Regulation 1975 prevail over and above Niyamawali, 1980 therefore only one punishment could have been awarded.

The matter has been referred to the larger bench as to analyze the correct position of law when punishment is awarded under Regulation 84 read with Rule 83.

Matter referred to Larger Bench (E-10)

Cases referred:-

1. Satya Narain Mishra Vs Prabandh Nideshak & anr (2002) 1 AWC 582

2. Vijay Bahadur Yadav, Firozabad Vs Chairman, U.P. Co-operative Federation Ltd. Lko & ors (1992) 2 UPLBEC 1215

3. Virendra Kumar Gupta Vs St of U.P. & ors (2015) 7 ADJ 19

4. U.P. State Cooperative Land Development Bank Ltd. Vs Chandra Bhan Dubey & ors (1999) 1 Supreme Court Cases 741

5. Najeebullah Siddiqui Vs Registrar, U.P. Co-operative Societies Writ Petition No. 6725 of 1989

6. Superintendent and Remembrance of Legal Affairs, West Bengal Vs Corporation of Cal AIR (1967) SC 997

7. Gladstone Vs Bower (1960) 3 All ER 353 (CA)

8. Bangalore Water Supply and Sewerage Board Vs A. Rajappa & ors (1978) 36 FLR 266

9. Magor & St. Mellons R.D.C. Vs Newport Corporation (1951) 2 All ER 839 (841)

10. Vemareddy Kumaraswamy Reddy & anr Vs St of Andhra Pradesh (2006) 2 SCC 670

11. Star India Private Limited Vs Department of Industrial Policy and Promotion & ors (2019) 2 SCC 104

12. Petroleum and Natural Gas Regulatory Board Vs Indraprastha Gas (2015) 9 SCC 209

Case followed:

1. Virendra Kumar Gupta Vs St of U.P. & ors (2015) (7) ADJ 19

Case overruled: -

1. Satya Narain Mishra Vs Prabandh Nideshak & anr (2002) (1) AWC 582

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This Full Bench has been referred two questions for adjudication by a Division Bench of this Court vide order dated 27.10.2017 noticing some inconsistencies in Regulation 84 of U.P. Co-Operative Societies Employees Service Regulations, 1975 (hereinafter referred to as "Regulation, 1975") and Rule 83 of U.P. Co-operative Federation Limited Karmchari Seva Niyamawali,

1980 (hereinafter referred to as "Rules, 1980") and also expressing its disagreement with view taken by another Division Bench in **Virendra Kumar Gupta Vs. State of U.P. and others** in Service Bench No. 614 of 2009, decided on 28.07.2015.

2. The questions referred for adjudication are as under:

*"1. Whether **Regulation 84** of the U.P. Co-operative Societies Employees' Service **Regulation 1975** read with **Rule 83** of the U.P. Co-operative Federation Limited Karmchari Seva **Niyamawali, 1980 services can be harmonized so as to uphold the punishment by way of dismissal of an employee coupled with an order directing recovery of an amount on** the charge of a financial embezzlement or misappropriation to be included within the fold of Regulation 84 ?*

*2. Whether the law laid down in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** in respect of the true import of Regulation 84 read with Rule 83 aforesaid does not state the correct position of law as against the reasoning given by the learned Single Judge in paragraph no.13 in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** and alternatively as to whether the statement of law in that regard as explained in the judgment of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** should be accepted as the correct position of law ?"*

(Emphasis added)

3. The facts giving rise to the present Reference may be stated as under.

4. That U.P. Co-operative Federation Limited (hereinafter to as 'PCF') is an Apex Level Co-operative Marketing Society, constituted and registered under the provisions of U.P. Co-operative Societies Act, 1965 (hereinafter referred to as 'U.P. Act, 1965'). Petitioner, Pancham Ram Yadav, was appointed as Storekeeper with the respondent-PCF on 09.03.1981. In 1988, he was working in a godown situated at Dandi, near Mama-Bhanja Talab in trans-yamuna area of Allahabad. In the night of 22/23 April, 1993, a theft was committed in the said godown in respect whereto a First Information Report was lodged at Police Station, Naini, Allahabad on 23.04.1993 registered as Case Crime No. 297 of 1993, under Sections 409, 457 and 380 I.P.C. It was reported that 361 bags of sugar were stolen. During investigation, police arrested one Suraj Bhan Singh and also recovered 101 sugar bags. One of the facts noticed during investigation was that the locks of godown were not broken and bags of sugar were stolen. Considering the matter, in detail, Managing Director, PCF, passed an order of suspension on 18.05.1993 placing petitioner under suspension and appointing one S.P. Singh, General Manager, Head Quarter, as Enquiry Officer. A charge-sheet dated 22.01.1994 was served upon petitioner levelling four charges. During inquiry, upon being transferred, Enquiry Officer was changed and one Prateek Sanjar, General Manager, PCF was appointed as Enquiry Officer by order dated 30.10.1994 who completed enquiry and submitted report holding charges proved against petitioner. Thereafter, a show-cause notice dated 29.05.1998 was issued to petitioner and ultimately punishment order dated 03.03.2000 was passed by Managing Director, PCF imposing

punishment of dismissal from service with the approval of Institutional Service Board and also for recovery of Rs. 2,69,130.14. This punishment order dated 03.03.2000 was challenged by petitioner in Writ Petition No. 18891 of 2000. The ground on which punishment order was assailed before learned Single Judge is that two punishments could not have been awarded in view of Regulation 84 of Regulation, 1975 but learned Single Judge (Hon'ble D.P. Singh, J.) relying on an earlier Single Judge judgment in ***Satya Narain Mishra Vs. Prabandh Nideshak and another : 2002 (1) AWC 582*** rejected the submission and dismissed the writ petition vide judgment dated 12.11.2007.

5. Petitioner, Pancham Ram Yadav, then came up in Special Appeal No. 435 of 2008 (Earlier No. 238 (Def.) of 2008) and Division Bench, though agreed with the view taken by learned Single Judge, but finding another Division Bench judgment taking a different view in its way, made this reference to Larger Bench to answer the questions noticed hereinabove.

6. Section 121 of U.P. Act, 1965 confers power upon Registrar to frame Regulations to regulate emoluments and other conditions of service including disciplinary control of employees in a Co-operative Society or a class of Co-operative Societies and any Society to which such terms are applicable, shall comply with those Regulations and any orders of Registrar issued to secure such compliance. Regulations framed in sub-Section (1) of Section 121 of U.P. Act, 1965 are required to be published in the Gazette and take effect from the date of such publication.

7. Section 122 of U.P. Act, 1965 confers power upon State Government to constitute an Authority or Authorities, in such manner as may be prescribed for recruitment, training and disciplinary control of employees of Co-operative Societies, or a class of Co-operative Societies, and may require such Authority or Authorities to frame Regulations regarding recruitment, emoluments, terms and conditions of service including disciplinary control of such employees and subject to the provisions contained in Section 70, settlement of dispute between an employee of a Co-operative Society and the Society.

8. Regulations framed under sub-section (1) of Section 122 of U.P. Act, 1965 are subject to approval of State Government and publication in the Gazette. After publication in Gazette the said Regulation would supersede any Regulations made under Section 121 of Act, 1965.

9. In exercise of powers under sub-section (1) of Section 122 of U.P. Act, 1965 (U.P. Act No. XI of 1966), read with Rule 389-A of Rules, 1968, Governor, vide Notification dated 04th March, 1972, as amended by Notification dated February 7, 1973, constituted an Authority, namely, U.P. Co-operative Institutional Service Board (hereinafter referred to as the 'Board'), for recruitment, training and disciplinary control of employees of Apex Level Societies, Central or Primary Societies (excluding Co-operative Cane Development Unions which include U.P. Co-operative Cane Unions Federations Ltd., Lucknow) whose area of operation extends to more than one District or State, District or Central Co-operative Banks, District Co-operative Federations, Co-operative Milk Unions including Kanpur Co-operative

Milk Board, Co-operative Cane Sugar Factories, Co-operative Textile Mills and U.P. Co-operative Housing Federation. The constitution of Board and functions to be exercised by it are also provided in the said Notification and the same read as under:-

"U.P. Co-operative Institutional Service Board

1. The Board shall consist of -

(i) A Chairman appointed by State Government from amongst a serving or retired Additional Registrar, who has put in at least ten years' service in the U.P. Co-operative Service Class I.

(ii) Two members appointed by the State Government from amongst serving or retired officers of the U.P. Co-operative Service Class I.

2. The Chairman or a member of the Board shall hold office for a term of two years from the date on which he enters upon his office and such term may be extended from time to time subject to the condition that the total period of such extended terms does not exceed four years or until he attains the age of 60 years, whichever is earlier.

3. (i) The Board shall have a secretary and such other staff as the State Government may from time to time sanction to enable the Board to carry out its business.

(ii) The Secretary and other staff of the Board shall be appointed by the Board and shall be under the administrative control of the Chairman, provided that the Chairman may delegate any of his powers relating to the administrative control to any member of the Board.

(iii) The Secretary of the Board shall be from amongst the officers of the U.P. Co-operative Service Class II.

4. The emoluments of the Chairman, Members and the staff of the Board shall be determined and paid by the State Government.

5. The Chairman or a Member shall cease to hold office from the date he ceases to hold the qualifications necessary for his being the Chairman or a Member, as the case may be.

6. The State Government may remove the Chairman or a Member where it is the opinion that he ---

(a) has been guilty of misconduct of gross negligence of duty as such Chairman or Member; or

(b) has become of unsound mind, or has become deaf and dumb, or blind or suffers from leprosy; or

(c) has been convicted for any offence involving moral turpitude; or

(d) is in default (at least for a period of six months) to a co-operative society in respect of any loan taken by him or is a judgment-debtor, or

(e) has taken up any paid or honorary job in any Co-operative Society.

7. The Board shall undertake the job of training of the employees only after prior permission of the State Government is obtained in that respect.

8. The office of the Board shall be headquartered as Lucknow, but the Board may hold its sittings in any place or places within the State for performance of its duties and functions.

9. The Board shall frame its own rules of business and shall submit a copy thereof to the State Government.

10. The Board shall frame regulations regarding recruitment, emoluments, terms and conditions of

service including disciplinary control within three months of its constitution:

Provided that the said period may be extended by the State Government from time to time."

10. In the Constitution of the Board and other aspects, as contained in paragraphs 1 and 2 of the Notification dated 04th March 1972, subsequently amendment was made and paragraphs 1 and 2 of Notification dated 04th March 1972 were substituted by Notification dated 31st August 1988, as under:-

"AMENDMENTS

1. The Board shall consist of three members appointed by the State Government from amongst Serving Officers of category 'A' of the U.P. Co-operative Service, who have put in atleast 10 years of service in that category. The Seniormost members shall be appointed Chairman by State Government:

Provided that a person who is the Chairman or a member of the Board at the commencement of this para and is a Serving Additional Registrar shall be deemed to have been appointed under this para.

2. The State Government may, at any time transfer a member of the Board to his parent service.

A member of the Board or Chairman shall retire on attaining the age of his superannuation."

11. By certain subsequent Notifications, some other Authorities were notified under Section 122 (1) to govern specified types of Co-operative Societies inasmuch as by Notification dated 24th February 1974, Cane Commissioner was constituted as an Authority competent to perform functions under Sub-section 1 of Section 122 in respect of all the employees of Co-operative Cane Development Union including U.P. Co-operative Cane Union Federation Ltd., Lucknow. Similarly, by Notification dated 06th August 1977, Commissioner and Secretary, Sugar Industry and Cane Development Department, Uttar Pradesh was notified as competent authority for recruitment, training and disciplinary control of the employees of all Co-operative Sugar Mills in Uttar Pradesh and U.P. Co-operative Sugar Factories Federation Limited, Lucknow. The above reference is only to place the facts straight.

12. Section 130 of U.P. Act, 1965 confers power upon State Government to frame Regulations so as to carry out the purposes of U.P. Act, 1965 and some of the matters, without prejudice to the generality of the power under sub-section (1), are detailed in sub-section (2) of Section 130 of U.P. Act, 1965.

13. In exercise of powers under Section 130 of U.P. Act, 1965, U.P. Co-operative Societies Rules, 1968 (hereinafter referred to as Rules, 1968) were framed by State Government. Rule 389-A of Rules, 1968 provided as under:

"389-A. The ***authority or authorities*** under Section 122 may be ***constituted by the State Government by Notification*** published in the ***Official Gazette."*** (Emphasis added)

14. For the purpose of present matter, we need not go into any Regulations alleged to have been framed under Section 121 for the reasons that in exercise of powers under Section 122 (2), Regulations, 1975 have been framed

under Section 1 of Section 122 and published in the Gazette. They have superseded existing Regulation on the date of publication of Regulations, 1975 which was published in U.P. Gazette (Extraordinary) dated 06.01.1976.

15. Regulation 2 (ix) of Regulation, 1975 defines "Co-operative Societies" for the purposes of Regulation, 1975 and reference to Co-operative Societies placed under the purview of Board by Government Notification dated 04th March 1972. 'Employees' governed by Regulation, 1975 are defined in Regulation 2 (xi) and reads as under:

"(xi) 'employee' means a person in whole-time service of a co-operative society, but does not include a casual worker employed on daily wages or a person in part-time service of a society."

16. Chapter-VI of Regulations, 1975 deals with conduct and discipline of the employees of Co-operative Societies governed by Regulations, 1975 and contains Regulations 62 to 83. Thereafter comes Chapter-VII which deals with penalties, disciplinary proceedings and appeals. Regulation 84(i) talks of penalties and reads as under:-

"84. Penalties.- *(i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under section 103 of the Act or does anything prohibited by these regulations shall be* ***liable to be punished by any one of the following penalties: -***

(a) censure,

(b) with holding of increment,

(c) fine on an employee of Category IV (peon, chaukidar, etc.).(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,

(e) reduction in rank or grades held substantively by the employee,

(f) removal from service, or

(g) dismissal from service."

(Emphasis added)

17. The punishment contemplated under Regulation 84 can be imposed by competent authority in the manner and as per the procedure prescribed under Regulation 85 of Regulations, 1975. Regulations, 1975 are deemed to be operative to the extent of their inconsistency with any labour laws as provided by Regulation 103 which reads as under:-

"103.The provisions of these regulations to the extent of their inconsistency, with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any co-operative society or class of co-operative societies, shall be deemed to be inoperative."

18. Regulation 106 confers power upon State Government to pass such orders, not inconsistent with Regulations, 1975, as deemed necessary and to remove difficulty arising in relation to emoluments, terms and conditions of service, termination, dismissal or removal, adoption or merger.

19. Then comes Regulation 102 which contemplates framing of Service

Rules by a Co-operative Societies with the approval of Board. It reads as under:-

*"**102.(i) Subject to the provisions of these regulations, a co-operative society shall** within three months from the date of coming into force of the regulations (unless an extension of time is allowed by the Board in writing) **frame service rules for its employees.***

(ii) The service rules framed under sub-clause (i) shall be submitted to the Board for approval and shall be operative only after the approval.

*(iii) **Notwithstanding, anything** contained in these Regulations the **existing employees shall have an option to continue to be governed by the existing service rules, if any,** in the society only in respect of their emoluments and benefits or to opt the new services rules on these matters.*

***Explanations.-** (1) Provisions relating to pay, increments and allowance (other than travelling allowance), probation, confirmation, retirement, provident fund, and gratuity, shall be deemed as included in term "emoluments and benefits".*

(2) In case of any doubt or dispute interpretation in respect of matter mentioned in (1) above, reference shall be made to the Board and its decision shall be final.

(3) Existing service rules means authentic service rules framed by and with the approval of the competent authority."

(Emphasis added)

20. It is the admitted case of respondents that Rules, 1980 have been framed by PCF pursuant to resolution dated 18.11.1977 approving the said Rules which was approved by Board, vide letter dated 20.04.1979, proposing some amendments/corrections. Thereafter, matter was again examined and PCF passed a resolution dated 11.03.1980 and the same was approved by Board vide letter dated 04.12.1980.

21. In the present case, we are concerned with Rule 83 of Rules 1980, which reads as under:-

*"किसी अन्य सेवा नियम में दिये गये उपबन्धों पर प्रतिकूल प्रभाव डाले बिना किसी कर्मचारी को जो अपने कर्तव्यों का काई उल्लंघन करता है या दण्ड अपराध अधिनियम की धारा 103 के अधीन किसी अपराध के लिये सिद्ध दोष हुआ है या सेवा नियमावली द्वारा प्रतिषिद्ध कोई कार्य करता है, तो उसे निम्न शास्तियों में से **एक या अधिक शास्तियों द्वारा दण्डित किया जा सकेगा ।***

(क) निन्दा,

(ख) वेतन वृद्धि पर रोक,

(ग) श्रेणी 4 के किसी कर्मचारी (चपरासी, चौकीदार आदि) पर जुर्माना,

(घ) कर्मचारी के आचरण द्वारा फेडरेशन को होने वाली किसी धन संबंधी क्षति को पूर्णतया अथवा आंशिक रूप से क्षतिपूर्ति करने के लिये वेतन या प्रतिभूति से वसूली,

(ड.) कर्मचारी द्वारा मौलिक रूप में धृत पर या श्रेणी में अवनति,

(च) सेवा से हटाया जाना, तथा

(छ) सेवा से पदच्युत

(2) दण्ड के आदेश की प्रतिलिपि अनिवार्यतः सम्बद्ध कर्मचारी को दी जायेगी और कर्मचारी के सेवा अभिलेख में इस आशय की प्रविष्ट की जायेगी।

(3) निन्दा करने के अलावा कोई भी शास्ति तब तक आरोपित नहीं की जायेगी जब तक कि कर्मचारी के कारण बताने की नोटिस न दे दी गई हो और या तो वह विनिर्दिष्ट समय के भीतर उत्तर देने में असफल रहा हो अथवा उत्तर दण्ड देने वाले अधिकारी द्वारा असंतोषजनक पाया गया हो।

(4) (क) आरोपित कर्मचारी को समुपयुक्त प्राधिकारी द्वारा अपराध की गम्भीरता के अनुसार दण्ड किया जायेगाः

प्रतिबन्ध यह है कि खण्ड (1) के उपखण्ड (ङ.), (च) या (छ) के अधीन कोई शक्ति अनुशासनिक कार्यवाही किये बिना आरोपित नहीं की जायेगी।

(ख) कोई कर्मचारी उस प्राधिकारी से जिसके द्वारा वह नियुक्त किया गया था भिन्न किसी प्राधिकारी द्वारा तब तक हटाया या पदच्युत नहीं किया जायेगा जब तक कि नियुक्त प्राधिकारी ने ऐसे अप्राधिकार का प्रतिनिधायन ऐसे अन्य व्यक्ति या प्राधिकारी को लिखित रूप में पहले ही न कर दिया हो।

(5) नियुक्त प्राधिकारी या उसके द्वारा प्राधिकृत व्यक्ति वेतन वृद्धि रोकने का आदेश देते समय उस अवधि का जब तक के लिये वह रोकी गई है और इसका कि क्या उससे भविष्य की वेतन वृद्धियां अथवा पदोन्नति स्थगित होगी, उल्लेख करेगा।''

(Emphasis added)

22. The question up for our consideration is that Regulation 84 of Regulations, 1975 which confers power upon competent authority to impose anyone of the punishments prescribed in Regulation 84 while Rule 83 of Rules, 1980 talks of anyone or more of the punishments prescribed in Rule 83 and therefore the first question is "whether to the extent only one punishment is permissible under Rule 83, is it inconsistent with Regulation 84; or, Rule 83 will have an independent operation without being affected in any manner by Regulation 84.

23. One of the earlier decision cited before us is that of a Single Judge (Hon'ble D.P.S. Chauhan, J.) in ***Vijay Bahadur Yadav, Firozabad Vs. Chairman, U.P. Co-operative Federation Ltd. Lucknow and others : (1992) 2 UPLBEC 1215,*** wherein, after reproducing Regulation 84 in a short judgment, learned Single Judge has held that the punishment order providing three penalties cannot be sustained. After quoting Regulation 84 in paragraph 4 of the judgment, learned Single Judge has observed that under aforesaid Regulations, punishing authority is authorised to impose any one of the penalties provided thereunder, and not more than one.

24. This decision has been followed in ***Virendra Kumar Gupta Vs. State of U.P. and others 2015 (7) ADJ 19*** by a Division Bench comprising of Hon'ble S. N. Shukla and Akhtar Husain Khan, JJ. It has been held therein that Rules framed by a Co-operative Society under Regulation 102 are subject to the provisions of Regulations, 1975 in view of section 122 and for this purpose, reliance is placed on Supreme Court judgment in ***U.P. State Cooperative Land Development Bank Ltd. versus Chandra Bhan Dubey and others : (1999) 1 Supreme Court Cases 741.*** Having said so, Court has said that Rule 84 of Rules, 1975 shall prevail over Regulation 83 of Regulations, 1980 and since superior statutory provision permits imposition of only one penalty, hence more than one penalty cannot be imposed.

25. In ***Satya Narain Mishra's case (supra),*** learned Single Judge was confronted with the decision of the earlier Single Judge in ***Vijay Bahadur Yadav (supra)*** which was followed in Writ Petition No. 6725 of 1989 ***(Najeebullah Siddiqui Vs. Registrar, U.P. Co-operative Societies),*** decided on 02.02.1996 but having noticed above two decisions, learned Single Judge (Hon'ble Sunil Ambwani, J.) proceeded to consider the issue of misappropriation of public money by an employee of bank and observed that such misconduct cannot be treated lightly,

and if some amount has been misappropriated by a bank employee and he is imposed any other punishments and not recovery, that will proved to be an incentive to such an employee to siphon away huge public funds and thereafter get only one punishment, may be dismissal, but no recovery at all. The observations made by learned Single Judge in ***Satya Narain Mishra's case (supra),*** in paragraph 13, reads as under:-

"13. In case bank employee who is found to have embezzled the amount, the public policy demands that apart from the punishment given by departmental authority, he be held responsible for the recovery of the pecuniary loss caused by the employee to the Bank. If an employee is held to be liable to only one of the punishments, it may become an incentive to misappropriate or embezzle a large amount and escape liability of such misappropriation or embezzlement. The punishment of reversion or removal or dismissal on the ground of misconduct should be with direction of recovery to make good the loss caused due to such misconduct. Regulation 84, providing for penalties and stating that the employee is liable to be punished by any one of the penalty has thus to be interpreted to mean that in case of misappropriation or embezzlement which is the misconduct on account of which the employee has been penalised, the recovery of the amount of pecuniary loss caused to the bank is necessary to be coupled with the penalty effected upon delinquent employee. In **V.K. Bahadur u. State Bank of India. 2001 L&IC 935,** *this Court following the judgment in* **State Bank of India v. T.J. Paul, AIR 1999 SC 1994 ; Kailash Nath Gupta Vs. Enquiry Officer : 1997 (1) AWC 2.63 (NOC): 1997 ACJ 896,** *held that where financial irregularities of serious nature are found proved against the bank employee no lenient view should be taken. A bank runs on public confidence. A greater integrity and devotion is required from bank employee in comparison to employees of other organisations. If the allegation of embezzlement, misappropriation or gross negligence is found to be established causing pecuniary loss to the bank on account of delinquent employee, the amount of loss must be made good by him. In the present case, only half of the doubtful recoveries have been sought to be made good, and in the circumstances it is held that imposition of penalty of reversion along with recovery of the amount, does not violate Regulation 84 of the U. P. Co-operative Societies Service Regulation. 1975."*

26. His Lordship (Hon'ble Sunil Ambwani, J.) has sought to interpret Regulation 84 in the manner that in case of misappropriation and embezzlement, if an employee is penalized, the order of recovery of the amount of pecuniary loss caused to the employer is necessary to be coupled with the penalty inflicted upon delinquent employee. His Lordship has referred to this Court's judgment in **V.K. Bahadur u. State Bank of India. 2001 L&IC 935,** wherein, it was held that financial irregularities of serious nature, if proved against a bank employee, no lenient view should be taken. A greater integrity and devotion is required from bank employees in comparison to employees of other organizations. If the allegations of embezzlement, misappropriation or gross negligence is found to be established causing loss to the bank, such employee may be required to make the loss good.

27. There is clear disagreement on the part of the learned Single Judge in ***Satya Narain Mishra's case (supra)*** and from earlier judgment in ***Vijay Bahadur Yadav's case (supra)*** as also ***Najeebullah Siddiqui Vs. Registrar, U.P. Co-operative Societies (supra)*** but instead of referring the matter to Larger Bench, his Lordship has taken a different interpretation, which, in our opinion, was not appropriate and the proper course was to refer the matter to a Larger Bench.

28. The Division Bench making present reference has expressed its agreement with the learned Single Judge in ***Satya Narain Mishra's case (supra)*** and the reason is apparent that an employee who has caused loss to employer by embezzling public money etc. must be made liable to make the loss good and strict interpretation of statutory provision, if allows, such person would escape such liability, hence such interpretation would not be in public interest but would be the boom to the employee concerned.

29. Faced with these two views expressed in the above two sets of judgments, we have examined the scope and ambit of Regulation 84 of Regulation, 1975 vis-a-vis Rule 83 of Rules, 1980.

30. Rules, 1980, if would have been framed in an independent exercise of power under some provision of U.P. Act, 1965, things would have been much easier but, here, the real problem is that Rules, 1980 have been framed in exercise of power under Regulation 102 of Regulation, 1975. Such Rules have to be subordinate and subject to Regulation, 1975 and cannot be allowed to travel beyond specific provisions contained in Regulations, 1975. It is not a case where Regulations, 1975 is silent and, therefore, Rule, 1980 travels on a field which is unoccupied. On the contrary, here is a field covered by Regulation 84 of Regulations, 1975 which very specifically provides that only one of the punishments prescribed can be imposed. However Rule 83 of Rules, 1980 states that anyone or more punishment can be imposed. The words used in both the provisions are distinct. Regulation 84 while restrict power of punishing authority to the extent of imposing one punishment, there is no such restriction in Rule 83 of Rules, 1980. On the contrary Rule 83 permits imposition of more than one punishment.

31. Looking to the purpose and objective of the provisions dealing with disciplinary proceedings and the punishment to be imposed upon an employee, there cannot be any doubt that an employee, if found guilty of serious misconduct of embezzlement of public funds, he must be imposed major penalties of reduction in rank or dismissal or removal but, simultaneously, if such misconduct has also caused loss to the employer, one cannot have any doubt that punishment of recovery should also be imposed upon him so that such employee may not escape without making good the loss caused to the employer on account of misconduct. This object is very loud and must be given effect but, in our view, when Statute is specific, clear and categorical there is no reason that court must provide casus omissus and read something therein which legislating competent authority has chosen not to do.

32. It cannot be said that Board who actually drafted Regulations, 1975 and got it approved from State Government was

not aware that several kinds of punishments have been prescribed in the Statutes and provision could be made to impose more than one punishments, still it has chosen not to do so and has chosen not to make any amendment in Regulation 84 till date. If we add the words "or more" after the word "anyone" in Regulation 84(1), it will amount to a judicial legislation and will change the scope and ambit of Regulation in its entirety. The law on the subject is that Court should not add anything in the Statute when otherwise Statute is clear.

33. Normally a casus omissus should not be read by Court in the statute and should not be easily supplied unless it is found by implication that it was the intention of legislature and hence in the scheme of the statute, it is necessary. This Court is aware that the rules of the interpretation are not rules of laws and are not to be followed like rules enacted by legislature in Act as observed in **Superintendent and Remembrance of Legal Affairs, West Bengal Vs. Corporation of Calcutta, AIR 1967 SC 997.** The principles of interpretation serve only as a guide. A casus omissus cannot be supplied by Court. There is no presumption that a casus omissus exists and language permitting Court should avoid creating a casus Omissus where there is none. It would be appropriate to recollect the observations of **Devlin, L.J. in Gladstone Vs. Bower,(1960) 3 All ER 353 (CA):**

"The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for casus omissus."

34. In **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and others 1978 (36) FLR 266**, Court quoted with approval the following observation of Lord Simonds in **Magor & St. Mellons R.D.C. Vs. Newport Corporation, (1951) 2 All ER 839 (841):**

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited."

35. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real casus omissus, it is equally evident that it should not so interpret a statute as to create casus omissus when there is really none.

36. In **Vemareddy Kumaraswamy Reddy and another Vs. State of Andhra Pradesh 2006 (2) SCC 670** Court reiterated that while interpreting a provision, Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

37. Recently, in **Star India Private Limited Vs. Department of Industrial**

Policy and Promotion and others (2019) 2 SCC 104, Court referring to earlier judgment in **Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Ltd. (2015) 9 SCC 209** has held, where there is a casus omissus, such lacuna cannot be filled up by judicial interpretative process.

38. In this view of the matter, we find no reason to expand scope of Regulation 84 beyond what is stated specifically therein and/or to allow Rule 83 to operate beyond Regulation 84 which is part of principal legislation under which Rule 83 has been framed and has to be subordinate thereto.

39. We, therefore, hold that Regulation 84 shall prevail over Rule 83 and to the extent Rule 83 is inconsistent with Regulation 84, it is ultra vires and cannot be given effect to.

40. Having said so, we may also make it clear that it would not result in allowing an employee of a Co-operative Society to swallow funds of a Co-operative Society and go unburdened with the loss it has caused to the employer. By virtue of departmental enquiry, once it is established that an employee has caused some loss to the employer, in our view, it will become a civil liability of such an employee to make good the loss caused to the employer or employer can claim discharge of such liability by employee by paying such amount, failing which, to proceed for recovery in any other manner as provided in law. For example, since such loss/civil liability touches the business of Co-operative Society, its dispute can be resolved under Section 70 of U.P. Act, 1965 or the said amount can be recovered by bringing an action in civil law. Therefore, whatever we have said hereinabove is in the context of Regulation 84 of Regulations, 1975 vis-a-vis Rule 83 of Rules, 1980 but we make it clear that once siphoning off public funds or loss to the employer is proved and determined, such amount becomes civil liability of employee towards employer. Since it touched upon the business of employer, other remedies are also available to Co-operative Societies concerned to realize the said amount from employee.

41. We would also like to observe that the competent authority framing Regulations under Section 122 should look into the matter. It is advisable that Regulation 84 should be amended at the earliest so as to avoid any injurious situation occurring to Co-operative Societies governed by Regulations, 1975 on account of lacuna in the drafting of Regulation 84 of Regulations, 1975 with regard to imposing of punishment.

42. We, therefore, answer the questions referred to us as under:

(1) Since evident contradiction in the language of Regulation 84 of Regulations, 1975 and Rule 83 of Rules, 1980, the aforesaid provisions cannot be harmonized, hence Regulation 84 of Regulations, 1975 shall prevail over Rule 83 of Rules, 1980 and only one of the punishments prescribed can be imposed as specifically stated in Regulation 84 of Regulations, 1975.

(2) The Division Bench judgment in ***Virendra Kumar Gupta's case (supra)*** lays down correct law and otherwise view expressed by learned Single Judge in ***Satya Narain Mishra's case (supra)*** as also expressed in the

Reference order is not correct position of law.

43. Let the matter be placed before Division Bench for deciding appeal on merits.

(2019)10ILR A 1925

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE VIVEK VARMA, J.

Writ A No. 21057 of 2018

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

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare.

Counsel for the Respondents:
C.S.C.

A. Service Law - appointment - Employee Discipline and Conduct Rules - alleged that petitioner simultaneously pursued BTC and M.Sc. (1st year) course in same year - violation of the aforementioned Rules - petitioner took BTC course during the academic session 2012-2013 and 2013-2014 - M.Sc. course was pursued in the year 2014-2015 and 2015-2016 which eventually got cancelled

The Court observed that the authorities had failed to show any regulation or rule contemplating that a degree and a certificate course cannot be pursued simultaneously. Further the petitioner was appointed without availing the benefit of M.Sc. degree. (para 19)

B. Natural Justice - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rules 7, 8 and 9 - enquiry report not provided to the petitioner - enquiry vitiated

It is mandatory to provide enquiry report to the delinquent in order to provide opportunity to submit reply to the same. (Para 12, 13, 14 and 15)

Writ Petition allowed (E-10)

Cases cited:-

1. U.O.I. & ors Vs Mohd. Ramzan Khan (1991) 1 SCC 588

2. Kuldeep Kumar Pathak Vs St. of UP & ors (2016)3 SCC 521

(Delivered by Hon'ble Vivek Varma, J.)

1. Present writ petition has been filed for quashing the order dated 10.9.2018 (Annexure No. 13 to this writ petition) passed by Basic Shiksha Adhikari, Bijnor i.e. respondent no. 4 whereby the services of the petitioner as an Assistant Teacher has been terminated. The petitioner also prayed for reinstatement and for payment of his salary on month to month basis and further to release his arrears of salary w.e.f. 13.3.2018 with interest.

2. In brief, an advertisement dated 12.12.2014 was placed in the news papers inviting applications for the post of Assistant Teachers in Primary Institutions. Petitioner having possessed Graduation degree and two years Bachelor Training Certificate (BTC) Course applied pursuant to the said advertisement. The petitioner was selected under General category and was accordingly issued appointment letter dated 28.6.2016 by the Basic Shiksha Adhikari, Bijnor. The petitioner joined as Assistant Teacher on 27.6.2018 at

Primary Institution, Pittahedi, Block Kiratpur, District Bijnor. After completion of one year, the appointment was confirmed by the competent authority.

3. On 13.3.2018, petitioner was placed under suspension by the District basic Education Officer, Bijnor on the allegation that he had simultaneously pursued BTC course and M.Sc. First Year, as a regular student in the academic session 2014-15. The order of suspension was challenged by the petitioner before this Court being Civil Misc Writ Petition No. 12548 of 2018, which was dismissed on 24.5.2018 with the observation that the authority concerned shall conclude the departmental proceedings in accordance with law, within a period of three months from the date of production of certified copy of the order after considering the reply of the petitioner.

4. On 16.7.2018 a charge sheet was issued to the petitioner which contained three charges. The first charge states that the petitioner had simultaneously pursued BTC course from District Education and Training Institute, Bijnor and M.Sc. (Ist Year) from Vardhman College, Bijnor in the same year and thus has played fraud upon the department. The second charge is with regard to lowering the image of the department and third charge pertains to indiscipline and violation of Employee Discipline and Conduct Rules.

5. The petitioner submitted his reply that he had done the BTC Course in the academic session 2012-13, 2013-14 while the M.Sc. Course was undergone by him in the academic sessions 2014-15 and 2015-16, therefore, the academic sessions are different. He got the M.Sc. Degree cancelled, attention in this regard was drawn to the cancellation order dated 27.3.2018. It was categorically stated that he had not taken any benefit of M.Sc, degree in obtaining the appointment on the post of Assistant Teacher in Primary Institution. It was also submitted that even a perusal of his application form for appointment on the post of Assistant Teacher would reflect that he has not even mentioned his M.Sc. Qualification.

6. Thereafter, a letter dated 7.9.2018 was issued by Block Education Officer, Kiratpur seeking further reply on certain other issues, which was also replied by the petitioner. After completing the inquiry an inquiry report dated 10.9.2018 was submitted by the Block Development Officer to the District Basic Education Officer. Relying upon the said ex-parte inquiry report dated 10.9.2018, the services of the petitioner were terminated on the same day vide order dated 10.9.2018 passed by District Basic Education Officer, Bijnor. It is this order which is subject matter of challenge before this Court.

7. Learned counsel for the petitioner has submitted that the aforesaid impugned order has been passed in violation of principles of natural justice inasmuch as before passing the order impugned, no opportunity of hearing of any kind whatsoever was afforded to the petitioner. He has not been provided any relevant documents including the copy of inquiry report, and he has also not been afforded an opportunity of oral hearing, therefore, he submitted that the impugned order is bad and is liable to be quashed. It was further contended that there is no bar against pursuing a degree course and a certificate course, simultaneously, in view

of the resolution of University Grants Commission, New Delhi. He has also submitted that the petitioner has not played fraud or misrepresented before the respondents.

8. Per contra, learned counsel for the respondents submitted that the impugned order has been passed strictly in accordance with law and hence no interference is called for. The writ petition lacks merit and is liable to be dismissed.

9. Heard learned counsel for the parties and perused the material on record.

10. The question that needs to be answered first as to whether the disciplinary authority was justified in passing the impugned order of removal of petitioner from service without supplying the copy of the enquiry report and further whether the procedure prescribed under the Rules for holding departmental inquiry in respect of imposition of major penalty have been followed or not.

11. It is not in dispute that service conditions of the petitioner is governed by the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999. It is apposite to extract Rules 7, 8 and 9 of the Rules, 1999, which read as follows:

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

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

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

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

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

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

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

served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation :

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

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

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

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

(viii) The Inquiry Officer may summon any witness to given evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witness and Production of Documents) Act, 1976.

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

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

(xi) .....

(xii) .....

8. **Submission of inquiry report.**-- When the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority along with all the record of the inquiry. The Inquiry Report shall contain a sufficient record of brief facts, the evidence and statement of the findings on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.

9. **Action on Inquiry Report.**-- (1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation tot he charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2) .....

(3) .....

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The

Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned speaking order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

12. The procedure as contemplated under the Rule 7,8 & 9 of the Rules 1999 for imposition of major penalty was not followed. The enquiry officer admittedly did not fix any date or time for the enquiry, neither any evidence was led by the District Basic Education Officer to substantiate the charge.

13. The enquiry officer submitted his report to the Disciplinary authority on 10.9.2018. The Disciplinary Authority i.e. District Basic Education Officer agreed with the findings of the enquiry report and without supplying the copy of the same and without issuing any show cause against the proposed punishment, passed the order dated 10.9.2018 terminating his services. Failure to supply copy of the inquiry report, before the disciplinary authority, takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a clear breach of the principles of natural justice.

14. The object of rules of natural justice is to ensure that an employee is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. It is a basic requirement of rules of natural justice that an employee should be given a reasonable opportunity of being heard in any proceeding which may culminate in a major punishment being imposed on the employee. Thus, the disciplinary proceedings stood vitiated.

15. The Hon'ble Apex Court in the case of **Union of India & Ors. Vs. Mohd. Ramzan Khan, (1991) 1 SCC 588,** has held that it is mandatory to provide enquiry report to the delinquent in order to provide an opportunity to submit reply to the same. In case the punishment order imposing major penalty has been passed without providing enquiry report to the delinquent employee the said punishment order is not sustainable in the eyes of law. The relevant paragraphs read as under:-

"14. This Court in Mazharul Islam Hashmi v. State of U.P. [(1979) 4 SCC 537 : 1980 SCC (L&S) 54] pointed out:

"Every person must know what he is to meet and he must have opportunity of meeting that case. The legislature, however, can exclude operation of these principles expressly or implicitly. But in the absence of any such exclusion, the principle of natural justice will have to be proved."

15. Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry

report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done here which could be taken as keeping natural justice out of the proceedings and the series of pronouncements of this Court making rules of natural justice applicable to such an inquiry are not affected by the Forty-second Amendment. We, therefore, come to the conclusion that supply of a copy of the inquiry report along with recommendation, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-second Amendment has not brought about any change in this position.

16. At the hearing some argument had been advanced on the basis of Article 14 of the Constitution, namely, that in one set of cases arising out of disciplinary proceedings furnishing of the copy of the inquiry report would be insisted upon while in the other it would not be. This argument has no foundation inasmuch as where the disciplinary authority is the Inquiry Officer there is no report. He becomes the first assessing authority to consider the evidence directly for finding out whether the delinquent is guilty and liable to be punished. Even otherwise, the inquiries which are directly handled by the disciplinary authority and those which are allowed to be handled by the Inquiry Officer can easily be classified into two separate groups ? one, where there is no inquiry report on account of the fact that the disciplinary authority is the Inquiry Officer and inquiries where there is a report on account of the fact that an officer other than the disciplinary authority has been constituted as the Inquiry Officer. That itself would be a reasonable classification keeping away the application of Article 14 of the Constitution.

17. There have been several decisions in different High Courts which, following the Forty-second Amendment, have taken the view that it is no longer necessary to furnish a copy of the inquiry report to delinquent officers. Even on some occasions this Court has taken that view. Since we have reached a different conclusion the judgments in the different High Courts taking the contrary view must be taken to be no longer laying down good law. We have not been shown any decision of a coordinate or a larger bench of this Court taking this view. Therefore, the conclusion to the contrary reached by any two-Judge bench in this Court will also no longer be taken to be laying down good law, but this shall have prospective application and no punishment imposed shall be open to challenge on this ground.

18. We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and

make the final order liable to challenge hereafter."

16. Now coming to the other issue as to whether the petitioner has played fraud or misrepresented in getting appointment as Assistant Teacher. In this connection, a perusal of the record would disclose that the petitioner completed two years BTC course during the academic session 2012-13 and 2013-14, while M.Sc. Course was pursued and completed by the petitioner during academic session 2014-15 and 2015-16. Therefore, the academic session of both the courses are different. Further, based upon the application dated 14.3.2018 filed by the petitioner, the M.J.P. Rohilkhand University, Bareilly vide order dated 27.3.2018 proceeded to cancel the M.Sc. Degree of the petitioner. It appears from the impugned order dated 10.9.2018 that neither the Enquiry Officer nor the Disciplinary Authority considered this issue and passed the order terminating the services of the petitioner. Non supply of the enquiry report thus has seriously prejudiced the cause of the petitioner.

17. The impugned order would also reflect that it proceeds on the charge that by appearing in two examinations simultaneously for the same year, petitioner has played fraud and lowered the image of the respondents-department. Further the petitioner also acted in violation of the relevant Service Conduct Rules.

18. The reasoning given by the District Basic Education Officer is clearly unsustainable in as much as no such provision governing the petitioner's service has been brought to the notice of the Court, which may prohibit any such employee to undergo in the two examinations simultaneously. Infact the petitioner has relied upon the resolution of the University Grants Commission, New Delhi dated 28.12.2012, whereby a decision was taken that "a student pursuing a degree programme under regular mode may be allowed to pursue a maximum of one certificate/diploma/ advanced diploma/ PG Diploma programme simultaneously either in regular or open and distance mode in the same university or from other institutions" to contend that a student may pursue a degree course along with a certificate course.

19. Thus, it is more than apparent that the authorities have neither considered the issue in correct perspective nor the respondents have been able to show that there is any such regulation or rule contemplating that a degree and a certificate course cannot be pursued simultaneously. Moreover, the petitioner has been selected by the respondents on fulfilling the essential qualifications prescribed for the post of Assistant Teacher. The petitioner has not derived any benefit on account of his post-graduate degree (M.Sc.). The M.Sc. Degree was got cancelled by the petitioner. Even otherwise in view of the University Grants Commission resolution dated 28.12.2012, a student can pursue a degree course and a certificate course simultaneously. Therefore, appointment of the petitioner cannot be annulled on the ground that the petitioner tried to pursue both the courses simultaneously. It is also not the case of the respondents that petitioner has pursued the courses while holding the post of Assistant Teacher. The allegation that the petitioner has committed fraud or misrepresentation in

procuring the job of Assistant Teacher is not substantiated from the record and pleadings of the respondents.

20. A similar issue also arose for consideration before the Hon'ble the Apex Court in **Kuldeep Kumar Pathak Vs State of UP and others, 2016 (3) SCC 521,** wherein the Court held as under:-

"6. Before us, Mr. Pradeep Kant, learned senior counsel for the appellant has made a neat legal argument. He submits that though the impugned judgment proceeds on the basis that appearing in two examinations simultaneously for the same year is violation of the Regulations of the Board, this reason given by the High Court is clearly unsustainable inasmuch as no such Regulation is shown by the Board which prohibited any such candidate to appear in two examinations in the same year. The learned senior counsel further argued that the impugned order passed by the respondents for confiscating his Certificate of Intermediate exam was, otherwise also, contrary to the principles of natural justice inasmuch as no show cause notice and opportunity of hearing was given to the appellant before passing such an order, which was passed belatedly after a period of nine years from the passing of the said examination by the appellant.

7. We are of the opinion that both the submissions of the learned senior counsel are valid in law and have to prevail. The High Court has been influenced by the argument of the respondents that simultaneous appearance in two examinations by the appellant in the same year was 'contrary to the Regulations'. However, no such Regulation has been mentioned either by the learned Single Judge or the Division Bench. Curiously, no such Regulation has been pointed out even by the respondents. On our specific query to the learned counsel for the respondents to this effect, he expressed his inability to show any such Regulation or any other rule or provision contained in the U.P. Intermediate Education Act, 1921 or Supplementary Regulations of 1976 framed under the aforesaid Act or in any other governing Regulations. Therefore, the entire foundation of the impugned judgment of the High Court is erroneous.

8. It is also pertinent to note that the appellant's intermediate examination and result thereof was not in question before the U.P. Board. No illegality in the admission in that class has been pointed out by the respondents. The alleged charge of simultaneously appearing in two examinations, one of the U.P. Board and other of the Sanskrit Board, was with respect to Class X and equivalent examination which did not relate to admission in intermediate course. The only provision for canceling the said admission is contained in Regulation (1) of Chapter VI-B. It details the procedure for passing the order of punishment canceling intermediate results and, inter alia, prescribes that a committee consisting of three different members is to be constituted and entrusted with the responsibility of looking into and disposing of cases relating to unfair means and award appropriate penalty as specified in the Regulations itself. However, there is no allegation of any unfair means adopted by the appellant in the instant case and, therefore, that Regulation has no applicability. Even otherwise, no such committee was constituted. Therefore, having taken admission in Intermediate on the basis of past certificate issued by a separate Board, which was recognised, and not on the basis of the result of Class X of the U.P. Board, the appellant

derived no advantage from his examination of the U.P. Board while seeking admission in Intermediate course. Thus, from any angle the matter is to be looked into, the impugned orders dated April 20, 2011 and May 10, 2011 passed by the respondents are null and void, apart from the fact that they are in violation of the principles of natural justice.

9. The appeal is, accordingly, allowed with costs by quashing the aforesaid impugned orders and reversing the impugned judgment of the High Court. The appellant shall, accordingly, be entitled to all consequential benefits."

21. The law laid by the Hon'ble Apex Court cited in the preceding paragraph is fully applicable to the facts and circumstances of the present case.

22. In view of the aforesaid the writ petition is allowed. The impugned order dated 10.9.2018 (Annexure No. 13 to this writ petition) passed by Basic Shiksha Adhikari, Bijnor i.e. respondent no. 4. is hereby quashed and consequently respondents are directed to reinstate the petitioner forthwith with all consequential benefits.

(2019)10ILR A 1933

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2019

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No. 70374 of 2011

Jitendra Tiwari & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajit Kumar Singh, Sri A. Kumar, Sri Ramesh Chandra Dwivedi, Sri S.P. Rai, Sri Vinod Kumar Singh.

Counsel for the Respondents:
C.S.C., Sri Harshita Raghuvanshi.

A. Constitution of India- Article 226- seeking payment of salary from State Exchequer from the date of appointment in the primary section- primary school attached to intermediate college.

Primary institution teachers were brought in grant-in-aid list of the State Government- entitle to receive salary from State Exchequer-District Inspector of School granted prior approval for publishing notification for vacancies- Published in "Jagat Asha Deoria" and "Deoria Express Deoria"- no A. Service Law - U.P. Co-operative Societies Employees Service Regulation, 1975: Regulation 84; U.P. Co-operative Federation Limited Karamchari Seva Niyamawali, 1980: Rule 83

The Single Judge while relying on the judgment of Single Judge passed in *Satya Narain Vs Praband Nideshak and ors* dispensed the appellant from service and ordered for recovery of pecuniary loss caused from the embezzlement of money, thereby awarding identical set of two punishments which are awarded simultaneously.

The Division Bench in *Virendra Kumar Gupta vs. State of U.P. and ors* without taking note of the judgment of Single Judge of *Satya Narain (Supra)* emphasized that Regulation 84 of the Regulation 1975 prevail over and above Niyamawali, 1980 therefore only one punishment could have been awarded.

The matter has been referred to the larger bench as to analyze the correct position of law when punishment is awarded under Regulation 84 read with Rule 83.

Matter referred to Larger Bench (E-10)

Cases referred:-

1. Committee of Management, Shivdei Balika Junior High School, Bilaspur, Pilibhit & anr Vs St of U.P. & ors Writ Petition No. 59940 of 2010

2. Lalit Mohan Misra & anr Vs District Inspector of Schools & ors (1979) ALJ 1025

3. Chandra Mohan Pandey Vs D.I.O.S., C.O.M., Mahant Triveni Parvat Inter College & ors (2005) 6 AWC 6029

4. Ashok Kumar Das & ors Vs University of Burdwan & ors (2010) 3 SCC 616

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. The petitioners (five in number) are claiming payment of salary from the State Exchequer with effect from the date of their appointment i.e. on 18.05.2001 in the primary section (upto class V) attached to the institution namely Gyan Prakash Intermediate College, Bhaluwani, Deoria.

2. The stand of the petitioners is that the primary institution was established in the aforesaid institution in the year 1969 after it was granted recognition by the District Inspector of Schools vide letter No.582 dated 17.03.1969. Thereafter, the order of attachment of the said section to the intermediate college was passed. The order of recognition or attachment are not on record. Moreover, there is no dispute about the fact that the primary institution is being run since its establishment in the year 1969 as an integral part of the intermediate institution having common management and is being managed by the duly constituted committee of management.

3. It is stated in the writ petition that the teacher as well as student attendance register being maintained in the institution have been verified from time to time by the District Inspector of School concerned. The payment of salary to the primary teachers was initially being made form the reimbursement grant received from time to time from the State Government as well as out of managerial resources. By the Government order dated 06.09.1989, issued to bring the primary teachers attached to 393 boys higher secondary school, the primary institution teachers of the institution in question were brought on the grant-in-aid list of the State Government. Consequently the teachers working in the primary section were held entitled to get salary from the State exchequer. The circular dated 28.12.1989 was then issued by the Director of Education (Mahdyamik), U.P. providing for standard/fixing strength of the students per class/section as 40 (for class I to V) in continuation of the circular dated 21.10.1989, which in turn was issued for implementation of the Government order dated 06.09.1989 for bringing the attached primary schools to higher secondary institution running since 1973 or prior to that, in the grant-in-aid list of the State Government.

4. As per the aforesaid circular dated 28.12.1989, the standard per class/section of the teacher-student ratio to 1:40 was to be determined on the basis of strength of students as on 30.09.1989, it also provided that there should be one teacher for each class/section.

5. The submission of the petitioners is that previously the attached primary section of the institution-in-question was sanctioned 14 sections as per the strength of the students, but in the year 1990, the strength of students was increased to 880 which necessitated sanction of more

sections and teacher to man the same. The District Inspector of Schools vide letter dated 06.06.1990 granted approval for sanction of 11 additional sections in view of the increased strength of students to 880 in the primary section. It became, therefore, incumbent on the management to appoint 11 more teachers for the additional sections approved by the District Inspector of School. As the total number of sections was increased from 14 to 25, the committee of management of the institution had advertised vacancies in the daily newspaper "Akashmarg" on 15.05.1995 and after due selection, five teachers namely Tej Pratap Singh, Amar Nath Mishra, Bhanu Pratap Yadav, Smt. Anju Singh and Rajendra Prasad Yadav were appointed and joined the institution.

6. The papers pertaining to their selection was transmitted to the District Inspector of School, Deoria for financial approval but he sat tight over the matter. Resultantly, a Writ Petition No.29388 of 1995 **(Tez Pratap Singh Vs. D.I.O.S. Deoria & others)** was filed which was disposed of vide judgement and order dated 06.08.2002 relegating the petitioners therein to approach the District Inspector of Schools who was required to take a decision by passing a reasoned order. Pursuant thereto, the teachers filed representation but the District Inspector of School had refused to grant approval, which was subjected to challenge in Writ Petition No.35852 of 2004 **(Bhanu Pratap Yadav Vs. State of U.P. & others)** and other writ petitions being filed by the remaining teachers.

7. The Writ Petition No.35852 of 2004 was decided on 02.09.2004 quashing the order dated 15.05.2004 passed by the District Inspector of School, Deoria further relegating the matter for fresh decision by the District Inspector of School for grant of financial approval to the appointment of the said petitioners. Consequently, vide order dated 03.07.2006, the District Inspector of Schools, Deoria granted approval to the appointment of Bhanu Pratap Singh made in the primary section noticing that additional sections were approved by the District Inspector of School making the strength to 25.

8. It is then contended that two selected teachers namely Sri Amar Nath Mishra and Smt. Anju Singh did not join nor they made further claim for approval. Resultantly, five posts of teachers in the primary section fell vacant, as against 25 sanctioned post 20 teachers were working at that point of time.

9. Looking to the shortage of teachers in the primary section, the management wrote to the District Inspector of School on 23.04.2001 seeking prior approval for notification of the vacancies, which was duly granted by the District Inspector of School. The vacancies were published in the daily newspaper "Jagat Asha Deoria" and "Deoria Express Deoria" on 25.04.2001. The petitioners herein claim to have been selected by a duly constituted selection committee pursuant to the said advertisement and states that appointment letter were issued to them by the committee of management on 10.05.2001. It is claimed that the petitioners had joined their duties as Assistant Teachers in the attached primary school to the institution-in-question on 18.05.2001 and are discharging their duties since thereafter.

10. The papers pertaining to selection of petitioners were forwarded to

the District Inspector of School on 10.05.2001 itself for grant of financial approval but till date, no approval has been granted nor salary had been paid to the petitioners from the State exchequer. The management had sent reminders on 16.10.2002, further in the year 2003-04 last being dated 11.04.2011. Inspite of the best efforts made by the management, the District Inspector of School did not grant approval to the appointment/selection of the petitioners against the substantive vacancies. The petitioners, thus, pray for a writ of mandamus commanding the District Inspector of School, Deoria to accord financial approval to the selection/appointment of the petitioners and pay them salary from the State exchequer with effect from the date of their joining i.e. 18.05.2001.

11. The submission of learned counsel for the petitioner is that with the sanction of additional sections by the District Inspector of Schools, being satisfied with the increased strength of the students in the primary section, no exception could be taken by him for selection or appointment. Even otherwise, prior approval was taken for notifying the vacancies as on 25.04.2001. The District Inspector of School cannot keep quiet over the matter for such a long period. Approval was duly accorded to other teachers who had approached this Court at an earlier point of time against the increased strength of the teachers pursuant to the increase of sections.

12. Learned counsel for the petitioner further contends that by the Government order dated 24.07.2001 a ban was imposed for appointment/approval of the primary teachers in the attached primary sections of secondary education institutions which were taken on grant-in-aid list in the year 1958 and 1989, till framing of the Services Regulation. The District Inspector of Schools were directed to determine strength of the attached primary institution (from the date of maintenance grant till issuance of the said Government order). Again vide Government order dated 19.04.2003, a complete ban was imposed for creation of post, permission for additional section, appointment and approval of teachers in attached primary institutions without prior permission of the State Government. Appointment against the vacancies arose as a result of retirement of the then incumbent could be made as against the sanctioned post, after fresh determination of strength of students, sanctioned post and the working strength after prior permission of the State Government.

13. The aforesaid ban was relaxed vide Government order dated 25.05.2012 considering the fact that complete ban in the matter of appointment had disturbed the teaching work in the primary institution and in view of the mandate of the Right of Children to Free and Compulsory Education Act, 2009, it became necessary to appoint requisite number of teachers timely in the primary institutions. Taking note of the observations made by this Court in Writ Petition No.12977 of 2012 and 25733 of 2012, it was noted therein that the matter of framing regulations for selection/appointment of teachers in the attached primary school was subject matter of active consideration of the State Government. However, till the said regultion are framed, the District Inspector of School is empowered to fill up the vacant posts in the attached primary institution subject to the terms

and conditions provided therein which are relevant to be quoted herein:-

1. पद सृजन, अतिरिक्त कक्षा वर्ग की अनुमति दिये जाने का अधिकार जिला विद्यालय निरीक्षक को नहीं होगा

2. अनुदानित होने के समय सम्बद्ध प्राईमरी प्रभाग की जनशक्ति कितनी थी और उसके सापेक्ष वर्तमान में कितनी जनशक्ति है, का सम्यक परीक्षण जिला विद्यालय निरीक्षक द्वारा किया जाना आपेक्षित होगा।

3. प्रबन्धतंत्र द्वारा किसी सृजित पद के विरुद्ध नियुक्त की अनुमति जिला विद्यालय निरीक्षक से मांगी जायेगी तो जिला विद्यालय निरीक्षक द्वारा उक्त विद्यालय में अध्ययनरत छात्रो की पंजीकृत छात्र संख्या, औचक निरीक्षण में छात्रो की उपस्थिति का संज्ञान लेना होगा

4. जिला विद्यालय निरीक्षण यह सुनिश्चित करेगा कि नियुक्त की प्रक्रिया पारदर्शी है, और वह यह भी देखेंगे कि रिक्त पदो के विरुद्ध भर्ती हेतु विज्ञापन दिया गया है अथवा नहीं

5. जिला विद्यालय निरीक्षण द्वारा जब भर्ती हेतु अनुमति दी जायेगी तो उसकी सूचना शिक्षा निदेशक एवं शासन को निश्चित रूप से उपलब्ध कराया जाना आवश्यक होगा।

6. जिला विद्यालय निरीक्षक द्वारा छात्रो की संख्या के सापेक्ष कार्यरत अध्यापको की संख्या का परीक्षण मानक के अनुसार किया जाना अनिवार्य होगा।

7. जिला विद्यालय निरीक्षक यह सुनिश्चित करेंगे की आरक्षण नियमो का कड़ाई से अनुपालन किया जा रहा है।

8. संयुक्त शिक्षा निदेशको द्वारा जनपदीय भ्रमण के दौरान सम्बन्धित जिला विद्यालय निरीक्षण द्वारा पदो को भरे जाने हेतु दी गयी अनुमति का सत्यापन निश्चित रूप से किया जाना सुनिश्चित किया जायेगा।

9. विद्यालय प्रबन्धतंत्र एवं जिला विद्यालय निरीक्षक की दुरभिसन्धि का प्रकरण संज्ञान में आने पर नियमानुसार दण्डात्मक कार्यवाही सम्बन्धित सक्षम स्तर से की जायेगी।

14. Placing the said Government order dated 25.05.2012, it is contended by the learned Advocate that the ban imposed by the Government order was revoked with the direction to make appointment of teachers in the attached primary institutions looking to the strength of students studying therein. It is, thus, vehemently contended that after removal of ban, it was incumbent on the District Inspector of School, Deoria to grant approval to the appointment of the petitioners against the substantive vacancies. Reliance is placed upon the judgements of this Court in Writ Petition No.59940 of 2010 **(Committee of Management, Shivdei Balika Junior High School, Bisalpur, Pilibhit & another Vs. State of U.P. & others), Lalit Mohan Misra & another Vs. District Inspector of Schools & others,** reported in 1979 ALJ 1025, **Chandra Mohan Pandey Vs. D.I.O.S.; Committee of Management, Mahant Triveni Parvat Inter College & others)** reported in 2005 (6) AWC 6029, **Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad** reported in 1998 (3) AWC 2150 to submit that approval being granted to the appointment of petitioners would be effective from the date of their initial appointment/joining as posts were advertised after seeking prior approval of the District Inspector of School who had duly determined the sanctioned strength for grant permission to make appointment against the available vacancies.

15. Counter affidavit filed on behalf of respondent no.2 i.e. District Inspector of Schools, however, states that when the

attached primary institution was taken on grant-in-aid list on 06.09.1989, at that point of time 14 posts of teachers were sanctioned. The District Inspector of School vide order dated 06.06.1990 granted permission to run 11 additional sections looking to the strength of the students. Resultantly, against 25 sections sanctioned, 20 teachers were working when appointment of the present petitioners was made against five vacancies. The committee of management though sent a letter dated 23.04.2001 pressing the necessity of the teachers in the primary institution but without waiting for prior approval of the District Inspector of School, vacancies were advertised on 25.04.2001. It is then contended that the District Inspector of School could not have determined the necessity of appointment of teachers in the primary section without making a spot inspection, so as to verify the strength of the students studying at the relevant point of time.

16. As far as the selection of the petitioners is concerned, it is contended that the publication of vacancy in the newspaper "Deoria Express" cannot be said to be proper, in as much as, the aforesaid paper was not having wide circulation in District Deoria. Objections have also been raised regarding constitution of the selection committee and further that no appointment letter could be issued to the petitioners without getting approval of the selection made by the committee of management. It is urged that since appointments are not in accordance with law, the State Government cannot be asked to make payment. It is the committee of management of the institution which has to pay salary to the teachers/petitioners. It is further contended that the reminder letters though were received in the office of the District Inspector of School, Deoria but original record pertaining to the selection proceeding was not made available in the office of the said respondents and hence no decision could be taken with regard to the selection of the petitioners. Reference has been made to the Government order dated 24.07.2001 to state that in view of the specific direction of the State Government, no appointment of the teachers in the attached primary section could be made by the committee of management without prior permission of the District Inspector of School who in turn was required to seek permission of the State Government.

17. The committee of management filed a counter affidavit to support the stand of the petitioners to seek payment of salary from the State exchequer and further to state that the entire papers with regard to the appointment of the petitioners were sent to the District Inspector of School, Deoria on 10.05.2001 for according financial approval and that the same was received in the office of the District Inspector of School on the same date.

18. In the rejoinder affidavit, all the aforesaid assertions of the counter affidavit are denied and it is reiterated that the vacancies were in existence on the date of appointment, it is incorrect to say that the documents/record pertaining to selection was not forwarded by it.

19. In his argument learned counsel for the petitioners relied on the judgement of the Apex Court in **Ashok Kumar Das & others Vs. University of Burdwan &**

others reported in 2010 (3) SCC 616 to submit that the approval can be ex-post facto and any action taken before "approval" stands validated as soon as, "approval" is granted. Only in a case where ex-post facto "approval" is refused, the appointment/action taken pending approval stands invalidated. It is contended that there was no requirement of seeking "prior approval" for making selection to the substantive vacancies. Any "approval" being granted by the District Inspector of School looking to the record of selection would validate the action of the committee of management in making appointments, in as much as, no objection has been taken by the District Inspector of School with regard to the eligibility of the petitioners for appointment to the post of Assistant Teachers in the attached primary section.

20. To deal with this, relevant is to note that the appointment of the petitioners on the post of Assistant Teacher in primary section required "prior approval" and not simply "approval" by the District Inspector of School. That means before making appointment, the record of selection was required to be examined by the District Inspector of School to ascertain that there was no discrepancy in the procedure of selection and the selected teachers possessed requisite eligibility qualification. "Prior approval" as has been explained by the Apex Court in **Ashok Kumar Das (supra)** means a condition which pre-supposes the action to be taken after grant of "approval" by the competent authority. If an appointment is made with the "prior approval" of a competent authority, any appointment is to be made without that would be invalid and the approval if any granted in future would not validate the said act rather the appointment would stand approved from the date of approval only.

21. In the case of the petitioners herein, "prior approval" being a pre-condition to the appointment was required to be fulfilled before issuance of appointment letters to the petitioners. It, therefore, cannot be said that the appointment made by the committee of management without approval of the District Inspector of School would put obligation on the State to pay salary from the State exchequer merely for the fact that the appointments were made against the substantive vacancies.

22. It is further noteworthy that the petitioners claim to have been selected and appointed in the month of April & May, 2001. The ban imposed by the State Government vide Government order dated 24.07.2001, therefore, would not cover them. However, at the same time it is noted that the District Inspector of Schools, Deoria was not empowered to create new sections and permit sanction of posts, as sanction of posts is within the domain of the State Government. In case of any requirement of additional sections, coupled with the need to create posts to man the same, appropriate course of action for the District Inspector of Schools was to make an inspection of the primary institution and submit a report to the State Government making his recommendation after ascertaining the number of students studying therein. Under the Government order dated 25.05.2012, the District Inspector of Schools has been empowered to determine the sanctioned strength/requirement of teachers in an attached primary school at the time of

bringing the institution on the grant-in-aid list. He is further required to make surprise inspection of the institution from time to time so as to satisfy as to the number of students registered and actually studying therein. He would also be required to determine the strength of the teachers in the ratio of students as per the fixed standard.

23. It is, thus, clear that the District Inspector of Schools could not have unilaterally accepted the claim of the committee of management for creation of additional sections and increase of the strength of teachers. Such decision could have been taken only by the State Government after a report/recommendation in this regard would have been submitted by the District Inspector of School.

24. In the said scenario, the decision of the District Inspector of School not to grant financial approval to the appointments of the petitioners cannot be said to be illegal.

25. This apart, the District Inspector of School has categorically asserted that the committee of management of the institution did not provide necessary documents pertaining to the selection and further that the advertisement was not made in two daily newspapers of wide circulation. No exception could be taken to the said reasons of denial of approval by the District Inspector of Schools in its stand taken in the counter affidavit.

26. For the aforesaid, no mandamus can be issued. However, it is left open for the committee of management to request the District Inspector of Schools, Deoria to make a fresh inspection of the institution-in-question and to submit his recommendations to the State Government strictly in accordance with the conditions provided in the Government order dated 25.05.2012 by determining the sanctioned strength of the attached primary sections in the standard teacher-students ratio. In case, the District Inspector of Schools finds that the number of students studying in the institution are much more and the students-teachers ratio is not in accordance with the fixed standard, he shall submit a comprehensive report for consideration before the State Government.

27. On presentation of the said report, the State Government would be under obligation to take an expeditious decision in accordance with law.

28. Subject to the above, the writ petition is **disposed of.**

(2019)10ILR A 1940

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE VIVEK VARMA, J.

Writ A No. 25018 of 2018

Lokendra Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena, Sri Pankaj Kumar Tiwari, Sri Ashish Pandey.

Counsel for the Respondents:
C.S.C.

A. Service Law - Departmental Proceedings - Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991; Rule 8(2) (b) - *pari-materia* to Article 311(2) of the Constitution of India - petitioner suspended because of ongoing criminal proceedings - preliminary enquiry initiated - ex-parte enquiry report - dispensed with departmental enquiry without providing any reasons

The Court observed that decision to dispense with the departmental enquiry was based on the preliminary enquiry report which was though supplied to the petitioner but no opportunity was given to rebut the same. It is a clear violation of principles of natural justice. (Para 31)

In aforementioned provision of the Rule shows that an exception has been carved out from the normal rule of holding a departmental enquiry, before imposing a major punishment upon the delinquent officer. In order to exercise such exception the authority has to record reasons for dispensing with the departmental enquiry. (Para 12 and 13)

Writ Petition allowed (E-10)

Cases cited:-

1. U.O.I. & anr Vs Tulsi Ram Patel AIR (1985) SC 1416

2. Jaswant Singh Vs St of Pun & ors (1991) 1 SCC 362

3. Reena Rani Vs St of Haryana (2012) 10 SCC 215

4. Risal Singh Vs St of Haryana & ors (2014) 13 SCC 244

5. Pushpendra Singh & anr Vs St of U.P. & anr (2008) 3 ADJ 689 (D.B.)

6. Dayashankar Tiwari & ors Vs St of U.P. & anr (2010) 10 ADJ 574 (D.B.)

7.Rajendra Prasad Singh Vs St of U.P. & ors (2014) 3 WC 2616

8. Umesh Chandra Vs St of U.P. thu Secy Special Appeal No. 350 of 2017

(Delivered by Hon'ble Vivek Varma, J.)

1. By means of this petition under Article 226 of the Constitution, the petitioner has assailed the order dated 09.03.2018 passed by respondent no.4-Inspector General of Police, Moradabad Region, Moradabad and order dated 11.08.2018 passed by respondent no.3-Additional Director General of Police, Bareilly Region, Bareilly (Annexure Nos.5 and 9 to the writ petition).

2. Briefly, the facts of the case are that the petitioner was sub-inspector in civil police. When he was posted as Station House Officer in District Bulandshahar, he was approached by a lady, namely, Ms. Ruma Chaudhary in connection with a land dispute with her uncle. Upon intervention of the petitioner, the aforesaid dispute was resolved. Thereafter, Ms. Ruma Chaudhary became familiar with the family of the petitioner and won their trust. She took a loan and financial help from the petitioner to continue her studies. According to the petitioner, in the year 2011, Ms. Ruma Chaudhary successfully qualified the examination of constable in U.P. Police. But she still continued to take financial help from the family of the petitioner. Even after 4 to 5 years of service, she refused to repay the loan. It is stated that in October, 2017, the wife of the petitioner filed a complaint case being Case No. 23786 of 2017 (Smt. Geeta vs. Ruma Chaudhary), under Sections 406, 506 I.P.C. against Ms. Ruma Chaudhary. On 23.01.2018, Ms. Ruma Chaudhary, it is submitted as a counter blast, lodged an FIR against the petitioner under Sections 376, 377 and 506 I.P.C. alleging that said offences have been committed from June, 2010 onwards. Again on 09.02.2019, in order to pressurize

the petitioner, Ms. Ruma Chaudhary lodged another FIR under Sections 364, 511, 507, 504 and 506 I.P.C. Due to the aforesaid FIR and complaint of Ms. Ruma Chaudhary, the petitioner was placed under suspension vide order 14.02.2018 passed by S.S.P, Moradabad. On 27.03.2018, a charge-sheet was submitted against the petitioner in the FIR dated 23.01.2018. Thereafter, the petitioner is stated to have challenged the charge-sheet by filing Criminal Misc. Application U/S 482 Cr.P.C. No.21454 of 2018 and this Court vide order dated 20.06.2018 stayed the further proceedings. It is also stated that in the FIR dated 09.02.2018, a final report was submitted and no protest petition has been filed as yet.

3. It is submitted that while those proceedings were continuing, a departmental preliminary enquiry was initiated against the petitioner by the S.P. City, District Moradabad. The statements of Ms. Ruma Chaudhary and the Investigating Officers of the two cases instituted against the petitioner, were recorded by the enquiry officer. The preliminary enquiry report recorded that, prima facie, the allegations made by Ms. Ruma Chaudhary were correct.

4. On the basis of said ex-parte enquiry report, the petitioner was dismissed from service vide order dated 09.03.2018 by the Inspector General of Police, Moradabad Region, Moradabad under Rule 8 (2) (b) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the "Rules, 1991").

5. Aggrieved by the aforesaid order, the petitioner preferred a departmental appeal and the same was rejected by the Additional Director General of Police, Bareilly Region, Bareilly vide order dated 11.08.2018. The orders dated 09.03.2018 and 11.08.2018 are under challenge before this Court by means of present writ petition.

6. Heard Sri Amit Saxena, learned Senior Advocate, assisted by Sri Ashish Pandey, learned counsel for the petitioner and Mr D. K. Tiwari, learned Standing Counsel for the State.

7. Submission of Sri Amit Saxena, learned counsel for the petitioner is that the dismissal order passed against the petitioner without holding a departmental enquiry is entirely arbitrary, discriminatory and the same has been passed in violation of the principles of nature justice. There is no material before the disciplinary authority for arriving at any subjective satisfaction to dispense with the enquiry. There was no occasion to hold that enquiry into the matter is neither reasonable nor practicably possible.

8. Further submission is that reasons recorded for dispensing with the enquiry was irrelevant and was arbitrary and, therefore, the impugned termination was invalid and that the petitioner was liable to be reinstated in service.

9. Per contra, learned Standing Counsel for the State, in support of orders impugned, has submitted that Rule 8 (2) (b) of the Rules, 1991 has rightly been invoked in the matter as it was not possible to hold a departmental enquiry. He has further stated that the enquiry officer has clearly stated in his enquiry report that the petitioner indulged in criminal acts.

10. I have considered the rival submission advanced by learned counsel for the parties.

11. The services of the petitioner had been dismissed after invoking, the proviso to Rule 8 (2) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. To appreciate the contention made by learned counsel for the parties, it is necessary first to have a look at the provisions contained in Rule 8 of the Rules, 1991. It reads as under:

*"**8. Dismissal and removal.** - (1) No Police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.*

***(2) No Police Officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings** as contemplated by these rules :*

Provided that this rule shall not apply -

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State is not expedient to hold such enquiry.

(3) All orders of dismissal and removal of Head Constables or Constables shall be passed by the Superintendent of Police. Cases in which the Superintendent of Police recommends dismissal or removal of a Sub-Inspector or an Inspector shall be forwarded to the Deputy Inspector-General concerned for orders.

(4) (a) The punishment for intentionally or negligently allowing a person in police custody or judicial custody to escape shall be dismissal unless the punishing authority for reasons to be recorded in writing awards a lessor punishment.

(b) Every officer convicted by the Court for an offence involving moral turpitude shall be dismissed unless the punishing authority for reasons to be recorded in writing considers it otherwise."

12. Bare perusal of the aforesaid Rule would go to show that holding of inquiry is a rule and dispensing with the enquiry is an exception. Before proceedings to impose any one of the major penalty of dismissal, removal or reduction in rank the departmental inquiry is must. However in certain contingency said rule can be dispensed with. One such contingency provided for is that, it is not reasonably practicable to hold an inquiry for reasons recorded in writing. The said authority is to be exercised in exceptional circumstances and that too by recording finding to the effect as to why it is not reasonably practical to hold an inquiry. The sine quo non for exercise of power under the proviso (b) to Rule 8 (2) of U.P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules, 1991, is the requirement to record reasons that it is not reasonably practicable to hold such inquiry.

13. The proviso to Article 311 (2) of the Constitution of India, which is analogous to Rule 8 (2) (b) of Rules, 1991 provides for the mandatory requisites to dispense with the enquiry. In the aforesaid

provision also, an exception is carved out to the normal rule of holding a departmental enquiry, before imposing a major punishment upon the delinquent officer.

14. The condition precedent for exercise of powers to dispense with the departmental enquiry arose for consideration before the Hon'ble Supreme Court in the case of ***Union of India and another vs. Tulsi Ram Patel1.*** The Hon'ble Court held as under:

"60. The Second Proviso to Article 311(2) Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and audi alteram partem rule by providing that a person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges. To this extent, the pleasure doctrine enacted in Article 310 (1) is abridged because Article 311 (2) is a express provision of the Constitution. This safeguard provided for a government servant by clause (2) of Article 311, however, taken away when the second proviso to that clause becomes applicable. The safeguard provided by clause(1) of Article 311, however, remains intact and continues to be available to the government servant. The second proviso to Article 311 (2) becomes applicable in the three cases mentioned in clauses (a) to (c) of that proviso. These cases are :

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; and

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

130. The condition precedent for the application of clause

(b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable

man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to given evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause(3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail."

15. The Hon'ble Apex Court in the case of ***Jaswant Singh vs. State of Punjab and others2,*** the Court while dealing with the exercise of power as conferred by way of exception under Article 311 (2) (b) of the Constitution of India, opined as under:

"Clause (b) of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram Case: (SCC p.504, para 130)

A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the sanctification of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

16 In ***Reena Rani vs. State of Haryana3,*** after referring to the various authorities holding the field, the Hon'ble Apex Court ruled out when reasons are not ascribed, the order is vitiated and accordingly set aside the order of dismissal which had been concurred with by the Single Judge and directed for reinstatement in service with all consequential benefits. It has also been

observed therein that the order passed by this Court would not preclude the competent authority from taking action against the appellant/petitioner in accordance with law.

17. Recently, in the case of ***Risal Singh vs. State of Haryana and others4,*** while construing a similar provision, the Hon'ble Apex Court Court observed as follows:

"Non-ascribing of reason while passing the order dispensing with enquiry, which otherwise was must, definitely invalidates such action....

Tested on the touchstone of the aforesaid authorities, the irresistible conclusion is that the order passed by the Superintendent of Police dispensing with the inquiry is totally unsustainable and is hereby annulled. As the foundation founders, the order of the High Court giving the stamp of approval to the ultimate order without addressing the lis from a proper perspective is also indefensible and resultantly, the order of dismissal passed by the disciplinary authority has to pave the path of extinction"

18. The provisions of Rule 8 (2) (b) of the Rules, 1991 and Article 311 (2) of the Constitution of India are almost in pari-materia and the legislative intent behind the provisions are the same.

19. In view of the law laid down by the Hon'ble Apex Court noticed above, before exercising special powers to dispense with the enquiry, the disciplinary authority must be satisfied on the basis of objective material that it is not practicable to hold such enquiry.

20. At this stage, it would be appropriate to notice some authorities in point rendered by this Court, while interpreting proviso (b) to Rule 8 (2) of the Rules, 1991.

21. In ***Pushpendra Singh and another vs. State of U.P. and another5,*** the Court in paragraphs 7, 8, 9 and 10 held as follows:

"7. ..... Thus, in order to dispense with the regular departmental proceeding for inflicting punishment of dismissal, removal or reduction in rank, recording reasons is condition precedent. The idea or object of recording reasons is obviously to prevent arbitrary, capricious and mala fide exercise of power. Therefore, recording of reason is mandatory and in its absence the order becomes laconic and cannot sustain. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes. The Hon'ble Apex Court in the case of Union of India v. Tulsi Ram Patel, AIR 1985 SC 1416 while considering Articles 310 and 311 of the Constitution of India held that two conditions must be satisfied to uphold action taken under Article 311 (2) of the Constitution of India, viz., (i) there must exist a situation which renders holding of any enquiry not reasonably practicable, (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. The Hon'ble Apex Court further observed that though Clause (3) of Article 311 makes the decision of the disciplinary authority in this behalf final, yet such finality can certainly be tested in the Court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous

considerations or merely a rule to dispense with the enquiry. The Hon'ble Apex Court at page 1479 in Tulsi Ram Patel (supra) held as follows :

"A disciplinary authority is not expected to dispense with a disciplinary authority lightly or arbitrary or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the Government servant is weak and must fail."

8. The words some "reason to be recorded in writing that it is not reasonably practicable to hold enquiry" means that there must be some material for satisfaction of the disciplinary authority that it is not reasonably practicable. The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. The Apex Court in the case of Jaswant Singh v. State of Punjab and Ors. has observed as under:

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No. 3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry."

"...When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

9. Therefore, in view of the exposition of law such satisfaction has to be recorded either in the impugned order or in any case it must be available on record. In the case in hand, the impugned order is enclosed as Annexure 5 to the writ petition. From a perusal thereof it is evident that the Senior Superintendent of Police merely reproduced the provisions contained in Rule 8(2)(b) against the above police personnel, stating that it is not reasonably practicable to hold such enquiry. It does not contain any reason showing as to why it is not reasonably practicable to hold regular enquiry. The satisfaction that it is not reasonably practicable to hold such enquiry has to be spelled out either in the order itself or at least it has to be available on record. Learned Standing Counsel also during his submission could not show us any such reason recorded by the competent authority in the record to show any ground or reason for invoking the provisions contained in Rule 8(2)(b) *of the Rules. It is well settled legal position that when a statutory functionary makes an order based on some reasons or grounds, its validity is to be tested on the ground or reasons mentioned therein and cannot be supplemented by giving reasons through affidavit filed in the case (See Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors.).*

9. It is also an admitted position that the appellants have been dismissed from service without holding any enquiry. They have not been informed of the charges against them nor been afforded opportunity of being heard in respect of charges before inflicting punishment of dismissal from service. Thus, in the absence of reasons for dispensing with the regular enquiry the impugned order of

dismissal is patently illegal and it is difficult to uphold the same."

22. In ***Dayashankar Tiwari and another vs. State of U.P. and others6,*** the Court in paragraphs 9, 10 and 11 held as follows:

"9. In the present case, it is admitted that the petitioners were caught red handed while on duty, and no preliminary enquiry was held nor the petitioners were given opportunity to explain their conduct. The Senior Superintendent of Police has found that it was not reasonably practicable to hold a departmental enquiry against them only on the ground that the act of police personnel will cause serious damage to the police department, and general public will loose confidence in the police department.

10. In all the aforesaid cases, it was held that unless the reasons given by the disciplinary authority that it was not reasonably practicable to hold departmental enquiry, relevant for the exercise of power, the courts will not exercise power of judicial review.

11. In the present case, acceptance of bribe and being caught red handed in the act, may lower the image of the police department, and the confidence of general public, but that by itself cannot be said to relevant grounds to dispense with the preliminary and thereafter departmental enquiry. The exercise of powers under Section 8 (2) (b) will require the act of indiscipline or misconduct to be such, and not its consequences, which may be relevant to record findings that it is not reasonably practicable to hold departmental enquiry. Every allegation of corrupt practice by police officers results into possibility of indiscipline, lowering of image and loss of public faith. These consequences cannot be taken to be sufficient not to cause departmental enquiry to enquire into the truth of allegations after affording an opportunity of hearing to the delinquent employee."

23. In ***Rajendra Prasad Singh vs. State of U.P. and others7,*** the Court in paragraphs 9 & 10 held as follows:

"9. Thus, the consistent view is that holding an enquiry is a rule and it's dispensation, an exception. The test is that in a prevailing situation, what a reasonable man, taking a reasonable view, would have done. Further, the decision to dispense with the departmental enquiry is not based on the ipse dixit of the authority concerned but should be based on objective assessment of the relevant facts. If the subjective satisfaction is challenged before the Court of law, it has to pass the test laid down above and for which, it is the burden of the disciplinary authority to place the relevant facts and material before the Court to justify it's action in dispensing with the disciplinary enquiry.

10. Applying these principles to the facts of the present case, this Court finds that the decision to dispense with the enquiry is not based on relevant considerations and cannot be sustained in law. Perusal of the impugned order will demonstrate that the decision to dispense with the disciplinary enquiry is primarily based on two grounds: (1) that the delinquent continues to be absent and there is no possibility of his co-operation in the enquiry; and (2) the deeds of the delinquent were widely reported in various newspapers and media and,

therefore, it would be inexpedient and impracticable to hold the enquiry."

24. Recently, a Division Bench of this Court in the case of ***Umesh Chandra vs. State of U.P. through Secretary,*** Special Appeal No.350 of 2017, decided on 06.08.2019, (of which I was a member), the Court construed the provisions of Rule 8 (2) (b) of the Rules, 1991. The relevant extract of the judgments is quoted below:

"The above provision is pari-materia with Article 311 (1) and (2) of the Constitution, which gives constitutional protection to a Member of civil service of the Union or of the State. The normal rule is that no major punishment, such as, dismissal, removal or reduction in rank should be inflicted without taking recourse of regular disciplinary enquiry against any delinquent. However, Rule 8 (2) (b) of the Rules, 1991 has carved out certain exceptions where even without holding regular proceeding punishment of dismissal, removal or reduction in rank can be inflicted. In order to dispense with the regular departmental proceeding for inflicting major punishment recording reasons is a condition precedent to prevent arbitrary, capricious and mala fide exercise of power. Absence of reasons vitiates the order and renders it unsustainable in law. Secondly, the authority has to record its satisfaction based on credible material in the record, to dispense with the enquiry. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes."

25. The authorities in point are long, but the position of law has been consistent on the point.

26. In the case in hand, the Inspector General of Police vide his order dated 09.03.2018, dismissed the services of the petitioner relying upon a confidential/ex-parte preliminary enquiry report dated 15.02.2018 conducted by Deputy Inspector of Police, Moradabad by stating that since the petitioner had been posted as Inspector in police department, a cloud of fear exists, no witness came forward to depose against him, as such, further enquiry is not possible.

27. The said order also records that the petitioner is a married person and being a senior member of a disciplined force, has committed misconduct within the meaning of Rule 3 of The U.P. Government Servant Conduct Rules, 1956. He has tarnished the image of the police force. The continuance of such undisciplined and criminal minded person will cause serious damage to the police department and general public will loose faith. For this reason the disciplinary authority thought it fit to dispense with the enquiry.

28. The recital in the impugned dismissal order dated 09.03.2018 that no witness came forward to depose against the petitioner in the preliminary enquiry as such further enquiry is not possible, needs consideration. It does not stand to reason how witnesses were aware about the enquiry when even the petitioner was not informed. The said reasoning by no stretch of imagination could be a ground for dispensing with the disciplinary enquiry. It is a wholly subjective opinion not arising from any objective material.

29. It is also relevant to be noted that if a preliminary enquiry can be held then there is no reason as to why a regular departmental enquiry cannot be held, in

such facts. Admittedly, there are cross cases registered between petitioner and Ms. Ruma Chaudhary and also the fact that Ms. Ruma Chaudhary had duly appeared and deposed before the ex-parte preliminary enquiry.

30. It is trite law that the satisfaction of the authority has to be based upon objective material on record. There is no material on record to justify the conclusion that it was not possible to hold a departmental enquiry.

31. Also, the order has been passed on the basis of preliminary enquiry. The preliminary enquiry report was never supplied to the petitioner. The petitioner did not have an opportunity to refute the preliminary enquiry report. The report was adverse to the petitioner. The authority by failing to provide preliminary enquiry report to the petitioner and omitting to call for objections from the petitioner, has acted in violation of principles of natural justice. The procedure adopted by the authority while passing the impugned order is arbitrary and illegal. Even the appellate authority failed to appreciate the aforesaid issues and dismissed the appeal. The reasoning assigned in the impugned orders cannot be said to be relevant grounds to dispense with the departmental inquiry.

32. In view of the admitted facts and the legal position referred to above, the impugned dismissal order dated 09.03.2018 and appellate order dated 11.08.2018 cannot be sustained and are hereby set aside.

33. The writ petition is ***allowed.***

34. The matter is remanded back to the disciplinary authority to proceed from the stage prior to the passing of the impugned order dated 09.03.2018 and conclude the enquiry within a period of six months from the date of production of a certified copy of this Court.

(2019)10ILR A 1950

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2019

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No. 39169 of 2012

Harlal Saini ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava, Sri Santosh Kesarwani, Sri O.P. Agrawal, Ms. Pooja Srivastava, Sri Yogendra Kumar.

Counsel for the Respondents:
A.S.G.I., Sri A.S. Azami, Ms. Himkanya Srivastava.

A. Administrative Law: Principles of Natural Justice - A different conclusion can be drawn by the disciplinary authority only after inviting objections of the delinquent employee-The disciplinary authority proceeded to record its own finding and disagreed with the findings of the enquiry report-No opportunity of hearing was given to the petitioner- Allowing this petition, the High Court held -It is not permitted for the disciplinary authority to arrive at a conclusion on mere surmises and conjectures to hold the delinquent employee guilty. (Para 8 & 23)

B. When the disciplinary authority differs with the view of the inquiry officer and

proposes to come to a different conclusion, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. (Para 18, 19, 21 & 24)

Writ petition challenges order dated May 05, 1999, passed by Disciplinary Authority.

Writ Petition allowed (E-4)

Precedent followed: -

1. P.N.B. & ors. Vs Kunj Behari Misra, AIR 1998 SC 2713 (Para 7, 17, 18)

2. St. of Assam Vs Bimal Kumar Pandit, AIR 1963 SC 1612 (Para 19)

3. Managing Director, ECIL Vs Karunakar, 1994 AIR SCW 1050 (Para 19)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri B.K. Srivastava learned Senior Advocate assisted by Ms. Pooja Srivastava learned Advocate for the petitioner and Ms. Himkanya Srivastava learned Advocate for the respondent.

2. The petitioner seeks to challenge the order dated 15.5.1999, whereby his appointment to the post of Constable (CISF) has been brought to an end holding him guilty of the charges levelled against him. The charge against the petitioner in the charge sheet dated 20.1.1998 which had lead to the departmental enquiry is as follows:-

Charge

"Force No. 884667433 Constable H.L. Saini of CISF Unit SSTPS Shaktinagar and Force No. 8923331600 Constable Shailesh K.B. of CISF Unit B.C.C.L. Dhanbad Area 12 at Begunia Headquarters Unit Line on dated 11.09.1997 at 2030 hours both consumed opium solution which resulted in the death of said Constable Shailesh K.B. on 12.09.1997 at 0210 hours at Sanctoria Hospital E.C.L and Constable H.L. Saini received treatment by Dr. M. Khalid of Lions Club Raghunath Kharkia Eye Hospital Kharkianaga, Chirkundo against payment of Rs. 5/-. Hence this act of the said Constable H.L. Saini is an act of serious indiscipline, bad conduct and criminal behaviour which resulted in the death of Constable Shailesh K.B."

3. Reply to the charge sheet was submitted on 23.3.1998. The enquiry report dated 13.4.1999 was submitted exonerating the petitioner saying that the charges were not proved. The disciplinary authority put a disagreement note relegating the matter for fresh enquiry.

4. Against the order of disagreement dated 15.5.1999, the petitioner preferred an appeal on 6.5.1999, which was rejected on 21.10.1999. The said orders were, thereafter, subjected to challenge before the Supreme Court in a petition under Article 32 of the Constitution of India. It was dismissed as withdrawn with liberty to the petitioner to approach the High Court. In the writ petition filed before the Delhi High Court, the petitioner got it dismissed as withdrawn for filing it before the Court of competent jurisdiction.

5. The challenge to the dismissal order and the order of rejection of appeal is that the proceedings of enquiry was not concluded in accordance with the principles of natural justice. The alleged incident stated to have taken place at CISF Unit, BCCL, Jahria but the enquiry was conducted at a different place at Shaktinagar, where the records were not

available. The disciplinary authority once found that the findings of the enquiry officer was not in accordance with law, only option left before it was to quash the same and remit the matter back for fresh submission of the enquiry report.

6. Earlier the enquiry report dated 5.4.1999 was not agreed by the disciplinary authority and the entire file was returned to resubmit the enquiry report which was re-submitted on 13.4.1999. In the subsequent report, the enquiry officer gave a categorical finding that the charges against the petitioner were not proved, however, the disciplinary authority disagreeing with the findings recorded in the enquiry report, proceeded to record its own finding on the basis of circumstantial evidence holding the petitioner guilty. No notice or opportunity of hearing was given to the petitioner at this stage i.e. when the disciplinary authority disagreeing with the enquiry report proceeded to record its own finding, opportunity of hearing was needed.

7. Reference has been made to the judgment of the Apex Court in **Punjab National Bank and others vs. Kunj Behari Misra1** to substantiate this submission.

8. It is further contended that though the disciplinary enquiry proceeds on the principles of preponderance of probabilities but the reasons supporting the probabilities from the circumstances brought before the enquiry officer are required to be recorded. It is not permitted for the disciplinary authority to arrive at a conclusion on mere surmises and conjectures to hold the delinquent employee guilty. The adequacy or sufficiency of evidence would not be seen in a challenge to the departmental enquiry, but wherein there is a case of no evidence, the principles of preponderance of probability would not be attracted as the said principle requires at least some evidence for appreciation to reach at the conclusion of guilt of the delinquent.

9. In a case of no evidence, the conclusion of the disciplinary authority or reasoning of the enquiry officer to hold the delinquent guilty would be bad.

10. Learned counsel for the respondents, on the other hand, defended the order impugned with the submission that after full fledged enquiry, the charges were found proved by the disciplinary authority. The opportunity of hearing has been provided. There was sufficient evidence to hold the petitioner guilty.

11. In the supplementary affidavit, the statements of the witnesses who deposed against the petitioner has been brought on record.

12. In view of the above rival submissions, relevant is to note that the charge against the petitioner was that he alongwith another Constable Shailesh had consumed opium on 11.9.1997 at about 20:30 hours at Begunia Headquarters Unit Line, which has resulted in death of said Constable Shailesh on 12.9.1997. The petitioner also had undergone treatment by Dr. M. Khalid of Lions Club Raghunath Kharkia Eye College. Hence this act of the petitioner has been termed as an act of serious indiscipline, bad conduct and criminal behaviour which had resulted in death of another Constable Shailesh.

13. During the course of enquiry, eight witnesses were examined by the prosecution. Out of which, the key

witness was PW-1 Constable Trilochan Singh who deposed in his examination-in-chief that on 11.9.1997 at about 20:30 hours, the Constable petitioner offered him a liquid which looked like tea and asked him to drink it while informing that it was opium. P.W. 1 had, however, refused and went away. When he came back in the night at about 23:30 hours, he was told that Shailesh was admitted in the hospital and, thereafter, he received message that Shailesh had died. In his cross-examination, nothing much could be elicited apart from the fact that Shailesh was eating his food while sitting at the 'Cot' and was in normal condition.

14. In the cross examination by the enquiry officer, PW-1 further says that he did not know as to whom the liquid containing opium was offered after he refused to drink it as the Constable petitioner went back to his place. All other witnesses had proved that Shailesh fell ill and was admitted in the hospital and died. No one had seen Shailesh and the petitioner Constable consuming opium together or the petitioner offering it or that it was consumed by the deceased Shailesh. The reference of statements of all other witnesses, therefore, is not needed here. The doctor P.W.-8 proved his report and the opinion that death was caused by some unknown poison. Another doctor PW-11 was produced to prove that the petitioner was also treated in his hospital with complaint of obstruction in the passage of urine. He has given an opinion that in case of consumption of opium, such kind of medical condition may occur.

15. The enquiry officer after perusal of the record before it and oral evidences came to the conclusion that the charge that Constable Shailesh consumed opium on the offering of the delinquent and had died on account of the same was not proved. P.W.-2 only states that Shailesh while having his food had told him that he had consumed opium but no one could prove that the opium liquid was consumed by Shailesh which was offered by the petitioner. It is also not proved that he died on account of consumption of opium. No one had seen both of them sitting together or consuming opium.

16. This enquiry report was considered by the disciplinary authority but it has disagreed with the conclusion drawn by the enquiry officer. Having noted that the findings were not correct, it has proceeded to appreciate the evidences available on record. Noticing that the petitioner had offered opium solution to P.W. 1 who had refused to consume the same, it was presumed that the said opium solution was offered to and consumed by Shailesh. From the report of the doctor that the cause of death was "unknown poison", it was assumed that the poison was opium. From the fact that the petitioner himself was admitted in another hospital and was treated for obstruction of urine passage, it was assumed that he had consumed opium and was admitted in the hospital for that reason. The appellate authority while looking to the correctness of order of the disciplinary authority only records the past conduct of indiscipline of the petitioner.

17. However, no one could assail that fresh notice was required to be given by the disciplinary authority while recording independent finding, disagreeing with the enquiry report on the same set of evidence. Learned counsel for the petitioner has brought the judgment of

the Apex Court in **Punjab National Bank** (supra) to substantiate his submission that the order of the disciplinary authority is bad, inasmuch as, no opportunity of hearing was provided.

18. Reference has been made to paragraph nos. '17', '18' and'19' of the said report which are relevant to be quoted hereunder:-.

"17. These observations are clearly in tune with the observations in Bimal Kumar Pandit's case (AIR 1963 SC 1612) quoted earlier and would be applicable at the first stage itself. the aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the inquiry officer had given an adverse finding, as per Karunakar's case (1994 AIR SCW 1050) the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the inquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be over-turned by the disciplinary authority then no opportunity should be granted. The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the inquiring officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings what is of ultimate importance is the findings of the disciplinary authority.

18. Under Regulation 6 the inquiry proceedings can be conducted either by an inquiry officer or by the disciplinary authority itself. When the inquiry is conducted by the inquiry officer his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the inquiry officer. Where the disciplinary authority itself holds an inquiry an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the inquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the inquiry officer they are deprived of representing to the disciplinary authority before that authority differs with the inquiry officer's report and, while recording of guilt, imposes punishment on the officer. In our opinion, in any such situation the charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of

inquiry as explained in Karunakar's case(supra).

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

19. Considering the observations of the Apex Court in **State of Assam vs. Bimal Kumar Pandit2 and Managing Director, ECIL vs. Karunakar3,** it was held therein that the first stage of the enquiry is not complete till the disciplinary authority has recorded its finding. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiry officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority, who may take further action which may be prejudicial to the delinquent officer. In a case where enquiry report is in favour of the delinquent employee but the disciplinary authority proposes to differ with such conclusion, then that authority which is deciding fate of the delinquent officer must give him an opportunity of being heard for otherwise, he would be condemned unheard. In departmental proceedings what is of utmost importance is the finding of the disciplinary authority. It was finally concluded therein that where the disciplinary authority imposed penalty by coming to a different conclusion from that of the enquiry officer, it was required to provide opportunity of hearing to the employee. The reason being that the authority which has to take a final decision and impose a penalty shall give an opportunity to the officer charged of his conduct to file his reply on the charges, otherwise not found proved by the enquiry officer.

20. No contrary view could be placed before the Court by the learned counsel for the respondent.

21. In view of the above discussed law, it is clear that the order of the disciplinary authority is in gross violation of the principles of natural justice, as admittedly, opportunity has not been provided to the petitioner. Since, it was a case where charges were not found proved by the enquiry officer, a different conclusion could be drawn by the disciplinary authority only after inviting objections of the delinquent employee.

22. Now, on the question of merit of the order of the disciplinary authority, relevant is to note that the disciplinary

authority while disagreeing with the findings of the enquiry officer had simply recorded that since PW-1 knew that opium solution was with the petitioner who had offered it to him coupled with the fact that the Constable Shailesh was admitted in the hospital and died on account of some unknown case of poisoning, an inference can be drawn about involvement of the petitioner in offering him opium solution.

23. As noted above, having gone through the oral evidences on record, there is no doubt to the fact that there was no direct evidence against the petitioner that he had consumed opium with the deceased Shailesh or that he offered opium to Shailesh. No one had seen them consuming opium together or even sitting together. It is, thus, a case of no evidence. The disciplinary authority has simply acted on surmises and conjectures to create a hypothesis of involvement of the petitioner in the death of Constable Shailesh. Mere assumption of any situation on hypothetical criteria without any supportive evidence (even circumstantial) would not be proof even on the principles of preponderance of probabilities. The said principle does not give leverage to the disciplinary authority to create a hypothesis by its own imagination without any evidence. The reason given by the disciplinary authority in the order impugned of holding the petitioner guilty is nothing but creation of his own imagination. As this is a case of no evidence, the entire decision making process culminating in the decision of the disciplinary authority suffers from perversity and arbitrariness. The order of punishment awarded by the disciplinary authority, therefore, cannot be sustained. The same is hereby quashed.

24. The appellate authority has simply rejected the appeal on the ground that the procedure laid down for departmental enquiry had been followed and there was no miscarriage of justice. Further the punishment awarded was commensurate with the gravity of offence. It has simply overlooked the requirement of opportunity to be given by the disciplinary authority before recording the finding of guilt when the petitioner was exonerated in the enquiry i.e. charges against him were not proved by the enquiry officer.

25. The order of the appellate authority, therefore, is set aside.

26. The petitioner is entitled to reinstatement with all consequential benefits and back wages for the period of discontinuance, inasmuch as, the employers have illegally restrained him from working by proceeding in an arbitrary manner.

27. Subject to the above observations and directions, the writ petition is **allowed.**

(2019)10ILR A 1956

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2019

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ A No. 16106 of 2017

Arvind Kumar ...Petitioner
Versus
Registrar General High Court of Judicature at Alld. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Adarsh Bhushan.

Counsel for the Respondents:
S.C., Sri Manish Goyal, Sri Ashish Mishra.

A. U.P. District Court Service Rules, 2013 - Higher qualification clearly indicates or presupposes acquisition of lesser qualification prescribed for a post - Petitioner duly qualified for the post of Junior Assistant and was appointed vide letter of appointment dated 01.10.2015- Petitioner's services were terminated vide impugned order, pursuant to the resolution dated 26.08.2016, on the ground that he did not have CCC certificate issued by DOECC Society (NIETLIT). Allowing the present petition, the High Court Held-Order was passed without application of mind and without considering the fact that petitioner possessed qualification equivalent to/higher than the CCC Certificate. (Para 14)

Writ petition is against the order dated 07.01.2017, passed by District Judge, Chandauli

Writ Petition allowed (E-4)

Precedent followed: -

1. Jyoti K.K. & ors. Vs Kerala P.S.C. & ors., (2010) (15) SCC 596 (Para 8)

2. Sanjay Kumar Vs St. of U.P. & 2 ors., dated 06.05.2019 in Special Appeal (Defective) No. 679 of 2017 (Para 12, 15 & 16)

3. District Judge Azamgarh & anr. Vs Sandeep Kumar Chauhan & anr., dated 16.05.2019 in Special Appeal No. 1265 of 2018 (Para 12, 17)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Adarsh Bhushan, learned counsel for the petitioner and Sri Ashish Mishra, learned counsel appearing on behalf of respondent Nos.1 and 2 and learned Standing Counsel for respondent No.3.

2. The petitioner has preferred the present writ petition with the prayer to quash the order dated 07.01.2017 passed by the District Judge Chandauli/respondent No.2 (Annexure No.16 to the writ petition) with a further prayer to direct the respondent No.2 to reinstate the petitioner in service along with the arrears of salary and other consequential benefits.

3. Facts in brief as contained in the writ petition are that an advertisement was issued by the Registrar General, High Court of Judicature at Allahabad/respondent No.1 inviting applications from eligible candidates in order to fill up Group C Cadre Posts by direct recruitment in District Courts situated in State of U.P. The advertisement in question also includes the post of Junior Assistant and Paid Apprentice in Grade Pay of Rs.5200-20200/-. The essential qualification for appointment on the post of Junior Assistant was intermediate with special knowledge of Urdu and Hindi along with Computer Concept Course (hereinafter referred to as "CCC") issued by DOEACC Society and 25/30 words per minute for Hindi/English Type writing on Computer, Arithmetic, Menstruation, Elementary Land Surveying and Mapping.

4. The petitioner applied for the post of Junior Assistant under Scheduled Caste Category. Admit Card was issued and the written examination was held on 18.10.2014. The petitioner duly qualified the same and thereafter the petitioner was subjected to computer type test. In the result computer type test, the petitioner was found duly selected. Thereafter, the petitioner was participated in Hindi and English Typing Test on 24.05.2015. The final result was published in which the petitioner was finally selected for

appointment on the post of Junior Assistant and he was appointed on the aforesaid post in District Chandauli by respondent No.2 vide letter of appointment dated 01.10.2015. Thereafter the petitioner joined his duties and started working.

5. The Educational qualification of the petitioner are intermediate, B.A., M.A. in Hindi. Apart from the same, the petitioner also possessed professional qualification in Computer Education i.e. Diploma in Computer Application from Janta Computer Education Centre and also a Diploma in Computer Application from Community Development through Polytechnic Chandauli, Government of India Project, Chandauli Polytechnic Chandauli. It is contended in paragraph 16 of the writ petition that Director of Judicial Training and Research Institute (JTRI) has invited the newly appointed Class III District Court Employees for a computer Training Programme for 17.10.2016 and 18.10.2016 at JARI Lucknow vide order dated 21.09.2016. The petitioner duly participated in the aforesaid training programme and completed it successfully. A certificate in this regard was issued to the petitioner, copy of which is appended as Annexure No.7 to the writ petition. A circular was issued by the respondent No.1 on 06.01.2018 by which certain clarifications were issued with regard to the requirement of Computer qualification mentioned in the advertisement, i.e., possession of CCC certificate awarded by the DOEACC Society. Subsequently another circular dated 16.1.2016 was issued whereby information was sought for regarding details of computer qualification possessed by the selected/appointed candidates from each District Judgeship. A resolution was issued by the respondent No.1 addressed to all the District Judges of U.P. with regard to the requisite qualification, i.e., CCC Certificate.

6. Pursuant to the aforesaid resolution, the respondent No.2 issued a notice dated 31.8.2016 to the petitioner demanding CCC certificate issued by DOECC Society (NIETLIT) on 02.09.2016.The petitioner duly submitted his reply stated therein that he possessed computer qualification equivalent to CCC certificate. Another notice was issued by the respondent No.2 on 09.09.2016 stating that the CCC certificate issued by DOEACC (NIETLIT) is mandatory for post of Junior Assistant as has been stipulated in the resolution dated 26.08.2016. The petitioner again submitted its reply on 24.09.2016 stating therein that he possessed a diploma from Polytechnic, Chandauli which is within the purview of Government of India Project and the same is equivalent to CCC Certificate issued by DOEACC Society (NIETLIT). The petitioner was also direct to present in the office of respondent No.2 on 3.10.2016 along with certificate of computer qualification. It is contended that without considering the reply submitted by the petitioner, order dated 7.1.2017 was passed by the respondent No.2 terminating his services pursuant to the resolution dated 26.08.2016. The petitioner has preferred the present writ petition challenging the aforesaid order dated 7.1.2017.

7. It is contended by Sri Adarsh Bhushan, learned counsel for the petitioner that the order impugned dated 7.1.2017 is wholly unreasoned order and fails to accord any consideration to the

reply submitted by the petitioner in response of show cause notices issued by the respondent No.2. It is further argued that insofar as the CCC certificate issued by the DOEACC Society (NIETLIT) is concerned, the same is 80 hours basic course of study and in comparison thereto, the course content of the petitioner pertaining to the computer has been far wider. It is further argued that the order impugned has been passed in violation of principles of natural justice as no opportunity of hearing whatsoever has been given to the petitioner at any point of time before the impugned order was passed. It is further argued that the impugned order has been passed without application of mind and against the provisions of U.P. District Court Service Rules, 2013. It is further argued that the computer qualification possessed by the petitioner is equivalent to CCC Certificate issued by the DOEACC Society (NIETLIT). It is further argued that the qualification possessed by the petitioner is much higher than the CCC certificate issued by the DOEACC Society (NIETLIT). The petitioner cannot be non-suited on the ground that he does not have a particular certificate which is very basic qualification in the knowledge of computer operation.

8. Sri Adarsh Bhushan learned counsel for the petitioner relied upon a judgement of the Supreme Court in the case of ***2010 (15) SCC 596 (Jyoti K.K. and Others Vs.Kerala Public Service Commission and others).*** The Supreme Court in the aforesaid case was pleased to hold that higher qualification must clearly indicate or presupposes the acquisition of lower qualification prescribed for that post in order to attract that part of the rules to the effect that such of those higher qualification which presupposes the acquisition of lower qualification prescribed for the post.

9. In the counter affidavit filed by Sri Ashish Mishra, learned counsel appearing on behalf of the respondents, it is contended that the High Court of Judicature at Allahabad vide Advertisement No.01/Sub. Court/Category "C"/Clerical Cadre/2004 advertised the Uttar Pradesh Civil Court Staff Centralized Recruitment Scheme, 2014 calling for the post of Junior Assistant and Paid Apprentice for various vacancies in different Judgeships in the State of Uttar Pradesh. The essential qualifications prescribed in the said advertisement was as follows:-

"2. ESSENTIAL QUALIFICATIONS:

The Applicant must possess minimum essential qualification for all the posts on the last date of submission of the on-line application form for the following posts:-

Sl.	**Category Posts ("C" Cadre Posts)**	**Essential Qualification**	**Experience**
1	Junior Assistant (Amin Grade-II Category "C"/ Copyist (Civil & Police Case Diaries/Assistt. Account Clerk/ Additional Clerk/ Court Clerk/ Admin Clerk/ Writer & Runner/Typist, etc Clerk-cum-Typist Category "C")	Intermediate with Special Knowledge of Urdu and Hindi along with a CCC certificate issued by DOEACC Society and 25/30 words per minute for Hindi/ English Typewriting on Computer, Arithmetic, mensuration, elementary land surveying	N.A.

		and mapping, Order XXVIof Act No. V of 1908 and Rules (Civil) relating to the work and duties of the Junior Assistant. **Note:** For the post of Amin Grade-II, only those candidates will be considered who have passed their Intermediate examinations with Mathematics as one of the subject.	
2	Paid Apprentices	Intermediate with CCC certificate issued by DOEACC Society and 25/30 words per minute for Hindi/ English Typewriting on Computer.	N.A.

10. Thus, for both the posts Junior Assistant and Paid Apprentice, the minimum qualification of computer course to be possessed by the applicant was a "CCC' Certificate issued by the DOEACC Society (apart from other qualifications) on the last date of submission of the application form i.e. 30/09/2014. It is further contended that the services of the paid apprentice of the Subordinate Court are governed by the U.P. District Court Service Rules, 2013; Schedule-B of the said Rules provides the essential qualifications for the post in the Cadre. A perusal of the said schedule would show that the minimum essential qualification prescribed for the post of Junior Assistant, amongst other, includes "CCC' Certificate issued by DEOACC Society, as such it is submitted that the statutory provision which govern the services of the employees of the subordinate court, unequivocally provided that the candidate should have a "CCC' Certificate issued by DOEACC Society, as a minimum essential qualification.

11. It is further contended that the last date of filling up the online application form was 30.09.2014 and as per the essential qualifications prescribed in the advertisement, the applicant must possesses the minimum essential qualification on the last date of submission of the online application form. It is further contended that the petitioner applied for the post of Junior Assistant and was duly selected, though he did not possess computer qualification prescribed under the advertisement, as he did not have "CCC' certificate issued by the DOEACC Society or any higher qualification on the last date of filling of application form. The petitioner made a false declaration in the application form that the petitioner had CCC Certificate qualification. Sri Ashish Mishra, learned counsel for the respondent relied upon a Division Bench judgement dated 30.11.2016 passed in ***Special Appeal No.751 of 2016 (Ajay Seth Vs. State of U.P. and 2 others)*** which is annexure 3 to the writ petition.

12. In the rejoinder affidavit filed by the learned counsel for the petitioner, the facts as stated in the counter affidavit

were denied. Shri Bhushan learned counsel for the petitioner relied upon Division Bench Judgment of this Court ***dated 06.05.2019 in Special Appeal (Defective) No.679 of 2017 (Sanjay Kumar Vs. State of U.P. and 2 others)***. He further relied upon another Division Bench Judgement of this Court dated ***16.05.2019 in Special Appeal No.1265 of 2018 (District Judge Azamgarh and another Vs. Sandeep Kumar Chauharn and another).***

13. Heard learned counsel for the parties. Since affidavits have already been exchanged, with the consent of learned counsel for the parties, the matter is being heard finally and disposed of at the admission stage itself.

14. From perusal of the facts as narrated above, it is clear that on the last date of submission of online form, the petitioner does not have certificate of CCC issued by DOEACC Society. It is also clear that two show-cause notices were issued to the petitioner by the respondent No.2, i.e., notices dated 31.08.2016 and 09.09.2016. Replies of the aforesaid show-cause notices were duly given by the petitioner vide reply dated 29.09.2016 and 24.09.2016. In both the replies, it is clearly mentioned by the petitioner that he possess a Diploma from Polytechnic Chandauli which is within the purview of Government of India Project and is equivalent to Computer Concept Course (CCC) Certificate issued by DOEACC Society (NIETLIT) but by passing the impugned order, the reply submitted by the petitioner was not at all taken into consideration by the respondent No.2From perusal of the impugned order dated 7.1.2017, it is clear that the order was passed by the respondent No.2 without application of mind and without considering the fact that the qualification possessed by the petitioner is equivalent to the Computer Concept Course (CCC) Certificate.

15. Apart from the same, Division Bench of this Court in the case of ***Sanjay Kumar (supra)*** has already been held that the Computer Concept Course (CCC) is designed to fulfill the beginner level computer literacy and that can be undertaken by a person at his own also. It was further held that only requirement is that he must get the same verified by NIELIT (formerly known as "DOEACC Society"). The course in question is not expertise in computer application but is the most preliminary knowledge for computer operation. The certificate of CCC is available even for the persons who are having no formal education.

16. After taking into consideration the aforesaid aspects of the matter, the Division Bench was pleased to set aside the order passed by the learned Single Judge dismissing the writ petition filed by Sanjay Kumar as well as the order passed by the District Judge Unnao cancelling the appointment of the applicant-petitioner. The petitioner was directed to reinstate in the District Judgeship of Unnao with all consequential benefits except actual the actual payment of salary for the period he remained out of employment. Relevant portion of the aforesaid judgement is reproduced below:-

"In appeal, we have looked into the entire issue including the nature of certificate of CCC. As per the details available on the official websidte of the NIELIT, the deails of the Course on Computer Concepts (CCC) is as follows:-

*"**Introduction:** This course is designed to aim at imparting a basic level*

IT LIteracy programme for the common man. This programme has essentially been conceived with an idea of giving an opportunity to the common man to attain computer literacy thereby contributing to increased and speedy PC penetration in different walks of life. After completing the course the incumbent should be able to use the computer for basis purposes of preparing his personnel/business letters, viewing information on internet (the web), receiving and sending mails, preparing his business presentations, preparing small databases etc. This helps the small business communities, housewives, etc. to maintain their small accounts using the computers and enjoy in the world of Information Technology. This course is, therefore, designed to be more practical oriented.

Eligibility: *The candidates can appear in the NIELIT CCC Examination through following three modes and the eligibility criteria for each mode are indicated against each:*

2.1 Candidates sponsored by NIELIT approved Institutes permitted to conduct CCC Course - irrespective of any educational qualifications;

2.2 Candidates sponsored by Government recognized Schools/Colleges having obtained an Unique Identity number from NIELIT for conducting CCC - irrespective of any educational qualifications, and

2.3 Direct Applicants (without essentially undergoing the Accredited Course or without being sponsored by a Govt. recognized School/College) - irrespective of any educational qualification;

Duration: *The total duration of the course is 80 hours, consisting of*

(I) Theory 25 hours

(ii) Tutorials 5 hours

(iii) Practicals 50 hours

The course could ideally be a two weeks intensive course."

The introduction quoted above indicates that the Course on Computer Concepts (CCC) is designed to fulfill the beginner level computer literacy and that can be undertaken by a person at his own also. The only requirement is that he must get the same verified by NIELIT (formerly known as "DOEACC Society"). The course is not expertise in computer application but is the most preliminary knowledge for computer operation. The certificate of CCC is available even for the persons who are having no formal education. As a matter of fact, it is the first step for computer literacy. The only purpose to include certificate of "CCC" in the eligibility is that the aspirant must be aware with computer and he should a computer literate. The appellant-petitioner who is a Post Graduate Diploma in Computer Application is too ahead to the knowledge extended through CCC. The advance knowledge available to the appellant-petitioner very well satisfies the purpose and need to have certificate of CCC. Learned single Bench failed to appreciate that the purpose of having a CCC certificate stands satisfied on having the higher qualification of Post Graduation in Computer Application.

In view of whatever stated above, we are of considered opinion that learned single Bench erred while arriving at the conclusion that the order passed by District Judge, Unnao dated 19th September, 2016 does not suffer from any error.

Accordingly, the appeal is allowed. The order dated 5th January, 2017 is set aside. The Writ Petition No.60818 of 2016 is allowed. The order

dated 19th September, 2016 passed by the District Judge, Unnao cancelling the appointment of the appellant-petitioner is set aside. The petitioner is declared entitled to be reinstated as Stenographer Grade III in district judgeship Unnao with all consequential benefits except the actual payment of salary for the period he remained out of employment in pursuance to the order dated 19th September, 2015."

17. Similar view was taken by the Division Bench of this Court in the case of ***District Judge Azamgarh and another (supra)*** . The petitioner is possessing diploma in Computer Application from Janta Computer Education Centre as well as diploma in Computer Application from Polytechnic, Chandauli. The diploma obtained from Polytechnic Chandauli is under Government of India. The duration of diploma obtained from Polytechnic Chandauli is of more than 80 hours whereas the essential qualification of having CCC certificate issued by DOEACC Society (NIETNIT) is 80 hours basic course of study. The petitioner in reply to the show cause notice has given full detail regarding his essential qualification. Since the petitioner is having a diploma which is higher qualification than CCC certificate, as such, the order dated 7.1.2017 terminating his services is not sustainable.

18. In view of the law laid down by the Division Bench in the aforesaid two judgements, I am of the opinion that the writ petition is liable to be allowed and the same is allowed. The order dated 07.01.2017 passed by the District Judge Chandauli (Annexure 16 to the writ petition) is set aside. The petitioner is declared entitle to reinstate in the District Judgeship of Chandauli with all consequential benefits except the actual payment of salary for the period he remained out of employment pursuant to order dated 01.07.2017.

19. With the aforesaid observations, the writ petition is allowed.

(2019)10ILR A 1963

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2017

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Special Appeal No. 435 of 2008

Pancham Ram Yadav
...Petitioner-Appellant
Versus
The U.P. Co-Operative Federation Ltd. & Anr. ...Respondents

Counsel for the Appellant:
Sri Prakash Padia, Sri Chandan Kumar.

Counsel for the Respondents:
C.S.C., Sri Ram Gopal Tripathi, Sri V.C. Tripathi.

A. U.P. Co-operative Societies Employees Service Regulation, 1975- Regulations 84, 85 and U.P. Co-operative Federation Limited Karamchari Seva Niyamawali, 1980- Rule 83- Regulation 84 and Rule 83 combined together should not allow the process to remain unfinished-Writ against the dismissal of appellant from service was dismissed vide impugned order dated 12.11.2007- Recall application also dismissed. Referring the matter to a Larger Bench, the High Court observed -Regulation 84 should be read in a manner so as to allow the Disciplinary Authority to impose an appropriate punishment coupled with a

direction to recover the entire financial loss show caused. (Para 11, 12 & 15)

B. Harmonizing the words "any one" of the penalties in Regulation 84 with the words used in Rule 83 of the 1980 Rules, would be a paradox and against public policy and therefore such an interpretation deserves to be avoided.
(Para 15)

Special appeal against the judgment and order dated 12.11.2007, passed by learned Single Judge in CMWP No. 18891 of 2000. (E-4)

Precedent followed: -

1. Satya Narain Mishra Vs Praband Nideshak & anr., (2002) (1) AWC 582 (Para 4, 6, 7, 8, 9, 10, 15 & 16)

Precedent deferred from: -

1. Virendra Kumar Gupta Vs St. of U.P. & ors. in Service Bench No. 614 of 2009 decided on 28.07.2015 (Para 6, 7, 9, 13, 15 & 16)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J. & Hon'ble Saral Srivastava, J.)

1. Heard Sri Chandan Kumar, learned counsel for the appellant and Sri Ram Gopal Tripathi, learned counsel for all the respondents.

2. This appeal prays for setting aside the judgment dated 12.11.2007 of the learned Single Judge in Writ Petition No.18891 of 2000 in so far as it relates to the present appellant only.

3. The appellant while working as a Storekeeper in the godown of U.P. Cooperative Federation Limited, the respondent herein, is alleged to have been involved in the illegal removal of 361 bags of Sugar as a result whereof, along with others, he was also charge-sheeted in disciplinary proceedings and was called upon to answer the charges including the charge of financial loss having been caused on account of such removal of bags. The said charges were enquired into and the appellant was held to be liable for the said loss and the charges of misappropriation were stated to have been proved. As a measure of punishment to the appellant, on the conclusion of the enquiry, the appellant was dismissed from service vide order dated 03.03.2000 and was also simultaneously saddled with the recovery of the amount stated to have been misappropriated as per the charges that have been found to be proved. An F.I.R. was also lodged and a criminal case is being pursued. During investigation more than 100 bags of the misappropriated Sugar are stated to have been recovered.

4. Aggrieved the appellant filed Writ Petition No.18891 of 2000 that has been dismissed by the learned Single Judge by the judgment dated 12.11.2007 holding that the complicity of the appellant is established and in the circumstances the dispensation of the services of the appellant as well as the recovery of the pecuniary loss from the appellant has been upheld. While proceeding to dismiss the writ petition the learned Single Judge noticed and followed the judgment of another learned Single Judge in the case of **Satya Narain Mishra Vs. Prabandh Nideshak and another 2002(1) AWC, 582.**

5. The appellant herein filed a Recall Application for the said judgment before the learned Single Judge urging that his counsel had not been heard. The said application was rejected vide order dated 21.01.2008, hence this appeal.

6. Sri Chandan Kumar while advancing his submissions has urged that since the correct position of law has not been noticed by the learned Single Judge, namely the power to award punishment as per Regulations 84 and 85 of the U.P. Co-operative Societies Employees Service Regulation, 1975 therefore the impugned judgment is vitiated. He submits that the same Regulations, in a case of almost an identical set of two punishments having been awarded simultaneously, a Division Bench in the case of **Virendra Kumar Gupta Vs. State of U.P. and others in Service Bench No.614 of 2009 decided on 28.07.2015** has held that since Regulation 84 of the Regulations 1975 prevail over and above the U.P. Co-operative Federation Limited Karmchari Seva Niyamawali, 1980, therefore only one punishment could have been awarded, hence, the reliance placed by the learned Single Judge in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** is contrary to law as considered by the said Division Bench.

7. It may be noticed that the judgment impugned in the present writ petition was delivered on 12.11.2007 when the judgment in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** was reportedly prevailing. The Division Bench judgment in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** has been rendered on 28.07.2015 without noticing the ratio of the judgment of the learned Single Judge in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra).**

8. Sri Chandan Kumar submits that the Division Bench judgment being later in point of time, delivered and interpreting the same Regulation, would prevail, inasmuch as, this was a direct case with regard to an employee of U.P. Co-operative Federation Limited whereas the judgment rendered by the learned Single Judge in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** was in relation to a Co-operative Bank. He therefore, contends that the Division Bench judgment having interpreted the same regulations and being a later judgment would prevail and would be binding.

9. Replying to the said submissions Sri Ram Gopal Tripathi, learned counsel for the respondents has urged that since the Division Bench judgment had been rendered without noticing the ratio of the judgment in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** interpreting the same regulations, this Court should attempt to harmonize the provisions of Regulations 84 and 85 of the 1975 Regulations and Rule 83 of the 1980 Rules referred to therein. His contention therefore is that the Division Bench judgment in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** which does not notice the ratio of the judgment in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)** should not be applied on the facts of the present case or alternatively the matter may require a revisit on the question of law.

10. We have considered the submissions raised. In order to appreciate the aforesaid rival submissions raised it would be appropriate to extract paragraph no.13 of the judgment in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra) :**

"In case bank employee who is found to have embezzled the amount the public policy demands that apart from the punishment given by departmental authority, he be held responsible for the recovery of the pecuniary loss caused by the employee to the Bank. If an emmployee is held to be liable to only one of the punishments, it may become an incentive to misappropriate or embezzle a large amount and escape liability of such misappropriation or embezzlement. The punishment of reversion or removal or dismissal on the ground of misconduct should be with direction of recovery to make good the loss caused due to such misconduct. Regulation 84, providing for penalties and stating that the employee is liable to be punished by any one of the penalty has thus to be interpreted to mean that in case of misappropriation or embezzlement which is the misconduct on account of which the employee has been penalised, the recovery of the amount of pecuniary loss caused to the bank is necessary to be coupled with the penalty effected upon delinquent employee. In V.K.Bahadur Vs. State Bank of India, 2001 L&IC 935, this Court following the judgment in State Bank of India Vs. T.J.Paul, AIR 1999 SC 1994; Kailash Nath Gupta V. Inquiry Officer : 1997 (1) AWC 263 (NOC): 1997 ACJ 896, held that where financial irregularities of serious nature are found proved against the bank employee no lenient view should be taken. A bank runs on public confidence. A greater integrity and devotion is required from bank employee in comparison to employees of other organizations. If the allegation of embezzlement, misappropriation or gross negligence is found to be established causing pecuniary loss to the bank on account of delinquent employee, the amount of loss must be made good by him. In the present case, only half of the doubtful recoveries have been sought to be made good, and in the circumstances it is held that imposition of penalty of reversion along with recovery of the amount, does not violate Regulation 84 of the U.P. Co-operative Societies Service Regulation, 1975."

11. A perusal of the aforesaid view expressed by the learned Single Judge would indicate that Regulation 84 came to be interpreted in a manner which in our opinion is based on a sound reasoning to advance the purpose of punishment. It holds that in a case of misappropriation and financial embezzlement if, the said charge is found to be proved then Regulation 84 should be read in a manner so as to allow the Disciplinary Authority to impose an appropriate punishment coupled with a direction to recover the entire financial loss show caused.

12. This in our opinion also would not amount to a double punishment but would be supplemental to the punishment awarded to the employee on having found to be indulging in financial misappropriation or causing financial loss which would be a sound public policy while interpreting Regulation 84. The money which is sought to be recovered is in a sense not an award of punishment but is to recover something that belonged to the employer and was an entrustment.

Regulation 84 is extracted hereinunder :

"Penalties.--(i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal

offence or an offence under Section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished ***by any one*** *of the following penalties :*

(a) censure.

(b) withholding of increment.

(c) fine on an employee of Category IV (peon, chaukidar etc.),

(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the Co-operative Society by the employee's conduct,

(e) reduction in rank or grade held substantively by the employee,

(f) removal from service, or

(g) dismissal from service."

13. What we find is that the Division Bench in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** while proceeding to interpret the provision has held that the Rules of 1980 have been framed under the Regulations of 1975 and therefore, they being subordinate to Regulation 84, Rule 83 of the Rules can not be read so as to expand the meaning of the award of any one punishment as provided for in Regulation 84. Rule 83 of the 1980 Rules are extracted hereinunder :-

''1 किसी अन्य सेवा नियम में दिये गये उपबन्धों पर प्रतिकूल प्रभाव डाले बिना किसी कर्मचारी को जो अपने कर्तव्यों का कोई उल्लंघन करता है या दण्ड अपराध अधिनियम की धारा 103 के अधीन किसी अपराध के लिये सिद्ध दोष हुआ है या सेवा नियमावली द्वारा प्रतिषिद्ध कोई कार्य करता है, तो उसे निम्न शास्तियों में से **एक या अधिक शास्तियों** द्वारा दण्डित किया जा सकेगा।

(क) निन्दा,

(ख) वेतन वृद्धि पर रोक,

(ग) श्रेणी 4 के किसी कर्मचारी (चपरासी, चौकीदार आदि) पर जुर्माना,

(घ) कर्मचारी के आचरण द्वारा फेडरेशन को होने वाली किसी धन संबंधी क्षति को पूर्णतया अथवा आंशिक रूप से क्षतिपूर्ति करने के लिये वेतन या प्रतिभूति से वसूली,

(ड.) कर्मचारी द्वारा मौलिक रूप में धृत पर या श्रेणी में अवनति,

(च) सेवा से हटाया जाना, तथा

(छ) सेवा से पदच्युत

(2) दण्ड के आदेश की प्रतिलिपि अनिवार्यतः सम्बद्ध कर्मचारी को दी जायेगी और कर्मचारी के सेवा अभिलेख में इस आशय की प्रविष्ट की जायेगी।

(3) निन्दा करने के अलावा कोई भी शास्ति तब तक आरोपित नहीं की जायेगी जब तक कि कर्मचारी के कारण बताने की नोटिस न दे दी गई हो और या तो वह विनिर्दिष्ट समय के भीतर उत्तर देने में असफल रहा हो अथवा उत्तर दण्ड देने वाले अधिकारी द्वारा असंतोषजनक पाया गया हो।

(4) (क) आरोपित कर्मचारी को समुपयुक्त प्राधिकारी द्वारा अपराध की गम्भीरता के अनुसार दण्ड किया जायेगाः

प्रतिबन्ध यह है कि खण्ड (1) के उपखण्ड (ड.), (च) या (छ) के अधीन कोई शक्ति अनुशासनिक कार्यवाही किये बिना आरोपित नहीं की जायेगी।

(ख) कोई कर्मचारी उस प्राधिकारी से जिसके द्वारा वह नियुक्त किया गया था भिन्न किसी प्राधिकारी द्वारा तब तक हटाया या पदच्युत नहीं किया जायेगा जब तक कि नियुक्त प्राधिकारी ने ऐसे अप्राधिकार का प्रतिनिधायन ऐसे अन्य व्यक्ति या प्राधिकारी को लिखित रूप में पहले ही न कर दिया हो।

(5) नियुक्त प्राधिकारी या उसके द्वारा प्राधिकृत व्यक्ति वेतन वृद्धि रोकने का आदेश देते समय उस अवधि का जब तक के लिये वह रोकी गई है और इसका कि क्या उससे भविष्य की वेतन वृद्धियां अथवा पदोन्नति स्थगित होगी, उल्लेख करेगा।''

14. The sum and substance of the conclusion drawn by the Division Bench

therefore is that even though the 1980 Rules does provide for one or more than one punishment, yet the same can-not travel beyond the language used in Regulation 84 of the 1975 Regulations.

15. We are unable to respectfully agree with the aforesaid interpretation inasmuch the words "any one" of the penalties should be harmonized with the words used in Rule 83 of the 1980 Rules particularly in cases relating to financial impropriety or embezzlement as is involved in the present case and was also involved in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra)**. We would therefore approve of the reasoning given by the learned Single Judge in paragraph no.13 of the judgment in the case of **Satya Narain Mishra Vs. Praband Nideshak and another (Supra),** as against the interpretation given by the Division Bench in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** in view of the above discussion. We find that such an interpretation would advance the cause of justice and would alienate all possibilities of perpetuation of any mischief, inasmuch as, an employee who may be on the verge of his retirement can take recourse or attempt to such financial misappropriation or embezzlement and then walk away with the punishment of dismissal without any liability to return back the amount. This would be a paradox and would be against public policy and therefore such an interpretation deserves to be avoided. We may add that an interpretation, the effect whereof is likely to be utilized by an unscrupulous employee as an incentive or license to embezzle, should be cast aside. Any loophole or possibility of free play should be prevented from acting as a catalyst for an indulgent individual. The purpose of punishment is also to act as a deterrent. An action, as a consequence of a proved charge of misappropriation, to recover, is like a natural corollary that should be implemented and executed to complete the process or else it would invite a legal criticism of letting the guilty escape. Regulation 84 and Rule 83 combined together should not allow the process to remain unfinished.

16. Consequently having not found ourselves in agreement with the ratio of the judgment of the Division Bench in the case of **Virendra Kumar Gupta Vs. State of U.P. and others (Supra)** in respect of the subject matter in issue, we find it necessary to refer this question to a Larger Bench with a request to Hon'ble The Chief Justice to constitute a larger Bench for resolving the question of law formulated hereinafter :

1. Whether Regulation 84 of the U.P. Co-operative Societies Employees' Service Regulation 1975 read with Rule 83 of the U.P. Co-operative Federation Limited Karmchari Seva Niyamawali, 1980 services can be harmonized so as to uphold the punishment by way of dismissal of an employee coupled with an order directing recovery of an amount on the charge of a financial embezzlement or misappropriation to be included within the fold of Regulation 84 ?

2. Whether the law laid down in the case of Virendra Kumar Gupta Vs. State of U.P. and others (Supra) in respect of the true import of Regulation 84 read with Rule 83 aforesaid does not state the correct position of law as against the reasoning given by the

learned Single Judge in paragraph no.13 in the case of Satya Narain Mishra Vs. Praband Nideshak and another (Supra) and alternatively as to whether the statement of law in that regard as explained in the judgment of Satya Narain Mishra Vs. Praband Nideshak and another (Supra) should be accepted as the correct position of law ?"

17. Let the papers be placed before Hon'ble The Chief Justice for constituting a Larger Bench in terms of Chapter V Rule 6 of Allahabad High Court Rules, 1952 at the earliest for being resolved.

(2019)10ILR A
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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2019

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Special Appeal No. 743 of 2019 connected with 744, 745, 595, 599 of 2019

Sunil Kumar Mishra ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Khare, Abhilasha Singh.

Counsel for the Respondents:
C.S.C., Sri Indra Raj Singh, Sri Vijay Kumar Singh.

A. U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982) - Sections 18, 21, 33-A, 33-B - All the five appeals were dismissed and order of the Single Judge was upheld-Answering issue of collateral challenge to regularity and validity of the appointment while considering issued related to seniority, it was held that the issue as regards existence of substantive vacancy is fundamental and, once raised, ought to be addressed while determining the issue relating to seniority. (Para 38, 39 & 40)

B. Para 5 of First Removal of Difficulties Order -the procedure for appointment on ad hoc basis against a substantively vacant post is what is laid down in Para 5 of First Removal of Difficulties Order and that procedure is mandatory-Any appointment made in transgression of that procedure is illegal and void. (Para 46, 47 & 48)

C. U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982) - Section 18-The provisions contained in Section 18 and Removal of Difficulties Order are to be harmonized – It is incorrect to say that appointment of a teacher on ad hoc basis is either u/s 18 or under the First Removal of Difficulties Order. The procedure prescribed in the First Removal of Difficulties Order for making ad hoc appointment against a substantive vacancy was to be followed for an appointment contemplated u/s 18 and any appointment intransgression thereof was void. (Para 50, 51 & 52)

D. U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982)-section 33-B-Paragraph 3 of the Second Removal of Difficulties Order - Where short-term vacancy gets converted into a substantive vacancy after 07.08.1993, the tenure of teacher appointed on ad hoc basis against a short-term vacancy would be governed by the provisions of Section 33-B and would not be governed by Para 3 of the Second Removal of Difficulties Order. (Para 54 to 61)

Appeal against the judgment and order dated 02.04.2019 passed by Ashwani Kumar Mishra, J. in W.P. No. 52277 of 2014.

Special appeal dismissed. (E-4)

Precedent followed: -

1. Julfikar Hussain Ansari Vs St. of U.P. & ors., (2013) (1) ADJ 80 (Para 16, 22, 23, 51)

2. Vijay Narain Sharma Vs Distt. Inspector of Schools, Etawah & ors., (1986) UPLBEC 44 (Para 14, 18, 31, 38)

3. Radha Raizada & ors. Vs Committee of Management, Vidyawati Darbari Girls' Inter College & ors., (1994) (3) UPLBEC 1551 (Para 14, 16, 22, 23, 34, 46, 49, 50, 51)

4. Jahaj Pal Vs Distt. Inspector of Schools & anr. (Special Appeal No. 280 of 2013, decided on 21.02.2019) (Para 34, 46, 51, 60, 63)

5. Prabhat Kumar Sharma & ors. Vs St. of U.P. & ors., (1996) 10 SCC 62 (Para 15, 16, 22, 23, 34, 46, 50, 51)

6. Shesh Mani Shukla Vs Distt. Inspector of Schools, Deoria, (2009) 15 SCC 436 (Para 15)

7. Rama Kant Chaturvedi Vs St. of U.P. & ors., Single Judge decision dated 22.10.2010 passed in Writ Petition No. 8960 of 2010 (Para 14, 18, 31)

Precedent distinguished: -

1. Balveer Singh & ors. Vs DIOS & anr., decision dated 27.09.2018 passed in Special Appeal No. 321 of 2013 (Para 14, 16, 22, 23, 26, 49, 51)

2. Ashika Prasad Shukla Vs Distt. Inspector of Schools, Allahabad & anr., (1998) (3) UPLBEC 1722 (Para 14, 23, 51)

3. Vijay S. Sathaye Vs Indian Airlines Ltd. & ors., (2013) 10 SCC 253 (Para 14, 43)

4. Deputy Director of Education (Secondary) & ors. Vs Smt. Jyoti Yadav & anr. 2016 (4) ALJ 27 (Para 14, 44)

5. Smt. Pramila Mishra Vs Dy. Dir. Edu., Jhansi Division, Jhansi & ors 1997 (2) UPLBEC 1329 (Para 11, 60)

6. R.S. Khan Vs St. of U.P., 2005 (1) ESC 515 (Para 15)

Precedent referred: -

1. Committee od Management, Arya Nagar Inter College, Arya Nagar, Kanpur Vs. Sree Kumar Tiwari and others, (1997) 4 SCC 388 (Para 15)

2. Km. Nishi Bhargava Vs Dy. Director of Education, Agra Region, Agra & ors., (1987) UPLBEC 415 (Para 14)

(Delivered by Hon'ble Manoj Misra, J.)

1. These five special appeals are against judgment and order dated 02.04.2019 passed by learned Single Judge in four connected writ petitions, namely, Writ A Nos. 52277 of 2014; 48836 of 2016; 57215 of 2016; and 60494 of 2016. As common questions of law and fact are involved in these five appeals, with the consent of learned counsel for the parties, they were heard together and are being decided by a common order.

2. To have a clear understanding of the controversy, it would be apposite for us to have a glimpse of the facts and the rival contentions in the aforementioned writ petitions which have given rise to these appeals.

3. Sri Sunil Kumar Mishra (for short Sunil), the writ petitioner in Writ A Nos. 52277 of 2014 and 60494 of 2016, who is the appellant in Special Appeal No. 743 of 2019 (Old Defective No. 493 of 2019), Special Appeal No. 744 of 2019 (Old Defective No. 496 of 2019) and Special Appeal No. 745 of 2019 (Old Defective No. 498 of 2019), was appointed on 29.10.1985 as Lecturer in Chemistry in Madan Lal Inter College, Bisauli, Budaun (for short 'College') for a period of six months. His letter of appointment suggested that he was offered appointment on temporary basis against a leave /short-term vacancy. When his term of appointment was not extended beyond

30th June 1986, he filed Writ A No. 20807 of 1986 in which an interim order was passed on 17.12.1986 thereby providing that till his services are duly terminated or some one on the recommendation of the Commission joins the post held by him, his ad-hoc appointment in the Lecturer Grade shall be deemed to continue and he shall be entitled as such to the emoluments. Under this interim order, he was permitted to continue in service and was paid monthly salary. Thereafter, on 19.05.1992, his services were regularized w.e.f. 06.04.1991 by placing reliance on the provisions of Section 33-A of U.P. Act No. 5 of 1982. On regularization of his service, Writ A No. 20807 of 1986 was rendered infructuous. Consequently, by noticing the regularization order, dated 19.05.1992, Writ A No. 20807 of 1986 was dismissed as infructuous vide order dated 11.09.2006. It is the case of Sunil that since then the college authorities treated him as substantively appointed Lecturer and in the seniority list of Lecturers, published by the College on 08.08.2007, his name finds mention at serial no. 5.

4. According to Sunil, Ganesh Chandra Goel (for short Ganesh), who is the writ petitioner in Writ A No. 48836 of 2016 and is respondent no. 6 in Special Appeal No. 743 of 2019 (Old Defective No. 493 of 2019) and respondent no.5 in Special Appeal No. 745 of 2019 (Old Defective No. 498 of 2019), was merely an Assistant Teacher in L.T. Grade in the College and his name did not figure in the seniority list published on 08.08.2007 but, later, he was granted promotion on the post of Lecturer in Mathematics in October 2007, therefore Ganesh is junior to him.

5. Indisputably, the post of Principal in the College was lying substantively vacant. As a consequence whereof, the senior most Lecturer in the College had to officiate as Principal. Initially, one Rajan Sareen, who was the senior most Lecturer, officiated as Principal. He was to retire on 30th June 2014. A dispute arose with regard to the Lecturer entitled to be appointed as officiating Principal post retirement of Rajan Sareen. The management of the college (writ petitioner in Writ A No.57215 of 2016 and appellant in Special Nos.595 of 2019 & 599 of 2019) recommended appointment of Ganesh as officiating Principal of the College. Against the proposal, Sunil, claiming himself to be the senior most lecturer and eligible, filed an application before the District Inspector of Schools, Budaun (for short DIOS) thereby raising his claim for appointment as officiating Principal. On the rival claims, a report was called from the Principal, Government Girls' Inter College, Dataganj, Budaun. On the basis of that report, on 26.06.2014, the proposal to appoint Ganesh was approved by observing that Sunil was appointed ad-hoc on a leave vacancy; that he continued in service pursuant to interim order dated 17.12.1986 passed in Writ A No. 20807 of 1986, which stood dismissed; that his regularization was not legally sustainable as on the date of his regularization there was no substantive vacancy; that substantive vacancy came into existence on 30.06.2006 and, prior to that, on 01.02.2006, requisition for filling up the post had been sent to the Board.

6. Aggrieved by order of the DIOS, dated 26.06.2014, Sunil filed Writ A No. 35497 of 2014, which was allowed by order dated 15.07.2014 and the order

dated 26.06.2014 was set aside and the matter was remitted back to the DIOS to pass a fresh order after giving opportunity of hearing to the parties.

7. Pursuant to the order dated 15.07.2014, the matter was re-considered by the DIOS. After hearing both sides, the DIOS, by order dated 18.09.2014, canceled the order of regularization of service of Sunil and approved the appointment of Ganesh as officiating Principal. While deciding the issue, the DIOS found that appointment of Sunil was on a leave vacancy which had arisen on account of incumbent, Suraj Prakash Agarwal (for short Suraj), Lecturer, Chemistry, proceeding on leave; that the post fell substantively vacant on 30.06.2006, consequent to retirement of Suraj and, to fill up that post, requisition was sent to the Board on 01.02.2006, therefore, the services of Sunil Kumar Mishra could not have been regularized on 19.05.1992. In addition to above, the DIOS expressed doubts in respect of the genuineness of the regularization order.

8. Assailing the order dated 18.09.2014 passed by DIOS, Writ A No. 52277 of 2014 was filed. While Writ A No. 52277 of 2014 was pending, on 28.09.2016, the DIOS passed a fresh order, superseding his earlier order, thereby directing that Sunil would be provided charge of officiating Principal of the College, as he was the senior most eligible lecturer in the College. However, this order was made subject to decision of Writ A No. 52277 of 2014.

9. Ganesh filed Writ A No. 48836 of 2016 against the order dated 28.09.2016 by claiming that the order dated 28.09.2016 amounts to review of the earlier order dated 18.09.2014 which was not permissible and that the issues raised in the earlier order dated 18.09.2014 were not addressed. It was also claimed that no opportunity of hearing was extended to him. On merits, Ganesh claimed that Sunil was appointed on a short-term vacancy therefore the order regularizing his services by taking the aid of Section 33-A of the U.P. Act No. 5 of 1982 was not at all sustainable as regularization of an ad-hoc appointee against a short-term vacancy could only be as per the provisions of Section 33-B of the U.P. Act No. 5 of 1982, as per which, regularization could be upon recommendation of a Selection Committee headed by the Joint Director of Education whereas for Sunil's regularization no recommendation was there.

10. In the meantime, the Committee of Management of the College (for short Management) passed a resolution, dated 20.11.2016, whereby a decision was taken to terminate the services of Sunil. Pursuant to which, the management terminated the services of Sunil vide letter/ order dated 22.11.2016. However, this resolution dated 20.11.2016 was declared illegal by the DIOS, vide order dated 25.11.2016, on the ground that no decision to terminate the services of a teacher could be given effect to without prior approval of the Board as contemplated by Section 21 of the U.P. Act No. 5 of 1982.

11. Assailing the orders dated 28.09.2016 and 25.11.2016, the Management filed Writ A No. 57215 of 2016 by claiming that in view of Full Bench decision of this court in ***Smt. Pramila Mishra v. Deputy Director of Education, Jhansi Division, Jhansi and***

others : 1997 (2) UPLBEC 1329, the moment short-term vacancy, on account of retirement of Suraj on 30.06.2006, stood converted in to a substantive vacancy, services of Sunil stood automatically terminated by operation of law. Therefore, there was no need to obtain prior approval of the Board.

12. Writ A No. 60494 of 2016 was filed by Sunil to question the resolution of the Management dated 20.11.2016 and the consequential termination of his service.

13. As the aforementioned four petitions raised issues that were inter-dependent on each other, the learned single judge decided them by a common judgment and order dated 02.04.2019.

14. On behalf of Sunil, the submissions made before the learned Single Judge were that the DIOS, while adjudicating a claim for appointment as officiating principal of the college, was not justified in questioning the validity of the regularization order dated 19.05.1992 and re-opening the already determined seniority because it is not permissible for any party to raise a collateral challenge to the appointment /regularization in a dispute relating to seniority/ appointment as officiating principal. To support the above submission, reliance was placed on a single judge decision of this Court in ***Vijay Narain Sharma v. District Inspector of Schools, Etawah and others : 1986 UPLBEC 44***; and another single judge decision dated 22.10.2010 passed in ***Writ Petition No. 8960 of 2010 (Rama Kant Chaturvedi vs. State of U.P. and others).*** It was also urged that, admittedly, in the seniority list of lecturers, drawn on 08.08.2007, Sunil's name was there but the name of Ganesh was not even mentioned, hence, there was no occasion for the DIOS to entertain and address a collateral challenge to the initial appointment/ regularization. In respect of his initial appointment, Sunil's case was that the vacancy against which he was appointed was substantive inasmuch as the incumbent Suraj had abandoned his services by not turning up to resume service since the time he went on leave in the year 1980. It was urged that five years of continuous absence from service is more than sufficient to draw an inference that the incumbent has abandoned the service. In support of this plea, reliance was placed on two decisions: (a) ***Vijay S. Sathaye vs. Indian Airlines Limited and others : (2013) 10 SCC 253; and (b) Deputy Director of Education (Secondary) and others vs. Smt. Jyoti Yadav and another : 2016 (4) ALJ 27***. It was urged that as the post on which Sunil was appointed was an abandoned post, his appointment was against a substantive vacancy, consequently, by dint of his continuous service, his claim for regularization was sustainable under Section 33-A of U.P. Act No.5 of 1982 and, therefore, the regularization order was justified. In respect of the procedure adopted while making his initial appointment, it was claimed that prior to the law laid down by Full Bench of this court in ***Radha Raizada and others vs. Committee of Management, Vidyawati Darbari Girls' Inter College and others : 1994 (3) UPLBEC 1551,*** the appointments were made under Section 18 of U.P. Act No.5 of 1982 for which the Committee of Management was empowered, as held by a Division Bench of this Court in ***Km. Nishi Bhargava vs. Deputy Director of Education, Agra Region, Agra and others : 1987***

UPLBEC 415. It was urged that the law declared by Full Bench in ***Radha Raizada's case (supra)*** was prospective in its application, that is to those appointments which were made after its decision, as was held by a Division Bench in ***Balveer Singh and others vs. DIOS and another (decision dated 27.09.2018 passed in Special Appeal No. 321 of 2013),*** *following the decision in the case of* ***Ashika Prasad Shukla vs. District Inspector of Schools, Allahabad and another : 1998 (3) UPLBEC 1722.***

15. On behalf of the Management, before the learned Single Judge it was urged that the vacancy against which Sunil was appointed was a short-term vacancy caused by going on leave by the then Chemistry lecturer Suraj. The short-term appointment came to an end, upon expiry of six months, and therefore services of Sunil were rightly terminated. Though Sunil continued to serve under interim order passed in Writ A No. 20807 of 1986, which was dismissed on 11.09.2006. As, Sunil, had not continued in service in his own right, he was not entitled to be regularized either under Section 33-A or under Section 33-B of the U.P. Act No. 5 of 1982. It was urged that if the vacancy against which Sunil was appointed is treated as substantive then his ad-hoc appointment would be a nullity as it was not made by following the procedure prescribed by paragraph 5 of the First Removal of Difficulties Order. Such appointment being void would confer no right irrespective of the length of service. In support of this submission, reliance was placed on decisions of the Apex Court in ***Prabhat Kumar Sharma and others vs. State of U.P. and others : (1996) 10 SCC 62 (paragraph nos. 7 and 10); and Shesh Mani Shukla Vs. District Inspector of Schools, Deoria : (2009) 15 SCC 436 (paragraph nos. 18 and 19).*** On the claim of regularization of the services of Sunil it was urged that the benefit of continuity in service was not available to him as that was rendered under an interim order because regularization has to be on the basis of continuous service rendered in one's own right. In that regard, reliance was placed on a decision of the Apex Court in ***Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur Vs. Sree Kumar Tiwari and others : (1997) 4 SCC 388 (paragraph nos. 6 and 7)***. It was also urged that once Writ A No. 20807 of 1986 filed by Sunil was dismissed there would be automatic revival of his termination order. In that regard, reliance was placed on a Division Bench decision of this Court in ***R.S. Khan Vs. State of U.P. : 2005 (1) ESC 515.*** In the alternative, it was claimed that consequent to retirement of Suraj on 30.06.2006, the short-term vacancy got converted into substantive vacancy, as a result, the appointment of Sunil stood automatically terminated by operation of law and therefore there was no requirement to seek approval under Section 21 of U.P. Act No. 5 of 1982.

16. On behalf of Ganesh, apart from adopting the case pleaded by the management, it was urged that though the view taken in ***Radha Raizada's case (supra),*** in respect of the procedure to be adopted for ad hoc appointment against short-term vacancies, is to be applied prospectively, but the law laid therein in respect of ad hoc appointment against substantive vacancy is applicable to all appointments that were to be made during the currency of the First Removal of Difficulties Order. It was urged that the above principle has been accepted by a

Division Bench of this Court in ***Julfiqar Hussain Ansari Vs. State of U.P. and others : 2013 (1) ADJ 80.*** It was urged that the Division Bench decision of this Court in ***Balveer Singh's case (supra)*** had not considered the judgment rendered in the case of ***Julfiqar Hussain Ansari's case (supra)*** and it has also not considered the decision rendered by the Apex Court in the case of ***Prabhat Kumar Sharma's case (supra).*** Hence, the Division Bench decision rendered in the case of ***Balveer Singh's case (supra)*** is per-incuriam.

17. Upon consideration of the submissions raised by rival parties, the learned Single Judge framed three issues for consideration, which are extracted below:

"(i) Whether in a dispute relating to inter-se seniority of Lecturer, for the purposes of officiating on the post of Principal, the nature of initial vacancy and ad hoc appointment or regularization could be examined for determining the date of substantive appointment?

(ii) Based upon the outcome of aforesaid issue, the nature of vacancy as well as appointment offered to Sunil Kumar Mishra would fall for determination, so as to consider whether he can be treated to have been substantively appointed as Lecturer, w.e.f. 6.4.1991, and be entitled to seniority, as such?

(iii) Whether ad-hoc appointment made against substantive vacancy, without following the procedure laid down in para 5 of the First Removal of Difficulties Order, 1981 could be protected by drawing analogy of the Division Bench Judgement in Ashika Prasad Shukla (supra)?"

18. On the first issue, the learned Single Judge, on the basis of paragraph 24 of the judgment in ***Vijai Narain Sharma's case (supra),*** observed that relevant factors for determining inter se seniority amongst teachers are: the grade in which the teacher is working; whether he is appointed on a substantive post or not; whether the appointment is permanent or temporary; the date of the appointment or promotion; and the age of the teacher. Learned Single Judge observed that as seniority of a teacher in a particular grade has to be determined on the basis of the date of his substantive appointment in that grade and, where, the substantive appointment is dependent on regularization, then question relating to its legality would be a material issue, which would have to be examined to correctly determine the main issue of seniority.

19. After holding as above, the learned Single Judge proceeded to examine the second and third issues framed by him.

20. The second and third issues being interconnected, were dealt with by the learned Single Judge step-wise. The learned Single Judge proceeded to first examine the nature of the vacancy against which Sunil was appointed ad-hoc. For that, the claim made by Sunil that a substantive vacancy came into existence consequent to alleged abandonment of service by the incumbent Suraj was examined from two different angles. The first was whether Sunil could raise such a plea when it runs counter to his own admitted document which suggested that he was appointed against a leave vacancy. The second was whether the question of abandonment of service by Suraj could be dealt with and determined in absence of

Suraj as a party to the proceedings, particularly, when the management had itself not treated his alleged absence from service as a case of abandonment of service, inasmuch as, the management had sent a requisition to the Board in the year 2006 to fill the vacancy that was to arise on 30.06.2006, consequent to retirement of Suraj.

21. In addition to above, the learned Single Judge took into consideration the mode of appointment adopted to fill up the vacancy. Because, had it been a substantive vacancy, the procedure for ad hoc appointment had to be as provided in paragraph 5 of First Removal of Difficulties Order, which was, admittedly, not adopted. Thus, after considering all aspects, the learned single judge came to a definite conclusion that Sunil was appointed by treating the vacancy as short term.

22. While deciding the above issue and issue no.3, noticed above, the learned Single Judge took the view that the procedure prescribed for ad-hoc appointment against substantive vacancy, as held by Full Bench in ***Radha Raizada's case (supra),*** which was approved by the apex court in ***Prabhat Kumar Sharma's case (supra),*** is laid down in paragraph 5 of the First Removal of Difficulties Order, 1981, which is mandatory and any deviation therefrom would render the appointment void. The learned Single Judge while holding as above observed that in ***Balveer Singh's case (supra),*** the true import of the decision of the Full Bench in ***Radha Raizada's case (supra)*** with reference to its approval by the Apex Court in ***Prabhat Kumar Sharma's case*** was not examined and the earlier Division Bench decision in ***Julfikar Hussain Ansari's case (supra)*** also escaped its attention, therefore it cannot be taken to be a binding precedent.

23. While deciding issue no. 3, the learned Single Judge observed that the view taken in ***Radha Raizada's case (supra)*** that the procedure prescribed in paragraph 5 of the First Removal of Difficulties Order for ad hoc appointment against substantive vacancy is mandatory was approved by the Apex Court in ***Prabhat Kumar Sharma's case (supra),*** and, subsequently, followed by a Division Bench in ***Julfikar Hussain Ansari's case (supra)*** thereby holding that ad hoc appointment made against a substantive vacancy, without following the procedure prescribed by First Removal of Difficulties Order, would be a nullity. The learned Single Judge observed that the view to the contrary in ***Balveer Singh's case (supra)*** was not binding as it was rendered without considering binding precedents to the contrary. The learned single judge further observed that the decision in ***Ashika Prasad Shukla's case (supra)*** to the extent it held that decision in Radha ***Razaida's case (supra)*** is prospective in its operation, that is applicable to appointments made after the decision of the Full Bench, was with regard to the procedure to be adopted for making appointment against short-term vacancy and not in respect of ad hoc appointment against a substantive vacancy for which there already existed a detailed procedure in paragraph 5 of the First Removal of Difficulties Order. Accordingly, all the three issues were decided by the learned Single Judge against Sunil.

24. After deciding as above, the learned Single Judge dismissed Writ A

No. 52277 of 2014 by holding that regularization of the services of Sunil under Section 33-A of U.P. Act No. 5 of 1982 was not permissible because he was appointed against a short-term vacancy. It was observed that if he stakes a claim that his appointment was against a substantive vacancy then the appointment would be void, being de hors the procedure provided by the First Removal of Difficulties Order. Consequently, the learned Single Judge proceeded to allow Writ A No. 48836 of 2016 filed by Ganesh and quashed the order dated 28.09.2016 by which the DIOS had accepted the claim of Sunil to officiate as Principal of the College.

25. The other Writ A No. 57215 of 2016 filed by the Management was allowed to the extent it was against the order dated 28.09.2016 passed by the DIOS. However, the learned single judge refused to set aside the order dated 25.11.2016 passed by the DIOS disapproving the resolution of the Management terminating the services of Sunil. The learned single judge further proceeded to allow Writ A No. 60494 of 2016 filed by Sunil against the resolution dated 20.11.2016 and the letter dated 22.11.2016 whereby the Management terminated the services of Sunil and directed that his regularization would be considered under the appropriate provisions of U.P. Act No.5 of 1982.

26. Special Appeal No.743 of 2019 (old Defective No. 493 of 2019) has been filed by Sunil against the judgment and order of the learned Single Judge passed in Writ A No. 52277 of 2014 by claiming / submitting as follows: (a) that the vacancy against which Sunil was appointed was substantive which had come into existence by operation of law on abandonment of service by its incumbent as he had failed to attend the college since the year 1980; (b) that his appointment would be under Section 18 of U.P. Act No. 5 of 1982 and not under the First Removal of Difficulties Order therefore, even in absence of following the procedure prescribed in the First Removal of Difficulties Order, his appointment would not be void as held by a Division Bench in ***Balveer Singh's case (supra)***; (c) that the services were rightly regularized with effect from 06.04.1991 by order dated 19.05.1992; (d) that the order of regularization was acted upon and noticed by the High Court while dismissing Writ A No. 20807 of 1986; (e) that the order of regularization dated 19.05.1992 was not challenged or questioned by either the management or by any person and it continued to hold the field for over two decades and, in between, the seniority list also recognized his status as that of lecturer, there was, therefore, no justification for the DIOS to re-visit the regularization order and declare the same illegal while determining a claim for appointment as officiating principal. In addition to above, it was submitted that, admittedly, Ganesh was promoted as Lecturer in the year 2007, hence was junior to the petitioner, therefore the order approving resolution of his appointment as officiating Principal is illegal and liable to be set aside.

27. Special Appeal Nos.744 of 2019 and 745 of 2019 (old Defective Nos. 496 of 2019 and 498 of 2019) have been filed by Sunil against the judgment and order of the learned Single Judge to the extent it allowed Writ A Nos. 57215 of 2016 and 48836 of 2016 and set aside the order dated 28.09.2016 passed by DIOS by

which Sunil was declared senior to Ganesh. These appeals have been filed by him by claiming that the order dated 28.09.2016 rightly proceeded to hold Sunil senior to Ganesh for all the reasons pressed in Special Appeal No.743 of 2019 and, therefore, the order of the DIOS was not liable to be interfered with.

28. Special Appeal No. 595 of 2019 has been filed by management against the judgment and order of the learned Single Judge dated 02.04.2019 passed in Writ A No. 60494 of 2016 by which the petition of Sunil challenging the resolution of the management, dated 20.11.2016, and the consequential termination letter, dated 22.11.2016, was allowed and the termination was held invalid. Special Appeal No. 599 of 2019 has been filed by the management against the judgment and order dated 02.04.2019 passed by learned Single Judge to the extent the learned Single Judge refused to interfere with the order, dated 25.11.2016, passed by DIOS disapproving the resolution of the Management terminating the services of Sunil. In these two special appeals, the management has claimed / submitted as follows:

(a) that the management had already terminated the appointment of Sunil, which was for a period of six months only, and the writ petition filed by Sunil, in which, initially, interim order was passed, was dismissed, consequently, earlier order of termination stood revived, therefore, there was no requirement to obtain approval as contemplated by Section 21 of U.P. Act No. 5 of 1982; and

(b) that otherwise also, once the court held that the appointment of Sunil was against a short-term vacancy, upon conversion of that short-term vacancy into a substantive vacancy, there was automatic termination of appointment by operation of law, therefore there was no need to seek approval under Section 21 of the U.P. Act No. 5 of 1982.

29. We have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Abhilasha Singh, for Sunil (the appellant in Special Appeal No.743; 744; and 745 of 2019 - Old Defective Nos. 493 of 2019; 496 of 2019; and 498 of 2019); Sri Indra Raj Singh for the Management (respondent in the aforesaid three appeals and the appellant in Special Appeal Nos. 595 of 2019 and 599 of 2019); Sri V.K. Singh, learned senior counsel, assisted by Sri H.P. Shahi, for Ganesh (the respondent in Special Appeal No. 743 of 2019-Old Defective No.493 of 2019); and the learned Standing Counsel, who has appeared on behalf of State and its officers in all the appeals.

30. Having scanned through the pleadings and the submissions made, the first issue that arise for our consideration is whether while considering an issue as to who should be appointed as officiating Principal in the College, the management and the educational authorities (in the instant case DIOS) were justified in questioning the correctness of the order regularizing the services of Sunil, which stood recognized and implemented for over two decades. If we proceed to hold that the correctness of the regularization order can be examined, the second issue that would fall for our consideration is whether the order regularizing the services of Sunil was legally sustainable. Incidental to the second issue, following issues would also arise for our consideration: (a) whether the initial ad hoc appointment of Sunil in the year 1985

was against a substantive vacancy or a short-term/leave vacancy; (b) if it was against a substantive vacancy, whether the procedure provided for ad hoc appointment against a substantive vacancy was duly followed, if not, what would be its consequences; and (c) whether in view of dismissal of Writ A No. 20807 of 1986, the continuance of service of Sunil would be of no consequence.

31. On the first issue, Sri Ashok Khare, learned senior counsel, strenuously urged that in ***Vijai Narain Sharma's case (supra),*** which has been followed in ***Rama Kant Chaturvedi's case (supra),*** it was held that validity of the initial appointment cannot be collaterally questioned and examined while determining an issue relating to seniority, particularly, where the appointment has been made and has continued for long; and that such appointment should not be disturbed or set aside on technicalities or procedural irregularities.

32. Sri Khare urged that though Sunil was appointed on 25.10.1985 for a period of six months only but such appointment was against a substantive vacancy and ought to have continued till a regularly selected candidate recommended /selected by the Board joins the post. According to him, Sunil though continued in service, initially, under an interim order passed in Writ A No. 20807 of 1986, but, subsequently, his rights were correctly recognized by the DIOS and his services were regularized with effect from 06th April 1991 in view of the provisions of section 33-A of U.P. Act No. 5 of 1982. Since then Sunil continuously served the institution and was granted the benefits of continuous and regular service and was also placed in the seniority list published in the year 2007. Under the circumstances, reopening such an old/stale issue, to which no challenge was laid either by the management or by any other person, was not legally justified and permissible in a proceeding concerning appointment of officiating Principal. Sri Khare submitted that examining the legality of such an old appointment was not at all permissible and therefore, on that ground alone, the order passed by the learned Single Judge is liable to be set aside.

33. On the second issue, Sri Khare submitted that the incumbent Suraj by remaining absent for over five years had abandoned his service resulting in a substantive vacancy on the post therefore ad hoc appointment of Sunil would be deemed to have been made against a substantive vacancy and as per the provisions of Section 18 of U.P. Act No. 5 of 1982. Hence, there was no legal infirmity in the appointment.

34. **Per contra,** on the first issue, as culled out above, the learned counsel for the Management and Ganesh submitted that while determining an issue as to who is entitled to officiate as Principal of the College, the first and foremost question that arises for consideration is as to who is the senior most teacher in the highest grade in the College. Incidental to that would be determination of the date of substantive appointment of the claimant. Whether a person has been substantively appointed or not would depend on existence of a substantive vacancy and whether procedure provided for substantive appointment has been followed. If not, the appointment would be void, as held by the Apex Court in

Prabhat Kumar Sharma's case (supra). Because, if the appointment is void, any length of service rendered by an incumbent would not enure to his benefit. It was submitted that the management had already terminated the service of Sunil upon expiry of six months from the date of his initial appointment. Otherwise also, his appointment was to continue till the end of academic session i.e. 30.06.1986. Hence, continuance in service thereafter, pursuant to an interim order passed in Writ A No. 20807 of 1986 which was discharged with the dismissal of the petition on 11.09.2006, would be of no consequence. It was urged that even though Writ A No. 20807 of 1986 might have been dismissed as infructuous, after noticing the regularization order dated 19.05.1992, but such dismissal of the writ petition would not amount to affirmance of the regularization order dated 19.05.1992. It was submitted that regularization could have lawfully followed only if the initial appointment had been against a substantive vacancy and as per the procedure prescribed by paragraph 5 of the First Removal of Difficulties Order. It was urged by them that since the appointment letter itself suggests that it was against a leave vacancy, the order of regularization was nothing but void, which conferred no right. It has been urged by them that not only in ***Radha Raizada's case (supra),*** which was approved by the apex court in **Prabhat Kumar Sharma's case (supra),** but also in subsequent five-judges Full Bench decision of this Court in ***Jahaj Pal Vs. District Inspector of Schools and another (Special Appeal No. 280 of 2013, decided on 21.02.2019),*** it was observed that ad-hoc appointment against a substantive vacancy had to be as per the procedure prescribed under the First Removal of Difficulties Order and regularization of service under Section 33-A of U.P. Act No.5 of 1982 would be permissible only if the procedure as laid down in the First Removal of Difficulties Order has been followed. It was thus urged that since the regularization order was passed without examining as to whether a substantive vacancy had existed, and whether the procedure prescribed for making ad-hoc appointment against substantive vacancy was followed, the same was vulnerable and was rightly declared illegal/void by the subsequent order dated 18.09.2014.

35. On the issue of abandonment of service by the incumbent Suraj and the resultant substantive vacancy, the learned counsel for the respondents submitted that abandonment or relinquishment of service is dependent on the intention of the post-holder. It has been submitted that Suraj was not a party in the writ proceedings and there is no document to suggest that a substantive vacancy came into existence and notified by the date of initial ad hoc appointment of Sunil. Under the circumstances, it would not be appropriate to draw an inference that on the date of ad hoc appointment of Sunil there existed a substantive vacancy caused by abandonment of service by the incumbent.

36. It was also submitted on behalf of the management that from the record it appears that substantive vacancy was notified in 2006, just prior to the official date of retirement of Suraj, therefore it could be assumed that earlier the management never treated the post to be substantively vacant. In the alternative, it was submitted that assuming that there existed a substantive vacancy on the date when Sunil was appointed, the procedure

relating to such ad hoc appointment was admittedly not followed, therefore the ad-hoc appointment would be void bearing no fruits of regularization, regardless of the length of service.

37. Apart from the issues and submissions noticed above, another issue that arises for our consideration, particularly, in the Special Appeals preferred by the management, is whether the appointment of Sunil stood automatically terminated by operation of law consequent to conversion of short-term vacancy into substantive vacancy and therefore there was no requirement of approval under Section 21 of U.P. Act No. 5 of 1982.

38. Having given our thoughtful consideration to the rival submissions as also the authorities cited by the counsels appearing for the parties, on the first issue, we observe that view taken in ***Vijai Narain Sharma's case (supra)*** that a collateral challenge to regularity and validity of the appointment should not ordinarily be entertained while considering issues relating to seniority etc. is to avoid litigation and disputes over stale/old issues which are difficult to address owing to loss of records etc., therefore, a collateral challenge to an appointment, which has continued for long and had remained unchallenged, by referring to non-fulfillment of procedural technicalities in the making of the appointment, is held not permissible while considering an issue relating to seniority and its consequences. But, whether the appointment of a claimant is substantive, if so, since what date, are issues which have to be addressed while determining the seniority to maintain a claim for appointment as officiating Principal of the College. Incidental thereto, is the issue with regard to existence of a substantive vacancy. Because, existence of a substantive vacancy is sine qua non for any substantive appointment. Its non existence renders the appointment void. Therefore, the issue as regards existence of substantive vacancy is fundamental and, once raised, ought to be addressed while determining the issue relating to seniority. More so, when it can always be examined with reference to the nature of vacancy that existed at the time of appointment.

39. In the instant case, the issue before the DIOS was as regards validity of regularization. By regularization an ad hoc appointment gets converted into substantive appointment. This issue was fundamental and has been addressed with reference to the nature of the vacancy that existed and on facts which are borne out from the documents admitted to the parties. It is not a case, at least shown to us, that there was complete loss of records and, therefore, the issue could not have been addressed. Thus, in our considered view, the validity of the order of regularization was open for examination to determine the date of substantive appointment, while addressing the claim for appointment as officiating principal, based on seniority.

40. We find that the DIOS, while addressing the resolution of the management proposing appointment of Ganesh as officiating Principal, addressed the claim of Sunil with reference to the date of his substantive appointment and in that context he examined the nature of vacancy on which he claimed appointment. Upon finding that Sunil had not been appointed against a substantive

vacancy but against a leave vacancy (short-term vacancy), the consequences that followed were automatic, that is, there could be no regularization under Section 33-A of U.P. Act No.5 of 1982, thereby rendering the order of regularization void. Once, it is so, it is of no consequence and can be ignored. The order passed by this court, dated 11.09.2006, dismissing Writ A No. 20807 of 1986 as infructuous after noticing the regularization order would not breathe life into an otherwise void order nor such dismissal of the writ petition would amount to affirmance of the regularization order. Thus, for all the reasons stated above, we are in agreement with the view taken by the learned Single Judge that the issue relating to validity of regularization of the services of Sunil was open to scrutiny while addressing the claim for appointment as an officiating principal on the strength of seniority.

41. The other issue that arises for our consideration is whether the vacancy against which Sunil was appointed was a substantive vacancy or a short-term vacancy. Adjudication of that would depend upon our decision on the plea whether on account of continuous absence of incumbent Suraj, for a period of about five years, a substantive vacancy came into existence by deemed abandonment of service.

42. On the aforesaid issue, the thrust of the arguments on behalf of Sunil had been that Rule 18 of Fundamental Rules provides for automatic cessation of service on ground of abandonment of service by remaining continuously absent from duty for five years whether with or without leave. It is urged on behalf of Sunil that Suraj had remained absent since 1980 whereas the appointment of Sunil was made on 29.10.1985, therefore it could be assumed that it had been made on a post which had been abandoned by its incumbent therefore appointment was against a substantive vacancy.

Fundamental Rule 18 reads as follows:-

"18. Unless the Government, in view of the special circumstances of the case, shall otherwise determine, after

five years' continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, a Government servant ceases to be in Government employ."

43. ***In Vijay S. Sathaye's case (supra),*** the decision cited on behalf of Sunil, the facts of the case, as noticeable from the judgment, were that the writ petitioner had joined service of Indian Airlines Ltd. on 19.03.1972 as First Officer and was promoted as Captain on 19.12.1975 and was further promoted as Commander on 01.01.1986. In 1989, the Indian Airlines came out with a Voluntary Retirement Scheme for its employee who had completed 25 years of service or who had attained 55 years of age. Subsequently, the condition prescribed in the aforementioned Scheme was reduced to 20 years of service in 1992. Regulation 12 of the Service Regulations provided that if an employee fulfills the aforesaid criteria of eligibility he can give three month's notice for voluntary retirement. It was provided that acceptance of the said resignation would be subject to the approval of the competent authority. The petitioner of that case completed 20 years of service on 19.03.1992. Thereafter, he was promoted as Deputy General Manager

(Operations) on 30.08.1994. On 07.11.1994, the petitioner submitted an application seeking VRS with effect from 12.11.1994. The petitioner was informed vide letter dated 11.11.1994 that he should continue in service till the time decision is taken. However, the petitioner did not attend the duty after 12.11.1994. Rather, he joined services of Blue Dart Ltd and he did not go to the respondents to work from 12.11.1994. As there had been no response from the respondents, the petitioner filed writ petition for issuance of a writ of mandamus directing the respondents to accept the petitioner's application for voluntary retirement. During the pendency of the petition, the petitioner was informed by the respondents that his application had been rejected. The writ petition was dismissed as infructuous. Consequently, another writ petition was filed challenging the letter rejecting the request for VRS. The Court dismissed the writ petition against which Special Leave Petition was filed before the Apex Court. The Apex Court found that Regulation 12 had required a three month's notice which was mandatory and as the petitioner had not given that notice, his application was liable to be rejected. After holding as above, the Apex Court, in the alternative, found that since the petitioner was asked to continue in service till a decision is taken on his application and he did not attend the office of the respondents after giving the notice, he had voluntarily abandoned the services of the respondents and therefore there was no requirement on the part of the respondents to pass any order on his application as it was a clear cut case of voluntary abandonment of service. While holding as above, the Apex Court, in paragraph 12 of the judgment, had observed as follows:-

"12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer."

44. The aforesaid decision of the Apex Court has been considered by a Division Bench of this Court in the case of ***Dy. Director of Education (Secondary) and others Vs. Smt. Jyoti Yadav (supra).*** The Division Bench although did not on its own express any opinion whether, in the facts of the case before it, there had been an abandonment of service, it remanded the matter back to the learned Single Judge for examining the issue.

45. Reverting to the facts of the instant case, we find that in Writ A No. 52277 of 2014, which has been filed by Sunil, there is no specific pleading as to since when, in the year 1980, Suraj proceeded on leave. In the counter-affidavits filed on behalf of Management of the College and Ganesh, the exact and specific date as to when Suraj proceeded on leave without pay is not disclosed. However, in the counter-affidavit filed on behalf of DIOS in Writ A No.52277 of 2014, which is at page 160 of the paper book of Special Appeal No. 743 of 2019 (Old Defective No. 493 of 2019), in paragraph 13 it is stated that Suraj had proceeded on leave without pay on 28.08.1985 and continued till 30.06.2006. We also find that the management has not

proceeded to fill up the vacancy by treating the same as substantively vacant, either on account of abandonment of service by Suraj or otherwise. The writ petition is silent whether Suraj had joined some other institution or service so that it could be assumed that he abandoned his service. Under the circumstances, in absence of Suraj as party respondent in the proceedings, keeping in mind that the petitioner's own record suggests that he was initially appointed against short term vacancy, it would not be appropriate for us to determine and hold that the post of Lecturer on which Sunil was appointed had been abandoned by its holder and therefore it was substantively vacant since before 29.10.1985, that is the date on which Sunil was appointed. We are thus in agreement with the view taken by the learned Single Judge that it would not be appropriate for the Court to come to a conclusion that the post against which the petitioner had been appointed on 29.10.1985 was substantively vacant since before, consequent to abandonment of service by Suraj.

46. Even if we assume that there existed a substantive vacancy at the time of ad-hoc appointment of Sunil, it would not come to his rescue as it has come on record that the procedure provided for in paragraph 5 of the First Removal of Difficulties Order relating to ad-hoc appointment against substantive vacancy was not followed. In a recent five-judges Full Bench decision of this Court in ***Jahaj Pal's case (supra)***, the Court has observed that the procedure for appointment on ad-hoc basis against a substantively vacant post is what is laid down in paragraph 5 of the First Removal of Difficulties Order and that procedure is mandatory. While holding as above, the Full Bench had taken notice of the majority view rendered in the earlier three-judges Full Bench decision of this Court in ***Radha Raizada's case (supra),*** which was approved by the Apex Court in the case of ***Prabhat Kumar Sharma's case (supra),*** wherein, it was held that any appointment made in transgression of that procedure is illegal and void. Paragraph 148 of the Full Bench decision in ***Jahaj Pal's case (supra)*** is relevant and the same is extracted below:-

*"148. First Order was considered by Supreme Court in **Prabhat Kumar Sharma and others Vs. State of U.P. and others, (1996) 10 SCC 62** and it was held that any appointment made in transgression thereof is illegal and void. Such an appointment would not confer any right upon the appointee. Therefore, whenever any act or omission contemplated under a Removal of Difficulties Order is to be considered, for example, an appointment made under the provisions of Removal of Difficulties Order, one has to meticulously examine whether all the requirements of Difficulties Order have been followed or not. In other words we can say that the provisions of Removal of Difficulties Order have to be applied mandatorily."*

47. The five-judges Full Bench also notices the legislative intent in drawing distinction between the provisions of Section 33-A and Section 33-B of U.P. Act No. 5 of 1982. It would be useful to reproduce paragraph 162 of the judgment of the Full Bench in that regard:-

"162. We may notice here a marked distinction between philosophy and intention of Legislature in enacting Section

33-A and 33-B in different manner though, broadly, purpose was to give benefit of substantive appointment to ad hoc teachers. Those ad hoc appointments, which were made following procedure under First Order, Legislature treated them as having already undergone a substantially wider procedure of selection and, therefore, found no necessity of reassessment of their suitability by any agency, therefore, declared such ad hoc teachers, who were appointed against substantive vacancies in accordance with Para 2 of First Order, as "deemed to be appointed substantively" and no further selection was required in their cases. However, Second Order deals with short-term vacancies wherein a short and summary method of selection for such short-term vacancies is provided and therefore, this summary selection was not given same status, as was given to cases covered by First Order. For ad hoc appointments under Second Order, Legislature has provided that these ad hoc teachers appointed against short-term vacancies will undergo a process of selection through a Selection Committee constituted under the provisions of Section 33-B and only those, who are recommended by it, would be given substantive appointment. This legislative recognition of distinction in process of appointment of First and Second Order cannot be overlooked. There is no reason to dilute the same particularly when such section has been followed in subsequent amendments in Act, 1982 with regard to substantive appointment of ad hoc teachers. "

48. From above, it is clear that for ad-hoc appointment against a substantive vacancy, there exists a different procedure of selection as is provided in paragraph 5 of the First Removal of Difficulties Order. The procedure contemplated there requires inviting of applications through public advertisement of vacancy in at least two newspapers having adequate circulation in Uttar Pradesh. After receipt of applications, the DIOS is to cause the best candidate selected on the basis of quality points specified in the Appendix entered in a list on the basis of which appointments are made. It is because of adoption of this detailed procedure in making ad hoc appointment against substantive vacancy, section 33-A of U.P. Act No.5 of 1982, which provides for regularization of such ad hoc appointment, does not provide for reassessment of a candidate's suitability, it simply declares such an ad-hoc teacher, subject to fulfillment of other conditions specified by the section, deemed to be appointed substantively. However, where ad hoc appointment is against short-term vacancy, as the procedure prescribed by Second Removal of Difficulties Order had no such stringent requirements, as found in First Removal of Difficulties Order, those ad-hoc appointees have to undergo a process of selection as is provided in Section 33-B of U.P. Act No.5 of 1982.

49. Now, we shall deal with the submission of Sri Khare that as Sunil's appointment was under Section 18 of the U.P. Act No.5 of 1982, the stringent procedure provided by paragraph 5 of the First Removal of Difficulties Order was not required to be followed because the appointment was made prior to the three-judges decision in ***Radha Raizada's case,*** *as held in* ***Balveer Singh's case.***

50. In **Radha Raizada's case,** the Full Bench had held that the procedure

provided in paragraph 5 of the First Removal of Difficulties Order for ad hoc appointment against substantive vacancy had to be strictly followed for making ad hoc appointments under section 18 of U.P. Act No.5 of 1982 as the said procedure supplemented the provisions of Section 18 of the U.P. Act No.5 of 1982 which, on its own, initially, did not prescribe for the procedure for appointment. The decision was upheld by the Apex Court in **Prabhat Kumar Sharma's case (supra).** The relevant extract from the judgment in **Prabhat Kumar Sharma's case** is reproduced below:

"6. We are not concerned in this case with the Second Removal of Difficulties Order, 1981 which deals with filling up of short-term vacancies of ad hoc teachers. It is, therefore, not necessary to deal with the procedure prescribed in that behalf. The Full Bench has elaborately considered the legislative history. In paras 26 and 27 it had dealt with the amendments to the U.P. Intermediate Education Act, 1921 and various provisions of Ordinance 8 of 1981. The object was to provide teachers selected through the Commission or the Board with a view to raise the standard of education and in the event of there being delay in allotting the selected teachers, with a view to allow the institution to appoint teachers on ad hoc basis so as to avoid hardship to the students. Procedure under Section 18 was provided for appointment of such teachers

in the institutions purely on ad hoc basis in accordance with the procedure prescribed thereunder. The method of recruitment and appointment of such teachers is regulated in para 5 of the First 1981 Order. The appointment, therefore, should be made in accordance with the said procedure. In para 41 of the judgment, it has expressly dealt with ad hoc appointments as under:

"41. It has already been noticed that Section 18 of the Principal Act provides for power to appoint a teacher purely on ad hoc basis either by promotion or by direct recruitment against the substantive vacancy in the institution when the condition precedent for exercise of powers exist namely that the Management has notified the said vacancy to the Commission in accordance with the provisions of the Act and the Commission has failed to recommend the name of any suitable candidate for being appointed as a teacher within one year from the date of such notification and the post of such teacher has actually remained vacant for more than two months. However, since the State Government was alive to the situation that the establishment of the Commission may take a long time and even after it is established, it may take a long time to make available the required teacher in the institution and as such issued the Removal of Difficulties Order dated 30-1-1982 and Removal of Difficulties Order dated 14-4-1982. In fact these Removal of Difficulties Orders were issued to remove the difficulties coming in the way of a Management in running the institution in the absence of teachers. This power to appoint ad hoc teachers by direct recruitment thus, is available only when preconditions mentioned in Section 18 of the Act are satisfied, secondly, the vacancy is substantive vacancy and thirdly, the vacancy could not be filled by promotion. Neither the Act nor the Removal of Difficulties Order defined vacancy. However, the vacancy has been defined in Rule 2(11) of U.P. Secondary

Education Services Commission Rules, 1983. "Vacancy' means "a vacancy arising out as a result of death, retirement, resignation, termination, dismissal, creation of new post or appointment, promotion of the incumbent to any higher post in a substantive capacity. Thus, both under Section 18 of the Act and under the Removal of Difficulties Order, the Management of an institution is empowered to make ad hoc appointment by direct recruitment, in the manner laid down in para 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission joins the post. As noticed earlier both Section 18 of the Act and the provisions of First Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of the scheme. Scheme being provision for ad hoc appointment of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and, therefore, the provisions contained in Section 18 and Removal of Difficulties Order are to be harmonized. It is, therefore, not correct to say that appointment of a teacher on ad hoc basis is either under Section 18 of the Act or under the Removal of Difficulties Order. Thus, if contingency arises for ad hoc appointment of teacher by direct recruitment the procedure provided under the First Removal of Difficulties Order has to be followed. Para 5 of the First Removal of Difficulties Order provides that the management shall, as soon as may be, inform the District Inspector of Schools about the details of vacancy and the District Inspector of Schools shall invite applications from the local Employment Exchange and also through public advertisement in at least two newspapers having adequate circulation in Uttar Pradesh. Sub-para (3) of para 5 further provides that every such application shall be addressed to the District Inspector of Schools. Sub-para (4) of para 5 of the Removal of Difficulties Order provides that the District Inspector of Schools shall cause the best candidate selected on the basis of quality points specified in Appendix. The compilation of quality points may be done by the retired Government Gazetted Officer, in the personal supervision of the Inspector. Para 6 of the First Removal of Difficulties Order further provides for appointment of such teacher under para 5 who shall possess such essential qualification as laid down in Appendix A referred to in Regulation 1 of Chapter II of the Regulations made in the Intermediate Education Act.

42. In view of these provisions the ad hoc appointment of a teacher by direct recruitment can be resorted to only when the conditions precedent for exercise of such powers as stated in Section 18 of the Act are present and only in the manner provided in para 5 of the Removal of Difficulties Order.

... Thus, both under Section 18 of the Act and under the Removal of Difficulties Order the Management of an institution is empowered to make ad hoc appointment by direct recruitment, in the manner laid down in para 5 of the First Removal of Difficulties Order only when such vacancy cannot be filled by promotion and for a period till a candidate duly selected by the Commission joins the post. Both Section 18 of the Act and the provisions of First

Removal of Difficulties Order provide for ad hoc appointment of teacher in the institution, later further providing for method and manner of such appointments are part of one scheme. Scheme being provision for ad hoc appointments of teacher in the absence of duly selected teachers by the Commission. The provisions may be two but the power to appoint is one and the same and, therefore, the provisions contained in Section 18 and Removal of Difficulties Order are to be harmonized. It is, therefore, not correct to say that appointment of a teacher on ad hoc basis is either under Section 18 of the Act or under the First Removal of Difficulties Order. Thus if contingency arises for ad hoc appointment of teacher by direct recruitment the procedure provided under the First Removal of Difficulties Order has to be followed."

(emphasis supplied)

7. It would thus be clear that any ad hoc appointment of the teachers under Section 18 shall be only transient in nature, pending allotment of the teachers selected by the Commission and recommended for appointment. Such ad hoc appointments should also be made in accordance with the procedure prescribed in para 5 of the First 1981 Order which was later streamlined in the amended Section 18 of the Act with which we are not presently concerned. Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees. The removal of difficulties envisaged under Section 33 was effective not only during the period when the Commission was not constituted but also even thereafter as is evident from the second para of the preamble to the First 1981 Order which reads as under:

"And whereas the establishment of the Commission and the Selection Boards is likely to take some time and even after the establishment of the said Commission and Boards, it is not possible to make selection of the teachers for the first few months."

51. From the decision of the apex court noticed above, it is clear that the procedure prescribed in the First Removal of Difficulties Order for making ad hoc appointment against a substantive vacancy was to be followed for an appointment contemplated under section 18 of the U.P. Act No.5 of 1982 and any appointment in transgression thereof was void. In ***Ashika Prasad Shukla's case (supra),*** the court held that since the Full Bench in Radha Raizada's case had also directed for adoption of certain aspects of the procedure relating to ad hoc appointment against substantive vacancy, which were not provided for in the Second Removal of Difficulties Order governing ad hoc appointment against short term vacancy, the said adoption would be deemed prospective, that is applicable to appointments made after the decision of **Radha Raizada's case.** This view taken in **Ashika Prasad Shukla's case** is limited to ad hoc appointments against short term vacancies as has been clarified in a subsequent Division Bench decision in **Julfikar Hussain Ansari's case (supra).** The view taken in **Balveer Singh's case (supra)** that the principle laid down in **Radha Raizada's case**, in respect of applicability of the procedure laid down in the First Removal of Difficulties Order for ad hoc appointment against substantive vacancy, would be applicable prospectively, in view of decision in **Ashika Prasad Shukla's case,** is in ignorance of the binding

precedent of the Apex Court in Prabhat Kumar Sharma's case. Hence in our considered view the decision rendered in **Balveer Singh's** case can not be treated as a binding precedent. As it has failed to consider binding precedent of the Apex Court, we do not deem it necessary to refer the issue to a larger Bench, particularly, when the said view has been reiterated in a subsequent Full Bench decision in **Jahaj Pal's case.**

52. We are, therefore, in agreement with the view taken by the learned Single Judge that even if we assume that there existed a substantive vacancy against which Sunil was appointed on ad-hoc basis, on 29.10.1985, the appointment would have conferred no right on him to seek regularization under Section 33-A as the procedure for ad hoc appointment against substantive vacancy provided in the First Removal of Difficulties Order was not followed.

53. The learned Single Judge was therefore justified in his conclusion that the order dated 18.09.2014 passed by DIOS was legally correct in declaring the order, dated 19.05.1992, regularizing the services of Sunil, void.

54. Now, the questions that arise for our consideration are: (a) whether the services of Sunil were liable to be terminated upon conversion of the short-term vacancy into a substantive vacancy, with effect from 30.06.2006; and (b) whether his services were rightly terminated with effect from 30.06.1986. If yes, then whether any prior approval was required under Section 21 of the U.P. Act No. 5 of 1982.

55. With regard to the above issues, in Special Appeal No. 595 of 2019 and Special Appeal No. 599 of 2019, the learned counsel for the Management submitted that under para 3 of the Second Removal of Difficulties Order, the duration of ad-hoc appointment made against short-term vacancy is provided as follows:

*"**3. Duration of ad-hoc appointment.** - Every appointment of a teacher under Paragraph 2 of this Order shall cease from the earliest of the following dates, namely :*

(a) when the teacher, who was on leave or under suspension joins the post; or

(b) when the period of six months from the date of such ad-hoc appointment expires; or

(c) when the short-term vacancy otherwise ceases to exist." "

56. It was submitted by the learned counsel for the management that upon expiry of six months period of the initial appointment, the management took a decision to terminate the services of Sunil, with effect from 30.06.1986, against which Sunil filed Writ A No. 20807 of 1986 in which, initially, an interim order was passed but, thereafter, the petition was dismissed as infructuous. Consequent to its dismissal, the interim-order stood discharged and merged in the final order. As a result, the services of Sunil stood automatically terminated. Hence, he was not entitled to continue in service any further. In the alternative, it was argued on behalf of the management, that, in any case, once the short-term vacancy got converted into a substantive vacancy, the ad hoc appointment stood automatically terminated by operation of law, as per provision of Second Removal of Difficulties Order, for which no approval was required.

57. The aforesaid submissions made on behalf of the management, in our view, are liable to be rejected for the following reasons:

58. With effect from 30.01.1982, paragraph 3 of the Second Removal of Difficulties Order was substituted by U.P. Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 wherein clause (b) in paragraph 3 of the Second Order stood deleted. As a result, the term of six months provided in the letter of appointment, as per unamended provision of paragraph 3 of the Second Order, was not legally justified as such appointment had to continue till the teacher who was on leave or under suspension joins the post; or when short-term vacancy otherwise ceases to exist.

59. As it is not the case of the management that the teacher who was on leave or under suspension had joined the post, the appointee was entitled to continue till conversion of short-term vacancy into a substantive vacancy. Further, it is not the case of the management that the short-term vacancy got converted into a substantive vacancy prior to insertion of Section 33-B in the U.P. Act No. 5 of 1982, which provides for regularization of ad-hoc appointments made against short-term vacancies upon conversion into a substantive vacancy. Rather, it is the case of the management that the short-term vacancy got converted into a substantive vacancy on 30.06.2006 by which date Section 33-B was inserted in U.P. Act No.5 of 1982. In view of the above, the incumbent Sunil was entitled to continue in service till his regularization was considered under Section 33-B of the U.P. Act No. 5 of 1982 and, thereafter, as per the provisions contained therein.

60. At this stage, it may be observed that the view taken in earlier three-judges Full Bench decision of this Court in ***Smt. Pramila Mishra's case (supra)*** has been clarified in five-judges Full Bench decision in ***Jahaj Pal's case (supra)***. The relevant portions of the judgment rendered by five-judges Full Bench in ***Jahaj Pal's case (supra)*** is reproduced below:

"70. Section 33-B(1)(a)(i) covered such ad hoc teachers who were appointed by promotion or direct recruitment in Lecturer Grade or Trained Graduate Grade till 14.05.1991 and in CT Grade till 13.05.1989, in accordance with procedure proscribed in Para 2 of Second Order and such short term vacancy was subsequently converted into a substantive vacancy.

71. Section 33-B(1)(a)(ii) covered those ad hoc Teachers who were appointed by direct recruitment on and after 14.07.1981 till 12.06.1985 against substantive vacancies in CT Grade through advertisement and such appointment was approved by DIOS.

72. Section 33-B(1)(a)(iii) brought within its ambit ad hoc teachers, whether appointed by promotion or direct recruitment from 31.07.1988 to 14.05.1991, against substantive vacancies in accordance with Section 18 as it stood before its omission by Amendment Act, 1992 (in fact this is Amendment Act 1 of 1993).

73. All the above three categories of teachers, if possessed requisite qualifications or exempted from such qualification, on the date of such ad hoc appointment, and served continuously

the institution, from the date of such ad hoc appointment till 07.08.1993, and not related to Management/ Principal/ Headmaster of Institution concerned, were entitled to be considered by a Selection Committee to determine their suitability for appointment in a substantive capacity. Constitution of Selection Committee is provided in sub-section (2) of Section 33-B and ad hoc teachers who are recommended by Selection Committee, are to be given substantive appointment by Management in order of seniority.

74. Section 33-B(4) declares that all such teachers who are given substantive appointment under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

75. Sub-section (5) of Section 33-B provides that teachers who are within the ambit of Section 33-B(1), if not found suitable for substantive appointment by Selection Committee, they shall cease to hold ad hoc appointment on such date as State Government, by order, specifies.

76. Here comes the change in tenure of ad hoc teachers who are within the ambit of sub-section (1) of Section 33-B. Even if they are not found suitable for substantive appointment, sub-section (5) confers a right upon them to continue till the date State Government by order specify for their cessation.

77. In our view, all such teachers who come within the ambit of Section 33-B(1), on and after 07.08.1991, got protection with regard to their right to hold ad hoc appointment till the eventuality contemplated in sub-section (5) happens and such teachers could not have been ceased to work on and after 07.08.1991, when Section 33-B came into force, by taking recourse to the tenure provided in Second Order or any other provision.....

164. Sub-Section (5) of Section 33-B makes provision in respect of such ad-hoc teachers who are not found suitable under sub-section (1) of Section 33-B. It is said that such teachers shall cease to hold appointment on such date as State Government may, by order, specify. This sub-section (5) of Section 33-B, therefore, makes an inroad in the tenure provided in Para 3 of Second Order where an ad-hoc appointee would cease on joining of teacher who has caused short term vacancy; on expiry of 6 months from the date of ad-hoc appointment (this condition was applicable only till 29.01.1982); and when short term vacancy otherwise ceased to exist.

165. We have no hesitation in holding that as soon as Section 33-B came into force, sub-section (5), providing different tenure, will come into play, and would override the provision otherwise contained in Para 3 of Second Order and from that date onwards i.e. 06.08.1993, tenure of ad hoc teachers appointed against short-term vacancies, who are/were considered by Selection Committee constituted under Section 33-B(3) and not found suitable, will not cease to work but would continue till such date as State Government may by order, specify. In order to give effect to Section 33-B, even though it is not clearly said but we have no doubt that ad hoc teachers entitled for consideration for substantive appointment under Section 33-B, so long as Selection Committee has not considered them, they would also be entitled to continue, and on and after 07.8.1993, when Section 33-B came into force, such teachers cannot/shall not be terminated if any eventuality

contemplated in Para 3 of Second Order arises or happen.

166. In respect of ad-hoc teachers, who do not get any right to be considered for substantive appointment under Section 33-B(1) by virtue of sub-section (6), their tenure of ad-hoc appointment under Para 3 of Second Order would continue to be governed by Para 3 of Second Order. They would cease when the candidate selected and recommended by Commission/Board joins or when short term vacancy ceases otherwise. In respect of other ad-hoc teachers, who were eligible and entitled to be considered for substantive appointment under Section 33-B but not found suitable by Selection Committee constituted under sub-section (2) of Section 33-B, such teachers will not cease on happening of a condition under Para 3 of Second Order but here sub-section (5) of Section 33-B will come into play and such teachers will cease to hold ad-hoc appointments on such date, as State Government may, by order, specify. Thus, here an order under sub-section 33-B(5) from State Government would be required for. .....

169. We also reiterate that after Section 33-B came into force, from that day and onwards, even those adhoc teachers who were appointed in short-term vacancies under Second Order and eligible to be considered for substantive appointment by Selection Committee under the said provision, if any contingency, as provided in Para 3 of Second Order, occurs, in the interregnum period when Selection Committee has still to consider such teachers, they will be entitled to continue by virtue of Section 33-B(5) read with sub-section (6) of Section 33-B. For example, on and after 07.08.1993, even an ad hoc teachers, is yet to be considered by Selection Committee for substantive appointment under Section 33-B if he fulfills all the requisite conditions making him eligible and entitled for such consideration, if certain vacancies ceased by becoming a substantive vacancy, such teacher will not cease to work by application of Para 3 of Second Order, but, would be entitled to continue till he is considered by Selection Committee. If found suitable, he will be appointed as such, and, if not found suitable, he will be governed by sub-section (5) of Section 33-B. The only exception is the cases where matter is governed by sub-section(6) of Section 33-B. .....

206. Full Bench judgment in ***Smt. Parmila Mishra (supra)*** *therefore, insofar as a bald observation has been made in Para 16 of judgment (as quoted above) is clarified and we hold that cases governed by provisions relating to substantive appointment/regularization like 33-B and 33-F etc., the same wherever applicable, will prevail over otherwise inconsistent provision contained in Removal of Difficulties Order and in particular Second Order. "*

61. From the observations/ ratio, extracted above, it is clear that where the short-term vacancy gets converted into a substantive vacancy after 07.08.1993, the tenure of teacher appointed on ad-hoc basis against a short-term vacancy would be governed by the provisions of Section 33-B and would not be governed by paragraph 3 of the Second Removal of Difficulties Order.

62. In view of the reasons recorded above, we are of the view that the learned Single Judge was justified in affirming the order of the DIOS disapproving the resolution of the management, terminating the services of Sunil. The

learned Single Judge was also justified in issuing a direction to consider regularization of the services of Sunil under the appropriate provisions of U.P. Act No.5 of 1982.

63. The submission of the learned counsel for the management that consequent to dismissal of Writ A No. 20807 of 1986, Sunil had lost his right to continue in service is misconceived inasmuch as Writ A No. 20807 of 1986 was not dismissed on merits by upholding the order terminating the services of Sunil but was dismissed as the cause to sue did not survive consequent to the intervening regularization order. Under the circumstances, when the regularization order was canceled, a fresh look in respect of regularization of the services of Sunil in accordance with the provisions of Section 33-B of U.P. Act No. 5 of 1982 in the light of the law laid down by five-judges Full Bench in ***Jahaj Pal's case (supra)*** is required. For all the above reasons, we are of the view that the learned Single Judge was justified in affirming the order of the DIOS disapproving the resolution of the management terminating the services of Sunil and issuing direction for consideration of regularization of his services under the provisions of U.P. Act No. 5 of 1982.

64. In view of the discussion made above, all five appeals are liable to be dismissed and are accordingly dismissed. There is no order as to costs.

(2019)10ILR A 1993

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2019

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ A No. 39757 of 1996

Rajendra Prasad Saxena & Ors.
...Petitioners
Versus
Distt. Judge, Budaun & Anr.
...Respondents

Counsel for the Petitioners:
Sri R.C. Singh, Sri Rakesh Kumar.

Counsel for the Respondents:
S.C., Sri Ashish Mishra, Sri B.B. Jauhari, Sri Deep Chandra Joshi, Sri Rahul Sahai, Sri Rajeev Gupta, Sri Rajiv Joshi, Sri Yashwant Verma.

A. Subordinate Civil Courts Ministerial Establishment Rules, 1947- Rule 19 - Length of service be taken as basis for determination of seniority-Impugned order dated 30.05.1996, held Respondent No. 2 to be senior to the petitioners on the ground that regularisation of Respondent No. 2 was with retrospective effect. Representation rejected by order dated 31.10.1996- Allowing this petition, the High Court held- Rule 19 itself permits in exceptional cases to rely on criteria other than confirmation. (Para 16)

B. Interpretation of Rule 19: "ordinarily"- "Ordinarily" means "in the large majority of cases but not invariably"-The word envisages an eventuality resulting in an anomaly if determination of seniority by using the literal interpretation is adopted. (Para 14, 16 & 17)

Writ petition challenges order dated 31.10.1996 and order dated 30.05.1996, passed by District Judge, Budaun.

Writ Petition allowed (E-4)

Precedent followed: -

1. Dileep Kumar Srivastava Vs St. of U.P. (2010) 6 All. L. J. 474 (Para 14, 16, 19)

Precedent distinguished: -

1. St. of Haryana & ors. Vs Vijay Singh & ors., AIR 2012 SC 2901 (Para 7, 18)

2. Dr. Chandra Prakash & ors. Vs St. of U.P. & ors., AIR 2003 SC 588 (Para 7, 18)

3. T. Vijayan & ors. Vs Divisional Railway Manager & ors., AIR 2000 SC 1766 (Para 7, 18)

4. Ajit Kumar Rath Vs St. of Orrisa, AIR 2000 SC 85 (Para 7, 18)

5. The Direct Recruits Class II Engineer Assn. Vs St. of Mah., AIR 1999 SC 1607 (Para 7, 18)

6. G.C. Gupta Vs N.K. Pandey, AIR 1998 SC 268 (Para 7, 18)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The present petition has been filed by the petitioners seeking following reliefs:-

i) issue a writ order or direction including a writ in the nature of certiorari quashing the order dated 31.10.1996 (Annexure No.13 to the writ petition) and order dated 30.5.1996 (Annexure No.12 to the writ petition) passed by respondent no.1.

ii) issue a writ, order or direction including a writ in the nature of mandamus commanding the respondent no.1 not to make any recovery from the salary of the petitioners.

2. The averments as stated leading to the filing of the present petition, in brief, are as under:-

3. The petitioner no.1 was appointed on ad-hoc basis against a temporary post of Stenographer on 2.4.1979 and continued as such till his regularisation, the petitioner nos.2,3 & 4 were also appointed on the post of Stenographer (Hindi) on ad-hoc basis against clear vacancy on 21.4.1980 and continued as such till their regularisation. It is also alleged that the respondent no.2, Rajendra Kumar Gupta was appointed as an approved candidate for the post of officiating Paid Apprentice of District Judge's Court on 6.11.1973. He worked in various capacities since then, and on 20.4.1979 he was posted as Stenographer to the Civil Judge, Budaun but, his substantive appointment remained as Copyist which is a lower post on temporary basis. The petitioner no.1 was confirmed on the post of Stenographer on 11.2.1987 with immediate effect on the temporary post being made permanent whereas the petitioner nos.2,3 & 4 were confirmed on 6.1.1990 with immediate effect. The services of the respondent no.2 were confirmed with retrospective effect on 27.7.1993. A dispute arose in between the petitioners and the respondent no.2 with regard to their inter se seniority. The competent authority took cognizance of the inter se seniority dispute called for a report and the First Additional District Judge, Budaun submitted a report on 23.10.1989 recommending to place the petitioner no.1 above the respondent no.2 vide his report dated 23.10.1989. The respondent no.2 filed his objections against the report dated 23.10.1989 and on the said objections another report was called by the District Judge, Budaun. The Third Additional District & Sessions Judge, Budaun submitted another report on 19.5.1991 agreeing with the earlier report dated 23.10.1989, the District Judge, Budaun relying upon the aforesaid reports dated 23.10.1989 and 19.5.1991

determined the seniority dispute holding that the petitioner no.1 to be senior vide his order dated 3.6.1991 (Annexure No.6 to the writ petition). The said order dated 3.6.1991 was challenged by the respondent no.2 by filing a writ petition before this Court being Writ A No.14497 of 1992 (Rajendra Kumar Gupta Vs. District Judge and others) which was subsequently dismissed as having become infructuous. The respondent no.2 also raised seniority dispute between the petitioner nos. 2,3 & 4 on one hand and the respondent no.2 on the other hand and on his objections the District Judge, Budaun constituted a Team of two Additional District Judges to enquire and submit a report with regard to the inter se seniority of the petitioner nos. 2, 3 & 4 and the respondent no.2. The said Team submitted a report on 8.9.1993 recommending therein to place the petitioners no. 2,3 & 4 above the respondent no.2 in the seniority list, the District Judge, Budaun agreeing with the report dated 8.9.1993 accepted the same and passed an order on 9.9.1993 and the petitioners no. 2,3 & 4 were held to be senior to the respondent no.2.

4. In terms of the said decision dated 9.9.1993, the seniority dispute came to an end and the salary of the petitioners were fixed accordingly. The respondent no.2 aggrieved against the said decision again agitated the matter for re-fixing the inter se seniority and the District Judge, Budaun vide his order dated 30.5.1996 held the respondent no.2 to be senior to the petitioners on the ground that the regularisation of the respondent no.2 was with retrospective effect and as such the respondent no.2 was senior to the petitioners. The said order dated 30.5.1996 has been filed as Annexure No.12 to the writ petition. The petitioners moved an application before the District Judge, Budaun for reviewing the order dated 30.5.1996, however, their representation was rejected vide order dated 31.10.1996 (Annexure No.13 to the writ petition). The present petition challenges the order dated 30.5.1996 as well as the order dated 31.10.1996.

5. We have heard Sri R.C. Singh, learned Senior Advocate, appearing on behalf of the petitioners as well as Sri Ashish Mishra, counsel for respondent no.1.

6. Sri R.C. Singh, Senior Advocate submits that the services of the petitioners and the respondent no.2 are governed by the Subordinate Civil Courts Ministerial Establishment Rules, 1947 (hereinafter referred to as 1947 Rules) and rule 19 of the said Rules clearly provides for determination of seniority. He has further argued that the functioning of the petitioners on ad-hoc basis has not been considered while fixing the seniority and merely because the respondent no.2 was confirmed with retrospective effect, the ad-hoc functioning of the petitioners cannot be ignored and if working of the petitioners on ad-hoc basis is taken into account, the petitioners are senior to the respondent no.2 and it is this aspect of the matter that the District Judge, Budaun has not taken into account while passing the impugned order.

7. Sri R.C. Singh, Advocate has relied upon the following judgements:-

i) State of Haryana and others Vs. Vijay Singh and others, A.I.R. 2012 S.C. 2901.

ii) Dr. Chandra Prakash and others Vs. State of U.P. And others, AIR 2003 S.C. 588,

iii) T. Vijayan and others Vs. Divisional Railway Manager and others, AIR 2000 S.C. 1766,

iv) Ajit Kumar Rath Vs. State of Orrisa, AIR 2000 S.C. 85,

v) The Direct Recruits Class II Engineer Association Vs. State of Maharashtra, A.I.R. 1999 S.C. 1607,

vi) G.C. Gupta Vs. N.K. Pandey, A.I.R. 1998 S.C. 268.

8. He has further argued that the seniority dispute was already finally decided vide order dated 3/4.6.1991 and 9.9.1993 and the same could not have been reopened as no power of review is conferred on the District Judge, therefore, the order impugned is bad on that count also.

9. Sri Ashish Mishra, Advocate has on the other hand submitted that the order whereby the respondent no.2 was regularised with retrospective effect has not been challenged in the present petition and further it has been submitted that the petitioners as well as respondent have already superannuated from their service as such the present petition has become infructuous by efflux of time. He further argued that the confirmation of the respondent no.2 was done from the date of his substantive appointment on the post in question, i.e. on 16.9.1981 whereas the petitioners were appointed from the date of confirmation orders as the post on which they were working was not substantive and the same was created from the date of their confirmation. He thus, confines his submission on the ground that confirmation order not being challenged in the present writ petition as well as the petitioners and respondent no.2 having superannuated as such the writ petition is liable to be dismissed.

10. Considering the averments made at the bar, this Court is called upon to decide whether the fixation of the inter se seniority vide order dated 30.5.1996 was just and legal.

11. The Position as emerges with regard to the facts of the initial appointments and the confirmations of the petitioners and the respondent no.4, is as under:-

	Petitioner no.1	Petitioner no.2	Petitioner no.3	Petitioner no.4	Respondent no.4
Initial appointments	02/04/79 Temporary post	21.1.1980 Temporary post	21.1.1980 Temporary post	01/05/81 Temporary post	Working as Copyist since 22.11.1974. Joined on 16.9.1981 as Typist.
Confirmation	11/02/87	06/01/90	06/01/90	06/01/90	27.7.1993 with retrospective effect

12. It is not disputed that the service conditions of the petitioners as well as the respondent no.2 at that point in time were governed by the Subordinate Civil Courts Ministerial Establishment Rules, 1947. Rule 19 of 1947 Rules provides for manner of determination of seniority and is quoted as under:-

"Seniority in service, for the purpose of promotion shall ordinarily be determined from the date of the order of confirmation in the grade and if such date is the same in the case of more than one person than according to their respective position in the next lower grade or the register of recruited candidate in the case of person confirmed in the lowest grade."

13. Thus, what is to be considered in the present case is as to how the seniority of the petitioners and the respondent no.4 is to be determined in consonance with Rule 19 of the said 1947 Rules and it is important to understand the import of the word 'ordinarily' used in Rule 19 of the said 1947 Rules.

14. Rule 19 of 1947 Rules was considered by this Court in the judgement delivered in the case of ***Dileep Kumar Srivastava Vs. State of U.P. (2010) 6 All. L.J. 474*** and the Court observed as under:-

"The rule 19 provides that seniority in service for the purpose of promotion shall be ordinarily determined from the date of confirmation. Word "ordinarily" came for consideration before the apex Court and this Court on several occasions. The appellant himself has placed reliance on the judgement of the apex Court in AIR 1961 S.C. 1346 Kailash Chand Vs. Union of India. The Apex Court was considering the provisions of Railway Establishment Code Rules 2046(2) (a) where the words "should ordinarily be retained" were used. While considering the meaning of word "ordinarily", the apex Court laid down following in paragraph 8:

"(8) This intention is made even more clear and beyond, doubt by the use of the word "ordinarily". "Ordinarily" means "in the large majority of cases but not invariably". This itself emphasises the fact that the appropriate authority is not bound to retain the servant after he attains the age of 55 even if he continues: to be efficient. The intention of the second clause 1 therefore clearly is that while under the first clause the appropriate authority has the right to route the' servant who falls within clause (a) as soon as he attains the age of 55, it will, at that stage, consider whether or not to retain him further. This option to retain for the further Period of five years can only be exercised if the servant continues to be efficient; but in deciding whether or not to exercise this option the authority has to consider circumstances other than the question of efficiency also; in the absence of special circumstances he "should" retain the servant; but, what are special circumstances is loft entirely to the authority's decision. Thus, after the age of 55 is reached by the servant the authority has to exercise' its discretion whether or not to retain the servant; and there is no right in the servant to be retained, even if, he continues to be efficient."

Word "ordinarily" came for consideration before this Court in Lalit Mohan Vs. Secretary/General Manager, Distt. Co-op. Bank, Varanasi (1995)1 LBESR 298. The Court was considering Regulation 85 (x) of U.P. Cooperative Society Employees Service Regulation 1975, which provides that no employee shall ordinarily remain under suspension for more than six months. Following was laid down in paragraph 9:

"9. The learned counsel for the respondents referred to various cases including the case of Kailash Chandra v. The Union of India 1961 (3) FLR 379

(SC), Nirmal Chand Jain v. The District Magistrate, Jabalpur and Anr. AIR 1976 MP 95, Krishan Dayal and Ors. v. General Manager, Northern Railway AIR 1954 Punjab 245 and the Full Bench in the case of AM. Patroni and Anr. v. E.C. Kesavan AIR 1965 Ker.75. In the said cases, the use of the word 'ordinarily' in various statutes and its implications have been considered. Considering the law laid down in the said cases and the meaning of the word 'ordinarily' as given in various Dictionaries it seems that the word 'ordinarily' means in the majority of cases but not invariably. Agreeing with the said view I feel that in the present rule also the word 'ordinarily' means majority of cases unless there are special circumstances."

From the above decision, it is clear that the word "ordinarily" means majority of cases unless there are special circumstances. In the present case, Administrative Judge, while considering the inter-se seniority between the parties has taken the view that rule 19 uses the word "ordinarily" which is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation. Following was the observations made by the Administrative Judge in his order dated 23.1.2006:

"The confirmation is an inglorious uncertainty. The counting of seniority from the date of confirmation leaves him at the whim of the appointment authority, who may confirm or delay the confirmation of a particular employee to give undue benefit to a favour employees. Once an employee is confirmed on a substantive post his seniority must be reckoned from the date he was substantially appointed on the post. Rule 19 as such rightly refers to word "ordinarily" and is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation."

15. In the present case while dealing with the objections of Sri R.K. Gupta, in the report dated 19.5.1991, the Presiding Officer had repelled the arguments of the respondent no.4 to the effect that the petitioners were appointed on the temporary posts of Stenographers which were created by the Government for the Courts of Munsif Magistrates and the Chief Judicial Magistrates in 1979, holding that whether the appointment was against a temporary vacancy or against a permanent vacancy, the fact is that both the persons were appointed as Stenographers in the Pay Scale of Rs. 250-425 and their being no separate cadre for the Stenographers appointed against a substantive vacancy as opposed by Stenographers against a temporary vacancy. Thus, the seniority was fixed giving the benefit of service from the date of initial joining on the post of Stenographers and the petitioners were placed higher than the respondent no.4. The said seniority list was upset only on literal interpretation of Rule 19 of 1947 Rules and was determined from the date of order of confirmation, in the case of respondent no.4 the confirmation being with retrospective effect, he was held to be senior to the petitioners, although the admitted position is that the petitioners were working as Stenographers from a date prior to the working of the respondent no.4 as a Stenographer.

16. Thus, in this case what is to be considered is whether the services rendered from the date of initial appointment should be considered for determining the seniority or adopting literal interpretation of Rule 19 of 1947 Rules, the seniority should be determined from the date of the order of confirmation and the word ordinarily used in the Rule 19 of 1947 Rules should be completely overlooked. This question of interpretation of the word 'ordinarily' has already been dealt with in the judgement of ***Dileep Kumar Srivastava Vs. State of U.P. (supra).*** The Division Bench also considered whether there was any exceptional circumstance due to which the confirmation in service could not be taken as basis, rather length of service be taken as basis from determination of seniority. The Division Bench while considering whether any exceptional circumstances existed to take the length of service as basis for determination of seniority instead of confirmation in service, held as under:-

The question to be considered is as to whether there was any exceptional circumstance in the present case due to which the confirmation in service could not be taken as basis rather length of service be taken as basis for determination of seniority. There is no dispute that the respondent no. 4 was appointed earlier to the appellant and he was transferred to Allahabad on 11.4.1974. The confirmation of the appellant was made at Mirzapur on 30.4.1983 and after his confirmation he was transferred to Allahabad on 1.10.1984. The respondent no. 4, who was transferred to Allahabad in 1974 itself continued awaiting his confirmation which was done only on 1.2.1985. There is nothing on record to indicate that at any point of time, earlier to 1.2.1985, the respondent no. 4 was considered for confirmation and was not found fit. The appellant was appointed at judgeship of Mirzapur and was confirmed in the Mirzapur Judgeship, whereas the respondent no. 4 and the employee even appointed earlier to him i.e. respondent no. 7, who was appointed as early as in 1967, were not confirmed till 1.2.1985. The present is not a case where confirmation of all the employees was taken at Allahabad. At Allahabad, the confirmation was made with great delay in the year 1985 of the respondent no. 4, who was transferred and working at Allahabad from 11.4.1974 i.e. after more than a decade, which was special feature on the basis of which Administrative Judge did not refer to or relied the determination of seniority on the basis of confirmation. The Administrative Judge has rightly held that a person with different attribute of confirmation cannot contend that error was committed in not relying on criteria of confirmation as provided under Rule 19. Rule 19 does not mandatorily provides that confirmation in service, in all cases has to be the basis for determination of seniority. It uses the word "ordinarily" which gives a flexibility and in a case where there are certain special circumstances, the criteria other than the confirmation can be adopted by the appointing authority, for determination of seniority. In the present case, the appellant was confirmed at Mirzapur judgeship where he was appointed and the respondent no. 4, who was appointed earlier to appellant at Mirzapur itself and transferred to Allahabad in the year 1974, waited for his confirmation more than a decade, which ultimately was done on 1.2.1985. The

reliance on the length of service by the appointing authority cannot be said to be arbitrary or beyond the scope of Rule 19. Thus, Rule 19 itself permits in exceptional cases to rely on criteria other than confirmation and in the facts of the present case, we are satisfied that substantial justice has been done in determination of seniority of petitioner and the respondent no. 4, on the basis of length of service."

17. Coming to the circumstances which lead to the appointments of the petitioners and the respondent no.4 as culled out from the pleadings on record, are that some 242 temporary posts were created for the appointment of Hindi Stenographers to the Courts of Munsif Magistrates in the Pay Scale of Rs.250-425 and on the said posts, appointments were made and they started working with effect from 2.4.1979 (in respect of petitioner no.1) whereas the respondent no.4 was appointed as an English Stenographer vide order dated 16.9.1981 against the substantive post of English Stenographer in the Court of Civil Judge. Admittedly, the petitioners joined and started workings as Stenographers prior to the respondent no.4. The State Government, it appears regularised the temporary vacancy notified in the year 1979, subsequently sometimes in the year 1987, merely because the State Government took a long time to confirm the temporary vacancy into permanent one, the petitioners who were working cannot be denied the benefit of their working from the date of their initial appointment by using literal interpretation of Rule 19 of the 1947 Rules. The word 'ordinarily' used for the Rule 19 of 1947 Rules in fact, envisages an eventuality resulting in an anomaly if determination of seniority by using the literal interpretation is adopted. In fact, the present case is a classic case wherein the seniority should be determined on the basis of their initial working and not on the basis of their confirmation for the simple reason that the petitioners could not be confirmed as the posts on which they were appointed were themselves temporary and the State Government took a long time in conforming the said temporary sanctioned posts. Although, it is true that the petitioners have not challenged the confirmation of the respondent no.4 with retrospective effect in the present writ petition, however, what remains un-rebutted is that the respondent no.4 started working on the post of the Stenographer from a date subsequent to the date on which the petitioners started working.

18. Coming to the judgements relied upon by Sri R.C. Singh that the seniority should be determined from the date of initial appointment and not from the date of their confirmation, all the judgements cited by Sri R.C. Singh relate to rules which are differently worded than the Rule 19 of the 1947 Rules and, thus, are of no avail in the present case.

19. However, the facts of the case, in the case of ***Dileep Kumar Srivastava Vs. State of U.P. (supra)*** squarely apply to the facts in question and, thus, I have no hesitation in following the said judgement and holding that the fixation of seniority as done by the impugned order dated 30th May, 1996 (Annexure No.12 to the writ petition) and the rejection of the representation vide order dated 31.10.1996 (Annexure no.13 to the writ petition) are liable to be quashed and the same are hereby quashed.

20. The respondent No.1 is directed to re-fix the seniority of the petitioners and the respondent no.4 from the date of their initial appointment and not from the date of their confirmation. As the petitioners and respondent no.4 have already superannuated the consequences of the re-fixation of seniority will follow.

21. The writ petition is allowed. No order as to costs.

(2019)10ILR A 2001

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2019

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 12175 of 2018

Devendra Prasad Srivastava & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Tarun Agrawal, Sri Vinayak Mithal, Sri Ravi Kant

Counsel for the Respondents:
C.S.C., Sri Rajesh Kumar Yadav, Sri Suresh C. Dwivedi

A. U.P. Krishi Utpadan Mandi Act, 1964 - Sections 2(x), 15, 19, 23-A, 25-A, 26- F, 26- L, 26-M, 26- P, 26- X; U.P. Krishi Utpadan Mandi Samiti (Centralized) Retirement Benefit Regulations, 2013 - The conferment of pension to its employees is a service condition which the Board is free to provide by making/amending the Regulations - with prior approval of State Government and in consonance with the provisions of Act, 1964 - Whether the State Government in exercise of its powers under Act can compel the Board to accept a Pension Scheme other than that proposed by the Board by framing the Regulations? Answering the question in negative and allowing the present petition, the High Court held - The State Government lacks power and authority to reject the Pension Scheme (condition of service) sought to be implemented by the Board by making the Regulations, 2013, in exercise of its powers conferred u/s 26-X. The conferment of pension by the Board to its employees is a service condition which the Board is free to provide by making/amending the Regulations. The only rider cast upon the Board u/s 26-X is that it has to take prior approval of the State Government and that the Regulations was in consonance with the provisions of the Act, 1964. (Para 24 & 26)

B. Interpretation of Section 26-X - "previous approval" - The expression 'previous approval' has to be read in the context it is used in the statutory provision. The only requirement mandated in S. 26-X is that before embarking upon to make the Regulations, the Board is bound to take approval of the State Government- No further permission thereafter is required to be taken by Board from the State Government before implementing the Regulations. (Para 32)

Approval 'in principle' would mean that the concerned authority (State Government) has agreed to the proposal without getting into the details of other required statutory/legal compliances. If something is possible 'in principle' there is no reason why it should not happen, even though it has not happened before. (Para 32, 34, 38 & 39)

C. U.P. Agricultural Produce Markets Committee (Centralized) Service Regulations, 1984 - Regulation 47 - Regulations 1984, is distinct from the Regulations, 2013. Regulations 1984

would apply to the employees that came to be appointed on or before January 1, 1999, whereas, the Regulations 2013 would apply to the employees appointed on and after January 1, 1999 and before April 1, 2005 - Both the Regulations operate in different fields and cater to separate class of employees insofar entitled to distinct and different retiral Schemes, therefore, Regulation 47 would not be an impediment in implementing the Pension Scheme. (Para 41)

D. Entering into the domain of framing and implementing 'condition of service' by thrusting upon the employees NPS Scheme which was not proposed by the Board was beyond the authority and jurisdiction of State Government. (Para 48)

E. The State Government has been conferred power u/s 26-M to issue directions on 'question of policy' in the discharge of its functions and not with regard to conditions of service. (Para 46, 49 & 50)

Writ petition assails Orders dated 08.01.2016, 16.02.2018 by the State Government and Order dated 19.03.2018, passed by the Board.

Writ Petition allowed (E-4)

Precedent followed: -

1. N. Raghavendra Rao Vs Dy Commissioner, South Kanara, Mangalore, AIR 1965 SC 136 (Para 27)

2. St. of Mysore &anr. Vs R. Basappa & ors., (1981) 3 SCC 659 (Para 27)
3. Life Insurance Corpn. of India Vs Escorts Ltd. & ors., (1986) 1 SCC 264 (Para 28)

4. Shakir Husain Vs Chandoo Lal, AIR 1931 All. 567 (Para 28)

5. U.P. Avas Evam Vikas Parishad & anr. Vs Friends Coop. Housing Society Ltd. & anr., (1995) (Suppl.) (3) SCC 456 (Para 30)

6. Director of Education & ors. Vs Gajadhar Prasad Verma, AIR 1995 SC 1121 (Para 31)

7. UOI & ors. Vs Harananda & ors., (2019) SCC Online SC 126 (Para 38)

8. St. of U.P. Vs Preetam Singh & ors., (2014) 15 SCC (Para 41, 50)

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Sri Tarun Agrawal, Sri Vinayak Mithal, learned counsels for the petitioner, Sri Suresh C. Dwivedi, learned counsel for the second to tenth respondent, Sri Anuruddh Charan Mishra, learned Additional Chief Standing Counsel and Sri Jagdish Singh Bundela, learned Standing Counsel for the first respondent.

2. The State Agricultural Produce Markets Board (for short "the Board'), a body corporate having perpetual succession and a common seal and may sue or be sued by the said name and acquire, hold and dispose of property and enter into contracts. The Board for all purposes is deemed to be a local authority. It came into existence, consequent upon the promulgation of the Uttar Pradesh Krishi Utpadan Mandi Act, 1964 (for short "Act 1964'). The employees of the Board and the Committees (Mandi Samiti) were members of a Contributory Provident Fund Scheme (for short "CPF Scheme'). The Board desired to grant all the employees better retiral benefits, consequently, a proposal was made by the Board in its 86th meeting vide resolution dated 23 April 1999 to extend pensionary benefits to the employees, in lieu of the existing CPF Scheme w.e.f. 1 January 1999.

3. Pursuant thereof, the Board reminded the State Government on 31 May 1999, requesting to expedite the proposal for grant of Pension/Gratuity Scheme to its employees. The State Government vide communication dated 11 February 2000, addressed to the

Director of the Board, in principle, granted approval with certain conditions, including, that necessary amendments accordingly be carried out in the Service Regulations, thereafter, submit the Regulations to the Government with the approval of the Board. The Board, consequently, in its 91st meeting, vide resolution dated 18 January 2001, enhanced the contribution of its employees to the CPF Scheme from 8.33% to 10% w.e.f. 1 January 1999. The increased contribution was with a view to fund the pension scheme which was made effective from 1 January 1999. The employees of the Board, thereafter, have been contributing the enhanced amount to the CPF Scheme.

4. The matter, however, was kept pending by the State Government and w.e.f. 1 April 2005, the State Government adopted the National Pension System (for short "NPS'). The existing Pension/Gratuity Scheme was done away with from the notified date. The Government vide communication dated 25 May 2005, addressed to the Director of the Board, sought opinion of the Board as to whether the NPS could be made applicable to all the employees of the Board irrespective of their date of appointment. The Board informed the State Government vide communication dated 1 August 2005 that the employees have unanimously refused to accept NPS scheme. The Board in its 143rd meeting dated 24 September 2012, yet again resolved to extend the benefits of Pension/Gratuity Scheme to its employees at par with the employees of other Corporations/Development Authorities. Accordingly, the Board constituted a Committee on 10 October 2012 to study the proposal and give its recommendations. Pursuant thereof, the Committee recommended framing of Regulations for grant of pension on the lines prevalent in the other Corporations/Development Authorities. The Board in exercise of powers under Section 25-A and 26-X of Act, 1964, framed the U.P. Krishi Utpadan Mandi Samiti (Centralized) Retirement Benefit Regulations, 2013 (for short "Regulations, 2013'). The Regulation was remitted to the State Government for approval/information. The State Government vide communication dated 5 December 2013 sought certain clarifications which was duly replied by the Board and again vide communication dated 10 October 2014 Government sought the opinion of the Board with regard to the applicability of NPS to all the employees in view of Government Order dated 28 March 2005. In response, the Board vide communication dated 17 November 2014 pointed out that NPS cannot be made applicable uniformly, the employees who were recruited/appointed prior to 1 April 2005 from a separate class. NPS is applicable upon those employees who were recruited/appointed on or after 1 April 2005 or have not put in ten years qualifying service on the said date. The Board again reiterated that the State Government to approve the Regulations, 2013. The State Government, however, by the impugned order dated 8 January 2016, extended NPS Scheme to all the employees of the Board irrespective of their date of appointment/recruitment. The Board again vide communication dated 18 April 2016 pointed out that NPS Scheme cannot be made applicable to the employees who were appointed/recruited prior to 1 April 2005. The Board again requested the Government to approve the

Pension/Gratuity Scheme framed vide Regulations, 2013, which was pending with the Government.

5. Aggrieved by the conduct of the State Government a writ petition came to be filed by the employees being Writ Petition No. 67292 of 2015, which came to be disposed of on 10 January 2018, directing the State Government to take a final decision in the matter. Pursuant thereof, the State Government vide order dated 16 February 2018 rejected the representation of the petitioners reiterating its earlier order that the all the employees of the Board, irrespective of their date of appointment, would be entitled to NPS. The Board in compliance issued letter dated 19 March 2018 succumbing to the stand of the State Government.

6. The petitioners are retired employees of the Board/Committees (Centralized Service), they came to be appointed prior to 1 April 2005, by the instant writ petition they are assailing the orders dated 8 January 2016 and 16 February 2018 passed by the State Government and the consequential order dated 19 March 2018 passed by the Board, uniformly applying NPS Scheme to all the employees. A further prayer has been sought to direct the State Government to accord approval to the Regulations, 2013, implementing Pension/Gratuity Scheme framed by the Board.

7. Learned counsel appearing for the petitioners submits that the Board has been conferred powers under Section 26-F to appoint officers and servants as it considers necessary for efficient performance of its function on such terms and conditions as may be provided for in the Regulations made by the Board. Section 26-X confers powers upon the Board to make Regulations with the previous approval of the State Government for the administration of the affairs of the Board. The Regulations provide for the salaries, allowances and other conditions of service of the officers and other employees of the Board, and of officers referred to in sub-section (2) of Section 23.

8. The Board in exercise of its powers under Section 26-X framed the U.P. Agricultural Produce Markets Committee (Centralized) Service Regulations, 1984. Regulation 47 provides for retirement benefits, but pension was not admissible to the employees (Centralized Service). The employees were to contribute to the provident fund. The Board, however, in 1999 resolved to provide Pension/Gratuity Scheme in lieu of CPF Scheme to its employees w.e.f. 1 January 1999, which came to be accepted and approved, in principle, by the State Government on 11 February 2000, thereafter, the Board in exercise of power conferred under Section 26-X framed Regulations, 2013, providing the benefit of Pension/Gratuity Scheme to its employees who came to be appointed/recruited after 1 January 1999 and before 1 April 2005. NPS Scheme was made applicable upon the employees of the Board who were recruited/appointed on or after 1 April 2005, subject to ten years qualifying service.

9. In this back drop, it is urged by the learned counsel for the petitioner that it was not open to the State Government to have declined the employees of the

Board the Pension/Gratuity Scheme sought to be implemented by framing Regulations, 2013. The impugned order imposing NPS scheme on all employees uniformly is arbitrary without jurisdiction and in violation of the Government Order dated 28 March 2005. The Government Order clearly stipulates that the NPS scheme would be applicable on employees who came to be appointed/recruited on or after the cut of date provided therein i.e. 1 April 2005. The Pension/Gratuity Scheme would, however, continue to apply to the employees recruited/appointed prior to that date.

10. It is further urged that the Board is an autonomous body and is not funded by the State Government, revenue is generated by the Board to finance its activities under Act, 1964. The salary, allowance and other conditions of service of employees are governed by the Regulations framed by the Board from time to time in exercise of powers under Section 26-X. The Pension/Gratuity Scheme sought to be made applicable to the employees is to be funded and financed by the Board from its own resources, therefore, it is urged that it is not open to the State Government to impose upon the employees of the Board a pension scheme i.e. NPS ignoring Regulations, 2013. The Government had clarified in February 2000 while approving the proposed Pension Scheme that the Government would not fund the Pension/Gratuity Scheme and declined to take any liability/burden upon itself to fund the pension of the employees of the Board.

11. It is further urged that the determination and funding of salary/pension of the employees of the Board falls exclusively within the powers of the Board and would not fall within the ambit of "question of policy'. The Board is bound by the directions on question of policy as may be given to it by the State Government in exercise of its power under Section 26-M and not on conditions of service. It is further urged that the reasons assigned for declining the Pension/Gratuity Scheme to the employees appointed prior to 1 April 2005, is not a "question of policy', rather, a statutory obligation cast upon the Board to determine the service conditions of its employees, including pension, in exercise of powers under Section 26-X. The Government lacks the power to withhold the Regulations, 2013, seeking to implement the Pension/Gratuity Scheme which came to be approved by the Government in February 2000 itself. Pursuant thereof, the Board proceeded by enhancing deduction to the CPF Scheme to fund the pension scheme and thereafter framed the Regulations implementing the Pension/Gratuity Scheme on the direction of the State Government. It is submitted that no further approval/permission is required from the State Government.

12. Learned counsel appearing for the respondent-Board submits that the Board has resolved to provide Pension/Gratuity Scheme to its employees, to be funded from its own resources, accordingly, the contribution to the CPF Scheme was enhanced from 8.33% to 10% w.e.f. 1 January 1999, the employees, thereafter, have been contributing the amount since then. The corpus to fund the Pension Scheme is more than sufficient. It is not in dispute that the Board went ahead with the scheme after receiving approval of the

State Government way back on 11 February 2000. The Board, and not the Government, has been conferred powers under Act, 1964 to determine the service conditions of its employees. He further submits that the direction issued by the State Government, otherwise, cannot be disobeyed by the Board, but the Board still is awaiting the formal permission from the State Government with regard to the pending Regulations, 2013, implementing the Pension Scheme.

13. Learned Standing Counsel appearing for the State respondent submits that the factual matrix inter se parties is not in dispute, the Board did resolve in 1999 to provide to its employees Pension/Gratuity Scheme, accordingly, the contribution to the CPF was enhanced. The State Government, in principle, granted approval to the Pension/Gratuity Scheme, however, it is urged that since pension was not admissible to the employees of the Board in view of Regulation 47 of Service Regulation 1984, therefore, after enforcement of NPS scheme w.e.f. 1 April 2005, the State Government had taken a conscious decision to implement the NPS scheme upon all the employees of the Board irrespective of their date of appointment. Learned counsel further submits that the impugned order is not arbitrary or illegal as the scheme (NPS) applicable on the date of passing of the impugned order has been made uniformly applicable to all the employees of the Board. He, however, admits that the Regulations, 2013 is still pending with the State Government and no specific decision thereon has been taken, however, it is submitted that in view of the impugned order, it tantamounts that the State Government has disapproved the Regulations, 2013.

14. Rival submissions fall for consideration.

15. The question that arises for determination is as to whether the State Government was justified in law in rejecting the Pension/Gratuity Scheme made by the Board for its employees in lieu of CPF Scheme.

16. The facts, inter se, parties are not in dispute. The scheme of the Act, 1964, provides for the constitution of a Board, the employees of the Board/Mandi Samiti constitute the Centralized Service. The service conditions of the employees is required to be made by the Board by framing Regulations in exercise of its powers conferred under Section 26-X, which inter alia, includes pension.

17. In exercise of its powers, Regulation 1984 came to be framed by the Board providing CPF Scheme to its employees which was subsequently sought to be modified/amended conferring Pension/Gratuity Scheme to its employees w.e.f. 1 January 1999. The proposal came to be accepted and approved by the State Government on 11 February 2000. The State Government categorically stated while approving the proposal that it would not finance the pension scheme nor would the Government be responsible to provide the funds, accordingly, the State Government directed the Board to frame/amend the Regulations. Pursuant thereof, Regulations, 2013 came to be made, inter alia, providing Pension/Gratuity Scheme to the employees who came to be appointed on or after 1 January 1999 but before 1 April 2005. The new NPS scheme was made applicable to the employees recruited/appointed on or after

the said date in terms of the Government Order. Accordingly, Regulation 47 of Regulation 1984, to that extent came to be modified by the proposed Regulations, 2013. The State Government by the impugned order has instead imposed the NPS scheme upon all the employees of the Board irrespective of the cut of date provided in the Government Order dated 28 March 2005. In other words, the State Government rejected the Pension/Gratuity Scheme framed by the Board and approved the NPS scheme.

18. In the aforesaid backdrop the issue that falls for consideration is as to whether the State Government in exercise of its powers under Act, 1964, can compel the Board to accept a Pension Scheme other than that proposed by the Board by framing the Regulations.

19. It would be apposite to scan the provisions of Act, 1964, in order to trace the source of power of the Board and the State Government.

20. Chapter V of Act, 1964 provides for External Control. Section 26-A provides for establishment of the Board by the State Government on notification in the Gazette. The power to appoint the officers and servants, including, framing of Regulations to determine their conditions of service has been conferred upon the Board under Chapter IV of Act, 1964. Section 26-F is extracted:

26-F. Appointment of Officers and Servants.-(1) *The Board may appoint such officers and servants as it considers necessary for efficient performance of its functions on such terms and conditions as may be provided for in regulations made by the Board.*

21. The constitution of the Centralized Service and conditions of employment of members of the cadre is provided under Section 23A and 25A which can be implemented by framing Regulations. The provisions reads thus:

23.A. Constitution of Centralised service and transfer of employees- (1) *Notwithstanding anything contained in any other provision of this Act, the Board may constitute cadres of Secretaries and such other officers common to all Committees as it may deem fit to appoint under sub-section (2) of Section 23.*

[25-A. Terms and conditions of employment of officers and servants of Committees.- *Subject to rules made in this behalf under this Act, the terms and conditions of employment of the members of a cadre constituted under Section 23-A and matters relating to discipline, control and punishment including dismissal and removal of such, officers shall be governed by such regulations as may be made by the Board.]*

22. The Board has been vested with exclusive powers to frame Regulations under Section 26-X, inter alia, with regard to the conditions of service of its employees, but with the previous approval of the State Government. Regulation 26-X is extracted:

26-X. Regulations.-(*1) The Board may, with the previous approval of the State Government make regulations, not inconsistent with this Act, and rules made thereunder, for the administration of the affairs of the Board.*

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may

provide for all or any of the following matter, namely-

(a) .....

(b) the powers and duties of the officers and other employees of the Board;

(c) the salaries and allowances and other conditions of service of officers and other employees of the Board and of officers referred to in sub-section (2) of Section 23;

(3) Until any regulations are made by the Board under sub-section (1), any regulations which may be so made by it may be made by the State Government, and any regulations so made may be altered or rescinded by the Board, in exercise of its power under sub-section (1)

23. The powers and function of the Board is spelled out in Section 26-L which reads thus:

26-L. Powers and functions of the Board.- (1) *The Board shall, subject to the provisions of this Act, have the following functions and shall have power to do anything which may be necessary or expedient for carrying out those functions-*

(i) superintendence and control over the working of the Market Committees and other affairs thereof including programmes undertaken by such Committees for the1 [construction of new Market yards and development of existing Markets and Market areas];

(ii) giving such direction to Committees in general or any Committee in particular with a view to ensure efficiency thereof;

(iii) any other function entrusted to it by this Act;

(iv) such other functions as may be entrusted to the Board by the State Government by notification in the Gazette.

(2) Without prejudice to the generality of the foregoing provision, such power shall include the power-

(i) to approve proposals of the new sites selected by the Committee for the development of Markets;

(ii) to supervise and guide the Committees in the preparation of site-plans and estimates of construction programmes undertaken by the Committee;

(iii) to execute all works chargeable to the Board's fund;

(iv) to maintain accounts in such forms as may be prescribed and get the same audited in such manner as may be laid down in regulations of the Board;

(v) to publish annually at the close of the year, its progress report, balance-sheet, and statement of assets and liabilities and send copies to each member of the Board as well as to the Chairman of all Market Committees;

(vi) to make necessary arrangements for propaganda publicity on matters related to regulated marketing of agricultural produce;

(vii) to provide facilities for the training of officers and servants of the Market Committees;

(viii) to prepare and adopt budget for the ensuring year;

(ix) to make subventions2 [and loans] to Market Committees for the purposes of this Act on such terms and conditions as the Board may determine;

(x) to do such other things as may be of general interest to Market Committees or considered necessary for the efficient functioning of the Board as

may be specified from time to time by the State Government.

24. The State Government thus, has been conferred power to entrust the Board such other function by notification in the Gazette [Sub-Section (1)(iv)]. Further, the State Government may specify to the Board from time to time to do such other things as may be of general interest of the Market Committees or considered necessary for efficient functioning of the Board [Sub-Section 2(x)]. On plain reading of Section 26-L, condition of service of the employees of the Board is not a function of the Board. In other words, the State Government lacks power and authority to reject the Pension Scheme (condition of service) sought to be implemented by the Board by making the Regulations, 2013, in exercise of its powers conferred under Section 26-X. The conferment of pension by the Board to its employees is a service condition which the Board is free to provide by making/amending the Regulations. The only rider cast upon the Board under Section 26-X is that it has to take prior approval of the State Government.

25. The funding of the activities of the Board and the Market Committees in discharge of their duties/functions has been provided under Section 19 and Section 26-P which includes, utilization of the fund to meet the expenses towards salary of its officers and servants, including pension. Section 19 and 26-P is extracted:

19. Market Committee Fund and its utilisation-(1) *There shall be established for each Committee, a fund to be called ''Market Committee Fund' to which shall be credited all moneys received by it including all loans raised by it, and advances and grants made to it.*

(2) All expenditure incurred by the Committee in carrying out the purposes of this Act, shall be defrayed out of the said fund, and the surplus, if any, shall be invested in such manner as may be prescribed.

(3) Without prejudice to the generality of the provisions contained in Section 16, the Committee may utilise its funds for payment of all or any of the following -

(i).....

(ii) salaries, pensions and allowances including allowances for leave, gratuities, compassionate allowance, medical aid and contribution towards provident fund and pensions of the officers and servants employed by or for it;

26-P. Board's Fund.-(1) *The Board shall have its own fund, which shall be deemed to be a local fund and to which shall be credited all moneys received by or on behalf of the Board, except the moneys required to be credited in the Uttar Pradesh State Marketing Development Fund under Section 26-PP.*

2.....

(i) Payment of salary, leave allowance, gratuity, other allowances, loans and advances and provident fund to the officers and servants employed by the Board and pension and other contribution to the Government servants on deputation;

26. On conjoint reading of the provision of the Act, 1964, extracted, hereinabove, it is explicit and unabmiguous that the Board has been vested with powers to make and regulate the conditions of service of its employees, including, pension. The salary and retiral

dues is to be funded by the Board from its own resources. The Regulations made by the Board would override the Regulations, if any, framed by the State Government in that regard (sub-Section (3) of Section 26-X). The Board upon approval of the State Government of its proposal/resolution to provide Pension Scheme, in lieu of CPF Scheme, acted thereon by enhancing the contribution of its employees to the CPF Scheme. The Board, thereafter, framed Regulations, 2013, as directed by the State. The condition of taking previous approval stipulated in Section 26-X was complied by the Board. Nothing more was required to be done at the level of the Board except to comply the conditions imposed by the State Government in the approval order. The State Government was not justified, nor it was within its jurisdiction to have rejected outright the Pension/Gratuity Scheme sought to be made applicable to the employees of the Board. Such a power is not vested in the State Government under the provisions of Act, 1964.

27. The import of the expression "previous approval' mandated in Section 26-X requires to be understood in the context the expression is used in the provision. The matter fell for consideration by a Constitution Bench, the Supreme Court observed as follows in ***N. Raghavendra Rao v. Deputy Commissioner, South Kanara, Mangalore3 :***

"The expression 'previous approval' would include a general approval to the variation in the conditions of service within certain limits, indicated by the Union Government. It has to be remembered that Article 309 the Constitution gives, subject to the provisions of the Constitution, full powers to a State Government to make rules. The proviso to Section 115(7) limits that power, but that limitation is removable by the Central Government by giving its previous approval.... ***The broad purpose underlying the proviso to Section 115(7) of the Act was to ensure that the conditions of service should not be changed except with the prior approval of the Central Government. In other words, before embarking on varying the conditions of service, the State Governments should obtain the concurrence of the Central Government."*** *(Para 4)*
(Refer: State of Mysore and another v. R. Basappa and others4)

28. In ***Life Insurance Corporation of India vs. Escorts Limited and others,5*** Supreme Court referred to the decision of this Court in ***Shakir Husain v. Chandoo Lal6,*** to explain "permission' and "approval' para-62 is extracted:

"We do not propose to refer to any dictionary to find out the meaning of the word 'permission', whether the word is comprehensive enough to include subsequent permission. We will only refer to what Sir Shah Sulaiman, CJ. said in Shakir Hussain v. Chandoo Lal

Ordinarily the difference between approval and permission is that in the first the act holds good until disapproved, while in the other case, it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

29. The Court observed that the word 'prior" or "previous" may be implied if the contextual situation or the object

and design of the legislation demands it. The Court declined interpreting 'permission' to mean 'permission', previous or subsequent, and there was no justification for limiting the expression 'permission' to 'previous permission'.

30. In **U.P. Avas Evam Vikas Parishad and another Vs. Friends Coop. Housing Society Ltd. and another7,** Supreme Court held that the expressions "prior approval" and "approval" are two different connotations and if the statute does not mention "prior approval" what is material would be only "approval".

31. Similarly, in **Director of Education and others Vs. Gajadhar Prasad Verma8,** it was held that in the absence of "prior approval", would not have an effect with regard to the creation of the post, therefore, the State is not obliged to reimburse the salary to the management of the incumbent appointed on the post without "prior approval" of the Director or the competent authority under the Act.

32. Learned Standing counsel has placed heavy reliance on the communication dated 11 February 2000, to emphasis that the State Government had granted approval "in principle' and that would not satisfy the condition "previous approval' mandated in Section 26-X. The submission taken on face value appears to be attractive, but on close analysis it lacks merit. The expression "previous approval' has to be read in the context it is used in the statutory provision. The only requirement mandated in Section 26-X is that before embarking upon to make the Regulations, the Board is bound to take approval of the State Government. No further permission thereafter is required to be taken by Board from the State Government before implementing the Regulations. On perusal of the communication dated 11 February 2000, it is explicitly evident that the State Government in essence or substance had approved the proposed Pension Scheme "in principle'. The State Government had further directed the Board to frame/amend the Regulations to that effect, this would tantamount to "previous approval' of the State Government contemplated under Section 26-X. The expression "in principle' approval used in the communication is only to convey to the Board that the approval is subject to certain conditions stipulated in the communication dated 11 February 2000. The conditions, inter alia, include, that the State Government would not bear the expenses nor fund the pension scheme; separate fund (Trust) would have to be earmarked by the Board to fund the pension scheme and finally, the Board was directed to make the Regulations to that effect to implement the Scheme. The Board on the conditional approval of the State Government framed Regulations, 2013, incorporating the conditions stipulated in the communication dated 11 February 2000. The State Government under Section 26-X was not required to give further approval/permission with regard to the implementation of the Regulations, but was to satisfy itself that the Regulations, 2013, framed by the Board incorporated the conditions stipulated by the State Government in the communication granting approval. Further, to ensure that the Regulation framed by the Board did not violate any provisions of Act, 1964.

33. The expression "in principle' approval would include a general approval to the proposal seeking to implement the Pension/Gratuity Scheme within certain limits, indicated by the State Government. But the limitation is

removal by the State Government by giving previous approval.

34. Approval "in principle' would mean that the concerned authority (State Government) has agreed to the proposal without getting into the details of other required statutory/legal compliances. If something is possible "in principle' there is no reason why it should not happen, even though it has not happened before.

35. The communication dated 11 February 2000 is extracted:

''प्रेषक

केशव देसिराजु
सचिव,
उत्तर प्रदेश, शासन।

सेवा में,

निदेशक,
मण्डी परिषद,
उत्तर प्रदेश, लखनऊ।

कृषि अनुभाग–5 / लखनऊ दिनांकः– 11.02.2000

पेंशन योजना के संबंध में मण्डी परिषद द्वारा उपलब्ध कराये गये प्रस्ताव पर सम्यक विचारोपरान्त शासन द्वारा मण्डी परिषद एवं मण्डी समितियों के कर्मचारियों को पेंशन सुविधा अनुमन्य किये जाने हेतु निम्न शर्तों एवं प्राविधानों के अर्न्तगत सिद्धान्ततः स्वीकृति प्रदान कर दी गयी है:– *विषयः– मण्डी परिषद एवं मण्डी समितियों के कर्मचारियों के लिये सी0पी0एफ0 योजना के अधीन पेंशन की सुविधा प्रदान किया जाना।*

महोदय,

उपर्युक्त विषयक आपके पत्र संख्या–परिषद–लेखा/पेंशन/99–721 दिनांक 31 मई, 1999 के सन्दर्भ में मुझे यह कहने का निर्देश हुआ है। कि ***पेंशन योजना के संबंध में मण्डी परिषद द्वारा उपलब्ध कराये गये प्रस्ताव पर सम्यक विचारोपरान्त शासन द्वारा मण्डी परिषद एवं मण्डी समितियों के कर्मचारियों को पेंशन सुविधा अनुमन्य किये जाने हेतु निम्न शर्तों एवं प्राविधानों के अर्न्तगत सिद्धान्ततः स्वीकृति प्रदान कर दी गयी है:–***

1. उक्त योजना लागू करने के पूर्व केन्द्र सरकार के श्रम मन्त्रालय के इम्प्लाइज प्रोवीडेंट फण्ड के नियमों का अध्ययन कर उसके अनुसार कार्यवाही किये जाने पर विचार किया जायेगा। तथा नियमों के अन्तर्गत कर्मचारियों से पेंशन योजना ग्रहण करने अथवा न ग्रहण करने के विकल्प पर स्पष्ट सहमति ली जायेगी। इसके लिए श्रम विभाग से परामर्श प्राप्त कर योजना तैयार करने की कार्यवाही की जायेगी।

2. पेंशन योजना का क्रियान्वयन राज्य सरकार के कर्मचारियों को दिये जाने वाली पेंशन व्यवस्था से भिन्न होगी। तथा इसको सी0पी0एफ0 पर आधारित अलग ट्रस्ट के रूप में संचालित किया जायेगा। पेंशन योजना पेंशन फण्ड की स्थिति पर ही आधारित होगी। तथा इस मद में जमा की गयी धनराशि को किसी अन्य मद में खर्च नहीं किया जा सकेगा।

3. इस योजना के लिये सी0पी0एफ0 फण्ड में शासन द्वारा या मण्डी परिषद द्वारा कोई धनराशि देय नहीं होगी। यदि किसी समय किन्ही कारणों से पेंशन हेतु फण्ड की धनराशि अनुपलब्ध होने के कारण पेंशन योजना बन्द हो जाती है तो इसक लिये शासन या मण्डी परिषद का कोई उत्तरदायित्व नहीं होगा।

4. फण्ड का संचालन ट्रस्ट एवं थर्ड पार्टी पेंशन फण्ड मैनेजर के साथ की गयी व्यवस्था के अनुसार सभी आर्थिक एवं वित्तीय पहलुओं को देखते हुये अपने पूर्ण उत्तरदायित्व पर की जायेगी। फण्ड के ट्रस्ट में शर्तों का अनुपालन करने हेतु मण्डी परिषद में तैनात वित्त नियंत्रक का उत्तरदायित्व होगा और ट्रस्ट में उच्च स्तर के अधिकारियों को सदस्य नामित किया जायेगा। जिससे कि ट्रस्ट सुचारू रूप से संचालित हो सके।

5. ***चूँकि मण्डी परिषद एवं मण्डी समितियों की सेवा नियमावलियों में कर्मचारियों को पेंशन की सुविधा अनुमन्य न किये जाने की व्यवस्था है, इस लिये इन सेवा नियमावलियों में इस आशय का संशोधन भी किया जाना होगा। इसके लिये सम्यक प्रस्ताव निदेशक, मण्डी परिषद उपलब्ध करायेंगे।***

कृपया तदनुसार आवश्यक कार्यवाही सुनिश्चित कराने का कष्ट करे।

भवदीय,

ह0 अ0

(केशव देसिराज)
सचिव।''

[From,
Keshav Desiraju
Secretary,
Government of Uttar Pradesh
To,
The Director,
Mandi Parishad,
Government of Uttar Pradesh, Lucknow.

Krishi Anubhag-5 /Lucknow: Date:- 11.02.2000

Subject: Extending pension facility to the employees of the Mandi Parishad and Mandi Samitis under the CPF Scheme.

Sir,

With regard to your letter no. - Parishad-Lekha/Pension/99-721 dated May 31st, 1999 on the afore-mentioned subject, I am directed to say that after due consideration of the proposal made available by Mandi Parishad for grant of the pension facility to the employees of Mandi Parishad and Mandi Samiti, approval in principle has been accorded by the government with the following terms and conditions: -

1. Before the implementation of the aforesaid scheme, the rules of the Employees Provident Fund shall be studied and action shall be taken accordingly, and as per rules, consent of the employees in clear terms shall be taken for opting the pension scheme or not opting it. For this purpose, the process to prepare the scheme shall be initiated after consultation with labour department.

2. The pension scheme, in respect of implementation, shall be different from the pension scheme of the state government employees, and it shall be operated as a separate trust based on the CPF. The pension scheme is based only on the status of the fund, and the amount deposited under this head shall not be spent for any other head.

3. No amount shall be payable in the C.P.F. fund for this scheme by the Government or the Mandi Parishad. If the pension scheme comes to be discontinued at any point of time due to unavailability of amount in the pension fund, the Government or Mandi Parishad shall not be responsible for the same.

4. The fund shall be regulated with with absolute liabilities, keeping in view all financial and economical aspects as per arrangements made with the Trust and the Third Party Pension Fund Manager. For complying with terms and conditions of the trust of the Fund, the Finance Controller shall be responsible and high level officers shall be nominated as members to run the Trust in a smooth manner.

5. In the service rules of the Mandi Parishad and Mandi Samitis, since there is a provision of pension facility not to be admissible to its employees, amendment in this respect shall have to be effected in these service rules. For this purpose a proposal shall be made available by the Director, Mandi Parishad.

Necessary action may please be ensured accordingly.

Sincerely yours
Signature illegible
(Keshav Desiraj)
Secretary]

(English translation by the Court)

36. On perusal of the communication, in particular the opening paragraph read with para (5) and the last sentence it is evident that the State Government approved the proposal of the Board in essence/ or substance to

implement the Pension Scheme. Further, directed the Board to amend the Regulations incorporating the Scheme and proceed accordingly. The condition of service, including, pension could be made either by amending the existing Regulations or by framing separate Regulation, for which the State Government had given green signal to the Board by approving the Pension Scheme.

37. In the counter affidavit, it is not the case of the State respondents that previous approval was not granted to the Board approving the Pension Scheme, rather the State admits in para 15 and 16 that the Board acted upon after previous approval of the State Government. Para 15 and 16 of the counter affidavit reads thus:

"15. That the contents of paragraphs 29 and 30 of the writ petition need no reply being matter of record. However, it is submitted that the State Government vide letter dated 11.2.2000 granted in principle approval of the resolution of the board for providing pensionary benefits to the employees.

16. That the contents of paragraphs 31, 32 and 33 of the writ petition need no reply being matter of record. It is submitted that vide letter of the State Government dated 11.2.2000, the Director, Raj Krishi Utpadan Mandi, was directed to made available proposal in respect of amendment in service Rules and in reply thereto the Director, Mandi Parishad send proposal dated 6.9.2000 with recommendation to grant pensionary benefits to the officers and employees of Mandi Parishad/ Mandi Samiti as available to the Government Employees of State of U.P."

38. In **Union of India and others Versus Harananda and others, 2019 SCC Online SC 126,** the short question posed for consideration before the Supreme Court was, whether in the facts and circumstances of the case, the High Court has committed any error in treating and/or considering the Office Memorandum (OM) dated 8 May 2003 of the Department of Personnel and Training (Cadre Review Division) [for short "DoPT'], Government of India as "in principle' decision for constitution of the Railway Protection Force (for short "RPF') as an Organized Group "A" Central Service. The Court rejected the contention of the appellants that the OM cannot be said to be "in principle' approval granted by the DoPT to constitute the RPF as an Organized Group "A" Central Service. Merely because the "in principle' decision was conditional and was to be placed before the Cadre Review Committee, it cannot be said that the "in principle' decision contained in the OM was subject to further approval and/or no "in principle' decision was taken.

39. In the given facts of the instant case, it is admitted by the respondent State that "in principle' approval to the Pension Scheme was granted. In view, thereof, and on reading Section 26-X, the Board was not required to take further approval. The State Government only had to ensure that the board while framing the Regulations implementing the Pension Scheme had complied the condition stipulated by the State Government in the approval order and that the Regulations was in consonance with the provisions of Act, 1964.

40. The mandatory requirement of Section 26-X to frame Regulations to implement the Pension Scheme stood complied. No further approval/permission

was required from the State Government under the Act, 1964. The impugned order passed by the State Government does not state that any of the conditions stipulated in the communication dated 11 February 2000 was flouted by the Board while framing Regulations, 2013. The contention of the learned Standing Counsel lacks merit, accordingly, unacceptable.

41. It is further urged on behalf of the State that Regulation 47 of Regulations, 1984, would be an impediment in the implementation of the Pension/Gratuity Scheme sought to be implemented by the Board. Regulation 47 clearly stipulates that the employees of the Board are not entitled to pension but to Contributory Provident Fund. Though this is not a reason assigned in the impugned order. However, the contention lacks merit. Regulations, 1984, is distinct from Regulations, 2013. Regulations, 1984 would apply to the employees that came to be appointed on or before 1 January 1999, whereas, the Regulations, 2013 would apply to the employees appointed on and after 1 January 1999 and before 1 April 2005. Both the Regulations operate in different fields and cater to separate class of employees insofar entitled to distinct and different retiral Schemes, therefore, Regulation 47 would not be an impediment in implementing the Pension Scheme. The contention is untenable, accordingly, rejected.

42. A similar challenge came to be raised by the employees of the U.P. Avas Evam Vikas Parishad (for short the "Parishad') in **State of Uttar Pradesh versus Preetam Singh and others9,** assailing the order of the State Government disapproving the Pension/Gratuity Scheme sought to be implemented by the Parishad. The Parishad a corporate body created under the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (for short " the Act'), a proposal was made, to extend pensionery benefits to the employees of the Parishad, in place of the existing Contributory Provident Fund (CPF) Scheme. The Parishad upon conditional approval from the State Government proceeded to implement the Pension/Gratuity Scheme in lieu of the existing CPF Scheme. The State Government in the approval order clarified that the State Government would not bear the expenses nor the pension fund should create any financial liability on the State Government.

43. All of a sudden, the State Government withdrew its approval altogether. The denial of the permission by the State Government was assailed by the employees of the Parishad before the High Court. Writ petition came to be allowed. The order issued by the State Government was expressly quashed. A writ in the nature of mandamus was issued to the Parishad requiring it to implement the Pension/Gratuity Scheme. Pursuant thereof, the Parishad implemented the Pension/Gratuity Scheme by issuing a notification. The Scheme was expressly extended to such employees of the Parishad, who were in service on 1 January 1996. The Pension/Gratuity Scheme in terms of the notification, would be applicable only till the introduction of the newly defined Contributory Fund Rules (NPS) framed by the State Government and was not applicable to the employees of the Parishad who had entered its service on or after 1 April 2005.

44. The State Government raising challenge to the impugned judgment of

the High Court took a plea that the Scheme could not have been formulated, and given effect to in absence of an express approval from the State Government. Reliance was placed on Section 2 of the Uttar Pradesh State Control Over Public Corporations Act, 1975, which, inter alia, provided that every statutory body (by whatever name called), established or constituted under any Uttar Pradesh Act, excepting Universities governed by the Uttar Pradesh State Universities Act, 1973, shall, in the discharge of its functions, be guided by such directions on "question of policy', as may be given to it by the State Government, notwithstanding that no such power has expressly been conferred on the State Government under the law establishing or constituting such statutory body.

45. The Supreme Court upon examining of the provisions of Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965, opined as follows:

"14.....There can be no doubt that it is open to the State Government to issue directions of questions of policy to all Public Corporations in the State of Uttar Pradesh, in furtherance of the mandate contained in Section 2(1) of the 1975 Act. ***It would however be pertinent to mention that the above directions could be issued only in respect of questions of policy having a nexus to the "discharge of its functions".*** *Insofar as the Vikas Parishad is concerned, we are of the view that the functions of the Vikas parishad are relatable only to the functions stipulated in Section 15 of the 1965 Act."*

46. Upon perusal of the Section 15 of the Act, stipulating the functions of the Board, the Court held that the "conditions of service' of employees do not constitute the functions of the Parishad.

"16.....The conditions of service of employees, in our considered view, do not constitute the functions of the Vikas Parishad, and as such, we are satisfied that the directions contemplated under Section 2(1) of the 1975 Act, do not extend to the directions issued by the State of Uttar Pradesh in the impugned orders dated 13.9.2005 and 12.7.2007. We therefore find no merit in the first contention advanced by the learned counsel for the appellant."

47. Thereafter, the Court considered as to whether the Parishad was competent to frame Regulations, whereby, it could extend the Pension/Gratuity Scheme to its employees in lieu of CPF Scheme. Section 95 of the Act conferred power upon the Parishad to make Regulations, inter alia, with regard to the conditions of services of its officers and servants. The Court in para 18 held as follows:

"18.....A perusal of clause (f) of Section 95(1), with clause (I) of Section 95(1) would reveal, ***that the Vikas Parishad is vested with the right to make regulations, so as to extend to its employees a scheme in the nature of Pension/Family Pension and Gratuity Scheme i.e., a scheme similar to the one framed by the Vikas Parishad on 19.5.2009."***

48. In the facts of the case in hand upon examining the provisions of Act, 1964, extracted in the earlier part of this order, it is clear that the Board is vested with absolute power, though, with the "previous approval' of the State Government to make Regulations

governing the conditions of service of its employees, including, pension. The Government in the instant case had granted conditional approval on 11 February 2000 approving the proposal of the Board, fundamentally and in substance accepting the proposal in principle. Thereafter, the Board proceeded to frame the Regulations on the directions/approval of the State Government. It was, within the exclusive domain and power of the Board to frame Regulations governing the service conditions of its employees. Since the mandatory requirement contemplated under Section 26-X of taking previous approval of the State Government before making the Regulations was complied, in the circumstances, it was not open for the State Government to have indirectly, and not expressly, rejected the Regulations framing the Pension/Gratuity Scheme, which was beyond its authority and jurisdiction to have entered into the domain of framing and implementing "condition of service' by thrusting upon the employees NPS Scheme which was not proposed by the Board.

49. The State Government has been conferred power under Section 26-M of Act, 1964 to issue directions on "question of policy' in the discharge of its functions and not with regard to conditions of service. Section 26-M reads thus:

"26-M. Directions on question of policy.-(1) In the discharge of its functions, the Board shall be guided by such directions on question of policy, as may be given to it by the State Government."

50. The conditions of service would not fall within the "functions' of the Board as has been held in **Preetam Singh (supra)**. The directions, if any, that could have been issued by the State Government was only in respect to question of policy having nexus to the "discharge of its functions'. The impugned decision of the State Government rejecting the Pension/Gratuity Scheme would not fall within the ambit of "question of policy' in the discharge of its function conferred on the Board for enforcement of the provision of the Act, 1964, as is explicit from the reading of Section 26-M. Rather, it was within the exclusive jurisdiction and authority of the Board to frame Regulations governing conditions of service, including, pension. The only rider being the previous approval of the State Government which was duly obtained. The reasons assigned in the impugned order also does not inspire confidence in rejecting the Pension Scheme on the ground that since pension was not admissible to the employees of the Board earlier, therefore, there is no occasion for the Board to provide Pension/Gratuity Scheme to all its employees after the new NPS scheme was implemented w.e.f. 1 April 2005. Further, the State Government has not raised any objection with regard to the financial implication while implementing the proposed Pension Scheme or the ability and financial capacity of the Board to fund the Pension/Gratuity Scheme of its employees from its own resources while granting prior approval. It is not the case of the State Government that the mandate of Section 26-X was not complied by the Board. The reasons assigned in the impugned order is manifestly arbitrary and beyond the scope, power and authority conferred upon the State Government under Act, 1964. The State Government has not assigned any

plausible valid reasons, including, non compliance of the conditions set forth by it, while rejecting the Pension Scheme. Rather, the proposed Pension Scheme was accepted by the Government and accorded approval in February 2000, much before the NPS scheme was floated. The State Government, therefore, has exceeded its authority and jurisdiction while passing the impugned order rejecting the Pension/Gratuity Scheme/Regulations, 2013.

51. I have perused the Government Order dated 28 March 2005 with the assistance of the learned counsel for the parties. The Government Order categorically provides that the new NPS scheme shall be applicable to the employees who came to be appointed/recruited on or after 1 April 2005 and the Pension/Gratuity Scheme prevalent prior to the said date would continue to be applicable upon the employees appointed earlier.

52. The relevant portion of the Notification issued by the Finance Department, Government of Uttar Pradesh, is extracted hereinbelow:

"The State Government, in consideration of its long term fiscal interest and following broadly the pattern adopted by the Central Government, has approved the following proposal of introducing a new defined contribution pension system in place of the existing defined benefit pension scheme, for new entrants to the service of the State Government and of all State controlled autonomous institutions and State - aided private educational institutions where the existing pension scheme is patterned on the scheme for Government employees and is funded by the consolidated fund of the State Government:-

(i) From 1st of April, 2005, the new defined contribution pension system would mandatorily apply to all new recruits to the service of the State Government and of all State controlled autonomous / State aided private educational institutions referred to above. However, employees covered by the existing pension scheme whose service would be of less than ten years on 1st April, 2005 may also voluntarily opt for the new pension system in place of the existing pension scheme.

(ii)xxxxxxxxx

(iii)xxxxxxxx

(iv)xxxxxxxx

(v)xxxxxxxxx

53. The Board while framing the Regulations, 2013 had categorically provided that the Pension Scheme would apply to the employees who entered service on 1 January 1999 but before 1 April 2005, which is in consonance with the Government Order. The State Government lacked authority in imposing service condition against the resolution of the Board. The impugned order, further, violates the Government Order dated 28 March 2005 imposing uniform application of the NPS scheme to all the employees irrespective of their date of appointment/recruitment. The State Government would have been justified in not accepting that part of the Regulations had the Board ignored the Government Order and conferred the Pension/Gratuity Scheme to all its employees, bypassing the cut of date implementing the new NPS Scheme. The State Government in the same breath and on the same reasoning is unjustified in taking a stand directing the Board to implement a Scheme which is

violative of its own Government Order made applicable to all autonomous institutions.

54. No illegality, infirmity or jurisdictional error has been pointed out by the learned Standing Counsel in the Regulations, 2013, despite repeated opportunity.

55. Having due regard to the facts and circumstances of the case and the provisions of Act, 1964, the impugned order 8 January 2016 and 16 February 2018 passed by the State Government and the consequential order dated 19 March 2018 passed by t he Board, is set aside and quashed. The Board is directed to implement the Pension/Gratuity Scheme in terms of Regulations, 2013, within eight weeks from the date of filing of certified copy of this order.

56. The writ petition is allowed.

57. No cost.

(2019)10ILR A 2019

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 13017 of 2019

Radhika Prasad ...Petitioner
Versus
Registar General, High Court of Judicature at Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Narendra Pratap Singh, Sri Neeraj Singh

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra

A. U.P. Higher Judicial Service Rules, 1975 - Rules 3(b)-12-Notification dated 04.10.2012 by Ministry of Personnel Public Grievance of Pension - The Government competent to notify the age relaxation under Rule 12 is the Govt. of U.P. and not Union Government-Notification issued by the Central Government providing for age relaxation to Ex-Serviceman is not applicable to the recruitment made under the aforesaid Rules, which refer to the Govt. of U.P. (Para 8)

Writ Petition dismissed (E-4)

(Delivered by Hon'ble Pankaj Mithal, J.
Hon'ble Saral Srivastava, J.)

1. Heard Sri Narendra Pratap Singh, learned counsel for the petitioner and Sri Ashish Mishra, learned counsel appearing for the respondents.

2. The petitioner by means of this writ petition is seeking a direction to provisionally permit him to appear in the U.P. Higher Judicial Service, 2018 Part-III by giving 5 years of age relaxation to him as an Ex-Serviceman as is being provided to the SC, ST and OBC candidates.

3. In this regard Rule 12 of the U.P. Higher Judicial Service Rules, 1975 is relevant which is reproduced herein below for the sake of convenience: -

"12. Age-A candidate for direct recruitment must have attained the age of 35 years and must not have attained the age of 45 years on the first day of January

next following the year in which the notice inviting applications is published;

Provided that the upper age limit shall be higher by three years in case of candidates belonging to Scheduled Castes and Scheduled Tribes and such other categories as may be notified by the Government from time to time."

4. A plain reading of the aforesaid Rule reveals that the maximum age limit for appearing in the Higher Judicial Service is 45 years for general category of candidates as on the first day of January next following the year in which the notice inviting applications is published. The said age limit has been relaxed by 3 years only for SC and ST candidates.

5. There is no notification of the State Government providing any age relaxation for any other category of candidates much less the Ex-Serviceman.

6. Learned counsel for the petitioner submits that the Ministry of Personnel Public Grievance of Pension vide notification dated 4th October 2012 has provided for age relaxation for Ex-Serviceman.

7. The aforesaid notification is not in respect any service of the State Government. The Government competent to notify the age relaxation under Rule 12 is the Government of U.P.

8. The definition of the Government as provided in Rule 3(b) of the Rules refers to the Government of U.P., and not to the Union Government. Therefore, notification issued by the Central Government providing for age relaxation to Ex-Serviceman is not applicable to the recruitment made under the U.P. Higher Judicial Service Rules, 1975.

9. In view of the aforesaid facts and circumstances, we find no merit in the petition and the same is dismissed.

(2019)10ILR A 2020

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2019

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUNEET KUMAR, J.

Writ A No. 23733 of 2018 alongwith
Other Connected Cases

Atul Kumar Dwivedi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Deepak Kumar Jaiswal, Sri Ajay Singh Yadav, Sri Prashant Mishra, Sri Tarun Agrawal, Sri Venu Gopal.

Counsel for the Respondents:
C.S.C., Sri Hrithudhwaj Pratap Shahi, Sri M.M. Sahai, Sri Samarath Singh, Sri Sankalp Narain.

A. Police Act, 1861- Sections 2, 46(2)(c), 46(3), U.P. Sub Inspector and Inspector (Civil Police) Service (First Amendment) Rules, 2015- Rules 8, 15(a), 15(b), 15(c), 15(d), 15(e), 15(f); Notifications dated 17.06.2016 and 28.06.2017- Petition allowed while answering the following questions:

1) Whether the Selection Board transgressed its authority to alter/substitute the eligibility criteria (50 % marks) mandated in Rule 15(b) by normalized score to non-suit, all such

candidates from the recruitment process who obtained 50% marks and above.

2) The scope of judicial review of the Standardized Equitable percentile Method adopted by the Selection Board. (Para 64)

B. It is the rule-making authority to prescribe the mode of selection and minimum qualification for any recruitment-The Courts and Tribunals can neither prescribe the qualifications nor entrench upon the powers of the executive so long as the rule prescribing the qualification are not violative of any provisions of the Constitution, statute and rules. 50% marks should not be read to include the normalized percentile score. (Para 74)

C. The rule making authority upon prescribing the eligibility criteria, conferred limited power upon the Selection Board to determine the detailed procedure of written examination- Selection Board lacks inherent jurisdiction to entrench upon the eligibility criteria- It violated Rule 15(b) and exceeded its authority and power by applying the normalized score and not the raw marks to determine the eligibility of the candidates while preparing the select list. (Para 79, 92, 93, 94 to 103)

D. The word "marks" used in Sub- clause (b) and (e) of Rule 15, has different connotation- Sub- clause (b) refers to 'marks' prescribed by the rule for eligibility purpose, whereas, Sub-clause (e) refers to marks/score obtained upon evaluation upon normalization of the marks referred to in Sub-clause (b) for the purpose of making the select list in the order of merit. (Para 88 & 89)

E. Percentile and Percentage are two different concepts- The percentage score reflects how well the student did in the exam itself, the percentile score reflects how well he did in comparison to other students- Percentile rank would, therefore, mean percentage of scores that fall at or below a given score. (Para 108)

F. The appropriate method to bring about uniformity in evaluation is left to the examining authorities and not subject to judicial review until it is shown that the exercise of authority was mala fide, violative of the statutory provision or the method had resulted in absurd results rendering the entire selection manifestly arbitrary. (Para 119)

Petition for quashing of select list dated 28.02.2019, derived by application of Standardized Equi-percentile Method.

Writ Petition allowed (E-4)

Precedent followed: -

1. P.U. Joshi & ors. Vs Accountant General, Allahabad & ors., (2003) 2 SCC 632 (Para 75)

2. Chandigarh Admin. Vs Usha Kheterpal Waie & ors., (2011) 9 SCC 645 (Para 76)

3. Mahinder Kumar & ors. Vs High Court of M.P., (2013) 11 SCC 87 (Para 32, 35, 45, 48, 80)

4. Sanjay Singh & anr. Vs P.S.C., Allahabad & anr., (2007) 3 SCC 720 (Para 17, 18, 51, 90, 91, 112, 115, 116)

5. Umesh Chandra Shukla Vs UOI & ors., (1985) 3 SCC 721 (Para 58, 94, 100)

6. Durgacharan Misra Vs St. of Orissa & ors., (1987) AIR 2267 (Para 97)

7. Ramachandra Iyer & ors. Vs UOI & ors., (1984) 2 SCC 141 (Para 98)

8. B.S. Yadav & ors. Vs St. of Haryana & ors., (1981) AIR 561 (Para 99)

9. Dr. Krushna Chandra Sahu & ors. Vs St. of Orissa & ors., AIR 1996 SC 352 (Para 58, 101)

10. Sant Ram Vs St. of Raj., AIR 1967 SC 1910 (Para 102)

11. Sunil Kumar & ors. Vs B.P.S.C. & ors., (2016) 2 SCC 495 (Para 45, 51, 115)

12. St. of Kerala Vs Kumari T.P. Roshana & anr., (1979) 1 SCC 572 (Para 20)

13. Sarita Naushad Vs R.P.S.C., (2009) SCC Online Raj. 4616 (Para 30)

14. Rajasthan P.S.C. Vs Balveer Singh Jat & ors., (2015) 13 SCC 620 (Para 31)

15. U.P.S.C. Vs S. Thiagarjan & ors., (2007) 9 SCC 548 (Para 37, 53)

16. St. of M.P. Vs Sanjay Kumar Pathak & ors., (2008) 1 SCC 456 (Para 37, 53)

17. Disha Panchal & ors. Vs UOI, The Secretary & ors., AIR 2018 SC 2824 (Para 45)

18. Paradise Printers & ors. Vs UT of Chandigarh & anr., AIR 1988 SC 354 (Para 50)

19. D. Saibaba Vs BCI & anr., (2003) 6 SCC 186 (Para 50)

20. Tirath Singh Vs Bachittar Singh & ors., AIR 1995 SC 830 (Para 50)

21. Rakesh Wadhawan & ors. Vs Jagdamba Industrial Corpn. & ors, (2002) 5 SCC 440 (Para 50)

22. Rutvj Waze & anr. Vs UOI & ors., (2015) SCC Online (MP) 3482 (Para 51)

23. Man Singh Vs Commissioner, Garhwal Mandal Pauri & ors, (2009) 11 SCC 448 (Para 54)

24. Motilal Padampat Sugar Mills Vs St. of U.P., (1979) 3 SCC 409 (Para 59)

25. Veerendra Kumar Gautam & ors Vs Karuna Nidhan Upadhayay, (2016) 4 SCC 18 (Para 60)

26. Karuna Nidhan Upadhya & anr Vs St. of U.P. & ors., (2012) (5) ADJ 182 (Para 60)

27. Raj Kumar & ors. Vs. Shakti Raj & ors., (1997) 9 SCC 527 (Para 121)

Precedent distinguished: -

1. K.H. Siraj Vs High Court of Kerala & ors., (2006) 6 SCC 395 (Para 52)

2. D. Saroj Kumari Vs R. Helen Thilakom & ors., (2017) 9 SCC 478 (Para 52, 120)

3. Ashok Kumar & anr. Vs St. of U.P. & ors., (2017) 4 SCC 357 (Para 52)

4. UOI & ors.Vs.C. Girija & ors., (2019) SCC Online SC 187 (Para 52)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Suneet Kumar, J.)

1. Heard Sri Radha Kant Ojha Senior Advocate assisted by Sri Shivendu Ojha, Sri Ashok Khare Senior Advocate assisted by Sri Siddharth Khare, Sri Shashi Nandan Senior Advocate assisted by Sri Udayan Nandan, Sri Tarun Agrawal, Sri Satyendra Tripathi and Ms. Shreya Gupta, learned counsels for the petitioners at length. All other counsels appearing for the petitioners in the writ petitions tagged with this bunch have adopted the arguments extended by the above noted counsels.

2. Sri Manish Goyal learned Additional Advocate General assisted by Sri Vikram Bahadur Yadav learned Standing Counsel has been heard on behalf of the State-respondents and the U.P. Police Recruitment and Promotion Board1. Sri Sankalp Narain learned Advocate has extended his arguments on behalf of the selected candidates, private-respondent Nos.4 to 23, in the leading writ petition.

3. These writ petitions have been filed by the candidates who had obtained 50% marks in each section/subject in the online written examination held in multiple shifts between 12.12.2017 and 23.12.2017. The facts relevant to appreciate the controversy at hands are that a notification dated 17.06.2016 was issued by the third respondent namely the Additional Secretary (Recruitment), Uttar Pradesh Police Recruitment & Promotion

Board, Lucknow (Selection Board) advertising 2707 posts of Sub Inspector (Civil Police), Platoon Commander P.A.C. and Fire Brigade Second Officer in the pay scale/pay band/9300-34800 and grade pay Rs. 4200. The recruitment was to be made on the basis of online written examination of one question paper (total 400 marks) comprising of four sections/subjects of 100 marks each, named as:-

Sl No.	**Subjects**	**Maximum marks**
1.	General Hindi	100 marks
2.	Basic Law/Constitution/General Knowledge	100 marks
3.	Numerical and Mental Ability Test	100 marks
4.	Mental Aptitude Test/I.Q. Test/Reasoning.	100 marks

4. Before conducting the written examination, in order to provide method and modalities of the selection process, a notification dated 28.06.2017 was issued by the Selection Board in continuation of the advertisement notification dated 17.06.2016. The aforesaid notification provides that online applications were invited for filling up total **2707** vacancies of Sub Inspector, Civil Police (Male and Female), Platoon Commander and Fire Service Second Officer whereunder total 6,30,926 applications had been received. Looking at the huge number of applicants, the Board had resolved to hold written examination in multiple shifts which would require preparation of different sets of examination papers. As there was possibility of variation in the difficulty level of the questions papers, it had decided that for preparation of merit list of successful candidates, the marks obtained by the candidate papers/subjects wise would be normalized by using "Standardized Equi-percentile Method" in the same line as adopted in M.A.H, M.B.A/M.M.S, C.E.T 2015 examination. The notification further states that the questions papers would be of 160 multiple choice questions carrying total 400 marks. Each section/subject comprised of 40 questions carrying maximum 100 marks; 2.50 marks allocated for each right answer. There was no negative marking for the wrong answer. It was further notified that the candidates who failed to obtain 50% marks in each subject would not be eligible for recruitment.

5. The recruitment to the posts in question is governed by the U.P. Sub Inspector and Inspector (Civil Police) Service (First Amendment) Rules' 20152, whereunder Rule 15 provides for detail procedure for direct recruitment to the post of Sub Inspector. The said rules have been framed in exercise of powers under clause (c) of sub-section (2) of Section 46 read with sub-section (3) of the said section and Section 2 of the Police Act' 1861 by the Governor to regulate the selection, promotion, training, appointment and other service conditions such as seniority and confirmation etc. of Sub Inspectors and Inspectors of Civil Police in U.P. Police Force notified on August 19, 2015 and had been amended with effect from the 3rd December, 2015, the date of publication of the First amendment Rules' 2015.

6. On the factual aspects of the selection, it is contended by the learned Advocates for the petitioners that total approx 11000 and odd candidates were called to participate in the "Physical Standard Test" and "Physical Efficiency Test" as per Rule 15 (c) and 15 (d) of the Recruitment Rues. They include all those candidates who had obtained 50% or more marks (Raw marks or actual marks) in the written examination and also those who had obtained 50% or more marks as per "normalized score", (the marks calculated by the Selection Board by using "Standardized Equi-percentile Method"). All the petitioners herein stated to have cleared both the subsequent stages of recruitment of "Physical Standard Test" as per clause (c) of Rule' 15 and Physical Efficiency Test {(as per Rule 15 (d)} and had obtained 50% or more than the actual/raw marks in each subject of the question paper. It was further stated that they had been excluded from the final select list i.e. inter-se merit list of the candidates selected for appointment prepared under Rule 15 (e) of the Recruitment Rules, on the ground that they obtained less than 50% "normalized score" derived by using Standardized Equi-percentile Method.

7. As per the "Statistics" provided by both the counsels for the petitioners and the selection Board, out of total 11,741 candidates notified to participate in the subsequent stages of selection i.e. "scrutiny of document and Physical Standard Test" and "Physical Efficiency Test", 5461 candidates were those who had obtained 50% of actual/raw marks in the written examination and 5713 candidates were those who obtained 50% "normalized score". Total 8877 candidates had qualified all the stages, which included 4334 candidates who obtained 50% or more actual/raw marks and 4543 candidates who obtained 50% or more normalized score. Out of 4543 candidates who had obtained 50% normalized score, 3457 candidates had been selected and sent for training. We are also informed that all selected candidates are under going training and as on date no-one has been appointed.

8. The notification declaring final result was displayed on 28.02.2019 on the website of the Board which comprised of 8 lists, detail of which is enumerated as under:-

"(i) List 1- List of 2181 selected candidates for the post of Sub Inspector (Civil Police), Platoon Commander PAC and Fireman Second Officer.

(ii) List 2- A joint merit list of 2181 selected candidates for Sub Inspector (Police), Platoon Commander PAC and Fireman Second Officer.

(iii) List 3- A joint merit list of 2181 selected candidates for Sub Inspector (Civil Police), Platoon Commander PAC and Fireman - Second Officer categories.

(iv) List 4- A list of 1943 candidates selected for Sub Inspector (Civil Police).

(v) List 5 - 162 candidate selected for Platoon Commander PAC.

(vi) List 6- List of 76 officers selected for Fireman second officer.

(vii) List 7- List of non selected candidates.

(viii) List 8 - List of candidates declared unsuccessful in the written examination."

9. The petitioners herein have been included in the List 8 i.e. the list of

candidates who had been declared unsuccessful in the written examination. At that stage, writ petitions were filed by the candidates who had been placed in the List 8 seeking for quashing of the said list as also the notification dated 28.06.2017 issued by the Selection Board notifying that the Selection Board shall adopt normalization procedure in preparation of the merit list. In some of the writ petitions in this bunch, the entire final select list dated 28.02.2019 is also subject matter of challenge.

10. The leading Writ Petition No.23733 of 2018 was, however, filed in the month of October 2018 before declaration of the final result wherein the grievances of the petitioners initially was that the Selection Board had wrongly applied the normalization process i.e. Standardized Equi-percentile Method by issuing call letters to all those candidates who had not obtained 50% or more (Raw/Actual score) in each four subjects and scored 50% (normalized marks derived by applying Standardized Equi-percentile Method) to appear in the "Physical Standard/Efficiency Test" held in the month of June and July 2018.

11. It appears that some of the petitioners before the Lucknow Bench had approached the Supreme Court in (**Manish Kumar Yadav Vs. State of U.P. & others**)3 challenging the order of the Division Bench dated 27.05.2019 leaving it open for the Selection Board to proceed with the appointment as per the final select list dated 28.02.2019, subject to the condition that the selected candidates shall not claim any lien or right over the appointment and their appointment shall be subject to the final outcome of the pending writ petition, wherein the following order dated 12.06.2019 was passed:-

"We do not find any cogent grounds to interfere with the order of the Division Bench impugned. The selected candidates have given an undertaking that they shall not claim any lien or right over the appointments which shall be subject to the result of the writ petition. The special leave petition is not entertained.

We, however, request the Chief Justice of the High Court to constitute a special Division Bench to expeditiously hear the writ petition on day-to-day basis without granting unnecessary adjournments and to dispose of the writ petition as expeditiously as possible preferably within thirty days form the date of constitution of the Bench.

The special leave petition and pending applications are accordingly disposed of."

12. In pursuance of the said order, on the application moved by the learned Advocates appearing for the petitioners dated 07.07.2019, this Special Division Bench has been constituted by Hon'ble the Chief Justice by the order dated 15.07.2019. The matter was placed before this Bench on 02.08.2019 with the office report dated 01.08.2019 alongwith all connected writ petitions pending at Allahabad High Court. The arguments of learned Advocates for the petitioners commenced on the said date i.e. on 02.08.2019 itself, but could not be concluded and as such the matter was fixed for 06.08.2019 in the additional cause list. Further hearing was resumed on 19.08.2019 and continued on day-to-day basis uptil 22.08.2019.

13. The arguments of learned Additional Advocate General was heard and concluded on 26.08.2019 and the

counsel for the private respondent commenced his arguments on that date itself. The matter was posted on 28.08.2019 for further hearing, but could not be taken uptill 04.09.2019 because of the strike observed by the lawyers of this Court. The arguments of Sri Sankalp Narain learned Advocate for the private-respondent concluded today. No other counsel had appeared on behalf of the private-respondents in any of the connected matters.

14. To summarise the arguments of the learned counsels for both sides, Sri R.K. Ojha learned Senior Advocate appearing for the petitioners submits that the process of normalization adopted by the respondents for preparation of the eligibility list is not contemplated in the Recruitment Rules. Even the Selection Board while issuing notification dated 17.06.2016 in Clause 4.1 and 4.2 thereunder under provided that selection would be made on the criteria of 50% marks being the qualifying marks in the written examination and select list calling the candidates for participation in the process of scrutiny of documents and Physical Standard test would be drawn on the said criteria.

15. In the notification dated 28.06.2017 (which was issued in Hindi), it was categorically provided that the candidates who did not attain 50% marks would be disqualified and would not be treated as eligible candidates. In paragraph no.'4' of the said notification it was provided that normalisation of the total marks obtained by the candidates taking the question paper as one unit would be made by applying Equi Percentile method for the purpose of drawing inter-se merit of the selected candidates. The Selection Board had committed illegality in drawing the final merit list by exclusion of all those candidates who did not attain 50% normalized marks (by applying the Equi-percentile Method) in each subject though they attained 50% actual/raw marks in each four subjects of the question paper for written examination and, thus, were qualified to be included in the list of eligible candidates for participation in the further stage of "Physical test and scrutiny of document" as per the Rule 15 (c) of the Recruitment Rules. The criteria of selection had been changed during the course of the selection process which was not permissible in view of the settled legal proposition that rules of the game cannot be changed during mid of the game.

16. Sri Ashok Khare learned Senior Advocate for the petitioners adding to the above contentions submits that minimum qualifying marks has been provided in the statute. The Equi-percentile Method only denotes inter-se ranking of the candidates and cannot be confused with the "qualifying marks" to be attained by a candidate for being included within the zone of consideration. The question paper consisted of multiple-choice questions to be evaluated by the computerized scanner. There was no examiner variability nor there was any optional paper in the main written examination. The syllabus displayed by the Board on its Website appended as Schedule-I to the advertisement notification dated 17.06.2016 was uniform for preparation of the question papers comprising of all compulsory subjects. The question papers were set up from the various topics provided in the common syllabus for the subject Hindi, Legal/General Knowledge, Numerical/Mental Ability, I.Q and

reasoning. There was, therefore, no possibility of variation in the difficulty level of the question papers and, even if this was so, moderation of question papers itself was required to be done by the Selection Board. Looking to the pattern of examination which was Online test of multiple-choice questions, it cannot be said that the candidates of different batches were required to undertake the examination at different difficulty levels. In-fact the syllabus of the examination provided by the Selection Board sets common difficulty level of the questions from the entire syllabus uniformly for all candidates of different batches.

17. Placing three different sets of questions papers filed with the Compilation provided by the learned Senior Advocate, it is contended that there was no justification for adoption of normalization process (Equi-percentile Method) for preparation of list of "eligible candidates". The method adopted by the Selection Board was contrary to the Recruitment Rules which provides the entire scheme for evaluation of the question papers of written examination for the purpose of preparation of the merit list. Reliance has been placed upon the judgement of the Supreme Court in **Sanjay Singh and another. Vs. U.P. Public Service Commission, Allahabad and another4,** to submit that the "scaling system" adopted by the Selection Board by normalization of actual/raw marks obtained by the candidates in the written examination was not permitted being contrary to scheme of the Recruitment Rules.

18. It is pointed out that the Supreme Court while answering the question no.(iii) in **Sanjay Singh2** had held that the "scaling score" or "scaling mark" cannot be considered to be "marks awarded to the candidates in the written examination" and, thus, concluded that scaling violated the recruitment rules therein.

19. The Recruitment Rules provided for preparation of merit list on the basis of "marks awarded to the candidates in the written examination" which can only be read as "percentage of marks" awarded on the answer scripts evaluated by computerized scanner. Appendix-'3' which provided syllabus for the written examination and mode & method thereof, attached to the original Recruitment Rule' 2015 had been deleted w.e.f. 03.11.2015 with the First amendment of the Recruitment Rules, but the legislature consciously has retained Rule 15 (b) of the Recruitment Rules providing maximum marks in each of the four subjects of the written examination and the minimum passing percentage. The legislative intent to provide the qualifying criteria is explicitly clear. Exclusion from the zone of consideration of the candidates who had scored 50% or more marks in each of the four subjects of the question papers (qualified under the rules), therefore, was not permitted.

20. Reliance is placed on the judgement of the Supreme Court in **State of Kerala Vs. Kumari T.P. Roshana & another5** to submit that it was held therein that minor differences in the marks obtained by the candidates in the qualifying examination conducted by different Universities with different standard, question papers and set of examiners are inconsequential.

21. Sri Tarun Agrawal learned Counsel urged that the percentage is a

measure of the absolute/raw marks obtained by a candidate on a scale of 100 which is calculated by the formula= **(marks obtained upon/total marks) x 100**. Whereas 'percentile' is the relative rank of the candidate within his group which can be seen from the formula= **(total number of students)-of the candidates rank)/(total number of students-1).**

22. "Hundred (100) percentile" means the candidate is above 99% candidates who had appeared in the test in the same batch or in other words it can be understood as that there are 0% candidates above him in his batch. Similarly, 90% percentile means the candidate is above 90% candidates or 10% candidates are above him. The 'percentile' thus, denotes the relative standing of a candidate vis-a-vis other candidates in his group or batch.

23. The 'Standardized Equi-percentile Method' which is applied by a standard formula {"Y=Y1+((Y2-Y1))/((X2-X1))x(X-X1)"}, has been derived to give level playing field to the candidates of different group or batches, looking to the difference in the standard of papers, for drawing the inter-se merit of all candidates for final selection. A batch where maximum number of students undertook examination if taken as the 'reference batch' or 'base batch'; by using both 'marks' and 'percentile' of the candidates of 'reference batch' in comparison to the candidates of other batches the normalized score i.e. value of 'Y' of candidates of those batches is obtained.

24. The values being used in the aforesaid formula are:-

- Y1= marks corresponding to immediate lower percentile of ref.batch
- Y2= marks corresponding to immediate upper percentile of ref. batch
- X2= immediate upper percentile of ref. batch
- X1= immediate lower percentile of ref. batch
- X= percentile of the candidate of the target batch
- Y= normalized score of the candidate of the target batch

25. The value of "Y", i.e. 'normalized mark', thus, only denotes the position or placement or ranking of the candidates of different batches in relation to the 'reference batch' or 'base batch', as 'Y-1' and 'Y-2' in the formula are the marks corresponding to the immediate 'lower and upper percentile' of the 'reference batch' and 'X-1' and 'X-2' are immediate 'lower and upper percentile' of 'reference batch'; whereas 'X' is the percentile of the candidate concerned whose marks are to be normalized by finding the value of "Y".

26. It is contended by the learned Counsel that Equi-percentile Method based on the doctrine of level playing field, by using both 'raw marks' and 'percentile' of the candidates of the reference batch and 'percentile' of the candidates of other batches for finding the value of "Y" (normalized marks), places the candidates of other batches somewhere in between the candidates of the reference batch so as to give them their position in the common inter-se merit list. The 'normalized marks' are, thus, used for the purpose of preparation of inter-se merit of the candidates appearing in multiple batches with different sets of question papers in one

competitive examination, tested on different difficulty level.

27. From the prospectus of Medical Entrance Test conducted by AIIMS, New Delhi, it is demonstrated that it was notified therein for stage 2, the candidate who had obtained "50% percentile" or above in the written examination (at stage no.1) would be called. The prospectus of AIIMS, New Delhi, January' 2018 of a fellowship programme, has been placed before us to submit that 'percentile' is the score based on relative performance of the candidates who appeared in the examination.

28. It is further contended that even the process of normalization as adopted in M.A.H, M.B.A, M.M.S, CET 2015 which has been taken as a model for adopting normalization in the examination-in-question, provides that Equi-percentile Method would be applied at the time of preparation of merit list for admission.

29. It is contended that the eligibility list as per Rule 15 (b) can only be prepared on the basis of raw/actual marks of the candidates in the written examination. As there is no indication in the rule that normalized marks will be used as "qualifying marks" to determine "eligibility of candidates", there is inherent flaw in the method adopted by the respondent. The normalized marks cannot be treated either as percentile (in their own batch) or actual or raw marks of the candidates.

30. By taking clue from a judgement of the High Court of Rajasthan in **Sarita Naushad Vs. R.P.S.C6,** it is contended that in the instant matter, scaling formula has resulted in unjust, unreasonable, irrational and arbitrary increase and decrease of marks to the detriment of the petitioners vis-a-vis persons who had been selected on the basis of normalized marks. The candidates who were not qualified as per the actual marks obtained were not entitled to be declared qualified as per the scaled marks or normalized marks.

31. The challenge to the said judgement was turned down by the Supreme Court in **Rajasthan Public Service Commission Vs. Balveer Singh Jat & others7**, noticing that the method of scaling for the purpose of assessment of answer sheets adopted by Rajasthan Public Service Commission for calling the candidates for interview was bad.

32. In order to substantiate his above submissions, Sri Agrawal has placed judgement of the Supreme Court in **Mahinder Kumar & others Vs. High Court of Madhya Pradesh8.** (Emphasis was laid to paragraphs nos.13 to 17, 19 to 24, 40, 50, 51, 53 & 55). It is contended that the normalized marks were not the basis therein for determining eligibility of the candidates to participate in the viva-voce or interview in the scheme of the Recruitment Rules namely Madhya Pradesh Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Rules' 1994 amended in the year 2005.

33. Sri Shashi Nandan learned Senior Counsel appearing for the petitioners in one of the connected writ petition, however, vehemently contends that under the scheme of the Recruitment Rules, 15(b) & (e), there was no room for any deviation in the procedure of evaluation of performance of the candidate in the written examination. The

role of the Selection Board was specified as to how it will prepare the select list of qualified candidates. It was absolutely beyond the jurisdiction of the Selection Board to prescribe or add any procedure for selection. The first part of Rule 15(b) is specific with regard to the written examination, the type of question paper, the maximum number of marks assigned to each subject or section of the question papers and the requirement that the candidates have to obtain '50% marks' in each of the four subjects for being eligible for recruitment. Only option given to the Selection Board was to decide the syllabus of the examination and the mode and manner in which the written examination was to be conducted. The words used in the latter part of clause (b) of Rule 15 "detail procedure for written examination shall be determined by the Selection Board" and will be displayed on its website does not include the procedure for evaluation for selection. Even Rule 15(e) states that final merit list shall be determined on the basis of marks obtained by each of the candidates in the written examination under clause (b) of the said rule. It was, therefore, not open for the Selection Board to adopt any normalization process or Equi-percentile Method at all even to draw the final merit list. The process of selection of candidates being enumerated elaborately in the rules will also include the procedure for evaluation of the performance of candidates.

34. For the aforesaid, the whole procedure adopted by the Selection Board in preparation of final select list dated 28.02.2019 is in contravention of the mandatory requirement of the Recruitment Rules. The notification dated 28.06.2017 displayed by the Board on its website is, therefore, liable to be quashed being in violation of the recruitment rules.

35. Learned Senior Counsel referring to **Mahinder Kumar7** submits that the said decision fortifies his argument that once the procedure for selection is determined in the Rule, it is not open to the selecting body or agency to deviate from the procedure. The normalization process upheld by the Supreme Court therein was in view of the rules prevailing, wherein the High Court was empowered to formulate its own procedure, which is not so in the present case.

36. Even the brochure of advertisement notification dated 17.06.2016 specified in clause 4-(i) that the candidates not attaining 50% marks in each subject would not be eligible for recruitment. After the notification of the vacancies providing conditions of selection in terms of the rule, it was not open for the Selection Board to adopt any other method for preparation of the merit list.

37. Sri Satendra Tirpathi learned Advocate for the petitioners adopting the arguments of Sri Ashok Khare and Sri R.K. Ojha learned Senior Counsel urged that the respondent have misconstrued the normalized marks as percentage, to decide cut-off marks for preparation of list of qualifying candidates. Even otherwise, as per the Selection Board's notification dated 28.06.2017, the normalized marks could be worked out only on the total marks obtained by a candidate in the question papers taken as a unit and not for each section/subject. The petitioners could not be declared failed for having not obtained normalized marks in anyone

of the four sections. Reliance is placed on the judgement of the Supreme Court in **U.P.S.C Vs. S. Thiagarjan & others9 and State of Madhya Pradesh and others vs. Sanjay Kumar Pathak and others10** to submit that meritorious candidates cannot be left out from the select list and the selection process marred by arbitrariness and unfairness cannot be allowed to stand. The selected candidates do not have any legal right merely for the fact that their names were found in the select list as no indefeasible right for appointment accrue in their favour.

38. Ms. Shreya Gupta learned counsel for the petitioners assailing the notification dated 28.03.2019 for applying Standardized Equi-percentile Method for normalization of marks obtained by the candidates in the written examination submit that the said method was not in consonance of the Recruitment Rules. The Selection Board's notification dated 28.03.2019 deviating from the procedure of selection is in transgression of its delegated power under the Recruitment Rules. It is settled that if a particular field is occupied by a statutory legislation, there is no scope for any addition or subtraction by any subordinate legislation.

39. She further proceeded to challenge the validity of clause 15 (f) of the first Amendment Rules' 2015 which provides that the candidates whose names are in the select list prepared as clause (e) of the Rule 15, if found unsuccessful in the medical examination conducted by a Board under the Rules shall be declared unfit by the appointing authority, and the vacancies occurred shall be carried forward for next selection.

40. Contention is that the medical examination of the selected candidates is only one of the four stages of selection; first stage being written examination under Rule 15(b); second scrutiny of documents and Physical Standard Test as per clause (c) of Rule 15; third Physical Efficiency Test as per clause (d) of Rule 15 and fourth and last stage is medical test as per clause (f) of Rule 15. Till medical test is conducted, the process of selection is not over and as such the vacancy occurred on account of any candidate having been found unsuccessful in the medical test will be the existing vacancy of the same selection. The principle of carry forward of the vacancy for the next recruitment year can only be related to the vacancies pertaining to Scheduled Caste, Scheduled Tribes and Women, that too due to unavailability of suitable candidates of that category.

41. The State of U.P. had given an undertaking to the Supreme Court in **Manish Kumar Yadav1** on an affidavit that all existing vacancies to the post of Constable and Sub Inspector of police will be filled up within the time lines given therein and in case of breach of the same, the officers of the State would be personally liable. As many as 821 vacancies in total are proposed to be carried forward which include Scheduled Caste, Scheduled Tribes & women and also include vacancies occurred on account of exclusion of those candidates who could not qualify the medical test. It is thus, vehemently contended that the vacancies occurred on account of exclusion of the candidates failing in the medical test, from the final select list under Clause (e) of Rule 15, are to be filled by placement of the candidates from list-7 (of non-selected candidates) by bringing down the cut off marks.

42. With the above contentions, the submissions of learned Advocates

appearing for the petitioners have been concluded. All other Advocates appearing for the petitioners in this bunch have either adopted the arguments noted above or reiterated the same. We, therefore, need not burden this judgement with their arguments separately.

43. Sri Manish Goyal learned Additional Advocate General on behalf of the State-respondents and the Selection Board, in reply to the arguments advanced by the learned counsels for the petitioners and to justify the process of normalization adopted by the Selection Board made the following submissions:-

44. The first submission is that the normalization is an universally approved standard method applicable in case of variable difficulty level of question papers and, therefore, application thereof was well within power of evaluation of the Selection Board. Placing the affidavit dated 12.04.2019 filed on behalf of the respondent Nos.2 & 3, it is contended that normalized marks "Y" were derived after applying the Equi Percentile formula on fraction of 100 and as such denote percentage and not percentile. The said formula was worked out by the agency which had conducted the examination and prepared result for the Selection Board. The experts/statistician of the company had applied Equi-percentile Method in co-ordination with and under the instructions of the Selection Board. It is wrong to assert that normalized marks achieved by the Equi-percentile Method and percentile are one and the same thing. Ultimate value of "Y" being value out of '100' is percentage marks of the candidates. The equation of Equi Percentile formula re-written on fraction of 100 at page no.'10' (Annexure no.2 of the said affidavit) is noted hereunder:-

$$Y = Y1/100 + (Y2/100 - Y1/100) \quad \text{---------- X} \quad (Nx \times 100 - Ny1 \times 100)$$
$$(NY2 \quad NY1) \qquad \text{-----} \qquad \text{-------}$$
$$\text{-----} \times 100 - \text{-----} \times 100 \quad Ncb \qquad Nbb$$
$$Nbb \qquad Nbb$$

45. It is then contended that looking to the huge number of applicants more than 6 lacs, the Selection Board had decided to adopt Equi-percentile Method to normalize the marks of candidates who appeared in multiple batches with different sets of question papers as there was no other method to keep uniformity in the question papers. The scaling method is well accepted norm to adjudge the merit and suitability of the candidates in a public examination, in as much as, the very concept of examination presumes prescription of same bench-mark for all candidates. The adoption of normalization process in order to streamline the whole selection in a fair and just manner as has been approved by the Supreme Court in **Mahinder Kumar7, Sunil Kumar & others Vs. Bihar Public Service Commission & others11 & Disha Panchal & others Vs. Union of India the Secrtary & other with connected matters12.**

46. Sri Goyal by reading different clauses of Rule 15 submits that the entire scheme of the Rules gives ample power to the Selection Board to evaluate the performance of the candidates for the purpose of preparation of the merit list. As the power of selection was given to the Selection Board, modalities thereof could be adopted by the Selection Board by moulding the procedure. Rule nowhere restricts the power of the Selection Board to decide eligibility as 50% criteria of marks, as latter part of Rule 15(b) cannot be read in isolation. Merit list of the qualifying candidates had to be prepared at the stage of second part of Rule 15 (b)

itself; i.e., at the time of preparation of result of the written examination, as only the scores in the written examination were to used for preparation of the select list contemplated as final list in Rule 15 (e) of the Recruitment Board, from amongst those candidates who had qualified all subsequent stages of selection.

47. The Recruitment Rule contains adequate flexibility and is not in rigid framework as is sought to be contended by Sri Shashi Nandan learned Senior Advocate and other counsels for the petitioners. It cannot be accepted that there was no scope at all for application of normalization method or the power of the Selection Board was limited in this respect. The action of the Selection Board in issuance of the notification dated 28.06.2017 intimating its decision to adopt normalization procedure was well within the four corners of the statutory rules.

48. It is vehemently argued that the Supreme Court in **Mahinder Kumar7** upheld the normalization process with the observation in paragraph no.'37.5' which states that the expression "evaluation" would take into its folds the minimum marks to be scored, the manner in which the evaluation is to be made and in the event of any requirement, to equalise the merits of the candidates in written examination and follow any appropriate procedure in consonance with law, in order to ultimately arrive at a fair process by which the candidate can be called for interview, based on the evaluation of the marks in the written examination.

49. Submission is that no-one has challenged the adoption or application of the said method. Only grievance is about the stage when it could be applied. On harmonious construction of Rule 15 (b) and 15 (e), the expression "50% marks" be read as "normalized marks", relative interpretation is to be given to normalized marks being equal to the qualifying marks, more-so when normalized marks also denote percentage having been calculated on the scale of 100, as per the equalise formula adopted by the expert agency in consultation with the Selection Board. The expression "more than one day in different shifts with separate question papers" has to be read positively to hold that the Selection Board was empowered to adopt "process of evaluation" for assessment of performance of the candidates in the written examination as "the pattern of evaluation has to be in consonance with the pattern of the examination".

50. To substantiate the plea of purposive and harmonious construction of the statutory Rule 15 (b) read with 15(e), reliance is placed upon the judgement of the Supreme Court in **Paradise Printers & others Vs. Union Territory of Chandigarh & other13; D. Saibaba Vs. Bar Council of India & another14; Tirath Singh Vs. Bachittar Singh & others15 & Rakesh Wadhawan & others Vs. Jagdamba Industrial Corporation & others16.**

51. He vehemently urged that the reliance placed on the decision in **Sanjay Singh2** is misplaced in view of the Supreme Court decision in **Sunil Kumar & others10** wherein it is clarified that **Sanjay Singh2** did not lay down any binding principle of law or directions or even guidelines with regard to the holding of public examination; evaluation of papers and declaration of results by the

examining body. Emphasis was laid on the observations in paragraph No.'17' of **Sunil Kumar & others10** to submit that holding of public examination is a complex task and the procedure for preparation of syllabus, evaluation of answer papers and preparation of result are the areas which have to be left to the expert bodies in the field and the scope of judicial review is limited to instances of arbitrary or malafide exercise of power. No such grounds have been taken by the petitioners in their efforts to challenge the select list. It is contended that the correctness of a statistical equation is within the domain of expert and normalized score achieved therefrom cannot be said to be invalid. (Reference **Rutvj Waze & another Vs. Union of India & others17).**

52. It is lastly contended that the decision of the Board to adopt normalization method for preparation of merit list was notified vide notification dated 28.06.2017 displayed on its website. The candidates being fully aware had participated in the selection without raising any dispute. Now having been declared unsuccessful, they cannot be permitted to challenge the procedure. Reliance is placed on the decisions of the Supreme Court in **K.H. Siraj Vs. High Court of Kerala & others18; D. Saroj Kumari Vs. R. Helen Thilakom & others19; Ashok Kumar & another Vs. State of U.P. & others20 , Union of India & others Vs. C. Girija & others21.**

53. Further that mere participation in different stages of selection does not vest any right in the candidates much less a legitimate expectation to be included in the final list. Reference **Union Public Service Commission Vs. S. Thiagarajan & others22 & Sanjay Kumar Pathak9.**

54. Any mistake in the process of the selection does not make the entire selection invalid. Reference **Man Singh Vs. Commissioner, Garhwal Mandal Pauri & others23.**

55. In the end, it is contended that the selected candidates have not been put to notice in various writ petitions connected with this bunch. The relief as prayed by the petitioners, therefore, cannot be granted in absence of the affected persons being party.

56. Sri Sankalp Narain learned Advocate for the selected candidates, private-respondents, impleaded in the leading Writ Petition No.23733 of 2018 submits that to apply normalization process the notification was issued by the Selection Board and all the lists from 'list-1 to list-8' displayed at the website on 28.02.2019. Prior to the declaration of final result, a Writ Petition No. 16160 of 2018 was filed by some candidates with the prayer that the Selection Board be directed to adopt normalization method as notified and the said writ petition had been rendered infructuous with the declaration of the final result. It is contended that due to variance of question papers individual performance of the candidates varied in different batches. More than 6 lacs candidates had participated in the selection and unless and until normalization was adopted at the stage of Rule 15 (b), i.e; for preparation of eligibility list for calling the candidates for further process of selection, the entire object of adoption of the normalization process would be negated. The candidates who were required to answer tough

question papers cannot be asked to compete with the candidates who answered an easy question paper. Variance in the question papers in different shifts had an impact on the overall assessment of performance of the candidates which was ruled out by the Selection Board by applying normalization at the stage of preparation of eligibility list under Rule 15(b).

57. The marks obtained in the written examination under both Rule 15(b) and (e) should be read as "normalized marks" as Rule 15 (e) itself contemplates for preparation of merit list on the basis of marks obtained by the candidates in the written examination. The stages of application of Equi-percentile Method cannot be different for the language employed in Rule 15(b) and 15(e). The methodology of equalizing marks obtained in the written examination had to be adopted at the threshold.

58. In rejoinder, Sri Ashok Khare Senior learned Counsel has placed the judgement of the Supreme Court in **Umesh Chandra Shukla Vs. Union of India & others24,** to state that it was held therein that the examining body cannot deviate from the Recruitment Rules while drawing the merit list so as to include ineligible candidates in the list of qualified candidates to appear at the viva-voce itself. With reference to **Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others25,** it is contended that the Selection Board does not have inherent jurisdiction to lay down the norms for selection or to adopt its own standard in addition to what is prescribed under the Rules, as it would amount to legislating a rule of selection, which is beyond its power.

59. Placing **Motilal Padampat Sugar Mills Vs. State of U.P.26,** it is contended that principle of waiver or estoppel would not be attracted in the instant case, in as much as, the basic requirement for applying the said principle is that the act of waiver must be an intentional act with knowledge. The persons who are said to have been fully informed of their right and have acted with full knowledge of such right can only be said to have intentionally abandoned it. It is contended that the Selection Board did not even adhere to the procedure notified by it in the notification dated 28.06.2017.

60. Placing the judgement of Supreme Court in **Veerendra Kumar Gautam & others Vs. Karuna Nidhan Upadhayay27** and the Division Bench of this Court in **Karuna Nidhan Upadhya & another Vs. State of U.P. & others28,** it was asserted that estoppel and acquiescence by conduct on the principle of waiver have no role where the selection process is marred by glaring illegality in the procedure of selection.

61. Having noted the rival contentions, at length, the submissions of the learned counsel for the petitioners, in brief can be summarized as follows:-

(i) the Selection Board has been conferred limited power under the Recruitment Rules only to determine the procedure of written examination;

(ii) the Selection Board is not vested with the power and authority to determine the procedure of selection which has been prescribed by the rule making authority;

(iii) the eligibility condition of obtaining 50% marks by a candidate is a

condition precedent mandated under the Rules, which is not subject to any alteration or substitution by normalized score;

(iv) normalization is a method of evaluation falling within the ambit of written examination and not an eligibility condition, normalized score at the best can be applied for preparing the select list in order of merit;

(v) the Selection Board by eliminating the qualified candidates having scored 50% marks in each subject by applying the normalized score exceeded its power and authority vested by the Recruitment Rules;

62. In rebuttal the submissions on behalf of the respondents, can be briefly summarized as follows:-

(i) the Selection Board is vested with the power and authority to equalize the marks obtained by a candidate in the backdrop of written examinations held on multiple dates/multiple shifts with different papers;

(ii) the Selection Board has inherent power to adopt a fair and just procedure by equalizing the marks to place all the candidates on a level playing ground;

(iii) the Selection Board has power to equalize the eligibility marks (50%) prescribed under the Rules in an examination held in multiple shifts with different standard of papers;

(iv) candidates appearing in difficult papers would be in disadvantageous position as against candidates appearing in relatively easier question papers. The word "marks' used in Sub-clause (b) and (e) of Rule 15 would mean and include normalized marks.

(v) petitioners after participating in the selection process cannot turn around to challenge the same.

63. Rival submissions fall for consideration.

64. The question that arises for our consideration is: (i) whether the Selection Board was within its power and authority in applying the normalized percentile score to determine the eligibility of the candidates or in the alternative whether the Selection Board transgressed its authority to alter/substitute the eligibility criteria (50% marks) mandated in Sub-clause (b) of Rule 15 by normalized score to non-suit, all such candidates from the recruitment process who obtained 50% marks and above; (ii) the scope of judicial review of the Standardized Equitable Percentile Method adopted by the Selection Board.

65. The Selection Board came to be constituted under the Recruitment Rules promulgated by the Governor in exercise of powers under the Police Act, 1861. The Recruitment Rules was notified on 19 August 2014, subsequently, amended on 3 December 2015, in supersession of all existing Rules and Orders, issued in this behalf, with a view to regulating the selection, promotion, training, appointment, determination of seniority and confirmation etc. of Sub-Inspector and Inspector of the Civil Police in Uttar Pradesh Police Force.

66. The scheme for recruitment is provided under the Rule 15 of the Recruitment Rules. The relevant portion of Rule 15, for the purposes of the instant case is extracted:-

"Procedure for Direct Recruitment to the post of Sub-Inspector:-

15. (a) Application form and call letter:-

A candidate shall fill only one application Form. The Board will accept only online applications. The application of candidates, who fill more than one form, may be rejected by the Board. The Head of the Department, in consultation with the Board, shall fix an application fee for any recruitment. Detailed procedure of filling the Application Form and issuance of call letter shall be determined by the Board and will be displayed on its own website.

The Government may change the number of vacancies for any recruitment at any time before the first examination and may also cancel any recruitment at any time or stage of recruitment without assigning any reason therefor.

(b) Written examination

Candidates whose applications are found correct, shall be required to appear for written test of 400 marks. In this written examination, the Board will keep one objective type question paper of the following subjects:-

Subject	**Maximum Marks**
1. General Hindi	100 marks (objective type)
2. Basic Law/ Constitution /General Knowledge	100 marks (objective type)
3. Numerical and Mental Ability Test	100 marks (objective type)
4. Mental Aptitude Test/I.Q. Test/Reasoning	100 marks (objective type)

Candidates failing to obtain 50% marks in each of the above subjects shall not be eligible for recruitment. *The detailed syllabus for the examination will be decided by Board and will be displayed on its own website. The Board will decide at its own level to conduct written examination on one date in a single shift or in more than one shift or on more than one shift or on more than one date in different shifts with different question paper.* ***Detailed procedure for written examination shall be determined by the Board and will be displayed on its own website.***

(c) ***Scrutiny of documents and physical standard test:-***

Candidates found successful in written examination under clause (b) shall be required to appear in Scrutiny of Documents and physical Standard Test. *Keeping in view the total number of vacancies, the Board shall decide at its own level, the number of candidates on the basis of merit to be called for this test. Physical Standards for candidates are as follows:-*

.1. Minimum Physical Standards for male candidates are as follows:-

(a) Height:-

xxxxxxx

(b) Chest:-

xxxxxxx

2. Minimum Physical Standards for female candidates are as follows:-

(a) Height:-

xxxxxxx

(b) Weight:-

For conducting this examination a committee will be constituted by the Board in which a Deputy Collector nominated by the District Magistrate will be the Chairman and the Deputy Superintendent of Police nominated by

the District Superintendent of Police will be the member, the other members of the committee shall be nominated by the District magistrate or the Superintendent of Police if requested by the Selection Board.

Detailed procedure for this examination shall be determined by the Board and will be displayed on its own website.

xxxxxxxxxxxxx

(c) Physical Efficiency test:-

Candidates found successful in Scrutiny of Documents and Physical Standard Test as per clause (c) will be required to appear in Physical Efficiency Test, which will be of qualifying nature. xxxxxxxxxxxxxxxxx Detailed procedure for Physical Efficiency Test shall be determined by Board and will be displayed on its own website. For conducting this exam a committee will be constituted by Board xxxxxxxxx

(e) Selection and final merit list:-

From amongst the candidates found successful in Physical Efficiency Test under clause (d), on the basis of marks obtained by each candidate in written examination under clause (b). Board shall prepare, as per the vacancies, a select list of each category of candidates, as per order of merit keeping in view of reservation policy and send it with recommendation to the Head of the Department subject to Medical test/character verification. No waiting list shall be prepared by the Board. List of all candidates with marks obtained by each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list sent by the Board to the Appointing Authority for further action.

Note:- xxxxxxxxx

(f) Medical Test:-

The candidates whose names are in the select list as per clause (e), will be required to appear for Medical Examination by the Appointing Authority. For conducting the medical examination, the Chief Medical Officer of the concerned district shall constitute a medical Board, which will have 03 doctors, who will conduct Medical Examination as per "Police Recruitment Medical Examination Forms" as prescribed and codified by the Head of Department in consultation with the Director General of Medical Health. Any candidate not satisfied by his Medical Examination, may file an appeal on the day of examination itself. xxxxxxxx The candidates found unsuccessful in Medical Examination shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for next selection".

(emphasis supplied)

67. The Selection Board issued a notification/advertisement dated 17 June 2016, inviting applications from eligible male/female candidates for following posts:-

Sub-Inspector Civil Police (Male) - 2,400
Platoon Commander (P.A.C.) (Male) – 210
Fire Brigade Section Officer (Male) - 97

Total 2,707

Sub-Inspector Civil Police (Female) - 600

68. The advertisement specified that the selections would be made in terms of Recruitment Rules. The candidates were required to submit forms online and take the written examination online. The Selection Board by notification informed that the candidates were required to answer objective type 160 questions divide into four subjects/sections, each carrying 100 marks. Two hours time was prescribed for the examination, each question was of 2.5 marks and there was no provision for negative score. The relevant portion of notification is extracted:-

Sl. No.	Subject	Number of Questions	Maximum Marks	Time
1.	General Hindi	40	100	2.00
2.	Basic Law/Constitution General Knowledge	24 16	100	Composite
3.	Numerical and Mental Eligibility Test	40	100	Time
4.	Mental Aptitude Test/I.Q. Test/Reasoning	40	100	
5.	Each Questions 2.50 Marks	Total Questions 160	Total Marks 400	2.00 Hours

69. The candidates were required to obtain 50% marks in each of the four subjects to qualify for the subsequent round of recruitment process i.e. document verification/physical efficiency test. In other words, a candidate failing to obtain 50% marks in any of the subjects would render him/her ineligible to participate in the further selection process.

70. The Selection Board vide notification dated 28 June 2017 disclosed that 6,30,926 application forms were received, consequently, the Selection Board having due regard to the large number of candidates informed the candidates that the online examinations would be conducted on multiple dates in different shifts and in different question papers for each date/shift. Since the level of multiple question papers would vary, accordingly, Normalization based on "MAH-MBA/MMS CET 2015" applying Standardized Equi-Percentile method would be adopted.

71. Emphasis has been placed by the respondents upon paragraph nos. 4 and 9 of the notification to contend that in the backdrop of the Recruitment Rules and the advertisement, the Selection Board by notification dated 28 June 2017, primarily specified that Normalization would be adopted and the raw/actual marks obtained by the candidates would be equalized. In other words, candidates scoring less than 50% of normalized score would not be eligible. Paras 4 and 9 are extracted:

ष4– उप निरीक्षक नागरिक पुलिस, प्लाटून कमाण्डर, पीएसी एवं अग्निशमन द्वितीय अधिकारी के पदों पर सीधी भर्ती ऑनलाइन लिखित परीक्षा में सफल अभ्यर्थियों के प्राप्तांको की श्रेष्ठता के आधार पर संचालित हो रही है।

अभ्यर्थियो की संख्या के अनुसार ऑनलाइन लिखित परीक्षा एक से अधिक तिथियों में विभिन्न पालियों में विभिन्न प्रश्नपत्रों के साथ संचालित कराने की आवश्यकता उद्भूत हुई है। प्रत्येक पालियों के प्रश्न–पत्र अलग–अलग होंगे जिनमें समानता न होने की सम्भावना के दृष्टिगत विभिन्न पालियों में इन अलग–अलग प्रश्नपत्रों में अभ्यर्थियों द्वारा प्राप्त अंकों के प्रासामान्यीकरण ;छवतउंसप्रंजपवदद्ध ष्ड।भ्.डठ।ध्डडै ब्म्ज 2015ष् में प्रयुक्त ैजंदकंतकप्रमक म्नप.चमतबमदजपसम उमजीवक द्वारा किया जायेगा।

xxx xxx xxx xxx xxx

9– प्रत्येक विषय में 50 प्रतिशत अंक प्राप्त करने में विफल रहने वाले अभ्यर्थी भर्ती के लिए पात्र नहीं होंगे।ष्

"4. The direct recruitment to the posts of Sub Inspector Civil Police, Platoon Commander, PAC and Fire Officer II is being conducted on the basis of merit in terms of the marks obtained by the candidates successful in the online written examination. In view of the number of candidates, need has arisen for conducting online written examination on more than one date in different shifts with different sets of papers. Question papers of the different shifts shall be different, and keeping in view the possibility of them being not similar, the normalization of the marks obtained by the candidates in different question papers shall be done by the "MAH-MBA/MMS CET 2015" Standardized Equi-percentile method.

x x x x x x x x

9. The candidates who fail to obtain 50 percent marks in each subject shall not be eligible for the recruitment."

(Translation by the Court)

72. Having due regard to the large number of applications received, the Selection Board vide notification dated 28 February 2019, informed the candidates that the written examination would be conducted at 17 districts, on and between 12 December 2017 to 23 December 2017.

73. Petitioners, herein, applied for the post of Sub-Inspector, they appeared and participated in the online written examination conducted by the Selection Board. All of them scored 50% marks in each subject, accordingly, were invited to participate in the next stage of selection process i.e. document verification/physical efficiency test. It is not disputed by the Selection Board that petitioners successfully qualified the physical efficiency test. The Selection Board, however, while declaring the final result (select list) have eliminated the petitioners on the ground that they failed to obtain 50% of the Normalized score. Consequently, petitioners were declared ineligible failing to have obtain the cut of marks prescribed under Sub-clause (b) of the Rule 15 of the Recruitment Rules.

74. It is well settled that it is the rule-making authority to prescribe the mode of selection and minimum qualification for any recruitment. The Courts and tribunals can neither prescribe the qualifications nor entrench upon the powers of the executive so long as the rule prescribing the qualification are not violative of any provisions of the Constitution, statute and rules. It is, therefore, not open to the respondents to contend that "50% marks' should be read to include the normalized percentile score by the Court.

75. In **P.U. Joshi and Others vs. Accountant General, Ahmedabad and others29,** it was held that Courts or Tribunals should restrain from directing the government/Selection Boards to have a particular method of recruitment or eligibility criterion, it pertains to the field of executive policy and is within the exclusive discretion and jurisdiction of the State.

"10. ... Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their

creation/abolition, prescription of qualifications and other conditions of service including ....criteria.....pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria ..... or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substraction the qualifications, eligibility criteria and other conditions of service ..... from time to time, as the administrative exigencies may need or necessitate." (Refer: V.K. Sood vs. Secretary, Civil Aviation30)"

76. Similarly in **Chandigarh Administration vs. Usha Kheterpal Waie and others31,** the Supreme Court observed thus:

"22. It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of the Constitution, statute and rules. [See J. Rangaswamy vs. Govt. of A.P.32 and P.U. Joshi vs. Accountant General33.

77. The Recruitment Rules prescribes the mode of selection. Rule 8 mandates that a candidate for direct recruitment to the post of Sub-Inspector must possess a Bachelor degree from any University established by law in India. The procedure for direct recruitment to the post of Sub-Inspector is provided under Rule 15. Sub-clause (b) of Rule 15 provides that the candidates shall be required to appear in a written examination comprising of 400 marks. The candidates would have to answer objective type question in four subjects of 100 marks each. The Rule further mandates that a candidate "failing to obtain 50% marks' in each of the subjects shall not be "eligible for recruitment'.

78. On a plain reading of Sub-clause (b) of Rule 15, the rule making authority explicitly and clearly mandated that a candidate fulfilling the educational qualification would have to take the written examination, in the event of the candidate "failing to obtain 50% marks' in each subject would not be "eligible' to participate in the subsequent stages of recruitment. The latter part of Sub-clause (b) confers power upon the Selection Board to determine: (i) detail syllabus for the examination; (ii) to conduct written examination on one date in single shift or in more than one shift or on more than one date in different shifts with different question papers; (iii) to determine the procedure for written examination. Sub-clause (c) of Rule 15 provides that candidates found "successful in written examination under sub-clause (b)" shall be required to appear in scrutiny of documents and physical efficiency test.

79. On conjoint reading of Sub-clause (b), in particular, the first part with sub-clause (c), it is evidently clear that the Selection Board has not been conferred

power to dilute, alter or prescribe the eligibility of a candidate by substituting the mandated '50% marks' by the 'normalized score' to qualify the candidates for subsequent stages of selection. The rule making authority upon prescribing the eligibility criteria, conferred limited power upon the Selection Board to determine the detailed procedure of written examination. The procedure of selection was prescribed by the rule making authority under Rule 15, however, the Selection Board was conferred limited power to determine the procedure of written examination. In the facts of the instant case, the Selection Board exceeded its authority and power by applying the normalized score and not the raw marks to determine the eligibility of the candidates while preparing the select list. The petitioners, herein, qualified the written examination by scoring '50% marks' in each subject, thereafter, were invited by the Selection Board to participate in the subsequent stages of recruitment i.e. document verification and physical efficiency test, which is of a qualifying nature, no marks are allotted. The Selection Board, however, eliminated the petitioners by applying the normalized score in order to determine the eligibility qualifying marks in contradiction to that mandated under the Rule in gross violation of Sub-clause (b) of Rule 15. The conduct of the Selection Board tantamounts to re-writing/amending the mandatory rule, thereby, vitiating the select list.

80. In **Mahinder Kumar7,** the issue before the Supreme Court was as to whether the High Court was empowered to formulate its own procedure in the matter of selection for the post of Madhya Pradesh Judicial Services. The ancillary question was, as to whether, the merit list could have been drawn solely based on the written examination marks and interview marks put together, without adopting the normalization process as was done by the High Court, which was not mentioned in the advertisement.

81. Rule 7 of the Madhya Pradesh Uchchtar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, 1994, which conferred power upon the High Court to specify from time to time "the procedure of selection for direct recruitment and promotion" was considered. In view of the rule, as well as, the prescription contained in the advertisement the High Court resolved that based on the evaluation of written examination papers made by the District Judges, a minimum 35% of marks in respect of SC/ST candidates and 40% of marks in respect of general candidates was required in the first and second papers to qualify for viva voce. Going by the said resolution the evaluation made by the District Judges was to be kept as the basis for ascertaining the marks scored by the candidate, both in reserved category, as well as, in general category in order to become eligible for attending the interview.

82. As per the second resolution, the Selection Committee for the purpose of determining merit of the candidates finally, felt necessary to evaluate the papers of those candidates who were short listed for the purpose of interview by way of common evaluation in which process the marks scored by the candidates in the written examination, would be normalized. The apparent purposes was, having regard to the different yardsticks applied by the District Judge evaluators,

to make a further evaluation for the purpose of normalization in order to finalise the selection. After normalization was done, the marks awarded by the common evaluators and marks scored in the viva-voce would be added for the purposes of determination of merit position. In other words, the normalized marks were not the basis for determining the eligibility of the candidates to participate in the viva voce, but were applied for the purpose of determining the inter-se merit position of the candidates.

83. The Court having regard to the statutory prescription and the conditions stipulated in the advertisement held that the High Court was fully empowered on administrative side, to find a fair method by which the normalization of the marks could be worked out.

"40. We have, therefore, no hesitation in holding that by virtue of Rule 7 and para 9(i), (iii), (iv) and (vi), there was enough prescription empowering the High Court to follow its own procedure in evaluating the answer sheets initially by the District Judges and subsequently by common evaluators, before holding the interview. We, therefore, reject the said submission made on behalf of the Petitioners in attacking the procedure followed by the High Court in the matter of holding the selection...."

84. In the facts of the case at hand, the primary issue is as to whether the Selection Board was empowered to adopt the normalization equi-percentile method in scaling the raw marks obtained by the candidates, and thereafter, applying the normalized score to determine the eligibility by substituting/altering the '50% marks' prescribed in Sub-clause (b) of Rule 15 to non-suit the petitioners from the select list.

85. It is urged by the learned Additional Advocate General and the learned counsel for the private respondents/selected candidates that the word "marks' employed in Sub-clause (b) and (e) of Rule 15 would mean and include the 'normalized score' and not the raw marks obtained by the candidates in the written examination held in multiple shifts. The Selection Board in exercise of its inherent power was within its jurisdiction and authority to scale (normalize) the raw marks obtained by the candidates in the written examinations having due regard to the variance in the level of question papers. A just and fair selection would justify the approach of the Selection Board so as to place all the candidates on a level playing field before determining their eligibility.

86. The learned counsel for the respondent placed heavy reliance, in particular, on para 4 and para 9 of the notification dated 28 June 2017 to urge that the Selection Board had spelled out the rules and method of the game viz. written examination. The normalization method as per the notification was to be applied scaling the raw marks. The notification provides that having due regard to the written examination being held in multiple shifts normalization method would be adopted. Para 9 would have to be read with para 4 conjointly to mean that normalized percentile score would determine the eligibility criterion and not 50% marks. The submission on face value appears attractive but on closer examination of the notification, lacks merit being in gross violation of the statutory provisions.

87. We have carefully gone through the notification with the assistance of the learned counsel for the parties and find no such prescription as is being suggested by the respondents. The conduct of the Selection Board in inviting all the candidates who scored 50% raw marks to take the subsequent stage of selection, clearly reflects that the Selection Board was not clear whether to apply 50% marks or 50% percentile score for determining the eligibility of the candidates to qualify for the subsequent stage of selection. The petitioners herein obtained 50% marks and were invited to participate in the selection process. Even taking the case of the respondents that the notification did provide that the normalised percentile score would determine the eligibility criteria which we do not find on reading the notification. Then in that event, as held by us, the Selection Board would exceed its power and authority conferred under the Recruitment Rules, encroaching upon the domain of the rule making authority by amending/rewriting the mandatory prescription of minimum 50% marks. To that extend the notification would be in teeth of the statutory provision [Rule 15(b)] and would have to be struck down. In our opinion the notifications of the Selection Board are in consonance with Recruitment Rules.

88. On reading Sub-clause (b) and (e) of Rule 15 the word "marks" used therein have different connotation. The phrase "failing to obtain 50% marks' employed by the rule making authority in Sub-clause (b) prescribes the eligibility criterion which is mandatory qualification. In other words, a candidate failing to obtain the prescribed eligibility marks gets excluded from the recruitment process automatically. Whereas, the phrase "marks obtained by each candidates" employed in Sub-clause (e) of Rule 15, would not mean and include the marks obtained by the candidate for determining his/her eligibility, but would take within its fold the 'normalized score' for preparing the select list in order of merit after equalising the marks obtained by the candidates in Sub-clause (b). Sub-clause (b) refers to marks prescribed by the rule for eligibility purpose, whereas, Sub-clause (e) refers to marks/score obtained upon evaluation upon normalization of the marks referred to in Sub-clause (b) for the purpose of making the select list in the order of merit. Such an approach in drawing the select list in an examination held in multiple shifts would be just and fair. The Selection Board is within its powers in adopting a method of evaluation of written examination papers in the backdrop of multiple shifts/different paper exams to arrive at a process to prepare the select list in order of merit.

89. The submission of Sri Shashi Nandan, learned senior counsel that the Selection Board has not been conferred power to equalize the raw marks obtained by the candidates in the written examination at any stage of recruitment process, cannot be accepted. On harmonious interpretation of Sub-clause (b) read with Sub-clause (e) it is unambiguous and clear that Selection Board has been vested with the power and authority to determine the procedure of written examination which would include the process of evaluation. After evaluation of the papers, the Selection Board has to prepare the select list in order of merit. The marks, in a multiple shift examination, would include the

"normalized score' obtained by applying the method of scaling, be it moderation or normalization, as the case may be, in order to draw the inter-se merit of the candidates. In case the submission of the learned Senior Counsel is accepted it would render Sub-clause (e) and the power of the Selection Board in determining the procedure of written examination nugatory. The Selection Board, however, is not vested to determine the eligibility of a candidate which has been prescribed by the rule making authority i.e. 50% marks. Any alteration or substitution of 50% marks would be negation of Sub-clause (b) of Rule 15.

90. **In Sajnay Singh2,** the Court was of the view that the expression "marks awarded" or "marks obtained in written examination" employed in the rule would not only refer to the actual marks awarded by the examiner. The process of evaluation does not end on marks being awarded by an examiner but would imply that the marks awarded by the examiner can be altered by moderation. Para '20' is extracted:

"20. We cannot accept the contention of the petitioner that the words "marks awarded" or "marks obtained in the written papers" refers only to the actual marks awarded by the examiner. 'Valuation' is a process which does not end on marks being awarded by an Examiner. Award of marks by the Examiner is only one stage of the process of valuation. ***Moderation when employed by the examining authority, becomes part of the process of valuation and the marks awarded on moderation become the final marks of the candidate. In fact Rule 20(3) specifically refers to the 'marks finally awarded to each candidate*** *in the written examination', thereby implying that the marks awarded by the examiner can be altered by moderation."*

(emphasis supplied)

91. Once the written examination part is fulfilled, the Examining Body/ Selection Board has to formulate a procedure by which the answer papers are to be evaluated in order to ascertain the marks scored by the respective candidates. The expression 'evaluation' takes within its fold the manner in which the evaluation is to be made, to equalize the merits of the candidates in the written examination. Paragraph '37.5' of **Sanjay Singh2** is extracted:

"37.5. The expression 'evaluation' would, therefore, take into its fold the minimum marks to be scored, the manner in which the evaluation is to be made and in the event of any requirement, to equalize the merits of the candidate in the written examination and follow any appropriate procedure in consonance with law, in order to ultimately arrive at a fair process by which the candidate can be called for interview, based on the evaluation of the marks in the written examination."

92. The Selection Board, in the instant case, however, erred in applying the normalized score in violation of the mandatory rule [Rule 15(b)] to determine the eligibility of a candidate to take the subsequent round of selection, instead of confining the normalized score to determine the inter-se merit of the candidates.

93. The members of the Selection Board or for that matter, any other

Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the rules made under Article 309. It is basically the function of the rule making authority to provide the qualification for selection. In the instant case, the rule making authority conferred limited power upon the Selection Board to determine the "procedure of written examination', which would include evaluation of papers and to draw the select list in order to merit. The Selection Board has not been conferred power by the rule making authority to prescribe the criteria/eligibility (minimum marks) for selection, rather, the procedure of selection has been codified by the rule making authority which could not have been breached/altered by the Selection Board while exercising its limited power of determining the procedure of written examination.

94. In **Umesh Chandra Shukla23,** the challenge was with regard to the validity of the candidates relating to the competitive examination held by the High Court of Delhi for the purpose of recruiting candidates for the posts in the Delhi Judicial Service. The Delhi Judicial Service Rules, 1970, *inter alia*, mandated that only such candidates would be called for viva voce who have obtained 50% in each written paper and 60 per cent in the aggregate except in the case of candidates belonging to the Scheduled Castes/Tribes, in whose case the qualifying marks would be 40% in each written paper and 50% in the aggregate.

95. The issue before the Supreme Court was whether it was open to the High Court to include in the list prepared under the rules names of the candidates who had not secured the minimum marks prescribed in the written examination for being eligible to appear in the viva-voce test. In other words, the Supreme Court was considering as to whether the High Court, having regard to the rules, had the power to add two marks to the marks obtained in each paper by way of moderation to make a candidate eligible. The Court in para-'13' held as follows:

"13. The question for decision is whether such a resolution can be passed by the High Court which is entrusted with the duty of conducting the examination. The High Court had not found any defect in the question papers or any irregularities in the valuation of the answer books. It may be that some candidates had obtained high marks in some papers and by reason of their not obtaining the required marks in the other papers or 60% and above in the aggregate they may not have become qualified for the viva voce test. ***In our opinion this alone would not be sufficient to add any marks by way of moderation. It is relevant to note the mandatory character of clause (6) in the Appendix to the Rules which says only such candidates will be called for viva voce who have obtained 50% marks in each written paper and 60% in the aggregate..... Addition of any marks by way of moderation to the marks obtained in any written paper or to the aggregate of the marks in order to make a candidate eligible to appear in the viva voce test would indirectly amount to an amendment of clause (6) of the Appendix."***

(emphasis supplied)

96. Further, the Court held that moderation had an adverse effect on the

candidates who otherwise scored the required qualifying marks in the examination but were declared ineligible for viva-voce test.

"The candidates who appear at the examination under the Delhi Judicial Service Rules acquire a right immediately after their names are included in the list prepared under rule 16 of the Rules which limits the scope of competition and that right cannot be defeated by enlarging the said list by inclusion of certain other candidates who were otherwise ineligible, by adding extra marks by way of moderation.

....

Exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of the principle of equality and may lead to arbitrariness. The cases pointed out by the High Court are no doubt hard cases, but hard cases cannot be allowed to make bad law. In the circumstances, we lean in favour of a strict construction of the Rules and hold that the High Court had no such power under the Rules. We are of the opinion that the list prepared by the High Court after adding the moderation marks is liable to be struck down." (para 13)

97. The decision was followed in **Durgacharan Misra v. State of Orrisa and others34** and the limitation of the Selection Committee was pointed out that it had no jurisdiction to prescribe the "minimum marks which a candidate had to secure at the viva-voce test." The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication.

98. In **Ramachandra lyer and others vs. Union of India and others35,** Supreme Court observed that the Selection Board had no power to add to the required qualification. The relevant para is extracted:

"By necessary inference, there was no such power in the ASRB to add to the required qualifications. If such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm."

99. It may be pointed out that rule making function under Article 309 is legislative and not executive as was laid down by the Supreme Court in ***B.S. Yadav and others v. State of Haryana and others36.*** For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection.

100. Similarly, in **Umesh Chandra Shukla23,** it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules.

101. The precedents cited hereinabove have been noticed and followed by the Supreme Court in Krushna Chandra Sahu24

102. In view thereof, it follows that the power to make rules regulating the conditions of service of persons appointed or seeking appointment on government posts is available to the Governor of the State under the Proviso to Article 309 or

under a statute and it is in exercise of this power the Recruitment Rules, was made. Where the statutory Rules, in a given case, is not made either by the Parliament or the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government, the Central Government under Article 73 and the State Government under Article 162, to issue executive instructions. Further, if the Rules have been made but are silent on any subject or point in issue, the omission can be supplied and the rules can be supplemented by executive instructions. But where the rules prescribe the procedure of selection by categorically providing the qualification and the eligibility criteria then in that event the examining Selection Board lacks inherent jurisdiction to entrench upon the eligibility criteria. (See: **Sant Ram v. State of Rajasthan37.)**

103. We are also fortified in our conclusion while tracing the evolution of the Rules pertaining to the recruitment of Sub Inspector. The Recruitment Rules came to be amended on 3 December 2015. The selections have been made pursuant to the amended Rules. Sub clause (b) of Rule 15 provides that "candidates failing to obtain 50% marks in each of the subject shall not be eligible for recruitment". The same phrase was employed in Sub-clause (e) of Rule 15 that came to be amended. In other words, eligibility criteria was not altered or changed by rule making authority. The only change brought about by the amendment was that the procedure for written examination was entrusted upon the Selection Board exclusively by omitting Appendix-3 which prescribed the procedure of written examination. We are informed that the superseded Rule (prior to enactment of Recruitment Rules) governing the appointment and selection of Sub-Inspector, viz., "The Uttar Pradesh Sub-Inspector And Inspector (Civil Police) Service Rules, 2008", Rule 15(f) provided that the candidate "who fails to obtain minimum 50% marks' in each subject shall not be eligible for recruitment. It is, thus, evident that the rule making authority was fully conscious that the candidates are required to score minimum marks (50%), failing which, they shall not be eligible for recruitment. The eligibility criteria was retained while promulgating Recruitment Rules. The Selection Board was not conferred the power and jurisdiction by the rule making authority to alter or amend the eligibility criteria. The Selection Board by the amended rules was vested with exclusive, but limited power to determine the procedure of the written examination, which includes evaluation of papers by adopting method of scaling to equalise the different levels of papers in examination held in multiple shifts and, accordingly, draw the select list. We accordingly find merit in the contention of the petitioners that Selection Board exceeded its authority by disqualifying the petitioners.

104. Now coming to the ancillary issue whether the Selection Board was justified in scaling the raw marks. Whether percentile and percentage are the same concepts. The scope of judicial review of the normalisation method adopted by the Selection Board.

105. Where the number of candidates taking the examinations are limited, it is to be assumed that there will be uniformity in the evaluation, but where large number of candidates take the

examination, in different shifts and in different papers, it therefore, becomes necessary to evaluate the question papers by evolving a procedure to ensure uniformity in the level of question papers. The examining bodies have been adopting different methods, and most examining bodies/Selection Boards appear to take the view that moderation is the appropriate method to bring about uniformity in evaluation where several examiners manually evaluate the answer scripts of descriptive (conventional) type question papers in regard to same subjects. Scaling is resorted to where a common merit list has to be prepared in regard to candidates who have taken examination in different subjects, in pursuance of an option given to them. Scaling places the scores from different tests or test forms on to a common scale. Normalization is adopted to equalize objective question papers held in different shifts. There are, thus, different methods of statistical scoring. Standard Score method, Linear Standard Score method, Normalized Equi-Percentile method are some of the recognized methods for scaling.

106. The concept of normalisation of marks was introduced to equalise the level of difficulty of question paper of government exams, conducted in various shifts, in different papers. For example, a student who has appeared in first session or shift of the written exam might have scored low marks. However, the same student would have scored more or even higher marks if he had appeared in any of the latter shifts of the same exam. To eradicate this discrepancy the exam conducting Selection Boards have introduced the concept of normalisation of marks in exams to equalize the different levels of objective question papers held in multishifts in same subjects, based on common syllabus.

107. Normalisation of marks, therefore, means increasing and/or decreasing the marks obtained by students in different timing sessions (shifts) to a certain number. In statistics, the term normalization refers to the scaling down of the data set such that the normalized data falls in the range between 0 and 1. Such normalization techniques help in comparing corresponding normalized values from two or more different data sets in a way that it eliminates the effects of the variation in the scale of the data sets i.e. a data set with large values can be easily compared with a data set of smaller values. The normalized score/percentile is obtained by applying a formula.

108. Percentiles, however, should not be confused with percentage. The latter is used to express fractions of a whole, while percentiles are the values below which a certain percentage of the data in a data set is found. In practical terms, there is a significant difference between the two. The percentage score reflects how well the student did in the exam itself, the percentile score reflects how well he did in comparison to other students. Percentile rank would, therefore, mean percentage of scores that fall at or below a given score. Usually written to the nearest whole percent and are divided into 100 equally sized groups. The lowest score is at the first percentile and the highest score is at the 99th percentile.

109. It is relevant to place on record that none of the aggrieved candidates have made any allegation of *mala fides* or lack of *bona fides*, as against the Selection

Board or its members or for that matter in the manner in which subsequent stages of selection were held by the Committee or with regard to the computation of normalized score arrived at by applying the Standardized Equi-Percentile method. In the absence of challenge to the normalization method and the scores obtained by the Selection Board in scaling the marks of the candidates scored in written examination, we take it that the normalisation formula and the normalized percentile score worked out by the Selection Board is just and fair.

110. Shri Tarun Agrawal, learned counsel for the petitioners on the strength of hypothetical statistics/data attempted to persuade the Court to examine whether the normalisation adopted by the Selection Board would to lead to absurd results. The learned counsels for the respondents on the other hand attempted to show on hypothetical data that the method adopted by the Selection Board was just and fair. On specific query, they, however, submit that hard (actual) data pertaining to the written examination has not been relied upon by either of the parties nor it is available on the record. In absence of pleadings and hard data to that effect we decline to examine the methodology of evaluation on hypothetical statistical data. Academic questions based on hypothesis cannot be gone into to determine the issue *inter se* parties.

111. We would, however, examine briefly the precedents where the Court interfered or declined to interfere with results of written examination adopting methods to equalise the raw marks.

112. In **Sanjay Singh2,** the Supreme Court was considering the validity of the selections held for appointment in the U.P. Judicial Service on the basis of a competitive examination in which the Rules prescribed five papers, all of which were compulsory for all the candidates. The U.P. Public Service Commission had scaled the marks awarded to the candidates by following the scaling method. The Court, on examining the Judicial Service Rules which governed the selection did not permit scaling down the marks obtained by the candidates. A further question with regard to the correctness of the adoption of scaling method to an examination where the papers were compulsory and common to all the candidates was also considered. In doing so the Court observed as follows:-

"24.The moderation procedure referred to in the earlier para will solve only the problem of examiner variability, where the examiners are many, but valuation of answer-scripts is in respect of a single subject. Moderation is no answer where the problem is to find inter se merit across several subjects, that is, where candidates take examination in different subjects. To solve the problem of inter se merit across different subjects, statistical experts have evolved a method known as scaling, that is, creation of scaled score. Scaling places the scores from different tests or test forms on to a common scale. There are different methods of statistical scoring. Standard score method, linear standard score method, normalized equipercentile method are some of the recognized methods for scaling."

113. It was furthermore observed:

"25...Scaling process, whereby raw marks in different subjects are adjusted to a common scale, is a

recognized method of ensuring uniformity inter se among the candidates who have taken examinations in different subjects, as, for example, the Civil Services Examination."

114. The Court came to the conclusion that the U.P. Public Service Commission had not ensured nor considered the preconditions of the scaling method and the consequential effects in the declaration of the results which were found to be unacceptable. The Supreme Court held that the adoption of the scaling method in the given facts had resulted in treating unequals as equal.

115. In **Sunil Kumar10,** the question before the Supreme Court was whether **Sanjay Singh2** laid down any principle or direction regarding the methodology that has to be adopted by the Commission while assessing the answer scripts of the candidates in a public examination and specially whether any such principle or direction has been laid down governing public examinations involving different subjects in which the candidates are to be tested. Closely connected with the aforesaid question was the extent of the power of judicial review to scrutinize the decisions taken by another constitutional authority i.e. the Public Service Commission in the facts of the case.

116. The appellants therein had contended that **Sanjay Singh2** categorically held that the system of moderation is applicable only to cases where the candidates take a common examination i.e. where there are no optional subjects and all the papers in which the candidates appear are the same. In a situation where the subjects are different, according to the appellants, it has been held in Sanjay Singh2 that it is the scaling method has to be applied and in such situations the system of moderation would not be relevant. The Court rejected the contention of the appellants that in **Sanjay Singh2** there was a declaration of law of precedent that in an examination where the papers are common, the system of moderation must be applied and to an examination when the papers and subjects are different, scaling is the only available option. Paragraph 19 is extracted:

"19. The entirety of the discussion and conclusions in Sanjay Singh (supra) was with regard to the question of the suitability of the scaling system to an examination where the question papers were compulsory and common to all candidates. The deficiencies and shortcomings of the scaling method as pointed out and extracted above were in the above context. But did Sanjay Singh (supra) lay down any binding and inflexible requirement of law with regard to adoption of the scaling method to an examination where the candidates are tested in different subjects as in the present examination? Having regard to the context in which the conclusions were reached and opinions were expressed by the Court it is difficult to understand as to how this Court in Sanjay Singh (supra) could be understood to have laid down any binding principle of law or directions or even guidelines with regard to holding of examinations; evaluation of papers and declaration of results by the Commission. ***What was held, in our view, was that scaling is a method which was generally unsuitable to be adopted for evaluation of answer papers of subjects common to***

all candidates and that the application of the said method to the examination in question had resulted in unacceptable results. Sanjay Singh (supra) did not decide that to such an examination i.e. where the papers are common the system of moderation must be applied and to an examination where the papers/subjects are different, scaling is the only available option. We are unable to find any declaration of law or precedent or principle in Sanjay Singh (supra) to the above effect as has been canvassed before us on behalf of the appellants. The decision, therefore, has to be understood to be confined to the facts of the case, rendered upon a consideration of the relevant Service Rules prescribing a particular syllabus.

(emphasis supplied)

117. The Supreme Court further observed that the requirement of adoption of moderation, scaling or normalization by their very nature should be left to the expert bodies in the field, including, Public Service Commission and the scope of judicial review is limited to instances of arbitrary or mala fide exercise of power or being against statutory provision.

"20. We cannot understand the law to be imposing the requirement of adoption of moderation to a particular kind of examination and scaling to others. Both are, at best, opinions, exercise of which requires an indepth consideration of questions that are more suitable for the experts in the field. *Holding of public examinations involving wide and varied subjects/disciplines is a complex task which defies an instant solution by adoption of any singular process or by a strait jacket formula. Not only examiner variations and variation in award of marks in different subjects are issues to be answered, there are several other questions that also may require to be dealt with. Variation in the strictness of the questions set in a multi-disciplinary examination format is one such fine issue that was coincidentally noticed in Sanjay Singh (supra). A conscious choice of a discipline or a subject by a candidate at the time of his entry to the University thereby restricting his choice of papers in a public examination; the standards of inter subject evaluation of answer papers and issuance of appropriate directions to evaluators in different subjects are all relevant areas of consideration.* ***All such questions and, may be, several others not identified herein are required to be considered, which questions, by their very nature should be left to the expert bodies in the field, including, the Public Service Commissions. The fact that such bodies including the Commissions have erred or have acted in less than a responsible manner in the past cannot be a reason for a free exercise of the judicial power which by its very nature will have to be understood to be, normally, limited to instances of arbitrary or malafide exercise of power."***

(emphasis supplied)

118. The Supreme Court declined to interfere with the results and the decision of the Bihar Public Service Commission in adopting the scaling method to the examination.

119. It therefore, follows that the appropriate method to bring about uniformity in evaluation is left to the examining authorities. The method adopted by the examining authority/Selection Board is not subject to judicial review until it is shown that the

exercise of the authority was mala fide, violative of the statutory provision or the method had resulted in absurd results rendering the entire selection manifestly arbitrary. In the facts of the instant case no allegation of mala fide has been made against the Selection Board or its members or with regard to the procedure of selection. It has not been shown by either of the parties based on hard statistics that normalisation had resulted in manifest, arbitrary or fair result.

120. The learned Additional Advocate General finally has submitted that it is well within the domain of the Selection Board under Sub-clause (b) of Rule 15 of the Recruitment Rules, to determine the procedure for written examination. It cannot be objected by the petitioners after having appeared in the examination knowing fully well about the procedure of the written examination notified by the Selection Board on 28 June 2017. In support of his above contention, reliance has been placed on the Supreme Court judgment in ***D. Sarojakumari vs. R. Helen Thilakom and others38.***

121. In reply to the contention, learned counsels for the petitioners would urge that when a candidate appears at an examination without objection and is subsequently found to be unsuccessful, a challenge to the process is precluded, but in the facts of the present case, the petitioners are not assailing the process of selection nor the notification of the Selection Board prescribing the procedure, but are respectfully praying that the process of selection mandatorily prescribed under the Recruitment Rules, be followed and applied strictly. It is further submitted that there may be no estoppel against the statute or Rules and if the process of selection is in derogation of the Rules, the same could have been assailed by the candidates who have been declared unsuccessful. The petitioners, herein, qualified the written examination and all subsequent stages of selection, but have been excluded from the select list. Reliance has been placed on the ***Raj Kumar and others vs. Shakti Raj And others39,*** referring para-16 which reads thus:-

"16. Yet another circumstance is that the Government had not taken out the posts from the purview of the Board, but after the examinations were conducted under the 1955 Rule and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the posts were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the candidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in Madan Lal vs. State of J & K [(1995) 3 SCC 486] and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of Selection as being illegal; he is estopped to question the correctness of the selection. ***But in this case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules & so also in the method of selection and exercise of the power in taking out from the purview of the Selection Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case. Thus, we consider***

that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action take by the Government are not correct in law."

(emphasis supplied)

122. On specific query, learned Additional Advocate General submits that all the petitioners herein who obtained 50% minimum marks (qualifying marks) were allowed to participate in the subsequent stages of selection i.e. physical standard test, document verification and physical efficiency test. It is, therefore, urged that the Selection Board would not be required to undertake any fresh exercise of selection/recrutiment in preparation of the select list in order to merit.

123. Having due regard to the facts and circumstances of the case and the provisions mandated by the Recruitment Rules, the writ petition is **allowed** by passing the following orders:

i) the select list dated 28 February, 2019 is set aside and quashed;

ii) the candidates having failed to obtain 50% marks (raw marks) in each subject are declared ineligible for recruitment/selection;

iii) the Selection Board shall prepare the select list in order to merit on normalized score, derived by Standardized Equi-Percentile Method;

iv) Selection Board to comply the order within six weeks from the date of filing of certified copy of this order and the selected candidates shall be sent for training.

124. No order as to costs.

(2019)10ILR A 2054

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 46317 of 2005

Mahesh Chand & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri P.K. Singh, Sri A.K. Dixit, Sri A. Kumar Singh, Sri N.K. Maurya, Sri V.K. Singh.

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

A. Employees Services Rules, 1985 - Rules 16, 19-When the procedure undertaken for recruitment was not correct- no illegality whereby financial approval was not granted -Petitioners have sought a writ of certiorari for quashing order dated 19.05.2005, passed by District Inspector of Schools, whereby financial approval to the appointment of petitioners was declined. Dismissing this petition, the High Court held - The procedure undertaken for recruitment was defective - No record to show how the Selection Committee was formed. Provisions of Rules of 1985 were not strictly complied with. (Para 10 & 12)

Writ petition challenges order dated 05.05.2005, passed by the District Inspector of Schools, Mainpuri.

Writ Petition dismissed (E-4)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Petitioners have approached this Court by way of filing present writ petition seeking a writ of certiorari for quashing the order dated 19.5.2005 passed by the District Inspector of

Schools, Mainpuri, whereby financial approval to the appointment of the petitioners on Class IV posts in the Government Girls Inter College Mainpuri was declined.

2. A co-ordinate Bench of this Court, vide order dated 18.4.2014, allowed the present writ petition and set aside the impugned order dated 19.5.2005, with the direction to respondent nos.2 and 3 to pay the salary and arrears of the petitioners, in accordance with law.

3. State of U.P. being aggrieved, preferred Special Appeal Defective No.177 of 2015 before the Division Bench of this Court and the said appeal was allowed, vide order dated 28.4.2017 wherein the order dated 18.4.2014 passed by the co-ordinate Bench of this Court was set aside and writ petition was restored to decide afresh in the light of the observations made in the order. The order dated 28.4.2017 is mentioned hereinafter :-

"Heard learned counsel for the parties.

Cause shown for the delay of 277 days in filing of the instant appeal is to the satisfaction of the Court.

Delay is condoned. The delay condonation application stands allowed.

Heard learned counsel for the parties.

The judgement and order under appeal is liable to be set aside on a short ground i.e. the learned Single Judge has not examined as to what was the constitution of the Selection Committee, which had recommended the petitioners for appointment on Class-IV posts in Government Girls Inter College, Mainpuri and whether procedure prescribed has been followed or not. Selection has to be in conformity with the provision of 'Group D' Employees Service (U.P.) Rules, 1985.

It has also to be ascertained as to whether there has been strict compliance of the 'Group D' Employees Service Rules, 1985, both in the matter of publication of advertisement, invitation for calling of name from employment exchange constitution of selection committee and the procedure of selection thereto. Since the aforesaid aspect of the matter has escaped the attention of learned Single Judge the judgement and order dated 18.4.2014 is hereby set aside.

Mere deposit of the money with the advertisers cannot lead to a presumption that advertisement infact had been published in the news paper. The petitioner had obliged to produce the news paper in support of his contention that there has been due advertisement. We further find that learned Single Judge has also not adverted to the issue of ban imposed on Class-IV appointment, which aspect in our opinion is also crucial before any mandamus can be issued for payment of salary mere information of the vacancies / advertisement to the higher authorities will not lead to presume that the ban imposed by the State Government has been diluted.

For all the aforesaid reasons, judgement and order dated 18.4.2014 is hereby set aside. The writ petition is restored to its original number. Let the same be decided in light of the observation made hereinabove .

With the aforesaid observations, the appeal is allowed."

For all the aforesaid reasons, judgement and order dated 18.4.2014 is hereby set aside. The writ petition is

restored to its original number. Let the same be decided in light of the observation made hereinabove .

With the aforesaid observations, the appeal is allowed."

4. In this background, this writ petition is now being heard. On the basis of order dated 28.4.2017, passed by a Division Bench, following are the issues for consideration of the Court :-

(a) Whether strict compliance of procedure prescribed in Section 19 of the 'Group D' Employees Services (U.P.) Rules, 1985 *(hereinafter referred as 'the Rules of 1985')* such as valid constitution of the Selection Committee, proper publication of advertisement, invitation for calling names from employment exchange etc. for appointment of petitioners on Class IV were followed or not ?

(b) What is the effect of ban imposed by State of U.P. on Class IV appointment under Government Order dated 3.11.1997 ?

5. It has not been disputed by learned counsel appearing on behalf of rival parties that appointment of Class IV employees in respondent college are governed by 'Group D' Employees Services (U.P.) Rules, 1985 *(hereinafter referred as 'Rules of 1985')*. For the purpose of proper adjudication of present writ petition, it is essential to quote Rule 19 of the Rules of 1985, which prescribed 'Procedure for Selection' :-

"19. Procedure for Selection.- (1) The appointing authority shall determine the number of vacancies to be filled during the course of the year as also the number of the vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories. The vacancies shall be notified to the Employment Exchange. The appointing authority may also invite application directly from the persons who have their names registered in the Employment Exchange. For this purpose, the appointing authority shall issue an advertisement in a local daily newspaper besides pasting the notice for the same on the notice board. All such applications shall be placed before the Selection Committee.

(2) When the names of the General candidates and Reserve Candidates (for whom vacancies are required to be reserved under the orders of the Government) have been received by the Selection Committee it shall inter view and select the candidate for the various posts.

(3) In making selection the Selection Committee shall give weightage to the retrenched employees awarding marks in the following manner:

(i) For the first complete year: 5 marks

(ii) For the next and every completed year of service: 5 marks

Provided that the maximum marks awarded to a retrenched employee under this sub-rule shall not exceed : 15 marks

(4) The number of the candidates to be selected will be larger (but not larger by more than 25 per cent) than the number of vacancies for which the selection has been made. The names in the select list shall be arranged according to the marks awarded at the interview."

6. The procedure prescribed in Rule 19 of the Rules of 1985 could be summarized as follows :-

(i) Determination of vacancies by the appointment authority and also number of vacancies to be reserved for the candidates belonging to the Schedule Caste and Schedule Tribes.

(ii) Determined vacancies shall be notified to the Employment Exchange.

(iii) Appointing Authority may also invite applications directly from the persons who are registered in the Employment Exchange.

(iv) Appointing Authority shall issue an advertisement in a local daily newspaper and also paste notice of the same on the notice board.

(v) All the applications received shall be placed before Selection Committee.

(vi) Selection Committee shall take interview and select the candidates and prepare select list according to marks awarded in the interview for making selection. The Selection Committee shall give weightage to the retrenched employees by awarding marks as prescribed in Rule 19(3).

7. Constitution of Selection Committee is prescribed in Rule 16 of the Rules of 1985, which is quoted hereinafter :-

*"**16. Constitution of Selection Committee.-** For the purpose of recruitment to any post, there shall be constituted a Selection Committee as follows:*

1.Appointing Authority;

2.An officer belonging to Scheduled Castes/Scheduled Tribes, nominated by the District Magistrate if the appointing authority does not belong to Scheduled Castes/Scheduled Tribes. If the appointing authority belongs to Scheduled Castes/Scheduled Tribes, an officer other than belonging to Scheduled Castes/Scheduled Tribes, Minority Community and Backward Class to be nominated by the District Magistrate;

3.Two officers nominated by the appointing authority, one or whom shall be an officer belonging to Minority Community and the other to Backward Class. If such suitable officers are not available in his department or organisation, such officers shall on the request of the appointing authority, be nominated by the District Magistrate and on his failure to do so, by reason of non-availability of suitable officer, such officers shall be nominated by the Divisional Commissioner."

8. Constitution of Selection Committee could be summarized as follows :-

a. Appointing Authority.

b. An officer belonging to S.C./S.T. nominated by Magistrate.

c. Two Officers nominated by Appointing Authority, one from Minority Community and other from Backward Class from the department in organisation.

d. Some provisions are mentioned, in case, members as mentioned above are not available.

9. From the record available, following procedure was adopted for the selection of the petitioners :-

(i) Advertisement for the post of Class IV, (one for OBC and other for B.C.) was published on 27.3.2001 and 25.3.2001 in a newspaper namely 'Danik Sach Kya Hai' and 'Danik Jantantra' respectively, which is on record of the writ petition.

(ii) Vacancies were not notified to the Employment Exchange, however, selected candidates (petitioners) were registered at Employment Exchange.

(iii) No record or detail of Constitution of Selection Committee is available on record.

(iv) 7 candidates appeared for interview.

(v) A letter dated 8.4.2001 was issued under the signature of Principal, Government Girls' Inter College, Mainpuri, Principal Government Girls' Inter College, Karhet Mainupri and Assistant Basic Shiksha Adhikari, Mainpuri (member of Selection Committee) declaring the petitioners as selected as Class IV employee in pursuance of interview.

(vi) Appointment letters were issued to the petitioners and the same has been placed on record to show the numbers given by the Selection Committee to the candidates.

10. From the above, it is clear that procedure adopted was defective so much as no record is submitted to show how the Selection Committee was formed as per Rule 16 of the Rule of 1985. Only document to show composition of Selection Committee is a letter communicating about selection of petitioners which is signed by three persons, however, there is no nomination on behalf of District Magistrate regarding persons from S.C./S.T., Minority and B.C. Commonly as prescribed in Rule 16 of the Rules of 1985. Vacancies were not notified from Employment Exchange, therefore, the provisions of the Rules of 1985 were not strictly complied with for the selection process under taken for appointment of petitioners.

11. Next issue which require consideration is regarding ban imposed on recruitment by Government Order dated 3.11.1997, the said G.O. had imposed ban on fresh recruitment, however, by subsequent G.O. dated 6.9.2000, said ban was removed sofar as appointment on the posts which are reserved for Schedule Castes/Schedule Tribes, specifically in Class III and Class IV. Therefore, the recruitment of petitioners was not barred according to G.O. dated 3.11.1997 as petitioners were appointed in the year 2001 when subsequent G.O. dated 6.9.2000 has lifted the ban.

12. As discussed above, the procedure undertaken for the recruitment of petitioners was not correct and there was no strict compliance of provisions of the Rules of 1985. The entire impugned selection is irregular, and therefore, there is no illegality in the impugned order whereby financial approval was not granted. Accordingly, the writ petition lacks merit, hence dismissed.

(2019)10ILR A 2058

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ A No. 68295 of 2009

Shri Satish Chandra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri A.B. Singh, Sri Anand Prakash Pandey, Sri Manish Singh.

Counsel for the Respondents:
C.S.C.

A. U.P. Intermediate Education Act, 1921 - Sections 2(a), 2(b), 2(d), 7(3), 7(4), U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 - Sections 2(b), U.P. Board of Basic Education Act, 1972-Sections 2(1)(d-1), 2(1)(d-2), 2(b), 2(d), 3, 4, 19, U.P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules, 1975 - Rule 2(c), 2(e), 3, 4, 5, 6, 7, 8, 9, 10, U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978 - Section 2(b), 2(d), 2(e), 2(2)(e-e), 2(f), 2(j), 10, U.P. State Universities Act, 1973 - Section 37(2) - Statute of Sampurnanand Sanskrit University-Statute 12.01 and U.P. Board of Sanskrit Education, 2000 -Sections 2(e), 2(f), 3, 9, 13 - Mere recognition by the Board does not entitle the institution to seek maintenance grant from the State.

B. Whether the primary institution in question can be said to be attached institution or integral part of the institution which is imparting Sanskrit Education from "Prathama" to "Acharya" (Junior High Schools to Post Graduate Level) and that whether recognition by District Basic Education Officer for running Classes I to V by itself put obligation on the State to pay to the teachers of the primary institution - Answering the questions in negative and dismissing this petition, the High Court held - As far as the primary institution (Class I to V), neither there was any provision in the Statute of the erstwhile University (Varanasi Sanskrit Vidyalaya Act, 1956) or in the Sampurnanand Sanskrit University first Statute, 1978 to regulate the same. There was, thus, no question of affiliation with the said Universities. Mere permission by the University to run classes I to V, therefore, is of no relevance. (Para 28)

C. After referring to all the relevant statutes, it was observed that at the best, the part of the institution- in-question running classes I to V can be said to be recognized by the Board of Basic Education pursuant to the order dated 10.01.1973. Maintenance grant provided to the institution in question for imparting Sanskrit education from "Prathama" (Junior High School) to "Shashtri" (Graduation) would not ipso-facto extend the said grant to the primary institution (Classes I to V), treating it as an integral part of the Sanskrit Mahavidyalaya. (Para 29)

D. State is under no obligation to provide maintenance grant to each private institution imparting primary education or free education to children from age (6 to 14 years). At the same time, it is necessary for a primary institution to seek recognition by the Board of Basic Education- Mere recognition by the Board, however, does not entitle the institution to seek maintenance grant from the State- Further, even in a recognized institution, not receiving maintenance grant, the appointment of teachers has to be made with the approval of the Basic Education Officer.(Para 33)

E. The recognition granted on 10.01.1973 is a permanent valid recognition within the meaning of the Basic Education Act, 1972 read with the Rules, 1975. The primary section of the institution in question is, thus, to be treated as a separate entity being a "recognized school" within the meaning of Rules, 1975 and shall be governed by the Act 1972 read with Rules 1975 as a "Junior Basic School" within the meaning of Section 2(1)(d-1) of the Basic Education Act, 1972 for all other relevant purposes. (Para 36)

Writ petition challenges order dated 21.08.2009, passed by UP Shiksha Nideshak (Sanskrit) Shiksha Nideshalya U.P. at Lucknow.

Writ Petition dismissed (E-4)

Precedent referred: -

1. Unni Krishnan J.P. & ors. Vs St. of A.P. & ors., (1993) 1 SCC 645 (Para 31, 32)

2. T.M.A. Pai Foundation & ors. Vs St. of Karnataka & ors., (2002) 8 SCC 481 (Para 32)

Precedent distinguished: -

1. St. of U.P. & ors. Vs Pawan Kumar Dwivedi & ors., (2014) 9 SCC 692 (Para 29)

2. Ramesh Upadhaya Vs St. of U.P. & ors., 1193 AWC 847 (Para 2, 4, 6, 34)

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri A.B.Singh, learned counsel for the petitioners and Sri Vishal Tandon, learned brief holder appearing on behalf of the State.

2. The petitioners (seven in number) claimed to be working as Assistant Teachers in the Primary School attached to Jhauwa Dharma Nagar Sanskrit Mahavidyalaya Shikriganj, Gorakhpur, seek to challenge the order dated 21.08.2009 passed by the respondent no.4 rejecting their claim for payment of salary from the State Exchequer in the light of the judgement of this Court in **Ramesh Upadhya Vs. State of U.P. & others** reported in 1193 AWC 847.

3. The facts in brief relevant to decide the controversy at hand are that the institution namely Jhauwa Dharma Nagar Sanskrit Mahavidyalaya Shikriganj, Gorakhpur is affiliated to the Sampurnanand Sanskrit University, Varanasi which imparts Sanskrit education. It is contended that the said institution is aided and recognized and the salary of teachers of the college is being paid from the State fund but the teachers of the attached primary school section are not getting their salary from the State Exchequer.

4. It is contended that the primary institution, attached to the Sanskrit Mahavidyalaya was duly recognized by the District Basic Education Officer, Gorakhpur vide letter dated 10.01.1973 and permission to run the primary classes (Classes I to V) was duly accorded by the Sampurnanand Sanskrit University. Both the letters of recognition and permission to run the classes are appended as Annexure no.'1' & '2' to the writ petition. It is contended that the Government order was issued in the year 1989 providing for payment of salary to the attached primary section of the Intermediate College but the teachers working in the Sanskrit institutions recognized and affiliated from Junior High School to the Post Graduate level were not being paid salary from the State exchequer. Pleading protection of doctrine of equality under Article 14 of the Constitution, few teachers of the primary section of a Sanskrit University approached this Court in **"Ramesh Upadhya" (Supra).** This Court had issued directions to the State-respondents to pay salary to the primary section teachers in the Sanskrit institution in the same line as has been done in the case of primary sections/ institution attached to the High School and Intermediate Colleges. The primary teachers were also held entitled to other consequential benefits like Group Insurance, General Provident fund, retiral benefits etc. as was being paid to the primary section teachers in the High School and Intermediate colleges. Submission is that only requirement was that the secondary or degree college/institution must be affiliated with the Sampurnanand Sanskrit University and the primary section should

be attached to the parent institution, which is aided and recognized. It is contended that the primary section of the institution-in-question is having the same status as that of the institution in **"Ramesh Upadhya" (supra),** the teachers working therein are, therefore, entitled to the same relief.

5. The petitioners claim to have been appointed in the year 1971-77, 1980-89 on different dates in the institution in question for teaching primary classes (class I to V). The submission is that they are entitled to salary and other allowances being teachers working in a recognized primary institution. Aggrieved by non-consideration of their claim, the petitioners filed a Writ Petition No.24514 of 2009 which was disposed of with the direction to consider their prayer and pass appropriate order. The Deputy Director (Sanskrit) for the Director of Education, U.P. Allahabad had passed the order dated 21.08.2009 rejecting their representation and hence this writ petition.

6. Learned counsel for the petitioner vehemently urged that with the permission being granted to the institution-in-question to run primary classes (from Class I to V) and the recognition given by the District Basic Education Officer, it cannot be said that the petitioners are not entitled to salary from the State fund. The plea taken by the Deputy Director that the decision in **"Ramesh Upadhyaya" (supra)** is not binding on him in as much as, in a similar matter a reference has been made to the Larger Bench of the Apex Court, is contemptuous. Mere reference to the Larger Bench of an issue would not take away the binding effect of the decision of a Court passed on merits.

7. As far as the merit of the order impugned, nothing much could be urged by learned counsel for the petitioners apart from the assertions noted herein above.

8. Learned Standing Counsel in rebuttal submits that mere recognition of the institution-in-question to run primary classes (I to V) would not bring any obligation on the State to pay salary of the teachers from the State fund, in much as, the institutions imparting Sanskrit education are not governed by the U.P. Basic Education Act' 1972 (in short Act' 1972). In order to regulate Sanskrit Education in the State of U.P. and for establishing the Board of Secondary Sanskrit Education, the U.P. Board of Secondary Sanskrit Education Act' 2000 (in short Act' 2000) had been enacted. The said Act provides for establishment of the U.P. Board of Secondary Sanskrit Education established under Section 3 thereof. The Government Sanskrit School and other institutions imparting Sanskrit Education upto Uttar Madhyama (Senior Secondary School) (Intermediate), affiliated to or recognized by the Government Sanskrit College, Varanasi or Sampurnanand Sanskrit University, Varanasi, running in the State of U.P. immediately before the commencement of the Act' 2000 are now deemed to have been recognized by the Board of Sanskrit Education from the date of commencement of the said Act and shall be governed by the provision of the Act' 2000. The examination of the persons pursuing "Prathama" (Junior High School), "Purva Madhyama" (High School) or "Uttar Madhyama" (Intermediate), courses of study in said institution are now being conducted by the Board of Sanskrit Education established under the Act' 2000.

9. Pertinent is to note that the institution-in-question is being run by a private committee of management which has not been impleaded in the present petition. Learned counsel for the petitioner was though permitted to implead Sampurnanand Sanskrit University as respondent no.5 in the array of parties, but there is no proper incorporation in the writ petition. No counter affidavit has been filed on behalf of Sampurnanand Sanskrit University. The Board of Sanskrit Education has not been impleaded as respondent though the District Inspector of School, Inspector of Sanskrit Pathshala has been impleded as respondent no.3.

10. The question before this Court is as to whether the primary institution in question can be said to be attached institution or integral part of the institution which is imparting Sanskrit Education from "Prathama" to "Acharya" (Junior High Schools to Post Graduate Level) and that whether recognition by the District Basic Education Officer for running Classes I to V by itself put obligation on the State to pay to the teachers of the primary institution.

11. To appreciate the said controversy, it would be apt to go through the relevant provisions of a few statutory enactments and the rules framed by the Government from time to time. In 1921, the U.P. Intermediate Education Act' 1921 (in short Act' 1921) was enacted to establish the Board of High School and Intermediate Education, which took place of the Allahabad University in regulating and supervising the System of High School and Intermediate Education in U.P. and prescribed courses therefor. Section 2 (a) of the Act' 1921 as amended in 1975 defines "Board" means the Board of High School and Intermediate Education and "Institution" defines in Section 2 (b) means a recognized Intermediate College, Higher Secondary School or High School and includes, where the context so requires, a part of an institution. "Recognition" in Section 2 (d) means recognition for the purpose of preparing candidates for admission to the Board's Examinations.

12. Section 7 sub sections (3) & (4) confer power on the Board to conduct examination at the level of the High School and Intermediate courses and to recognize institutions for the purpose of its examination; respectively. The U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act' 1971 (U.P. Act No.24 of 1971) was enacted to regulate the payment of salaries to teachers and other employees of the High School and Intermediate Colleges receiving aid out of the State fund and to provide for matters connected therewith. Section 2 (b) of the Act' 1971 defines "Institution" which means a recognized institution receiving maintenance grant from the State Government and includes a Sanskrit Mahavidyalaya or a Sanskrit Vidayalaya receiving maintenance grant from the State Government. It provides power to the Inspector of School namely District Inspector of Schools to make supervision in the matter of payment of salary to the teachers and other employees of the institution receiving maintenance grant and take action against such management which failed to disburse salary and post retiral benefits within time.

13. The U.P. Board of Basic Education Act' 1972 (in short as the Act'

1972) provides for the establishment of the Board of Basic Education and for matters connected therewith. The object of the Act is to strengthen the Basic Education (Primary and Junior High School) by reorganizing, reforming and expanding elementary education and to increase their usefulness by taking control and management of the primary education-institution, which were earlier managed by the Local Bodies (such as Zila Parishad and Municipal Board and Mahapalika in the State of U.P.). The said Act came into being from the academic session 1972-73. The expression "Basic Education" defined in Act' 1972 means :-

"Education upto the eight class imparted in schools other than high schools or intermediate college, and the expression "basic schools" shall be construed accordingly"

14. The definition of "Junior Basic School" and "Junior High School" in clauses (d-1) & (d-2) of sub section (1) of Section 2 inserted by U.P. Act No.2 of 2018, deemed to have come into force in August, 1972, provides the definition of the said expressions as follows:-

2(d-1)-*"Junior Basic School" means a basic school in which education in imparted upto class fifth."*

2(d-2)-*"Junior High School" means a basic school in which education is imparted to boys or girls or to both from class sixth to class eighth."*

15. One of the important functions of the Board as provided in Section 4 of Act' 1972 is to organize, co-ordinate and control the imparting of Basic Education. On coming into force of the said Act, the power of management, supervision and control over the Basic Schools defined in clauses (d-1) & (d-2) of sub Section (2), which before the appointed day was with the local bodies, stood transferred in respect of such school to the Board.

16. In exercise of powers under Sub Section (1) of Section 19 of the Act' 1972, the U.P. Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and other Conditions) Rules' 1975 were framed. The "Junior Basic School" defined therein is an institution other than the High Schools or Intermediate Colleges imparting education upto Class V. "Recognized School" defined in Rule 2 (e) of Rules' 1975 means any "Junior Basic School", not being an institution belonging to or wholly maintained by the Board or any local body, recognized by the Board before the commencement of the Rules' 1975 for imparting education from Classes I to V. The "Board" in Rule 2 (c) of the Rules' 1975 means the U.P. Board of Basic Education constituted under Section 3 of the Act and the "District Basic Education Officer" in Section 2 (d) means the District Basic Education Officer appointed by the State Government.

17. For the applicability of the Rules' 1975, Rule 3 provides that every "recognized institution" shall be bound by the conditions and restriction specified therein. Rule 4 says that every "recognized school" must posses adequate financial resources for its efficient working and adequate facilities in accordance with the standard specified by the Board for teaching the subjects in respect of which such school is recognized. Rule 5 to 8 of the Rules' 1975 regulate the requirement of building and equipment to run the school, tuition fee

and text books needed as per the curriculum prescribed by the Board. Rule 9 deals with the appointment of teachers in a recognized school and provides that no person shall be appointed as teacher or other employee in any recognized school unless he possess such qualifications as specified in this behalf by the Board and for whose appointment the previous approval of the Basic Education Officer has been obtained in writing. The procedure for appointment as provided therein is by publication of vacancy in daily newspaper and approval of selection by the Basic Education Officer. As far as the salary of teachers is concerned, Rule 10 provides that every recognized school shall pay the same scale of pay, dearness allowance etc. as are being paid to the teachers and employees of the Board possessing similar qualification and the payment shall be disbursed through cheque.

18. The recognition is granted with the object to supervise the working of the management of the recognized school to meet the standards of primary education.

19. The U.P. Junior High School (Payment of Salaries of Teachers and Other Employees) Act' 1978 came to be enacted by the U.P. Legislature to regulate the payment of salaries to the teachers and other employees of the junior high school receiving aid out of State fund and to provide for matters connected therewith. Clauses (b) & (d) of Section 2 of the Act' 1978 defines "Education Officer" as District Basic Education Officer appointed under the U.P. Basic Education Act' 1972 and "Inspector" means the District Inspector of Schools. Section 2 (e) defines "institution" means a recognized Junior High School for the time being receiving maintenance grant from the State Government. Sub section (2) (e-e) inserted by U.P. Act No.3 of 2018 provides for definition of "Junior High School" to mean as an institution which is different from the High School or Intermediate College in which education is imparted to boys or girls or to both from class VI to VIII.

20. "Maintenance grant" as defined in clause (f) of Section 2 means grant-in-aid of an institution provided by the State Government, by general or special order in that behalf to the level of the institution directed in the order. "Salary" of teachers means the aggregate of the emoluments including dearness or any other allowance, for the time being payable to a teacher or employee at the rate approved for the purpose of payment of maintenance grant. Section 2 (j) in the definition clause says :-

"(j) Other words and expressions defined in the Uttar Pradesh Basic Education Act, 1972 and not herein defined shall have the meanings assigned to them in that Act."

21. Section 10 of Act' 1978 makes State Government liable for payment of salaries of teachers and employees of every institution receiving maintenance grant due in respect of any period after the appointed day.

22. A cumulative reading of the aforesaid enactments indicates that though in Section 2(b) of the Act' 1971, expression "institution" includes a Sanskrit Mahavidyalaya or a Sanskrit Vidyalaya receiving maintenance grant from the State Government but neither the Basic Education Act' 1972 nor the

Payment of Salaries Act' 1978 includes schools imparting Sanskrit education at junior high school level i.e. "Prathama". The Sanskrit Vidyalaya or Sanskrit Mahavidyalaya were initially maintained under the Varanasi Sanskrit Vidyalaya Act' 1956 which was renamed as Sampurnanand Sanskrit University, Varanasi. During the course of time, Sampurnanand Sanskrit University, Varanasi first Statute 1978 was framed under the U.P. State Universities Act' 1973 to regulate the affiliation of the institutions imparting Sanskrit Education. In Statute 12.01 of the Statute of the Sampurnanand Sanskrit University, framed under Section 37 (2) of the U.P. State Universities Act' 1973, four categories of institutions have been provided which were affiliated by the Sampurnanand Sanskrit University to conduct the examination for the courses imparted by them.

1.	स्नाकोत्तर उपाधि महाविद्यालय (Post Graduate Degree College)	for imparing courses from "Prathama" upto "Acharya" and Post Graduate examination.
2.	उपाधि महाविद्यालय (Degree Colleges)	affiliated for "Shastri" (Graduate) examination (which may include courses from Prathama to Shashtri).
3.	उत्तर माध्यमिक महाविद्यालय (Senior Secondary School)	affiliated for imparting education upto "Uttar Madhyama" (Intermediate) examination (may include such institutions imparting courses from Prathama to Uttar Madhyama)
4.	पूर्व माध्यमिक विद्यालय (High School)	affiliated for imparting education upto "Purva Madhyama" (High School) which may include courses from Prathama to Madhyama.

23 Thus, under the Statute of the Sampurnanand Sanskrit University, affiliation could be granted from "Prathama" (junior High School) to "Shashtri" (Post Graduate). There was no provision for grant of recognition or affiliation for the purpose of running a primary education Classes (I to V) institution in the Statute of the Sampurnanand Sanskrit University.

24. With the enactment of the U.P. Board of Sanskrit Education' 2000 w.e.f 01.11.2000, (deemed to have come into force on 30.09.2000) enacted to regulate the Sanskrit education in the State of U.P., the institution imparting Sanskrit education upto "Uttar Madhyama (Intermediate)" are now recognized by the U.P. Board of Secondary Sanskrit Education established under Section 3 of the said Act. The "institution" as defined in Section 2 (f) of the Act' 2000 means:-

"Institution" means a sanskrit school imparting sanskrit education upto Uttar Madhayama recognized by the Board".

25. Section 2 (e) provides that the District Inspector of School shall discharge the functions of "Inspector" under the Act. Under Section 9 of the Act' 2000, the Board is to prescribe courses of instructions, text books etc. for "Prathama", "Madhyama", "Uttar Madhyama" (Junior High School to Intermediate) courses in Sanskrit Education and to conduct examination of the said courses and to grant diploma or certificate to the persons pursuing the same.

26. Section 13 of the Act' 2000 states that all institutions imparting Sanskrit Education upto "Uttar Madhyama", constituted in the State of U.P., immediately before the commencement of this Act, affiliated to or recognized by the Government Sanskrit College, Varanasi or Sampurnanand Sanskrit University, Varanasi shall be deemed to have been recognized by the Sanskrit Education Board under the Act' 2000 and shall cease to be affiliated to or recognized by the said college or University and shall be governed by the provisions of the Act' 2000.

27. Meaning thereby since September 30, 2000, the part of the institution-in-question for imparting Sanskrit education from "Prathama to Uttar Madhyama" is governed by the provisions of the Act' 2000 and is deemed to be recognized by the U.P. Board of Sanskrit Education. For the purposes of higher Sanskrit education such as "Shashtri" & "Acharya" course, the institution continue to be affiliated with the Sampurnanand Sanskrit University which shall conduct the said examination.

28. As far as the primary institution (class I to V), neither there was any provision in the Statute of the erstwhile University or in the Sampurnanand Sanskrit University first Statute' 1978 to regulate the same. There was, thus, no question of affiliation with the said Universities. Mere permission by the University to run classes I to V, therefore, is of no relevance.

29. At the best, the part of the institution in question running classes I to V can be said to be recognized by the Board of Basic Education pursuant to the order dated 10.01.1973 (Annexure No.'1' to the writ petition.). Maintenance grant provided to the institution-in-question for imparting Sanskrit education from "Prathama" (Junior High School) to "Shashtri" (Graduation) would not *ipso-facto* extend the said grant to the primary institution (classes I to V), treating it as an integral part of the Sanskrit Mahavidyalaya. The law laid down by the Supreme Court in the case of **State of U.P. and others Vs. Pawan Kumar Dwivedi & others** reported in 2014 (9) SCC 692 would not be attracted in the above noted facts and circumstances of the present case, in as much as, in the said case question was of payment of salary to the teachers and employees of a recognized "basic school" running classes from primary to junior high school i.e. classes I to VIII. By reading of the expression "Junior High School" for the purposes of Act' 1978 having the same meaning as that of the "Basic Education" in Section 2(b) of Act' 1972, it was held therein that the expression "Junior High School" in the Act' 1978 is intended to refer to the schools imparting "Basic Education" i.e. education upto class VIII. It was held that the fact that the legislature used expression "Junior High School" in the Act' 1978 and not the "basic school" as used and defined in Act' 1972 is

insignificant. It was concluded that if a "junior basic school" (classes I to V) is added after obtaining necessary recognition to the recognized and aided Senior basic school (class VI to VIII), then such "junior basic school" became integral part of one school i.e. the basic school having classes I to VIII.

30. The said analogy drawn by the Apex Court, in the opinion of this Court, cannot be imported here to bring a primary institution/[classes (I to V)] added to an institution imparting Sanskrit education from junior High School level "(Prathama)" to the higher level of education "(Shahstri or Acharya)".

31. As regards the obligation of the State of imparting free education to the children upto the age of 14 years, a constitutional guarantee under Article 21-A of the Constitution brought by 86th Amendment' 2002, suffice it to note that even prior to the insertion of the said Article, the Apex Court in **Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others** reported in 1993 (1) SCC 645 had observed that children upto the age of 14 years have a fundamental right to free education stipulated in Article 45 of the Constitution of India. However, at the same time, it observed that the said obligation cannot be said to be performed only through the State school but it can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children.. The observation in paragraph no.176 in **Unni Krishnan (supra)** read as follows:-

"176. This does not however mean that this obligation can be performed only through the State Schools. It can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, they too have a role to play. They meet the demand of that segment of population who may not wish to have their children educated in State-run schools. They have necessarily to charge fees from the students. In this judgment, however, we do not wish to say anything about such schools or for that matter other private educational institutions except "professional colleges'. This discussion is really necessitated on account of the principles enunciated in Mohini Jain v. State of Karnataka (1992) 3 SCC 666 and the challenge mounted against those principles in these writ petitions."

32. In **T.M.A. Pai Foundation and Ors. Vs. State of Karnataka and Ors.** reported in 2002 (8) SCC 481, the eleven judges Constitutional bench of the Apex Court had approved the view of **Unni Krishnan's (supra)** to the extent that it had held that primary education is a fundamental right, though it did not agree with the scheme framed in **Unni Krishnan (supra)** case and the direction to impose the same in respect of the fee charged by private institutions.

33. Thus, under the scheme of the legal Enactments and the judicial pronouncement of the Apex Court noted above, at least this much is clear that the State is under no obligation to provide maintenance grant to each private institution imparting primary education or free education to children from age (6 to

14 years). At the same time, it is necessary for a primary institution to seek recognition by the Board of Basic Education. Mere recognition by the Board, however, does not entitle the institution to seek maintenance grant from the State. Further, even in a recognized institution, not receiving maintenance grant, the appointment of teachers has to be made with the approval of the Basic Education Officer.

34. The decision in **"Ramesh Upadhaya" (supra)** by the co-ordinate bench of this Court does not consider any of the above legal aspect of the matter and as such is not binding on this Court being per-incurium.

35. It must, therefore, be held that the petitioners are not entitled to get salary from the State exchequer for the mere fact that the primary institution was recognized by the Board of Basic Schools. In so far as the plea that it was an attached institution to the Sanskrit Degree College, the same is found misconceived for the above noted reasons.

36. At the same time, this Court does not agree with the conclusion of the Deputy Director of Education (Sanskrit) that the Board of Basic Education was not having power to grant recognition to the institution-in-question to run primary classes. The recognition granted on 10.01.1973 is a permanent valid recognition within the meaning of the Basic Education Act' 1972 read with the Rules' 1975. The primary section of the institution-in-question is, thus, to be treated as a separate entity being a "recognized school" within the meaning of Rules' 1975 and shall be governed by the Act' 1972 read with Rules' 1975 as a "Junior Basic School" within the meaning of Section 2(1) (d-1) of the Basic Education Act' 1972 for all other relevant purposes.

37. It shall not open for the Basic Education Officer or any other educational authority to interfere in the running of the said "junior basic school" except in a case of contravention of the Act' 1972 or the Rules' 1975. However, it will be open for the management to make a request to the State Government for bringing this institution in its grant-in-aid list, in accordance with law.

38. Subject to the above observations and directions, the writ petition is **dismissed.**

(2019)10ILR A 2068

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Writ A No. 11208 of 2004

Bijendra Pal ...Petitioner
Versus
The Chairman Parivahan Nigam Mukhyalaya Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.D. Dubey, Sri Mool Chandra Maurya, Sri S.K. Rao.

Counsel for the Respondents:
S.C., Sri P.N. Rai, Sri Ramanuj Pandey, Sri V.C. Dixit.

When certain facts in the document, admitted as evidence are disputed - onus is on the employee to prove incorrectness.

Courts are not supposed to interfere in the discretion of selection of punishment by Disciplinary Authority.

Petitioner was suspended vide order dated 30.04.2001, on the allegation of carrying passengers without ticket and causing loss to UPSRTC. After enquiry, punishment of removal was imposed by the Disciplinary Authority. Appeal and Revision were also dismissed. Dismissing this petition, the High Court held that: -

When some part of the incident is admitted and the manner in which it happened is disputed by employee, employee has to prove his defence.
(Para 13, 22)

Non-examination of passengers would not vitiate findings of guilt. (Para 18, 19, 20)

The amount misappropriated may be small or large; it is the act of misappropriation that is relevant.
(Para 30, 31, 32)

Punishment imposed by Disciplinary Authority or Appellate Authority unless, shocking to the conscience of the Court, cannot be subjected to judicial review.
(Para 34, 36, 37)

Precedent followed: -

1. State of Haryana and Another Vs. Rattan Singh, (1977) 2 SCC 491 (Para 18)

2. Divisional Manager, Rajasthan S.R.T.C. Vs. Kamruddin, (2009) 7 SCC 552 (Para 19)

3. North West Karnataka Road Transport Corporation Vs. H.H. Pujar, (2008) 12 SCC 698 (Para 20)

4. Karnataka S.R.T.C. Vs. B.S. Hullikatti, (2001) 2 SCC 574 (Para 24)

5. Regional Manager, Rajasthan State Road Transport Corporation Vs. Ghanshyam Sharma, (2002) 10 SCC 330 (Para 25)

6. Jagdish Prasad Sharma Vs. U.P. State Public Services Tribunal and Others, decided on 15.02.2017, Writ Petition No. 4253 (S/S) of 1991 (Para 27)

7. Regional Manager, U.P.S.R.T.C., Etawah & Ors. Vs. Hoti Lal & Anr., (2003) 3 SCC 605 (Para 28)

8. Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254 (Para 29)

9. Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh, (2006) 6 SCC 187 (Para 30)

10. Uttar Pradesh State Road Transport Corporation Vs. Nanhe Lal Kushwaha, (2009) 8 SCC 772 (Para 31)

11. Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693 (Para 32)

12. Union of India Vs. Bodupalli Gopalawami, (2011) 13 SCC 553 (Para 35)

13. Sanjay Kumar Singh Vs. Union of India & Ors., AIR 2012 SC 1783 (Para 35)

14. S.R. Tewari Vs. Union od India, (2013) 6 SCC 602 (Para 35)

15. Ranjit Thakur Vs. Union of India & Ors. AIR 1987 SC 2386 (Para 36)

16. Union of India & Ors. Vs. R.K. Sharma, AIR 2001 SC 3053 (Para 37)

Precedent distinguished: -

1. Roop Singh Negi Vs. Punjab National Bank, 2009 (2) SCC 570 (Para 6, 16)

2. Kunwar Pal Vs. State of U.P. and Another, decided on 29.05.2018, Writ A No. 7500 of 2016 (Para 21, 22)

Present writ petition challenges order dated April 11, 2002, passed by Regional Manager, U.P. State Road Transport Corporation, Aligarh; order dated June 10, 2003, passed by Regional Chief Manager, U.P. State Road Transport Corporation, Meerut; Revisional Order dated November 17, 2003, passed by Chairman, Transport Corporation, Lucknow.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri S.K. Rao, learned counsel for petitioner and Sri Ramanuj Pandey, learned counsel for respondents.

2. This writ petition under Article 226 of Constitution of India has been filed by sole petitioner Bijendra Pal, assailing order dated 11.04.2002 (Annexure- 6 to the writ petition) passed by Regional Manager, U.P. State Road Transport Corporation, Aligarh (hereinafter referred to as "Disciplinary Authority") imposing punishment of removal; order dated 10.06.2003 (Annexure- 8 to the writ petition) passed by Regional Chief Manager, U.P. State Road Transport Corporation, Meerut rejecting appeal of petitioner and Revisional Order dated 17.11.2003 (Annexure-10 to the writ petition) passed by Chairman, Transport Corporation, Lucknow rejecting petitioner's representation. A mandamus has also been prayed by petitioner directing respondents to reinstate him in service with all consequential benefits.

3. Facts in brief, giving rise to the present writ petition are, that petitioner was initially appointed as Driver in U.P. State Road Transport Corporation *(hereinafter referred to as "UPSRTC")* and posted in Aligarh Depot, Iind, (Budha Bihar Depot). He met an accident in 1994 and was declared disabled to work as Driver vide UPSRTC's order dated 15.03.1995. Hence, he was accommodated to work as Conductor and posted in Hathras Depot.

4. On the allegation of carrying passengers without ticket and causing loss to UPSRTC, petitioner was suspended vide order dated 30.04.2001. A charge-sheet dated 10.05.2001 was served upon him containing single charge, which reads as under:-

"आपके विरूद्ध श्री मनोज कुमार त्रिवेदी सहायक क्षेत्रीय प्रबन्धक, बुलन्दशहर ने रिपोर्ट प्रस्तुत की है कि दिनांक 25.4.2001 को नरौरा डिपो की बस सं0 यू0पी0 81/ 9328 जिसका संचालन आप श्री रनवीर सिंह चालक के साथ बबराला –दिल्ली मार्ग पर कर रहे थे, का आकस्मिक निरीक्षण अपने सहयोगी वरिष्ठ स्टेशन प्रभारी व अन्य के साथ बुलन्दशहर पहुंचते हुये 17.00 बजे किया। निरीक्षण के समय आपकी बस में कुल 41 यात्री यात्रारत पाये गये। बस का भौतिक निरीक्षण करने पर पाया गया कि बस में 18 यात्री शिकारपुर से दिल्ली के बिना टिकट पाये तथा 09 यात्री जो शिकारपुर से दिल्ली के लिये बैठे थे तथा किराया भी दिल्ली से शिकारपुर तक का दिया गया, परन्तु इन 09 यात्रियो को आपके द्वारा शिकारपुर से दिल्ली के टिकट न देकर कम दूरी के टिकट बुलन्दशहर से दिल्ली का दिया गया था। निरीक्षकों द्वारा बिना टिकट यात्रियों के टिकट आपके टिकट रिक्त पुस्तिका से टिकट सं0 5927191 पर 45 ग 9 त्र 405 तथा 592192 पर 45 ग 9 त्र 405 जारी कर यात्रियों को दिया तथा शिकारपुर से बुलन्दशहर का अन्तर टिकट सं0 5927190 पर 10 ग 9 त्र 90 का जारी कर यात्रियों को दिया गया। बिना टिकट यात्रियों से आप किराया धनराशि निरीक्षण से पूर्व ही वसूल कर चुके थे। निरीक्षको द्वारा मार्ग पत्र में आवश्यक टिप्पणी अंकित कर मार्ग पत्र की एवं जारी किये गये टिकटों की मूल प्रतियों को निरीक्षण स्थल पर ही रोक लिया गया तथा मार्ग पत्र पर आपके भी हस्ताक्षर कराये गये। यदि बस का आकस्मिक निरीक्षण न किया गया होता तो आप निगम किरया धनराशि 900/– अपने निजी स्वार्थ में हड़पने में सफल हो जाते और निगम को हानि उठानी पड़ती। आपका यह कृत्य भ्रष्टाचार मे लिप्त पाये जाने का द्योतक है।

अतः आप पर (1) दिनांक ***25.4.2001 में 18 यात्री बिना टिकट एवं 09 यात्रियों को कम दूरी के टिकट देकर भ्रष्टाचार में लिप्त पाया जाना,*** *(2) निगम हितों के प्रतिकूल कार्य करने, (3) अपने कर्तव्यों एवं दायित्वों के विरूद्ध कार्य करने (4) कर्मचारी आचर संहिता के प्रतिकूल कार्य करने एवं (5) कर्मचारी सेवा विनियमावली के विरूद्ध कार्य करने आदि के आरोप लगाये जाते हैं।"*

"Shri Manoj Kumar Trivedi, Asstt. Regional Manager, Bulandshahr has presented a report against you that he along with his colleagues, the Senior Station Incharge and others, reached Bulandshahr and made a surprise inspection of Bus No. UP 81/9328 of Narora Depot, which you were plying along with the driver Ranveer Singh, on 25.04.2001 at 17 o'clock. At the time of the inspection, total 41 passengers were found travelling in your bus. On physical inspection of the bus,18 passengers were found to be travelling without ticket in the bus from Shikarpur to Delhi and 09 passengers were travelling from Shikarpur to Delhi and they had paid fare for Delhi to Shikarpur. Despite all this, all the 09 passengers were given tickets by you for Bulandshahr to Delhi, that is for a lesser distance instead of tickets from Shikarpur to Delhi. The passengers travelling without tickets were issued tickets by the Inspectors, 45x9 =405 on ticket no. 5927191 from your ticket blank book and the passengers were issued 45x9 on ticket number 592192. The passengers were issued tickets for differential distance for Shikarpur to Bulandshahr, 10x9=90 on ticket no. 5927190. You had realized fare from the ticket-less passengers prior to the inspection. The inspectors on inspection site itself recorded necessary remarks in the Route Book and withheld the originals of the tickets issued, and even your signature was obtained. If surprise inspection of the bus had not been made, you would have managed to grab the fare amount of Rs. 900 for your private ends and the Corporation would have to suffer the said loss. This act of yours is reflective of your involvement in corruption.

Hence, you stands ***charged with (1) being involved in corrupt practices by letting 18 passengers travel without tickets and issuing tickets for lesser distance to 09 passengers on 25.04.2001,*** *(2) working against the interest of the Corporation, (3) not performing your duties and responsibilities, (4) working contrary to the employees conduct code and (5) working against the employees service regulations and so on."*

(Emphasis Added)

(English Translation by Court)

5. Assistant Regional Manager *(Karmik)*, Aligarh was appointed as Enquiry Officer to conduct enquiry. Denying the charge, petitioner submitted reply dated 30.05.2001. Enquiry officer after conducting enquiry, submitted report dated 05.11.2001 holding charges proved, whereafter a show cause notice dated 25.01.2002 was issued, supplying copy of enquiry report to petitioner. Disciplinary Authority agreeing with the findings of Enquiry Officer, proposed punishment of "Removal" in the said show-cause notice. Petitioner submitted reply dated 06.03.2002. Thereafter, Disciplinary Authority imposed punishment of removal vide order dated 11.04.2002. Against said order, petitioner preferred appeal which was dismissed vide order dated 10.06.2003 and thereafter revision was also dismissed vide order dated 17.11.2003. These three orders of Disciplinary Authority, Appellate Authority and Revisional Authority are under challenge in the present writ petition.

6. Learned counsel for petitioner contended that charge of carrying 27 passengers without ticket has been held proved though not even a single passenger has been examined and therefore, it cannot be said that charge has been

proved by adducing any valid evidence; enquiry has not been conducted properly and charge has been held proved on conjecture and surmises; and that punishment is highly excessive and disproportionate the charge found proved. He has placed reliance on a Supreme Court decision in **Roop Singh Negi Vs. Punjab National Bank 2009(2) SCC 570.**

7. Learned counsel for respondents, however, submitted that petitioner was a Conductor in the bus and Inspection Team of UPSRTC checked the vehicle; inspection Report has been duly proved and non-examination of passengers, who were found travelling in the bus without ticket, is of no legal consequences since examination of passengers was not necessary in such cases; adequate opportunity was given to petitioner and punishment imposed upon him is just and valid, hence, no interference is called for.

8. From the record, it transpires that on 25.04.2001, petitioner was working as Conductor in Bus No. UP-81/9328 of Naraura Depot, running on Babrala-Delhi route. A surprise checking was conducted by Senior Station In-charge and others at around 5:00 p.m. when bus was reaching at Bulandshahr. Inspection Team found a total 41 passengers travelling in the bus, out of which 18 passengers, travelling from Shikarpur to Delhi were without any ticket and 9 passengers who boarded bus at Shikarpur and their destination was Delhi had paid fare from Shikarpur to Delhi but tickets were issued by petitioner for a shorter distance i.e. Bulandshahr to Delhi, instead of Shikarpur to Delhi. Further, petitioner had already charged fare from passengers who were found travelling without ticket. Inspection Team issued tickets to passengers travelling without ticket from Ticket Book possessed by petitioner. Ranveer Singh was driver of the bus.

9. In the reply to charge-sheet submitted by petitioner, he admits this fact that he was working as Conductor in Bus No. UP-81/9328 on 25.04.2001, when bus was running from Babrala to Delhi route. When bus reached Shikarpur, 27 passengers boarded and when they were boarding, Sri Manoj Kumar Trivedi, Assistant Regional Manager, Bulandshahr along with checking squad came. Petitioner asked checking team that let passengers sit in the bus and thereafter petitioner may be allowed to issue tickets and then checking be conducted but checking team snatched Ticket Book from petitioner and arbitrarily issued tickets and under threat obtained signature of petitioner on the inspection note. He alleged that Assistant Regional Manager, who conducted checking has concealed the fact that bus was at halt and not running which was got stopped and thereafter checked. He further said that checking was made at Shikarpur and not while bus was reaching Bulandshahr.

10. Thus, preparation of Inspection Report mentioning the fact that checking was conducted when bus was reaching at Bulandshahr and passengers were found without ticket and that checking report was signed by petitioner are the facts which are admitted by petitioner. He, however, has disputed contents of inspection note.

11. In these circumstances, onus shifted upon petitioner to show that contents of checking report were not correct and his signature was obtained

under threat for which he did not adduce any evidence whatsoever. Even Driver of bus who was in a position to give correct facts, was not produced by petitioner in support of his defence whereby he challenged correctness of the facts stated in checking report which admittedly contained petitioner's signature.

12. The question as to how oral enquiry would be conducted depends on facts of each case.

13. It cannot be disputed when a charge is completely denied, Employer has to prove the charge first and thereafter employee would be required to adduce his defence to disprove the allegations, but when some part of the incident is admitted that the manner in which it happened is disputed by employee, the fact given by employee in his defence is to be proved by him.

14. In the present case, a checking report was prepared mentioning the factum that petitioner was carrying passengers without ticket and thereby caused loss to UPSRTC. This checking report was duly signed by petitioner. This document was an evidence relied in the charge-sheet. Since in reply, aforesaid document itself was not disputed by petitioner, instead his stand was that the facts stated in the report do not depict correct facts and contain some incorrect facts, hence, onus was upon petitioner to show that checking report contained incorrect facts.

15. One of the best witness which would have been able to make his statement on this aspect, whether checking was conducted when bus was reaching Bulandshahr or Shikarpur and whether passengers were boarding the bus at Shikarpur when checking was made or passengers had actually travelled distance from Shikarpur and while reaching Bulandshahr, checking was made and they were found without ticket, could have been got verified by petitioner through Driver of bus but he made no such attempt. Since documents of department, as such, was not denied but correctness thereof was denied, hence, non-examination of any oral evidence on behalf of Employer makes no difference in the facts of this case and onus itself shifted upon petitioner to show that facts stated in the report were not correct as he put his defence in reply to charge-sheet.

16. In these facts and circumstances, the judgment cited by learned counsel for petitioner in his support, I find has no application to the facts of this case.

17. So far as non-examination of ticket-less passengers is concerned, I find that in the case of charge of travelling of passengers without tickets, factum that passengers were not made witnesses or their statements were not recorded, has not been found to be relevant or a crucial aspect for valid inquiry.

18. The scope of judicial review in such matter was examined in **State of Haryana and Another v. Rattan Singh 1977 (2) SCC 491,** wherein Court held that sufficiency of evidence in proof of finding by a domestic Tribunal is beyond scrutiny but in absence of any evidence in support of ending his certainty justified judicial review and interference by Court. However, evidence of Inspector of flying squad was relevant and if it supports the charge, it cannot be said that finding recorded by domestic Tribunal proving

the charge is based on no evidence. Court specifically held *"We cannot hold that merely because statements of passengers were not recorded the order that followed was invalid. Likewise, the re-evaluation of the evidence on the strength of co-conductor's testimony is a matter not for the Court but for the administrative Tribunal."*

19. A similar view was taken in **Divisional Manager, Rajasthan S.R.T.C. vs. Kamruddin (2009) 7 SCC 552.**

20. Both the above authorities were followed while repelling similar argument that non-examination of passengers would vitiate findings of guilt raised in **North West Karnataka Road Transport Corporation v. H.H. Pujar (2008) 12 SCC 698.**

21. Learned counsel for petitioner urged that in fact, no oral enquiry was held since dates were fixed but no witness by Employer was examined and, therefore, here is a case where major penalty of removal has been imposed without holding any oral enquiry. He placed reliance on a Division Bench Judgment of this Court in **Writ A No. 7500 of 2016, Kunwar Pal vs. State of U.P. and Another, decided on 29.05.2018.**

22. As I have already held that here is a case where charge is founded on a checking report existence thereof was not disputed by petitioner. In fact, he has also signed the said report but what he claimed is that report contained incorrect facts and for proving this aspect, onus lay upon petitioner to adduce evidence but he did not adduce any evidence, therefore, it cannot be said that non-production of any witness by Employer vitiates disciplinary proceedings in the case in hand. Hence, the aforesaid judgment and the principle of law is not applicable to the facts of this case.

23. Lastly, it is contended that punishment imposed upon petitioner is highly excessive or disproportionate to the gravity of charge and, therefore, it deserves to be set aside.

24. Here also, I find no force in the submission. It is not a case where misconduct of petitioner has not been found proved. It is also not a case where disciplinary enquiry was not conducted in a fair manner or principles of natural justice have been denied. The question of imposition of major penalty upon a Conductor of a Transport Corporation who has been found short charging of fare or carrying passengers without ticket was considered by Supreme Court in **Karnataka S.R.T.C. v. B.S. Hullikatti (2001) 2 SCC 574,** and Court said as under:-

"5. On the facts as found by the Labour Court and the High Court, it is evident that there was a short-charging of the fare by the respondent from as many as 35 passengers. We are informed that the respondent had been in service as a Conductor for nearly 22 years. It is difficult to believe that he did not know what was the correct fare which was to be charged. Further-more, the appellant had during the disciplinary proceedings taken into account the fact that the respondent had been found guilty for as many as 36 times on different dates. Be that as it may, the principle of res ipsa loquitur, namely, the facts speak for themselves, is clearly

applicable in the instant case. Charging 50 paise per ticket less from as many as 35 passengers could only be to get financial benefit by the Conductor. this act was either dishonest or was so grossly negligent that the respondent was not fit to be retained as a Conductor because such action or inaction of his is bound to result in financial loss to the appellant-Corporation.

6. It is misplaced sympathy by the Labour Courts in such cases when on checking it is fund that the Bus Conductors have either not issued tickets to a large number of passengers, though they should have, or have issued tickets of a lower denomination knowing fully well the correct fare to be charged. It is the responsibility of the Bus Conductors to collect the correct fare from the passengers and deposit the same with the Company. they act in a fiduciary capacity and it would be a case of gross misconduct if knowingly they do not collect any fare or the correct amount of fare."

25. The above decision was followed by a three Judges Bench of Supreme Court in **Regional Manager, Rajasthan State Road Transport Corporation vs. Ghanshyam Sharma SCC (2002) 10 330,** wherein Court said *"The main duty or function of the Conductor is to issue tickets and collect fare and then deposit the same with the Road Transport Corporation and when a conductor fails to do so, then it will be misplaced sympathy to order his re-employment instead of dismissal."*

26. The above authorities show that a Conductor held fiduciary relation with Employer and if he is found allowing travelling by passengers without tickets, it is a serious misconduct justifying maximum penalty of dismissal. Mere fact that subsequently fare was relied by checking squad it found sufficient to condone the misconduct committed by person concerned. Further it is not a number of passengers or quantum of ticket which will weigh the penalty but is the conduct which is of substance to examine whether penalty is justified or not. A Conductor who has failed to discharge his only duty of allowing passengers to travel after paying appropriate fare and to deposit the same with Employer is guilty of serious misconduct and deserves to be given maximum punishment.

27. In **Writ Petition No. 4253 (S/S) of 1991 Jagdish Prasad Sharma Vs. U.P. State Public Services Tribunal & Others,** decided on 15.2.2017, which was also case of bus conductor of UPSRTC. This Court in para 14 and 15 said as under :-

"14. We do not propose to multiply authorities on this aspect and suffice it to mention that dishonesty, lack of integrity on the part of an official of Corporation, going to the extent of causing loss to Corporation, of which the official is holding position in trust, is a very serious matter. It is the aptitude of a person which leans towards dishonesty and corruption or bad conduct, that needs punished. The circumstances or quantum of loss or amount of misappropriation or other things cannot be considered as a justification for such misconduct on the part of official concerned, so as to justify a lenient view on the issue of punishment.

15. There is no question of leniency or sympathy. In fact any indulgence in such matter will make even

Court a party to such dishonest action, which has to be avoided, prevented and is totally uncalled for. Court cannot be a party to a misdeed of a person. On the contrary, once a person had indulged in misconduct, shown lack of integrity or honesty etc., adequate preventive punishment, which may be a lesson to others also, is need of the day."

28. **In Regional Manager, U.P.S.R.T.C, Etawah & Ors. vs Hoti Lal & Anr 2003(3) SCC 605,** where Court said that it is the responsibility of Bus Conductor to collect correct fare from passengers and deposit the same with Corporation. They act in a fiduciary capacity and it would be a case of gross misconduct if knowingly they do not collect any fare or the correct amount of fare.

29. In **Divisional Controller, KSRTC (NWKRTC) Vs. A.T. Mane, (2005) 3 SCC 254,** amount found in possession being unaccounted money was only Rs. 93/-, but dealing with the question of quantum of punishment, Court said;

"..... question of quantum of punishment, one should bear in mind the fact that it ***is not the amount of money misappropriated that becomes a primary factor for awarding punishment, on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration.*** *In our opinion, when a person is found guilty of misappropriating corporation's fund, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal."*

(emphasis added)

30. In **Divisional Controller, N.E.K.R.T.C. Vs. H. Amaresh (2006) 6 SCC 187,** Court held that even short remittance amounts to mis-conduct and justifies major penalty.

31. In **Uttar Pradesh State Road Transport Corporation Vs. Nanhe Lal Kushwaha, 2009 (8) SCC 772,** Court held that a Conductor depositing lesser amount, irrespective of fact that the amount was small and the incumbent has retired, no interference would be justified in the matter of penalty.

32. In **Rajasthan State TPT Corporation and another Vs. Bajrang Lal, (2014) 4 SCC 693,** Court said;

"in cases involving corruption- there cannot be any other punishment than dismissal. ***Any sympathy shown in such cases is totally uncalled for and opposed to public interest.*** *The amount misappropriated may be small or large; it is the act of misappropriation that is relevant."* (emphasis added)

33. Applying the exposition of law as discussed above to the facts of the case, I find that petitioner was a Conductor whose responsibility was to ensure that any passenger who travel in the bus in which he is working as Conductor has paid due fare for the distance he has to travel and no person is allowed to travel without ticket so that no loss is caused to UPSRTC. Petitioner has not discharged his above duty and committed a serious misconduct in discharge of his duty.

34. When an employee fails to discharge fundamental duties he is supposed to perform, which includes even

financial aspects, Courts are not supposed to interfere in the discretion of selection of punishment by Disciplinary Authority since they are the best judge to decide what punishment should be impose upon erring official. The role of Court in the matter of departmental proceedings is very limited and Court cannot substitute its own views and findings by replacing findings arrived at by authority on detailed appreciation of evidence on record. In the matter of imposition of sentence, scope of interference by Court is very limited and restricted to exceptional cases. Punishment imposed by Disciplinary Authority or Appellate Authority unless, shocking to the conscience of the Court, cannot be subjected to judicial review. Court has to record reasons as to why punishment is disproportionate. Failure to give reasons amounts to denial of justice.

35. In **Union of India v. Bodupalli Gopalaswami, (2011) 13 SCC 553, Sanjay Kumar Singh v. Union of India & Ors., (AIR 2012 SC 1783) and S.R. Tewari v. Union of India, (2013) 6 SCC 602,** Court said that mere statement that punishment is disproportionate to charge is not sufficient and appropriate reasons have to be recorded by Court if it proposed to interfere with quantum of punishment.

36. Explaining the earlier judgment In **Ranjit Thakur v. Union of India & Ors., AIR 1987 SC 2386,** where Court held that punishment has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.

37. In **Union of India & Ors. v. R.K. Sharma, AIR 2001 SC 3053,** Court said that if the charge was ridiculous, the punishment was harsh or strikingly disproportionate it would warrant interference. However, it is only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds. The employees when act in fiduciary capacity and commits default, in financial matters, major penalty has been upheld.

38. In the entirety of the facts as discussed above and the exposition of law, I do not find any manifest error in the orders impugned in the present petition so as to justify interference by this Court.

39. Writ petition lacks merit and is accordingly dismissed.

(2019)10ILR A 2077

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE ASHOK KUMAR, J.

Writ A No. 12752 of 2019

Mohd. Uves & Anr. ...Petitioners
Versus
State Transport Appellate Tribunal Uttar Pradesh Lucknow & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anant Ram Dubey, Sri Shobhit Dubey

Counsel for the Respondents:
C.S.C.

A. Motor Vehicles Act, 1988 - Section 90; U.P. Motor Vehicle Rules, 1998: Rules 60,

91 (2)-Petitioners challenged order dated 22.11.2018, passed by the Regional Transport Authority, Aligarh, which was dismissed on the ground of limitation by the Appellate Tribunal. Allowing the petition, the High Court held - In absence of publication or proof of communication of order, the date of order would be deemed to be the date on which the order is communicated or published. (Para 20, 22)

B. Power to condone delay has to be liberally construed to advance the cause of justice. (Para 23)

Writ petition challenges order and judgment of State Transport appellate Tribunal, UP dated 26.04.2019.

Writ Petition allowed (E-4)

(Delivered by Hon'ble Ashok Kumar, J.)

1. Heard Sri A.R. Dube, learned counsel for the petitioners and Sri P.K. Giri, learned Additional C.S.C., who represents all the respondents.

2. Considering the nature of the order that is being passed, the learned counsel for the respondents does not pray for time to file counter affidavit and therefore with the consent of learned counsel for the parties, this petition is being disposed of finally.

3. The petitioners are aggrieved by an order and the judgment of the State Transport Appellate Tribunal, U.P. dated 26.04.2019 thereby the State Transport Appellate Tribunal, herein after referred as the 'Appellate Tribunal' has dismissed / rejected the Misc. Case No. 28 of 2019 and 29 of 2019 filed by the petitioner nos. 1 and 2 solely on the ground of limitation without touching the merit of the case.

4. The fact of the case are that the petitioners are indulged in transport business and they applied for grant of permanent stage carriage permits on the route. The applications of the petitioners for grant of stage carriage permits are considered by the Regional Transport Authority, Aligarh and the Regional Transport Authority, Aligarh by its resolution have granted permanent stage carriage permit to the petitioners by imposing model condition of vehicle of ten years age. The date of grant of permission by the Regional Transport Authority, Aligarh was 22.11.2018, however according to the petitioner the order of grant of permission was not pronounced on the said date i.e. on 22.11.2018 and it was kept pending by the Regional Transport Authority, Aligarh.

5. The petitioners' claims that on several times they approached the office of the Regional Transport Authority, Aligarh and requested for issuance of the copy of the grant of permission, however the same was not delivered.

6. According to the petitioners the applications are moved on 19.12.2018 before the Regional Transport Authority, Aligarh with a request to provide the certified copy of the order granting the permission dated 22.11.2018 to the petitioners but neither any information was supplied nor the copy of the decision was issued.

7. The petitioners' claims that they have continuously approached the office of the Regional Transport Authority, Aligarh but failed in their efforts to get the copy of the order dated 22.11.2018 of grant of permission.

8. The petitioners submits that the copy of the order dated 22.11.2018 passed by the Regional Transport Authority,

Aligarh was only provided to the petitioners on 21.02.2019 in which the date of issuance of the copy of the order was mentioned as 19.12.2018 instead of 21.02.2019. The petitioners approached the office of the Secretary, Regional Transport Authority, Aligarh to correct the date of issuance of the order dated 22.11.2018 but no heed was paid on the request of the petitioners to correct the date of issuance of the copy of the order dated 22.11.2018.

9. The counsel for the petitioners submits that since permanent stage carriage permits have been granted to the petitioners on the applied route with the condition that for lifting the permit the age of the vehicle should not be more than ten years.

10. According to the petitioners the condition stipulated in the permit was not correct nor acceptable, hence the petitioners were advised by their counsel to file an appeal / Misc. case before the State Transport Appellate Tribunal, U.P., hence the petitioners have filed Misc. Case / Appeals before the State Transport Appellate Tribunal, U.P. at Lucknow, which are numbered being Misc. Case No. 28 of 2019 and Misc. Case No. 29 of 2019.

11. Both the above Misc. cases were heard together by the Appellate Tribunal and are decided by a common judgment and order dated 26.04.2019 whereby the appeals / Misc. cases of the petitioners are dismissed on the ground of limitation without touching the merit of the case, hence the present petition.

12. The contention of the counsel for the petitioners is that admittedly the copy of the judgment and order passed by the Regional Transport Authority, Aligarh has been served upon the petitioners on 21.02.2019 against which the appeals / Misc. cases have been filed by the petitioners on 14.03.2019, that is within a period of 30 days, even then the Appellate Tribunal has dismissed the appeals / Misc. cases of the petitioners treating the same are filed beyond the prescribed limitation.

13. Learned counsel for the petitioners submits that the copy of the impugned order passed by the Regional Transport Authority, Aligarh dated 22.11.2018 are received on 21.02.2019 and not on 19.12.2018 therefore the rejection of the appeals / Misc. cases by the appellate Tribunal is totally illegal, arbitrary and bad.

14. Learned counsel for the petitioners placed reliance of the provision of Section 90 of the Motor Vehicles Act, 1988 which reads as follows:-

*"**Section 90. Revision.-** The State Transport Appellate Tribunal may, on an application made to it, call for the record of any case in which an order has been made by a State Transport Authority or Regional Transport Authority against which no appeal lies, and if it appears to the State Transport Appellate Tribunal that the order made by the State Transport Authority or Regional Transport Authority is improper or illegal, the State Transport Appellate Tribunal may pass such order in relation to the case as it deems fit and every such order shall be final.*

Provided that the State Transport Appellate Tribunal shall not entertain any application from a person

aggrieved by an order of a State Transport Authority or Regional Transport Authority, unless the application is made within thirty days from the date of the order.

Provided further that the State Transport Appellate Tribunal may entertain the application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by good and sufficient cause from making the application in time.

Provided also that the State Transport Appellate Tribunal shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

15. Learned counsel for the petitioners submits that admittedly the order dated 22.11.2018 passed by the Regional Transport Authority, Aligarh was not communicated to the petitioners either on the date of order or thereafter or before 21.02.2019 therefore the rejection of the appeals / Misc. cases by the Appellate Tribunal on the ground of limitation is wholly illegal bad and is also against the provision of Section 90 of the Motor Vehicles Act, 1988.

16. Learned counsel for the petitioners has referred the second proviso of Section 90 of the Act.

17. Learned counsel for the petitioners submits that since there was no delay in filing the appeals / Misc. cases at the hands of the petitioners therefore there was no occasion to file the delay condonation application.

18. He has further referred Rule 91(2) of U.P. Motor Vehicle Rules, 1998 which provides that any aggrieved person may prefer an appeal within a period of 30 days of the receipt of the order.

19. In the instant case the petitioners claims that they received the copy of the order impugned only on 21.02.2019 and the same were never communicated to the petitioners prior to 21.02.2019 therefore the appeals / Misc. cases filed by the petitioners on 18.03.2019 are well within the prescribed period of limitation.

20. Assailing the order passed by the Appellate Authority, learned counsel for the petitioners have submitted that under Rule 60 of the U.P. Motor Vehicles Rules, 1998 every decision of the Regional Transport Authority or State Transport Authority has to be published on the notice board by the Secretary of the concerned Regional Transport Authority or the State Transport Authority and in absence of its publication or proof of its communication / information of the order, the date of the order would be deemed to be the date on which the order is communicated or published and as there exists no material on record to show that the order was published, as per the provisions of the Motor Vehicles Rules or otherwise communicated to the petitioners, the date of the order would be deemed to be the date of its knowledge, hence appeal / Misc. cases of the petitioners were filed well within the period of limitation. In the alternative, it has been submitted that in any view of the matter since the Appellate Authority had the power to condone the delay in filing the appeal, the appeals / Misc. cases of the petitioners ought not to have been rejected on the ground of limitation or on technical ground as such the appeals / Misc. cases ought to have been decided by the Appellate Tribunal on merits.

21. Learned Additional C.S.C., who has appeared on behalf of all the respondents, though sought to defend the order passed by the Appellate Authority but did not dispute the fact that the Appellate Authority / Appellate Tribunal had the power to condone the delay as per the provisions of second proviso to Section 90 of the Motor Vehicles Act, 1988.

22. Having considered the rival submissions, I am of the opinion that prima facie there appears no delay in filing the appeals / Misc. cases before the Tribunal however, the delay if any noticed by the Tribunal ought to have been condoned when the petitioners have explained in their memo of appeal / affidavit that the order was neither published nor communicated and that no knowledge about the order was received by the petitioners upon enquiry from the office of the respondent no. 2 and that the copy of the order was only received by the petitioners on 21.02.2019 the Appellate Tribunal should have been proceeded in the matter by deciding the appeals / Misc. cases filed by the petitioners on merits.

23. It is well settled that power to condone the delay has to be liberally construed to advance the cause of justice and the limitation should not be used to shut out adjudication on merits, particularly, where the delay is not inordinate which, if condoned, would cause substantial prejudice to the other affected party. Accordingly, this Court considers it appropriate to set aside the orders passed by the State Transport Appellate Tribunal, U.P., Lucknow, dated 26.04.2019 and the Appellate Tribunal therefore is directed to proceed in the matter and to decide the appeals / Misc. cases filed by the petitioners on its merit.

24. The Appellate Tribunal will consider all legal and factual pleas on merits to be raised before it by the petitioners.

25. With the above directions, the writ petition stands **allowed.**

(2019)10ILR A 2081

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ A No. 9392 of 2019

Jitendra Kumar ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Manisha Chaturvedi

Counsel for the Respondents:
C.S.C.

A. Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 5 - Compassionate appointments are an exception and cannot be made the rule - delay in making a claim dilutes the case of immediate financial penury - Petitioner's mother died in harness on 18.10.1999 - He attained majority in 2003- Made a representation on 11.10.2018 and approached this Court by present petition to decide the representation - Dismissing this petition, the High Court held - The concept of compassionate appointments is created

only to enable the bereaved family to tide over the immediate financial crisis. They are an exception and cannot be made the rule - Mere death of an employee in harness does not entitle his family to such source of livelihood. (Para 14, 16, 17 & 19)

B. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. (Para 21, 24, 26 & 27)

C. Delay in making applications for appointment on compassionate grounds raises a presumption that the immediate financial crisis has been tided over. (Para 23, 28, 30, 31, 32 & 33)

D. The refusal to permit agitation of stale claims is based on the principle of acquiescence. (Para 54)

E. The rule of delay and laches by preventing the assertion of belated claims puts to final rest long dormant claims. The policy of litigative repose, creates certainty in legal relations and curtails fruitless litigation. (Para 55)

C. Emotional distress and financial penury are two distinct facts. Emotional distress occasioned by the death of the employee is not material for the appointment on compassionate grounds. (Para 38)

D. Third party interest created on the account of delay cannot be disturbed while exercising extraordinary jurisdiction under Art. 226. (Para 39, 42, 43 & 44)

Writ petition has been filed to decide representation dated 11.10.2018, for appointment on compassionate grounds.

Writ Petition dismissed (E-4)

Precedent followed: -

1. Umesh Kumar Nagpal Vs St. of Haryana, (1994) 4 SCC 138 (Para 17)

2. Director of Education (Secondary) Vs Pushpendra Kumar, (1998) 5 SCC 192 (Para 18)

3. Mumtaz Yunus Mulani Vs St. of Mah., (2008) 11 SCC 384 (Para 20)

4. St. of Haryana Vs Ankur Gupta, (2003) 7 SCC 704 (Para 21)

5. Bhawani Prasad Sonkar Vs UOI & ors., (2011) 4 SCC 209 (Para 26)

6. V. Sivamurthy Vs St. of A.P., (2008) 13 SCC 730 (Para 27)

7. Sanjay Kumar Vs St. of Bihar, (2000) 7 SCC 192 (Para 30)

8. Smt. Sonal Laviniya & anr. Vs UOI & anr., (2003) (5) AWC 4070 (Para 31)

9. Sanjeev Kumar Vs Food Corpn. Of India & ors., Writ A No. 11083 of 2018, entered on 03.05.2018 (Para 32)

10. Shiv Kumar Dubey Vs St. of U.P., (2014) (2) ADJ 312 (Para 33)

11. R & M Trust Vs Koramangala Residents Vigilance Group & ors., (2005) 3 SCC 92 (Para 42)

12. Maharashtra State Rd. Transport Corpon. Vs Balwant Regular Motor Service, AIR 1969 SC 329 (Para 43)

13. Shiv Dass Vs UOI, (2007) 9 SCC 274 (Para 44)

14. Shankara Co-op Housing Society Ltd. Vs M. Prabhakar 7 ors., (2011) 5 SCC 607 (Para 45)

15. C. Jacob Vs Director of Geology & Min. Indus. Est. & anr., (2008) 10 SCC 115 (Para 47)

16. S.S. Rathore Vs St. of M.P.., (1989) 4 SCC 582 (Para 48)

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

1. Heard Ms. Manisha Chaturvedi, learned counsel for the petitioner and

learned Standing Counsel for the respondents.

2. The petitioners claims, that he is entitled for appointment, under the dying-in-harness rules. The petitioner has made, several representations on 08.02.2015, 06.05.2017, 09.07.2017, 15.11.2017 and lastly on 11.10.2018, for grant of appointment on compassionate grounds. However, the same has not been decided till date.

3. The prayer made by the petitioner, is for a direction to the authorities, to decide his representation dated 11.10.2018, for appointment on compassionate grounds.

4. The submission of Ms. Manisha Chaturvedi, learned counsel for the petitioner, is that the petitioner could not apply for appointment, on compassionate grounds, in the immediate aftermath of the death of his mother, since he was minor at that point in time. The petitioner applied for appointment after he attained majority. The petitioner cannot be faulted, for the delay, on his part in making such application. Her prayer is that, the claim of the petitioner, for appointment under dying-in-harness rules, may be decided within a stipulated period of time.

5. Learned Standing Counsel raises a preliminary objection to the maintainability of the writ petition. He submits that the petition is barred by delay and laches. No satisfactory explanation to the delay and laches on part of the petitioner, in approaching this court has been made in the writ petition. He submits, that the delay in making the claim for appointment is not liable to be condoned. The family of the petitioner, did not face any immediate financial crisis, upon the death of his mother.

6. Heard learned counsel for the petitioner and learned Standing Counsel for the State.

7. Certain facts relevant for the judgment are established beyond the pale of dispute.

8. The mother of the petitioner was working on the post of Peon in the Nazarat, Collectorate, Gorakhpur. She died in harness on 18.10.1999. The petitioner was a minor, at the time of the death of his mother. Petitioner claims, that he attained majority, in the year 2003.

9. The petitioner submitted an application, for grant of appointment, on compassionate grounds, for the first time on 13.07.2007. Thereafter several applications, were submitted by the petitioner, on 06.05.2017 and 11.10.2018 ,before the authority concerned. The respondent authorities, did not act upon his claim, and failed to appoint him, under the "U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974".

10. The petitioner approached this Court by instituting the instant writ petition, on 28.05.2019, with a prayer to decide the representation of the petitioner dated 11.10.2018. The said representation of the petitioner, for appointment on compassionate grounds was moved almost 19 years after the death of the mother of the petitioner. The writ petition has been instituted by the petitioner, almost 20 years after the death of his mother.

11. This is the admitted case of the petitioner.

12. Grant of appointment on compassionate grounds in the respondent corporation is regulated and governed by the **Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974** (hereinafter referred to as the " Dying in Harness Rules").

13. The concept of dying in harness is unique to Service Law Jurisprudence.

14. The validity of the concept of appointments on the basis of an employee dying in harness was called in question before the courts. The constitutional validity of the aforesaid appointments soon came to be tested. The compassionate ground appointments passed the test of constitutional validity by a slender margin. The justification to make compassionate ground appointments was provided on the footing that the kin of the deceased stood on the brink of financial penury or faced an immediate financial crisis on account of the death of working member of the family. This feature alone constituted the kin of a deceased employee into one class and on the footing alone the rationale of compassionate ground appointments was justified.

15. It would be apposite to reinforce the narrative with good authority.

16. The purpose of compassionate appointments provides their justification. The death of a bread winner forces the family of the deceased into penury. The immediacy of the financial crisis creates the requirement for urgent redressal. The concept of compassionate appointments is created only to enable the bereaved family to tide over the immediate financial crisis.

17. The Hon'ble the Supreme Court in **Umesh Kumar Nagpal Vs. State of Haryana, reported at (1994) 4 SCC 138,** explained the purpose of compassionate in following terms:

"2.The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such

source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

18. A similar sentiment was echoed by the Hon'ble Supreme Court in the case of ***Director of Education (Secondary) v. Pushpendra Kumar***, reported at ***(1998) 5 SCC 192*** in the following terms:

"8.The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. InUmesh Kumar Nagpalv.State of Haryana[(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is

satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual categories. It was observed: (SCC p. 140, para 2)

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

19. However, there is a caution. Compassionate ground appointments are an exception and cannot be made the rule. The exception can be maintained only by strictly adhering to the pre-conditions of the appointment in a strict fashion. A relaxation in the aforesaid pre-conditions would open a floodgate of appointments on compassionate grounds. It will turn the compassionate ground appointments into a regular source of recruitment. The constitutionally accepted mode of appointment to public office or any other post under the State Government or its instrumentalities is by open and transparent recruitment process. Such recruitment process would invite eligible persons from the open market to compete for appointment. This process is consistent with the mandate of Article 14 and Article 16 of the Constitution of India.

20. It was with this constitutional mandate in mind that the Hon'ble Supreme Court in the case of ***Mumtaz Yunus Mulani v. State of Maharashtra,*** *reported at* ***(2008) 11 SCC 384*** cautioned that compassionate appointment were not an alternative mode of recruitment to public employment, by laying down the law thus:

"However, it is now a well-settled principle of law that appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis."

21. The Hon'ble Supreme Court reiterated the purpose and limitations of compassionate ground appointment in the case of ***State of Haryana v. Ankur Gupta,*** *reported at* ***(2003) 7 SCC 704*** held thus:

"6. As was observed in State of Haryana v. Rani Devi [(1996) 5 SCC 308

: 1996 SCC (L&S) 1162 : JT (1996) 6 SC 646] it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. InRani Devi case [(1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : JT (1996) 6 SC 646] it was held that the scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In LIC of India v. Asha Ramchhandra Ambekar [(1994) 2 SCC 718 : 1994 SCC (L&S) 737 : (1994) 27 ATC 174] it was pointed out that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in Umesh Kumar Nagpal v.State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] that as a rule, in public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

7. In Director of Education (Secondary) v. Pushpendra Kumar [(1998) 5 SCC 192 : 1998 SCC (L&S) 1302] it was observed that in the matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions, it cannot substitute the provision to which it is an exception and

thereby nullify the main provision by taking away completely the right conferred by the main provision.

22. It was in the experience of the State Government that a large number of applications for compassionate ground appointments were made much after the death of the government servants. Rule 5 of the said Rules provides for the said contingency. Rule 5 authorizes the State Government to condone the delay in making of an application for an appointment on compassionate grounds. The State Government undoubtedly has the power to condone the delay in filing of an application for appointment on compassionate grounds. However, while considering the scope of such power, purpose of compassionate ground appointments can not be lost sight of. The stated purpose which is the only justifiable ground for such appointments, is that the family which is facing immediate financial crisis, should be supported by providing an employment to a member of such family to tide over the crisis.

23. Only present and imminent financial crisis provides the sole justification for making appointments on compassionate grounds. Delay in making such applications for appointment on compassionate grounds raises a presumption that the immediate financial crisis has been tided over. Lifting of the immediate financial penury, denies the justification for making an appointment on compassionate grounds.

24. The criteria of financial hardship faced by the family of the deceased caused by his death, provides a thin membrane of legitimacy to compassionate appointments. Bereft of this thin cover of legitimacy or if any other criteria is employed to make compassionate appointments, the appointments would become vulnerable to a constitutional challenge. Appointments based on descent or claims of appointment which rest on heredity, invite the wrath of Article 16 of the Constitution of India.

25. It would be apposite to fortify the narrative with good authority.

26. The Hon'ble the Supreme Court set its face against appointments based on descent in the case of Bhawani Prasad Sonkar Vs Union of India and Others, reported at (2011) 4 SCC 209. The Hon'ble the Supreme Court in Bhawani Prasad Sonkar (supra), spoke as follows:

"Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both

on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve."

"In Umesh Kumar Nagpal v. State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] , while emphasising that a compassionate appointment cannot be claimed as a matter of course or in posts above Classes III and IV, this Court had observed that: (SCC p. 140, para 2)

1. "2. ... The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

"Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated

employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.

27. A similar stand against impermissibility of appointments based on descent was taken at an earlier point in time in the case of **V. Sivamurthy Vs. State of Andhra Pradesh,** reported at **(2008) 13 SCC 730, hereunder:**

"18. (a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies."

28. Delay in making a claim for compassionate grounds appointment dilutes the case of immediate financial penury and consequently negates the entitlement for appointment on compassionate grounds.

29. Appointments on compassionate grounds cannot wait for the claimants to attain majority or to enable them to acquire additional qualifications and get a better deal in appointments. Infact, such grounds militate against claim for compassionate grounds appointment.

30. The Hon'ble Supreme Court in the case of **Sanjay Kumar Vs. State of Bihar and Others** reported at **2000 (7) SCC 192** reiterated the purpose of a compassionate grounds appointments to tide over the sudden crisis resulting from the death of the earner in a family. However, the reservation of a vacancy to enable such person to attain majority was negatived by the Hon'ble Supreme Court by holding thus:

"3. We are unable to agree with the submissions of the learned Senior Counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the breadearner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in Director of Education v. Pushpendra Kumar [(1998) 5 SCC 192 : 1998 SCC (L&S) 1302 : (1998) 2 Pat LJR 181] . It is also significant to notice that on the date when the first application was made by the petitioner on 2-6-1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

31. A Division Bench of this Court after citing good authority, also concluded that financial penury ceased to exist in case an application was made long years after the death of the employee in the case of **Smt. Sonal Laviniya and another vs. Union of India and another** reported at **2003 (5) AWC 4070**:

"38. The purpose of providing such an employment has been to render the financial assistance to the family,

which has lost the bread earner immediately after the death of the employee. If the application has been filed after expiry of 9½ years the element of immediate need stood evaporated and there was no occasion for the respondents to consider the case of the petitioner for such a relief. The observation made by the learned Tribunal are in consonance with the law laid down by the Hon'ble Apex Court and no exception can be taken out."

32. A similar view was taken by learned Single Judge of this Court in the case of **Sanjeev Kumar Vs. Food Corporation of India and Others,** registered as **Writ A No. 11083 of 2018,** entered on 03.05.2018:

"In a case of compassionate appointment, it is the immediacy of appointment that is of prime consideration to ameliorate the financial hardship be falling the bread winner of the family. If the family of the bread winner or the claimant has managed to survive for 27 years after the death of the government servant, it cannot be said that there is any immediacy of the appointment. Compassionate appointment is an exception to the well established Rule of equality in the matter of recruitment to government service and therefore exceptional grounds must exist to justify such appointment."

33. The question of delay in filing applications for appointment under Dying-in-harness Rules and the consequences of such delay on the right to be appointed on compassionate grounds was posed to a Full Bench of this Court in the case of **Shiv Kumar Dubey Vs. State of U.P.** reported at **2014 (2) ADJ 312.** For ease of reference, the relevant part of the judgment in **Shiv Kumar Dubey (supra)** is reproduced hereunder:

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

[emphasis supplied]

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

[emphasis supplied]

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

[emphasis supplied]

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

[emphasis supplied]

Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (emphasis supplied).

34. The facts of the case found earlier shall now be considered in the light of the judicial authority stated in the preceding part of the judgment.

35. The mother of the petitioner died in harness on 18.10.1999. The petitioner made an application for grant of appointment on compassionate grounds on 11.10.2018. Delay in making the application for appointment on compassionate grounds, is defended on the sole ground, that on the date of death of the mother of the petitioner, the petitioner was minor. The petitioner applied for appointment on compassionate grounds when he attained majority. On these established facts and in view of the legal narrative in the preceding paragraphs, the claim of the petitioner is untenable in law.

36. Moreover, in the light of the discussion in the earlier part of the judgment, post cannot be kept reserved, for the kin of a deceased employee, till they attain majority.

37. In view of the delay, in filing the application, for grant of appointment on compassionate grounds, this Court consistent with the narrative in the earlier part of the judgment, finds that the financial crisis, if any, occasioned by the death of the mother of the petitioner, was not existing when the application for grant of compassionate grounds appointment, was made by the petitioner. There is no lawful basis for grant of appointment on compassionate grounds to the petitioner.

38. Emotional distress and financial penury are two distinct facts. Emotional

distress occasioned by the death of the employee is not material for appointment on compassionate grounds. Immediate financial penury, caused to the family by the death of the employee, is the only relevant consideration for appointment under dying-in-harness rules.

39. There is yet another aspect of the matter. The petitioner has approached this Court 20 years, after the cause of action arose. The issue of delay and laches on the part of the petitioner, as pointed out by learned Standing Counsel, shall now be considered. The petition is barred by delay and laches. The petitioner has approached this Court almost after 20 years from the date of death of his mother. There is no satisfactory explanation for laches and the delay in filing the petition on the part of the petitioner. Further third party rights have been entrenched. The law has long set its face against the indolent litigants to approach this Court after a long delay.

40. The courts have consistently observed that delay and laches on part of the litigant will disentitle him to any relief. In this regard the Hon'ble Supreme Court has settled the law with clarity and observed it with consistency.

41. The line of authorities on this point both consistent and long. It would be apposite to cite same authorities which would give a good sense of law on the point.

42. The Hon'ble Supreme Court in the case of ***R & M Trust Vs. Koramangala Residents Vigilance Group and others*** reported at ***2005 (3) SCC 91*** held thus:-

"There is no doubt that delay is a very important factor while exercising extraordinary jurisdiction under Article 226 of the Constitution. We cannot disturb the third party interest created on account of delay. Even otherwise also why Court should come to rescue of person who is not vigilant of his rights."

43. The Hon'ble Supreme Court in the case of ***Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service*** reported at ***AIR 1969 SC 329*** held thus:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

44. A similar sentiment was echoed by the Hon'ble Supreme Court in the case of ***Shiv Dass Vs. Union of India*** reported

at ***2007 (9) SCC 274*** the Hon'ble Supreme Court opined as under:-

"the High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction."

45. When the issue of delay and laches came up before the Hon'ble Supreme Court in the case of ***Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Ors*** reported at ***2011(5)SCC 607*** the Hon'ble Supreme Court reiterated settled position of law and confirmed the well established criteria which has to be considered before exercise of discretion under Article 226 of the Constitution of India. The relevant portion is extracted herein below:-

"53. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are: (1) there is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts. (2) The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the Petitioners. (3) The satisfactory way of explaining delay in making an application under Article 226 is for the Petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the Petitioner chooses to believe in regard to the remedy. (4) No hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts. (5) That representations would not be adequate explanation to take care of the delay."

46. The Hon'ble Supreme Court also noticed the ingenuous devices adopted by unscrupulous litigants to tide over the delay and laches on part of such litigants. One such commonly used device is by filing a representation to the authorities after a long delay. Such litigants then approach the Court with an innocuous prayer to decide the representation. Once such representation is decided in compliance of orders of the court, it is claimed that a fresh cause of action has arisen. Stale wine does not became fresh in a new bottle. The Hon'ble Supreme Court saw through the designs of such litigants and foiled their intent in no uncertain terms.

47. The Hon'ble Supreme Court considered this issue in the case of ***C. Jacob Vs. Director of Geology & Min.***

Indus. Est. and another reported at ***2008 (10) SCC 115.*** The law laid down by the Hon'ble Supreme Court would guide the fate of the case. The relevant extract of the judgment is reproduced hereunder for ease of reference :-

"6. Let us take the hypothetical case of an employee who is terminated from service in 1980. He does not challenge the termination. But nearly two decades later, say in the year 2000, he decides to challenge the termination. He is aware that any such challenge would be rejected at the threshold on the ground of delay (if the application is made before Tribunal) or on the ground of delay and laches (if a writ petition is filed before a High Court). Therefore, instead of challenging the termination, he gives a representation requesting that he may be taken back to service. Normally, there will be considerable delay in replying such representations relating to old matters. Taking advantage of this position, the ex-employee files an application/writ petition before the Tribunal/High Court seeking a direction to the employer to consider and dispose of his representation. The Tribunals/High Courts routinely allow or dispose of such applications/petitions (many a time even without notice to the other side), without examining the matter on merits, with a direction to consider and dispose of the representation. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly they assume that a mere direction to consider and dispose of the representation does not involve any `decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to `consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to `consider'. If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The Tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored"

48. A similar view was taken by the Hon'ble Supreme Court in the case of ***S.S. Rathore Vs. State of Madhya Pradesh*** reported at ***1989 (4) SCC 582.*** The relevant extract of the judgment is reproduced hereunder for ease of reference :-

"It is proper that the position in such cases should be uniform. Therefore, in every such case only when the appeal or representation provided by law is disposed of, cause of action shall first accrue and where such order is not made, on the expiry of six months from the date when the appeal was filed or representation was made, the right to sue shall first accrue. Submission of just a memorial or representation to the Head of the establishment shall not be taken into consideration in the matter of fixing limitation."

49. Law has long set its face against delay in approaching the court. The courts

have consistently declined to condone the delay and denied relief to litigants who are guilty of laches. Litigants who are in long slumber and not vigilant about their rights are discouraged by the courts. Belated claims are rejected at the threshold. Rip Van Winkles have a place in literature, but not in law !

50. All this is done on the foot of the rule of delay and laches. Statutes of limitation are ordained by the legislature, rule of laches was evolved by the courts. Sources of the law differ but the purpose is congruent. Statutes of limitation and the law of delay and laches are rules of repose.

51. The rule of laches and delay is founded on sound policy and is supported by good authority. The rule of laches and delay is employed by the courts as a tool for efficient administration of justice and a bulwark against abuse of process of courts.

52. Some elements of public policy and realities of administration of justice may now be considered.

53. While indolent litigants revel in inactivity, the cycle of life moves on. New realities come into existence. Oblivious to the claims of the litigants, parties order their lives and institutions their affairs to the new realities. In case claims filed after inordinate delay are entertained by courts, lives and affairs of such individuals and institutions would be in a disarray for no fault of theirs. Their lives and affairs would be clouded with uncertainty and they would face prospects of long and fruitless litigation.

54. The delay would entrench independent third party rights, which cannot be dislodged. The deposit of subsequent events obscures the original claim and alters the cause itself. The refusal to permit agitation of stale claims is based on the principle of acquiescence. In certain situations, the party by its failure to raise the claim in time waives its right to assert it after long delay.

55. The rule of delay and laches by preventing the assertion of belated claims puts to final rest long dormant claims. This policy of litigative repose, creates certainty in legal relations and curtails fruitless litigation. It ensures that the administration of justice is not clogged by pointless litigation.

56. The above stated position of law, on the question of delay and laches, on part of the petitioner, controls the facts of the case. There is no satisfactory explanation of the delay in writ petition. The entrenched rights of third parties are not liable to be disturbed in such view of the conduct of the petitioner.

57. The claim of the petitioner for appointment on compassionate grounds, is untenable in law.

58. The writ petition is dismissed.

(2019)10ILR A 2096

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 470 of 2003

Suresh Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Suresh Kumar, Rama Kant Dixit

Counsel for the Respondents:
C.S.C.

A. Service Law - resignation - petitioner appointed on the post of Constable in Provincial Armed Constabulary fell ill on duty - sent resignation when medical certificate was not accepted - after acceptance of resignation by the authorities, petitioner sent representation to reinstate him back

Resignation becomes absolute when accepted by the competent authority. (Para 20)

The intention or proposal to resign from office from a future or specific date can be withdrawn at the time before it (resignation) becomes effective (Para 23)

Black Law's Dictionary Sixth Edition Page 1310 defines *"resignation"* to be spontaneous relinquishment of one's own right therefore it implies voluntary surrender of the position by a person resigning and acting freely not under duress. (Para 19)

Writ Petition dismissed (E-10)

Cases Cited:-

1. Chhabiley Khan Vs St of U.P. & ors Writ A No. 34378 of 2005

2. Abdul Hamid Vs District Inspector of Schools (2018) 4 UPLBEC 2839

3. U.O.I. etc Vs Gopal Chandra Misra & ors AIR 1978 SC 694

4. P. Kasilingam Vs P.S.G. College of Technology AIR 1981 SC 789

5. Moti Ram Vs Param Dev (1993) 2 SCC 725

6. U.O.I. Vs Wing Commander T Porthasarathy (2001) 1 SCC 158

7. Dr. Prabha Atri Vs St of U.P. & ors (2003) 1 SCC 701

8. North Zone Cultural Centre & ors Vs Vedpathi Dinesh Kumar (2005) 5 SCC 455

9. Air India Express Ltd. Vs Gurdarshan Kaur Sandhu (2019) SCC Online SC 1082

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioner and the learned State Counsel.

2. By means of the present writ petition, the petitioner has challenged the judgment and order dated 11.12.1997, passed by the State Public Services Tribunal, Lucknow (in short "Tribunal") in Claim Petition No. 626/V/1990 [Suresh Singh v. State of U.P. and others].

3. Facts, in brief as submitted by the learned counsel for the petitioner, of the present case are to the effect that the petitioner was appointed on the post of Constable in Provincial Armed Constabulary (in short "PAC") on 28.02.1981. Thereafter, the petitioner while was on duty fell ill, as such, he submitted medical certificate to opposite party No. 5-Commandant, 25th Battalion PAC, Raebareli, and the same was not accepted by the opposite party No. 5. The petitioner being aggrieved, annoyed and in frustrated mood, on account of act of opposite party no.5, submitted his resignation letter dated 25.11.1987. In fact, under coercion and duress, the resignation of the petitioner was obtained on 25.11.1987.

4. Vide order dated, 19.12.1987, the opposite party No. 5 accepted the resignation letter singed by the petitioner. After acceptance of the resignation letter, the leave without pay was sanctioned by the opposite party No. 5 in the following manner:-

"(1) 165 days - 30.01.1987 to 03.07.1987.
(ii) 110 days - 30.08.1987 to 18.12.1987."

5. It is submitted by the learned counsel for the petitioner when the petitioner recovered from illness, his wife submitted a detailed representation in regard to reinstatement of the petitioner in service. The same was rejected by the competent authority vide order dated 25.07.1990 (Annexure No. 20 to the writ petition).

6. Aggrieved by the order dated 25.07.1990, the petitioner approached the Tribunal by means of the Claim Petition No. 626/V/1990 [Suresh Singh v. State of U.P. and others], which was dismissed vide order dated 11.12.1997 with the following finding:-

"I am, therefore, not prepared to believe the case of the petitioner that resignation letter dated 25.11.1987 was obtained by the opposite party No. 4 from the petitioner under duress and coercion. I, therefore, find no illegality in the order whereby the resignation of the petitioner was accepted by the competent authority.

The petitioner has not filed any application to show that he made any application to opposite party-4 for taking him back in service. In his claim petition he has re referred to the representation contained in Annexure -18 to the claim petition sent to the Chief Minister. In this representation sent by the wife of the petitioner, she had prayed to the Chief Minister that the petitioner may be taken back in service. The opposite parties have denied that any such representation was received by them. The petitioner has not filed any document to show that any such representation was received in the office of the Chief Minister. Even if it is presumed that the petitioner had moved any application before the Inspector General, PAC, for giving him re-employment, the petitioner had no right to get re-employment under the opposite parties and if his representation for taking him back in service has been rejected by the Inspector General of PAC vide his order dated 25.07.1990 contained in Annexure-19 to the claim petition, I do not find any illegality in it. I find that the order contained in Annexure-19 to the claim petition is an administrative order and there is no question of giving any reason for rejecting the representation of the petitioner seeking re-employment because the petitioner has no right to get re-employment under the Provincial Armed Constabulary. Even the learned counsel for the petitioner has not been able to show that the petitioner had any right to get re-employment and any such right of the petitioner has been infringed by the impugned order dated 25.07.1990.

The petitioner has no where mentioned in the claim petition as to where Chabbiley Khan was appointed and when he submitted his resignation and when he was re-employed. It is also not mentioned where the said Chabbiley Khan was posted when his resignation was accepted and where he was posted after re-employment. Thus, there is nothing on record to show that the case of the petitioner is similar to the said

Chabbiley Khan. I, therefore, hold that the petitioner has failed to prove that the opposite party No. 3 has in any way discriminated against him when he rejected the representation of the petitioner vide his order dated 25.07.1990 (contained in Annexure-19 to the claim petition) for taking him back in service.

In view of the above considerations, I do not find any merit in the claim petition which is liable to be dismissed."

7. Learned counsel for the petitioner while challenging the impugned order dated 11.12.1997, passed by the Tribunal submitted that in the present case, the resignation of the petitioner was obtained by way of threat and coercion adopted by the opposite party No. 5, as such, the petitioner may be reinstated in service.

8. In addition to the aforesaid, the learned counsel for the petitioner placed reliance on the order dated 19.02.2018 passed by this Court in Writ-A No. 34378 of 2005 (Chhabiley Khan v. State of U.P. and others). The order dated 19.02.2018 reads as under:-

"Heard learned counsel for the petitioner and learned Standing Counsel.

This writ petition has been filed by the petitioner seeking direction in the nature of mandamus commanding the respondents to sanction the advance increments of pay in time scale by counting the period of resignation by exercising the power conferred under Regulation 416 of U.P. Police Regulation.

As per the writ petition, the petitioner was appointed on 26.10.1970 as constable in 30th Battalion P.A.C (Provincial Armed Constabulary), Gonda, District Gonda. Subsequently, he resigned from service on 30.7.1979 due to some family problems and his resignation was accepted by the competent authority vide order dated 18.8.1979. Subsequently, the petitioner was again enlisted as constable vide order dated 21.11.1986 and joined his duty on 15.12.1986.

Learned counsel for the petitioner states that the Commandant 25th Battalion P.A.C, Raebareli vide letter dated 11.10.1988 (annexure-4 to the writ petition) recommended to sanction the advance increments of pay to the extent to bring a re-enlisted constable to the stage he would reached on the time scale of constable in the U.P. Police in view of the paragraph 416 of the Police Regulation, but till date no decision has been taken by the concerned respondent.

Under the aforesaid circumstance, the Director General of Police, U.P. Lucknow is directed to consider the grievances of the petitioner and pass the appropriate order in the matter as per the recommendation made by the Commandant 25th Battalion P.A.C Raebareli for which the petitioner is also directed to make fresh representation within two weeks from today, annexing all the relevant documents and orders passed by the concerned authority. In case, the petitioner file representation, the same shall be decided by reasoned and speaking order by the respondent no.4 within a period of three months from the date of production of certified copy of this order.

The writ petition is, accordingly, disposed of."

9. Reliance placed by learned counsel for the petitioner on the judgment dated 19.02.2018 passed by this Court in Writ-A No. 34378 of 2005 (Chhabiley Khan v. State of U.P. and others) is concerned, the same is not applicable in

the facts and circumstances of the present case, as such, the petitioner cannot derive any benefit from it, as in the said case, the petitioner-Chhabiley Khan was enlisted as constable after acceptance of resignation and the writ petition was filed for direction to state-respondents to sanction the advance increments of pay in time scale by continuing the period related to acceptance of resignation and re-enlistment of petitioner as constable.

10. The learned counsel for the petitioner also placed reliance on the judgment of the Division Bench of this Court passed in the case of Abdul Hamid Vs. District Inspector of Schools, [(2018) 4 UPLBEC 2839].

11. The aforesaid judgment is also not applicable in the said case, as the Deputy Inspector of Schools (DIOS) after passing the order dated 22.01.1981, holding resignation to be invalid passed another order dated 15.05.1998 holding that resignation to be invalid, passed another order dated 15.05.1998 holding that resignation is valid and the issue for consideration before the Court that whether DIOS is empowered to review its Order. This Court held that DIOS can not review its order and in view of the above, interfered in the order dated 15.05.1998.

12. Learned counsel for the State while reverting the contention raised by the learned counsel for the petitioner submitted that in the present case, the story set-up by the petitioner for submitting his resignation is wholly incorrect and wrong. The Tribunal after taking into consideration all the facts, dismissed the claim petition of the petitioner. While dismissing the claim petition, the Tribunal recorded findings on the issue of right to re-employment after acceptance of resignation and the story framed by the petitioner for submitting his resignation and held that once the petitioner's resignation has been accepted then he has no locus to withdraw the said resignation.

13. We have heard the learned counsel for the parties and gone through the record carefully.

14. Admittedly, the petitioner made a request for re-employment/withdrawal of resignation after acceptance of resignation. It is also admitted position that fact of acceptance of resignation was in the knowledge of the petitioner, as appears from the representation of the wife of the petitioner for re-employment of petitioner, which is on record as Annexure No. 19 to the writ petition, on which the order dated 25.07.1990 (challenged before the Tribunal) was passed, whereby the request for re-employment was rejected.

15. It is settled proposition of law that once the resignation of an employee/person is accepted then it becomes absolute and cannot be withdrawn.

16. The word 'Resignation' in relation to an office connotes the act of giving up or relinquishment of the office. To relinquish office means to cease to hold office or to lose hold of the office. Therefore, it means that the employees wants to sever his relation from the employer without any riders and then only it would amount to resignation.

17. Corpus Juris Secundum Vol. 77 page 311 defines the words 'resign' and 'resignation' as under:-

"RESIGN" To give up; to surrender by a formal act; to yield; to relinquish; to give up one's office or position; to withdrawn from. The word" resign" in its ordinary and usual sense, imports a voluntary act, and has been held not to include the act of one whose continuance in a position has been terminated by death or by induction into the armed forces under th Selective Service Act.

"RESIGNATION. It has been said that "resignation" is a term of legal art, having legal connotation which describe certain legal results. It is characteristically the voluntary surrender of a position by the one resigning, , made freely and not duress, and the word is defined generally as meaning the act of resigning or giving up, as a claim, possession, or position."

18. In Words and Phrases (permanent Edn.) Vol. 37 at page 473, the word 'Resign' denoting voluntarily act, relinquish to give up, surrender by formal out, yield, relinquish, give up ones' office or position, or withdraw from it. Further at age 436 the word resignation has been define as:-

"To constitute a ' resignation', it must be unconditional and with an intent to operate as such. There must be an intention to relinquish a portion of the term of office accompanied by an act of relinquishment. It is to give back, to give up in a formal manner, an office."

19. Black's Law Dictionary Sixth Edition Page 1310 defines the resignation as formal renouncement or relinquishment of an office. It must be made with intention of relinquishing the office accompanied by act of relinquishment. It is said that resignatio est juris proprii spontanea refutatio i.e. resignation is spontaneous relinquishment of one's own right thus the term of resignation implies voluntarily surrender of the position by a person resigning and acting freely not under duress and it becomes effective when the authority competent to make appointment accept it.

20. Moreover the resignation must be unambiguous and where an ambiguous letter of resignation is submitted, the authority should right to the employee to explain or clear the ambiguity instead of proceeding to accept the same. Further, the resignation becomes absolute when it is accepted by the appointing authority, date of communication of acceptance to him is not material.

21. Once the appointing authority accepts the resignation submitted by the Government servant, it becomes absolute and cannot be withdrawn thereafter. The date on which he was informed of the such acceptance is not material for the purpose till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant has locus poenitentiae but not thereafter.

22. Hon'ble Supreme Court while considering the meaning of the word "resigning office" in the case of ***Union of India etc. Vs Gopal Chandra Misra and others, AIR 1978 SC 694*** held as under:-

"In the general juristic: sense, also the meaning of " resigning office" is not different. There also , as a rule, both, the intention to give up or relinquish the office and the concomitant act of its relinquishment, are necessary to constitute a complete and operative

resignation (see, e.g. American Jurisprudence, 2nd Edition Volume 15A , page 80) although the act of relinquishment may take different forms or assume a unilateral or bilateral character , depending on the nature of the office and the conditions governing it. Thus, resigning office necessarily involves relinquishment of the office , which implies cessation or termination of, or cutting as under from the office . Indeed the completion of the resignation and the vacation of the office , are the causal and effectual aspects of one and the same event."

23. Further in para 42 of the aforesaid judgment the Hon'ble Apex Court approving the principle of withdrawal before the relationship of the employer and the employee held as under:-

"The general principle that emerges from the foregoing conspectus is that in the absence of anything to the contrary in the provisions governing the terms and conditions of the office post, an intimation in writing sent to the; competent authority by the incumbent, of his intention or proposal to resign his office/post from a future specific date, can be withdrawn by him at any time before it becomes effective, i.e. before it effects termination of the tenure of the office/post or the employment."

24. In the case of ***P. Kasilingam V. P.S.G. College of Technology, AIR 1981 SC 789***, Hon'ble Supreme Court has held that :-

"It may be conceded that it is open to a servant to make his resignation operative from a future date and to withdraw such resignation before its acceptance. The question as to when a Government servant's resignation becomes effect came up for consideration by this Court in Raj Kumar Vs. Union of India , (1968) 3 SCR 857; (AIR 1969 SC, 180) . It was held that the services of a Government servant normally stand terminated form the date on which the letter of resignation is accepted by the appropriate authority, unless there is any law or statutory rule governing the conditions of services to the contrary. There is no reason why the same principle should not apply to the case."

25. In ***Moti Ram Vs. Param Dev (1993) 2 SCC 725***, this Court observed as hereunder:-

"As pointed out by this Court, 'resignation' means the spontaneous relinquishment of one's own right and in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it, Union of India Vs. Gopal Chandra Misra (1978) 2SCC 301, If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect

from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g. acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it."

26. In ***Union of India Vs. Wing Commender T Porthasarathy (2001) 1 SCC 158***, the Apex Court has held that when a public servant has tendered resignation his service normally stands terminated from the date on which the letter of his request is accepted by the appropriate authority and the absence of any law or statutory rule governing the condition of his service contrary to the delay not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority.

27. In the case of ***Dr. Prabha Atri Vs. State of U.P. and other, (2003) 1 SCC 701***, Hon'ble Supreme Court has observed that letter when constitutes resignation , such a letter , held must be unconditional and intending to operate as such. Where an employee, required to submit his explanation for a certain lapse on his part, while submitting his explanation added that if the explanation was found to be not acceptable he would have no option left but to tender his resignation with immediate effect, held, such a letter did not amount to resignation. At best it could amount to a threatened offer to resign. The words "with immediate effect" in the said letter , held , could not be given undue importance dehors the context tenor of the language used, the purport of the letter and the portion of the letter indicating the circumstances in which the letter was written. Moreover, stopping the domestic enquiry by the management consequent to acceptance of the alleged resignation, held , had not significance in ascertaining the true or real intention of the said letter.

28. The Supreme Court in ***(2005) 5 SCC 455, North Zone Cultural Center and another v. Vedpathi Dinesh*** Kumar has observed that the resignation becomes effective on acceptance even if not communicated. Non Communication of the acceptance does not make the resignation inoperative provided there is in fact on acceptance before the withdrawal when the relevant rules not postulating communication of acceptance as a condition precedent for coming into effect of resignation. Employee tendering resignation with immediate effect and employer accepting the same on the same day but communicating the acceptance to the employee after 13 days. During the intervening period, the employee withdrawing his resignation. Such delay of mere 13 days, held , not an undue delay so as to infer that resignation had not already been accepted. Even the continued attendance to duty and signing of attendance register by the said

employee during the intervening period held, of no assistance to claim that the resignation had not taken effect. More so, when there was no responsible officer in the office during that time and taking the advantage of that situation the employee had marked his attendance, hence the High Court's decision holding that communication of the acceptance of resignation subsequent to withdrawal of the resignation by the employee had become redundant was held improper.

29. Recently, the Hon'ble Apex Court in judgment passed in the case of ***Air India Express Ltd. Vs. Gurdarshan Kaur Sandhu reported in 2019 SCC Online SC 1082***, summarized the legal portion on the issue of withdrawal of resignation. The relevant paras are reproduced as under:-

"12. The circumstances under which an employee can withdraw the resignation tendered by him and what are the limitations to the exercise of such right, have been dealt by this Court in a number of decisions.

A] In Jai Ram v. Union of India; AIR 1954 SC 584, the concerned Government servant was to attain age of 55 years on 26.11.1946. He applied on 07.05.1945 for leave preparatory to retirement in terms of Fundamental Rule 86. The request was finally allowed and he was given 6 months' leave which was to expire on 25.05.1947. Ten days before such expiry i.e. on 16.05.1947, he sent an intimation that he would resume his duties which request was rejected. The submission that the age of retirement was 60 years was rejected by this Court. The submission that in terms of Rule 56(b)(i) of Chapter IX of the Fundamental Rules, if found efficient, he could have continued till he attained the age of 60 years, was rejected. It was observed that when a public servant himself expresses his inability to continue in service any longer and seeks permission for retirement, the required exercise in terms of said Rule 56(b)(i) to decide whether to continue him beyond the age of 55 years was rightly not undertaken and the age of retirement for him would be 55 years. In the context whether he could apply for resuming duties on 16.05.1947, it was observed by the Constitution Bench of this Court,:--

"It may be conceded that it is open to a servant, who has expressed a desire to retire from service and applied to his superior officer to give him the requisite permission, to change his mind subsequently and ask for cancellation of the permission thus obtained; but he can be allowed to do so long as he continues in service and not after it has terminated.

As we have said above, the plaintiff's service ceased on the 27th of November 1946; the leave, which was allowed to him subsequent to that date, was post-retirement leave which was granted under the special circumstances mentioned in F. R. 86. He could not be held to continue in service after the 26th of November 1946, and consequently it was no longer competent to him to apply for joining his duties on the 16th of May 1947, even though the post-retirement leave had not yet run out. In our opinion, the decision of the Letters Patent Bench of the High Court is right and this appeal should stand dismissed."

B] In Raj Kumar v. Union of India; (1968) 3 SCR 857, an officer belonging to the Indian Administrative Service tendered resignation and addressed a letter to the Chief Secretary to the Government of Rajasthan on 30.08.1964 that it may be forwarded to the

Government of India with remarks of the State Government. The State Government recommended that the resignation be accepted and on 31.10.1964 the Government of India requested the Chief Secretary to the State Government "to intimate the date on which the appellant was relieved of his duties so that a formal notification could be issued in that behalf". Before the date could be intimated and formal notification could be issued, the officer withdrew his resignation by letter dated 27.11.1964. On 29.03.1965 an order accepting his resignation was issued. The challenge raised by the officer was rejected and the High Court held that the resignation became effective on the date the Government of India had accepted it. While dismissing the appeal, a Bench of three Judges of this Court observed:--

"The letters written by the appellant on August 21, 1964, and August 30, 1964, did not indicate that the resignation was not to become effective until acceptances thereof was intimated to the appellant. The appellant informed the authorities of the State of Rajasthan that his resignation may be forwarded for early acceptance. On the plain terms of the letters, the resignation was to become effective as soon as it was accepted by the appointing authority. No rule has been framed under Article 309 of the Constitution which enacts that for an order accepting the resignation to be effective, it must be communicated to the person submitting his resignation.

Our attention was invited to a judgment of this Court in State of Punjab v. Amar Singh Harika (AIR 1966 SCR 1313) in which it was held that an order of dismissal passed by an authority and kept on its file without communicating it to the officer concerned or otherwise publishing it did not take effect as from the date on which the order was actually written out by the said authority; such an order could only be effective after it was communicated to the Officer concerned or was otherwise published. The principle of that case has no application here. Termination of employment by order passed by the Government does not become effective until the order is intimated to the employee. But where a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus poenitentiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. In the present case the resignation was accepted within a short time after it was received by the Government of India. Apparently the State of Rajasthan did not immediately implement the order, and relieve the appellant of his duties, but the appellant cannot profit by the delay in intimating acceptance or in relieving him of his duties."

C] In Union of India v. Gopal Chandra Mishra; (1978) 2 SCC 301, the issue for consideration was whether a High Court Judge, who had by letter in his own hand writing sent to the President

intimated his intention to resign the office with effect from a future date would be competent to withdraw the resignation before the date had reached? The decisions in Jai Ram; AIR 1954 SC 584 and Raj Kumar; (1968 3 SCR 857), were considered and while dealing with the scope of clause(a) of the proviso to Article 217 of the Constitution, the Constitution Bench of this Court stated:--

"20. Here, in this case, we have to focus attention on clause (a) of the proviso. In order to terminate his tenure under this clause, the Judge must do three volitional things: Firstly, he should execute a "writing under his hand". Secondly, the writing should be "addressed to the President". Thirdly, by that writing he should "resign his office". If any of these things is not done, or the performance of any of them is not complete, clause (a) will not operate to cut short or terminate the tenure of his office.

22. It may be observed that the entire edifice of this reasoning is founded on the supposition that the "Judge" had completely performed everything which he was required to do under proviso (a) to Article 217(1). We have seen that to enable a Judge to terminate his term of office by his own unilateral act, he has to perform three things. In the instant case, there can be no dispute about the performance of the first two, namely: (i) he wrote a letter under his hand, (ii) addressed to the President. Thus, the first two pillars of the ratiocinative edifice raised by the High Court rest on sound foundations. But, is the same true about the third, which indisputably is the chief prop of that edifice? Is it a completed act of resignation within the contemplation of proviso (a)? This is the primary question that calls for an answer. If the answer to this question is found in the affirmative, the appeals must fail. If it be in the negative, the foundation for the reasoning of the High Court will fail and the appeals succeed.

13. The tenor and the effect of resignation were then considered in paragraph 28 and it was held that the letter in question was merely an intimation or notice to resign the office on a future date and it was open to withdraw the resignation before the arrival of the indicated future date. The observations were:--

"28. The substantive body of this letter (which has been extracted in full in a foregoing part of this judgment) is comprised of three sentences only. In the first sentence, it is stated: "I beg to resign my office as Judge, High Court of Judicature at Allahabad." Had this sentence stood alone, or been the only content of this letter, it would operate as a complete resignation in praesenti, involving immediate relinquishment of the office and termination of his tenure as Judge. But this is not so. The first sentence is immediately followed by two more, which read : "I will be on leave till July 31, 1977. My resignation shall be effective on August 1, 1977." The first sentence cannot be divorced from the context of the other two sentences and construed in isolation. It has to be read along with the succeeding two which qualify it. Construed as a whole according to its tenor, the letter dated May 7, 1977, is merely an intimation or notice of the writer's intention to resign his office as Judge, on a future date viz. August 1, 1977. For the sake of convenience, we might call this communication as a prospective or potential resignation, but before the arrival of the indicated future date it was

certainly not a complete and operative resignation because, by itself, it did not and could not, sever the writer from the office of the Judge, or terminate his tenure as such.

14. The Court went on to state the principles as:--

"41. The general principle that emerges from the foregoing conspectus, is that in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post, an intimation in writing sent to the competent authority by the incumbent, of his intention or proposal to resign his office/post from a future specified date can be withdrawn by him at any time before it becomes effective, i.e. before it effects termination of the tenure of the office/post or the employment.

50. It will bear repetition that the general principle is that in the absence of a legal, contractual or constitutional bar, a "prospective" resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resignor. This general rule is equally applicable to government servants and constitutional functionaries. In the case of a government servant/or functionary/who cannot, under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/or office-tenure terminated, when it is accepted by the competent authority. In the case of a Judge of a High Court, who is a constitutional functionary and under proviso (a) to Article 217(1) has a unilateral right or privilege to resign his office, his resignation becomes effective and tenure terminated on the date from which he, of his own volition, chooses to quit office. If in terms of the writing under his hand addressed to the President, he resigns in praesenti, the resignation terminates his office-tenure forthwith, and cannot therefore, be withdrawn or revoked thereafter. But, if he by such writing, chooses to resign from a future date the act of resigning office is not complete because it does not terminate his tenure before such date and the Judge can at any time before the arrival of that prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal."

15. As regards the applicability of the rule in Jai Ram; AIR 1954 SC 584, it was stated:--

"49. In our opinion, none of the aforesaid reasons given by the High Court for getting out of the ratio of Jai Ram case is valid. Firstly, it was not a "casual" enunciation. It was necessary to dispose of effectually and completely the second point that had been canvassed on behalf of Jai Ram. Moreover, the same principle was reiterated pointedly in 1968 in Raj Kumar case. Secondly, a proposal to retire from service/office and a tender to resign office from a future date for the purpose of the point under discussion, stand on the same footing. Thirdly, the distinction between a case where the resignation is required to be accepted and the one where no acceptance is required, makes no difference to the applicability of the rule in Jai Ram case."

D] In Balram Gupta v. Union of India; 1987 Supp SCC 228, the concerned officer was an accountant in the Photo Division of the Ministry of Information and Broadcasting. While holding that the matter was covered by the decisions of this Court in Raj Kumar; (1968 3 SCR

857) and Gopal Chandra Misra; (1978) 2 SCC 301, this Court considered the relevant guidelines and observed:

"12. In this case the guidelines are that ordinarily permission should not be granted unless the officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in such quick succession that it cannot be said that any administrative set-up or arrangement was affected. The administration has now taken a long time by its own attitude to communicate the matter. For this the respondent is to blame and not the appellant."

E) The principles laid down in Union of India v. Gopal Chandra Misra; (1978) 2 SCC 301 have since then been followed by this Court in P. Kasilingam v. P.S.G. College of Technology; (1981) 1 SCC 405, Punjab National Bank v. P.K. Mittal; 1989 Supp (2) SCC 175, Moti Ram v. Param Dev; (1993) 2 SCC 725, Power Finance Corpn. Ltd. v. Pramod Kumar Bhatia; (1997) 4 SCC 280, Nand Keshwar Prasad v. Indian Farmers Fertilizers Coop. Ltd.; (1998) 5 SCC 461, J.N. Srivastava v. Union of India; (1998) 9 SCC 559, Union of India v. Wing Commander T. Parthasarathy; (2001) 1 SCC 158, Shambhu Murari Sinha v. Proect & Development India Ltd.; (2002) 3 SCC 437, Bank of India v. O.P. Swarnakar; (2003) 2 SCC 721, Reserve Bank of India v. Cecil Denis Solomon; (2004) 9 SCC 461, Srikantha S.M. v. Bharath Earth Movers Ltd.1, Secy., Technical Education, U.P. v. Lalit Mohan Upadhyay; (2007) 4 SCC 492, New India Assurance Company Ltd. v. Raghuvir Singh Narang; (2010) 5 SCC 335 and Union of India v. Hitendra Kumar Soni; (2014) 13 SCC 204.

F) In Punjab National Bank v. P.K. Mittal9 a permanent officer in the bank sent a letter of resignation on 21.01.1986 in terms of Regulation 20 of PNB (Officers) Service Regulation, 1979, which was to become effective on 30.06.1986. By communication dated 07.02.1986, he was informed that his resignation was accepted with immediate effect. The resignation was withdrawn by the officer on 15.04.1986. The issue therefore arose in the context of said Regulation 20, whether the officer could withdraw the resignation. Regulation 20 was as under:

"20.(1) Subject to sub-regulation (3) of Regulation 16, the bank may terminate the services of any officer by giving him three months' notice in writing or by paying him three months' emoluments in lieu thereof. (2) No officer shall resign from the service of the bank otherwise than on the expiry of three months from the service on the bank of a notice in writing of such resignation:

Provided further that the competent authority may reduce the period of three

months, or remit the requirement of notice.

16. The submission that Clause 2 of Regulation 20 and its proviso were intended only to safeguard the bank's interest and as such the bank could accept the resignation before the date when it was to come into effect was rejected by this Court in following terms:

7. Dr. Anand Prakash emphasises that as clause (2) and its proviso are intended only to safeguard the bank's interests they should be interpreted on the lines suggested by him. We are of the opinion that clause (2) of the regulation and its proviso are intended not only for the protection of the bank but also for the benefit of the employee. It is common knowledge that a person proposing to resign often wavers in this decision and even in a case where he has taken a firm decision to resign, he may not be ready to go out immediately. In most cases he would need a period of adjustment and hence like to defer the actual date of relief from duties for a few months for various personal reasons. Equally an employer may like to have time to make some alternative arrangement before relieving the resigning employee. Clause (2) is carefully worded keeping both these requirements in mind. It gives the employee a period of adjustment and rethinking. It also enables the bank to have some time to arrange its affairs, with the liberty, in an appropriate case, to accept the resignation of an employee even without the requisite notice if he so desires it. The proviso in our opinion should not be interpreted as enabling a bank to thrust a resignation on an employee with effect from a date different from the one on which he can make his resignation effective under the terms of the regulation. We, therefore, agree with the High Court that in the present case the resignation of the employee could have become effective only on or about 21-4-1986 or on 30-6-1986 and that the bank could not have "accepted" that resignation on any earlier date. The letter dated 7-2-1986 was, therefore, without jurisdiction.

8. The result of the above interpretation is that the employee continued to be in service till 21-4-1986 or 30-6-1986, on which date his services would have come normally to an end in terms of his letter dated 21-1-1986. But, by that time, he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the bank. It is true that there is no specific provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles, to withdraw his letter of resignation. That is why, in some cases of public services, this right of withdrawal is also made subject to the permission of the employer. There is no such clause here. It is not necessary to labour this point further as it is well settled by the earlier decisions of this Court in Raj Kumar v. Union of India, Union of India v. Gopal Chandra Misra and Balram Gupta v. Union of India.

17. It is thus well settled that normally, until the resignation becomes effective, it is open to an employee to withdraw his resignation. When would the resignation become effective may depend upon the governing service regulations

and/or the terms and conditions of the office/post. As stated in paragraphs 41 and 50 in Gopal Chandra Misra; (1978) 2 SCC 301, "in the absence of anything to the contrary in the provisions governing the terms and conditions of the office/post" or "in the absence of a legal contractual or constitutional bar, a "prospective resignation' can be withdrawn at any time before it becomes effective". Further, as laid down in Balram Gupta; 1987 Supp SCC 228, "If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter.""

30. Thus, considering the settled proposition of law on the issue of withdrawal of resignation, as stated hereinabove and admitted facts of the present case to the effect that the petitioner submitted his resignation from service on 25.11.1987, on personal grounds and the same was accepted by the opposite party No. 5 on 19.12.1987 and acceptance of resignation was in the knowledge of the petitioner and thereafter, for withdrawal of the resignation, the representation was submitted, on which order dated 25.07.1990 was passed, whereby the request of re-employment made in the representation was rejected, we are of the view that after acceptance of resignation, it was not open for the petitioner to withdraw the same subsequently. Hence, there is no illegality or infirmity in the impugned order dated 11.12.1997, passed by the Tribunal in Claim Petition No. 626/V/1990 [Suresh Singh v. State of U.P. and others], which is under challenge in the present writ petition.

31. Resultantly, the writ petition lacks merits. Hence, dismissed. No order as to costs.

(2019)10ILR A 2110

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 15743 of 2018

Amit Kumar Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Neeraj Kumar Rai, Umesh Pratap Singh

Counsel for the Respondents:
A.S.G., Ajay Kumar Pandey, P.K. Srivastava

A. Service Law - Compassionate Appointment - Scheme of 1998; Clause 10(a) and 16(c) - claim for compassionate appointment rejected - competent authority was under obligation to consider the financial condition - compassionate appointment cannot be claimed as a matter of right - Tribunal righty dismissed claim petition in light of the proven financial status of the family of the deceased

The Court while relying on the judgment in *State of Himachal Pradesh and Anr Vs. Shashi Kumar* held that there is no right to compassionate appointment. While considering the application for compassionate appointment in light of the policies framed therein and judgments on this issue, the benefits received by the family on account of family welfare measures including family pension and death gratuity as well as income from other resources are required to be considered. (Para 12)

Writ Petition dismissed (E-10)

Precedent followed:-

1. St of H.P. & Anr Vs Shashi Kumar (2019) 3 SCC 653

(Delivered by Hon'ble Saurabh Lavania, J.)

1- Heard learned Counsel for the petitioner and learned Counsel for the respondents.

2- The petitioner has filed the present writ petition, for the following main reliefs:-

"1. To issue a writ, order or direction in the nature of certiorari thereby quashing the impugned judgment and order passed by the Central Administrative Tribunal dated 12.04.2017 and Rejection Order dated 23.07.2015 passed by O.P. No. 4 Assistant General Manager, Lucknow, contained Annexure No. 1 and 9 to the writ petition.

2. To issue a Writ, Order or Direction in the nature of Mandamus Commanding the Opp. Parties to consider the case of the petitioner for Appointment under Scheme for Compassionate Appointment dated 09.10.1998, in the interest of Justice."

3- The brief facts of the case are that father of the petitioner was working in Bharat Sanchar Nigam Ltd. on the post of Phone Mechanic. On 15.07.2005, the father of the petitioner died and the petitioner moved an application dated 23.02.2006 for compassionate appointment before the General Manager Telicom, BSNL, Faizabad and the same was forwarded to the Chief General Manager, Telecom, U.P. (East) Circle, Lucknow. Thereafter, vide letter/order dated 21.01.2018, the High Power Committee rejected the application of the petitioner for compassionate appointment. Thereafter, aggrieved by the said order dated 21.01.2018, the petitioner filed the Original Application No. 404 of 2009 before the Central Administrative Tribunal (in short "Tribunal") and the same was allowed by the order dated 06.05.2011. The Tribunal directed the opposite parties to consider the case of the petitioner afresh in view of Circular dated 09.10.1998. The relevant portion of the order dated 06.05.2011, is reproduced below:-

" Finally, therefore, in view of the aforesaid facts and circumstances, this O.A. deserves to be and is accordingly allowed. The impugned order dated 21.1.2008 (Annexure -1) alongwith minutes of the High Power Committee dated 11.12.2007 passed by the respondent authorities, so far it relates to the applicant, are hereby set aside. The respondents are directed to consider the case of the applicant afresh in view of the relevant O.M./circulars which were in force at the relevant time, ignoring the subsequent circular letter dated 27.06.2007 which cannot have retrospective effect. As the matter is already become quite old, it is desirable that this matter is finalized within a reasonable period say within 6 months from the date of certified copy of this order is produced by the applicant to the respondents. No order as to costs."

4- Thereafter, the order dated 06.05.2011 passed by the Tribunal in O.A. No. 404 of 2009 , was challenged by the opposite parties by filing Writ Petition No.1877(SB) of 2011 (Bharat Sanchar Nigam Ltd. Versus Amit Kumar Singh) and the same was also dismissed by this Court vide order dated 03.11.2011, which reads as under:-

"We have heard learned counsel for parties and perused the pleadings of writ petition.

Learned counsel for petitioner, Bharat Sanchar Nigam Limited, submitted that the direction to reconsider the case of respondent as given vide the impugned order is contrary to a judgment of Hon'ble the Apex Court reported in 2007 (1) ESC 66 (SC) (State Bank of India & Others vs. Jaspal Kaur) which has laid down the ratio that unless the financial condition is entirely penury, compassionate appointment cannot be made. In the said case, the financial condition of the applicant was not found to be one of destitution and besides the Bank had already paid a sum of Rs. 4,57,607.00 as terminal benefits apart from payment of a pensionary benefit of Rs. 2055/- per month.

On a careful consideration of rival submissions, we do not find any merit in the case for the reason that the Tribunal has only directed the Corporation to reconsider the case of the respondent and has not issued any direction to give appointment on compassionate ground.

Thus, the Writ Petition is dismissed."

5- Thereafter, the opposite parties challenged the order of this Court dated 03.11.2011 by filing Special Leave Petition (C) No. 13043 of 2012 and the same was dismissed vide order dated 18.02.2015. Thereafter, the petitioner, in relation to appointment on compassionate ground, submitted the representation before the concerned authorities alongwith the orders of this Court, but no action was taken by them. Thereafter, the petitioner filed Contempt Petition No. 58 of 2015 before the Tribunal and thereafter the opposite party no. 4 rejected the representation/application of the petitioner by its order dated 23.07.2015.

6- Aggrieved by the order dated 23.07.2015, the petitioner preferred a claim petition O.A. No. 475 of 2015 under Section 19 of Administrative Tribunal Act 1985, before the Tribunal, with the following reliefs:-

"1. Issuing/passing of an order or direction setting aside the impugned decision dated 23.07.2015 passed by the respondent No. 4 communicated vide letter/order dated 04.08.2015, issued by the respondent No. 3 (as contained in Annexure No. A-1), after summoning the original records.

2. Issuing/passing of an order or direction to the respondents to consider the case of the applicant afresh for appointment on compassionate grounds and to appoint the applicant on any post according to his eligibility and educational qualification, etc. within a period of two months."

7- Tribunal after considering the pleadings given by the learned Counsel for the parties and on the material on record, vide order dated 12.04.2017,dismissed the claim petition . The relevant portion of the order dated 12.04.2017, is reproduced below:-

"15. After taking into consideration the rival submissions of the parties, this Tribunal is of the view that this petition lacks merit and liable to be dismissed on following grounds:

(i) that the applicant's family received the terminal benefits of approximately six lakh coupled with family pension of more than three thousand per month apart from D.A. (ii) the fact that the income from the cultivation is Rs. 3000/- per month has not been rebutted and the same was based

on the report of Revenue Authorities i.e. SDE (HRD) Faizabad. Same was also reflected in the income certificate issued by the Tehshildar, Amdbedkarnagar.

(iii) the applicant's family purchased a house as is evident from the report after the death of the deceased employee.

(iv) both the sons are major and the applicant is residing in a rented accommodation near township of NTPC, Ambedkarnagar on monthly rent of Rs. 2500/- which shows that the applicant has sufficient means to survive and the family cannot be said to be living in penurious condition.

(v) that the entire agricultural land which has been shown in extract Khatoni is not the same but has been shown as only 0.5 acres.

(vi) that the property possessed and shown in the inspection report has not been specifically denied and rejoinder has been filed by simply denying the allegation. Due to evasive denial the facts pleaded in CA amounts to be admitted by the applicant.

16. In view of the above, the O.A. sans merit and is accordingly dismissed. There shall be no order to cost."

8- Assailing the orders impugned, the learned Counsel for the petitioner submits that the concerned authorities and Tribunal, both, rejected the claim of the petitioner for compassionate ground after considering the terminal/pensionary benefits received, on account of death of his father, by the family of the petitioner, income from agricultural and other aspect and as such Tribunal as well as concerned authorities erred in law and fact both, as the reasons of rejection of claim of the petitioner for appointment on compassionate ground are beyond the scope of scheme of compassionate appointment dated 09.10.1998 (in short "Scheme of 1998") (Annexure No. 10 to the writ petition). The reasons for rejection of claim of the petitioner for compassionate appointment cannot be taken into account as per Scheme of 1998.

9- Per contra, the learned Counsel for the respondents submitted that the reasons considered while rejecting the claim of the petitioner for compassionate appointment can be taken into account, as per Scheme of 1998. Thus, there is no illegality in the order dated 12.04.2017 of the Tribunal as well as order 23.07.2015 passed by respondent no. 4.

10- We have considered the submissions of learned Counsel for the parties and perused the records.

11- We find from Scheme of 1998 (Annexure No. 10 to the writ petition), particularly Clause 10(a), 16(c), that while considering the case for providing compassionate appointment, the competent authority is under obligation to consider the financial condition of the family. Clause 10(a) and 16(c) are quoted herein under for ready reference:-

"10(a) In deserving cases even where there is already an earning member in the family, a dependent family member may be considered for compassionate appointment with prior approval of the Secretary of the Department/Ministry concerned who, before approving such appointment, will satisfy himself that grant of compassionate appointment is justified having regard to number of dependents, assets and liabilities left by the Government Servant, income of the earning member as also his liabilities including the fact that the earning member

is residing with the family of the Government Servant and whether he should not be a source of support to other members of the family.

16 (c) The Scheme of compassionate appointments was conceived as far back as 1958. Since then a number of welfare measures have been introduced by the government which have made a significant difference in the financial position of the families of the Government Servants dying in harness/retired on medical grounds. An application for compassionate appointment should, however, not be rejected merely on the ground that the family of the Government Servant has received the benefits under the various welfare schemes. While considering a request for appointment on compassionate ground a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family, ages of the children and the essential needs of the family, etc.

12- In the facts of the case we would like to refer the judgment of the Hon'ble Apex Court passed in the case of **State of Himachal Pradesh and Another Versus Shashi Kumar, reported in (2019) 3 SCC 653: (2019) 1 SCC (L&S) 542**.

The Hon'ble Apex Court after considering the policy of compassionate appointment and relevant judgments on the issue, held that benefits received by family on account of welfare measures including family pension and death gratuity as well as income from other resources are required to be considered. The Hon'ble Apex Court further held that there is no right to compassionate appointment. The terms of policies framed for providing compassionate appointment must be implemented. The relevant paragraphs of the judgment are as under:-

"18. While considering the rival submissions, it is necessary to bear in mind that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. Dependants of a deceased employee of the State are made eligible by virtue of the policy on compassionate appointment. The basis of the policy is that it recognises that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. Where the authority finds that the financial and other circumstances of the family are such that in the absence of immediate assistance, it would be reduced to being indigent, an application from a dependent member of the family could be considered. The terms on which such applications would be considered are subject to the policy which is framed by the State and must fulfil the terms of the policy. In that sense, it is a well-settled principle of law that there is no right to compassionate appointment. But, where there is a policy, a dependent member of the family of a deceased employee is entitled to apply for compassionate appointment and to seek consideration of the application in accordance with the

terms and conditions which are prescribed by the State.

19. The policy in the present case which was formulated on 18-1-1990 categorically speaks of providing employment assistance to dependants of government servants who have died while in service, "leaving their families in indigent circumstances". The policy, in other words, is designed to meet the needs of those families where the death of a government servant has left them in indigent circumstances, requiring immediate means of subsistence. The policy recognises in Para (10) that the benefits which are received by a family on account of welfare measures are required to be considered. Among them, the policy stipulates that family pension and death gratuity are required to be taken into account in assessing the financial circumstances of the family. The policy does not preclude the dependants of a deceased employee from being considered for compassionate appointment merely because they are in receipt of family pension. What the policy mandates is that the receipt of family pension should be taken into account in considering whether the family has been left in indigent circumstances requiring immediate means of subsistence. The receipt of family pension is, therefore, one of the considerations which is to be taken into account. Para (10)(c) of the policy sets out the measures provided by the State which have a bearing on the financial need of the family.

20. In view of the clear terms of the policy, we are of the view that the High Court was in error in issuing a mandamus to the Government to disregard its policy. Such direction could not have been issued by the High Court. The High Court has drawn sustenance in issuing a mandamus in the above terms from a decision of this Court in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** . That was a case of compassionate appointment where in the course of the proceedings before the High Court, a learned Single Judge had directed Life Insurance Corporation, which was the employer of the deceased employee, to make an enquiry and submit a report on whether the members of the family engaged in gainful employment were also supporting the family of the deceased employee. This Court, in an appeal against the judgment of the High Court rejecting the petition for compassionate appointment, observed that the officer who had enquired into the matter in pursuance of the order of the learned Single Judge completely omitted to furnish any report on the points which were required by the High Court to be investigated. The High Court rejected the petition on the ground that the family was in receipt of family pension and other amounts towards terminal benefits. Reversing the view of the High Court, a two-Judge Bench of this Court held thus: (Govind Prakash Verma case **[Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] , SCC p. 291, para 6)**

"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules."

21. The decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S)**

590] has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in **Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** . The principles which have been laid down in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, **(1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 139-40, para 2)**

"2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

22. Specifically in the context of considering the financial circumstances of

the family of the deceased employee, several judgments of this Court have elaborated on the principles to be followed.

23. The decision in **SBI v. Kunti Tiwary [SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943]** involved an interpretation of an Office Memorandum dated 7-8-1996 circulated to all banks in the light of the decision in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** . The Indian Banks Association adopted the directions of this Court in the scheme which was proposed for the appointment of heirs of deceased employees. The scheme contemplated that in order to determine the financial condition of the family, the following amounts would have to be taken into account: (Kunti Tiwary case **[SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943] , SCC p. 273, para 7**)

"7. ... (a) Family pension.

(b) Gratuity amount received.

(c) Employee's/Employer's contribution to provident fund.

(d) Any compensation paid by the Bank or its Welfare Fund.

(e) Proceeds of LIC policy and other investments of the deceased employee. (f)

Income of family from other sources.

(g) Employment of other family members.

(h) Size of the family and liabilities, if any, etc."

Eventually, this recommendation was accepted in the scheme. In the light of these recommendations and the scheme, this Court observed that where the family of a deceased employee was not left without means of livelihood, the claim for compassionate appointment could not be sustained. It may be noted that in that case it was on a review of the overall financial position of the family, including amounts received towards terminal benefits that the decision was taken.

24. The decision of this Court in **Punjab National Bank v. Ashwini Kumar Taneja [Punjab National Bank v. Ashwini Kumar Taneja, (2004) 7 SCC 265 : 2004 SCC (L&S) 938**] followed the same principle. While reiterating the view which was taken in **Kunti Tiwary [SBI v. Kunti Tiwary, (2004) 7 SCC 271 : 2004 SCC (L&S) 943]** , this Court held that the scheme specified the amounts which were required to be taken into consideration.

25. The decision in **SBI v. Somvir Singh [SBI v. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92**] has noticed the scheme for appointment of dependants of deceased employees on compassionate grounds framed by State Bank of India. The Court expressly held that the authorities were not in error in taking account of the terminal benefits, investments and the monthly family income including the family pension paid by the Bank. The view of this Court finds expression in the following extract: (SCC p. 784, para 12)

"12. The competent authority while considering the application had taken into consideration each one of those factors and accordingly found that the dependants of the employee who died in harness are not in penury and without any means of livelihood. The authority did not commit any error in taking the terminal benefits and the investments and the monthly family income including the family pension paid by the Bank into consideration for the purposes of deciding as to whether the family of late Zile Singh had been left in penury or without any means of livelihood. The scheme framed

by the appellant Bank in fact mandates the authority to take those factors into consideration. The authority also did not commit any error in taking into consideration the income of the family from other sources viz. the agricultural land."

In the view of this Court, the only issue to be considered was whether the claim for compassionate appointment had been considered in accordance with the scheme. The income of the family from all sources was required to be taken into consideration according to the scheme. This having been ignored by the High Court, the appeal filed by the Bank was allowed.

26. The judgment of a Bench of two Judges in **Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077]** has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case.

27. In **Union of India v. Shashank Goswami [Union of India v. Shashank Goswami, (2012) 11 SCC 307 : (2013) 1 SCC (L&S) 51]** , this Court considered a circular issued by the Office of the Comptroller and Auditor General of India in terms of which the total income of the family from all sources, including terminal benefits received, was required to be taken into account. Income limits were specified in the circular for Group "B', Group "C' and Group "D' posts. Taking note of the fact that a family pension has been authorised to the widow of the deceased employee, this Court held that the case of the dependant did not fall within the income limits meant for Group "C' posts.

28. The same principle has been reiterated in another decision of a Bench of two Judges of this Court in **SBI v. Surya Narain Tripathi [SBI v. Surya Narain Tripathi, (2014) 15 SCC 739 : (2015) 3 SCC (L&S) 689]** . While adverting to a submission of the learned counsel based on the decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** , this Court noted thus: (Surya Narain Tripathi case **[SBI v. Surya Narain Tripathi, (2014) 15 SCC 739 : (2015) 3 SCC (L&S) 689] , SCC p. 741,** paras 8-9)

"8. He relied upon the judgment of this Court in **Govind Prakash Verma v. LIC [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590**] where a view has been taken that the compassionate appointment cannot be refused on the ground that another member of the family had received appropriate employment and the service benefits were adequate. We may humbly state that this view runs counter to the view which was taken earlier in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930]** which was not cited before the Court in **Govind Prakash [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] .** The subsequent two judgments which were referred above also take the same

view as in **Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930**] . Mr Vikas Singh has drawn our attention to the judgment in **SBI v. Somvir Singh [SBI v. Somvir Singh, (2007) 4 SCC 778 : (2007) 2 SCC (L&S) 92]** where the 1998 Scheme has been considered.

9. In all the matters of compassionate appointment it must be noticed that it is basically a way out for the family which is financially in difficulties on account of the death of the breadearner. It is not an avenue for a regular employment as such. This is in fact an exception to the provisions under Article 16 of the Constitution. That being so, if an employer points out that the financial arrangement made for the family subsequent to the death of the employee is adequate, the members of the family cannot insist that one of them ought to be provided a comparable appointment. This being the principle which has been adopted all throughout, it is difficult for us to accept the submission made on behalf of the respondent."

29. Now, it is in this background that it would be necessary to advert to the decision in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539]** . A scheme for compassionate appointment of 8-5-1993 was prevalent in Canara Bank when the employee died on duty in October 1998. Faced with the rejection of an application for compassionate appointment, the High Court was moved in a writ petition in which a learned Single Judge issued [**M. Mahesh Kumar v. Canara Bank, 2003 SCC OnLine Ker 657 : (2003) 98 FLR 1030]** a direction for reconsideration of the claim for appointment. During the pendency of the appeal before the Division Bench, the scheme for compassionate appointment was replaced by a new scheme providing for ex gratia in lieu of appointment. The main issue which fell for consideration before this Court was whether the subsequent scheme which was formulated in 2005 providing for ex gratia payment would govern or whether the application would have to be disposed of on the basis of the earlier scheme of 1993. It may be noted that the application for compassionate appointment in that case had been rejected on the ground that the family of the respondent was not in indigent circumstances, as required by the scheme for compassionate appointment of 1993.

30. Dealing with the applicability of the subsequent scheme, a Bench of two Judges of this Court held, following the earlier decision in **SBI v. Jaspal Kaur [SBI v. Jaspal Kaur, (2007) 9 SCC 571 : (2007) 2 SCC (L&S) 578]** , that the cause of action to be considered for compassionate appointment arose when the earlier scheme was in force. Hence, the claim could not be decided on the basis of the subsequent scheme which provided only for the payment of ex gratia. Moreover, as a matter of fact, the subsequent scheme was superseded in 2014 by reviving the scheme for the provision of compassionate appointment.

31. Hence, the issue which has been dealt with in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539]** is whether the application for grant of compassionate appointment could have been rejected on the basis of a scheme which had come into force after the date of submission of the application. That, as this Court observed, was the main question which fell for consideration. The Bench of two

Judges, however, also noted that it was urged on behalf of the appellant Bank that the family of the respondent was in receipt of family pension. This, the Court held, was of no consequence in considering the application for compassionate appointment.

32. The learned Senior Counsel appearing on behalf of the appellants has sought to distinguish the above observations, in the judgment in **Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539] ,** by submitting that it is not the case of the State of Himachal Pradesh that mere receipt of family pension would disable an applicant from submitting an application for compassionate appointment or preclude consideration of the claim. On the contrary, the submission which is urged is that the scheme requires consideration of all relevant sources of income and hence, receipt of family pension would be one of the criteria which would be taken into consideration in determining as to whether the family of the deceased employee is in indigent circumstances. We find merit in this submission for the simple reason that it is in accord with the express terms of the scheme of 18-1-1990 as modified by the State. The scheme contemplates that payments which have been received on account of welfare measures provided by the State including family pension are to be taken into account. Plainly, the terms of the scheme must be implemented.

33. For these reasons, we have come to the conclusion that the High Court was not justified, based on the decision in **Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590]** in issuing a direction to the State to act in a manner contrary to the express terms of the scheme which require that the family pension received by the dependents of the deceased employee be taken into account."

13- Learned Counsel for the petitioner could not point out any other good reason or ground to establish that the reasoning given by the Tribunal and respondent no. 4, while rejecting the claim of the petitioner, is unjustified and illegal.

14- Keeping in view the provision of the scheme of 1998 and the observations made by the Hon'ble Apex Court in the judgment passed in the case of **State of Himachal Pradesh(Supra)**, we hold that there is no illegality in the order dated 12.07.2017 passed by the Tribunal and order dated 23.07.2015 passed by respondent no. 4. For the aforesaid reason, we do not find a fit case for interference.

15- The petition is misconceived and hence **dismissed** accordingly.

(2019)10ILR A 2120

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.09.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 268 of 2019

Union of India & Ors. ...Petitioners
Versus
Ravindra Kumar Singh & Anr. ...Respondents

Counsel for the Petitioners:
Kuldeepak Nag (K.D. Nag)

Counsel for the Respondents:
R.C. Saxena

A. Service Law - disciplinary proceeding - disciplinary enquiry in contravention of sub-rule 2 & 3 of Rule 15 of Central Civil Services (Classification, Control and Appeal) Rules, 1965 as also principles of natural justice - the applicant-respondent failed to disclose the letter dated 12.10.2017 and the fact that he retired from the service on attaining superannuation - he who seeks equity must come with clean hands

When a person approaches a Court of Equity in exercise of its extra-ordinary jurisdiction under Article 226/227 of the Constitution of India, he should not only approach the Court with clean hands but with clean mind, heart and objective as well (Para 18)

Writ Petition disposed of (E-10)

Cases Cited:-

1. Smt. Sudama Devi Vs Commissioner & ors (1983) (2) SCC 1

2. State of Rajasthan & ors Vs Bal Kishan Mathur (dead) through legal representatives & ors (2014) (1) SCC 592

3. The Ramjas Foundation & Ors Vs U.O.I. & ors AIR (1993) SC 852

4. K.P. Srinivas Vs R.M. Premchand & ors. (1994) 6 SCC 620

5. Nooruddin Vs (Dr.) K.L. Anand (1995) 1 SCC 242

6. Ramniklal N. Bhutta & anr. Vs State of Mah & ors. AIR (1997) SC 1236

7. M/s Tilok Chand Motichand & ors*. Vs H.B. Munshi & anr. AIR (1970) SC 898

8. St of Haryana Vs Karnal Distillery AIR (1977) SC 781

9. Sabia Khan & ors. Vs St of U.P. & ors. AIR (1999) SC 2284

10. Agriculture & Process Food Products Vs Oswal Agro Furane & Ors. AIR (1996) SC 1947

11. Abdul Rahman Vs Prasony Bai & anr AIR (2003) SC 718

12. S.J.S. Business Enterprises (P) Ltd. Vs St of Bihar & ors. (2004) 7 SCC 166

13. S.P. Chengalvaraya naidu Vs Jagannath (1994) AIR 853

(Delivered by Hon'ble Anil Kumar, J.)

1. Heard Sri K.D. Nag, learned counsel for petitioner, Sri R.C. Saxena, learned counsel for applicant-respondent No. 1 and perused the record.

2. Facts in brief of the present case are that applicant-respondent No. 1/Ravindra Kumar Singh has filed an O.A. No. 75 of 2010 (Ravindra Kumar Singh Vs. Union of India and others), challenging the entire disciplinary, i.e. memorandum of charge, inquiry report, second stage advice of the CVC and the penalty order compulsorily retiring him from service and also challenged the penalty order dated 30.07.2010 by means of amendment in the said O.A. before the Central Administrative Tribunal (hereinafter referred to as the "Tribunal') In addition to abvoesaid O.A., applicant-respondent has also filed O.A. No. 316/2007.

3. Both the O.As were clubbed together and decided by the common judgment by the Tribunal.

4. So far as the O.A. No. 316/2007 is concerned, the Tribunal in its judgment and order dated 01.09.2017 held as under:-

"23. The only relief claimed in OA No. 316/2007 is challenged to the charge-sheet on the ground that the same has been issued by an incompetent authority. In view of the above, there is no merit in this OA, Which is liable to be dismissed. Ordered accordingly."

5. So far as the O.A. No. 75 of 2010 is concerned, the Tribunal in its judgment dated 01.09.2017 held as under:-

"24. As far as OA No. 75/2010 is concerned, we have already recorded our opinion that the procedure adopted by the disciplinary authority is in contravention to sub-rules (2)and (3) (a) of rule 15 of the CCS(CCA)Rules, 1965, as also violative of principles of natural justice. The impugned penalty order is thus liable to be set aside on this count. We order accordingly. notwithstanding the setting aside of the impugned penalty order, the matter is remitted back to the disciplinary authority to pass a fresh order after taking into consideration the reply of the applicant to the inquiry report, without taking into consideration the second stage advice of CVC."

6. The findings on which the abvoesaid judgment has been passed by Tribunal is quoted hereinbelow:-

"16. It is admitted case of the parties that on receipt of the inquiry report the disciplinary authority failed to forward the same to the Government servant. To the contrary without seeking response of the Government servant, CVC's advice was sought by recording its own tentative opinion of imposing the penalty, whereas ex facie the requirement of the rule is that the disciplinary authority is under a bounden duty to forward the report of the inquiry firstly to the charged officer for his representation and it is only after the comments/representation of the charged officer that the disciplinary authority, if after examining the representation of the Government servant to the inquiry report, is of the opinion that the penalty as prescribed under rules is required to be imposed, may seek second stage advice of the Commission. The object of this provision is based upon sound principles of natural justice. The disciplinary authority is not required to formulate its opinion merely on the basis of the inquiry report, except where he disagrees on the findings of the inquiring authority on any article of charge without considering the reply/representation of the Government servant to the findings of the inquiring authority. The very object is that the disciplinary authority on consideration of the representation/reply of the charged officer to the findings of the inquiring authority may change its opinion. In the present case, the disciplinary authority in gross contravention of the provisions of sub-rule (2) and sub-rule (3)(a) of rule 15, chose to seek second stage advice of CVC before providing opportunity to the Government servant to submit his representation/reply to the report of the inquiring authority. It is also pertinent to note that though the disciplinary authority is not bound by the advice of the Commission, nonetheless, the advice of the Commission, whether CVC or UPSC, is capable of influencing the mind of the disciplinary authority and in such an eventuality it would not be an independent, impartial and fair

application of mind by the disciplinary authority to the findings of the inquiring authority. The import of CVC's advice at the initial stage without having the benefit of the Government servant's response to the inquiry report is prone to seriously impact the decision making approach of the disciplinary authority. Thus, such a procedure is not only in contravention of sub-rules (2) and (3)(a) of rule 15 but also violative of the principles of natural justice.

17. Sub-rule 3(b) of rule 15 also requires the disciplinary authority to forward or cause to be forwarded a copy of the advice of the Commission received under clause (a) to the Government servant to provide him another opportunity to respond to the advice of the Commission. Thus, a two-fold protection has been provided to the Government servant (i) to respond to the report of the inquiry to provide a fair opportunity to the disciplinary authority to examine the report of the inquiry in the light of the defence of the Government servant; and (ii) in the event the advice of the Commission is against the Government servant, to enable the Government servant to again respond to such advice for the impartial and due application of mind by the disciplinary authority.

18. In ***Managing Director, ECIL v B. Karunakar & others*** *[(1993) 4 SCC 727] a Constitution Bench of the Hon'ble Supreme Court held that it is the right of the employee to have the report of the inquiry officer to defend himself effectively notwithstanding whether he asked for the report or not. The report has to be furnished to him even if the statutory rules do not permit furnishing of the report or are silent on this aspect. This is in consonance with Article 311(2) of the Constitution of India and principles of natural justice. However, where the disciplinary authority before providing opportunity to the Government servant makes up its mind to an impose penalty and further strengthens its opinion with the advice of CVC or UPSC, the very purpose of asking the Government servant to submit his representation is frustrated and renders it meaningless and illusory.*

19. The role and purpose of the Central Vigilance Commission in the matter of disciplinary proceedings is prescribed under Section 19 of the Central Vigilance Commission Act, 2003. Such consultation is on the basis of the rules and regulations governing vigilance or disciplinary matters relating to persons appointed to public services and posts in connection with the affairs of the Union. Any regulations made under the Central Vigilance Commission Act, 2003 have to be read harmoniously with the provisions of rule 15 of the CCS (CCA) Rules, 1965.

20. In the present case, from the record we find that vide letter dated 20.08.2009, the disciplinary authority sought the second stage advice of CVC. While seeking advice the disciplinary authority not only simply forwarded the report of the inquiring authority but also its own findings and conclusions on each article of charge. The opinion of the disciplinary authority recorded in the aforesaid letter is as under:

"Taking into account the findings of the Inquiry Officer as well as the views of the undersigned, it is considered that the imposition of one of the major penalty on Shri R.K Singh, Inspector (now Supdt) recommended by the CVC in its first stage Advice aforementioned would be just, fair and proper. Accordingly, I strongly recommend that one of the major penalty under Rule 11 of CCS (CCA) Rules, 1965

should be imposed upon Shri R.K. Singh, Inspector (now Supdt)."

CVC vide its office memorandum dated 22.01.2010 communicated to the disciplinary authority for acceptance of the inquiry officer's report for imposition of suitable major penalty in agreement with the disciplinary authority. The aforesaid memorandum reads as under:

"Sub: Disciplinary Proceedings against Shri R.K. Singh, Inspector (now Supdt.).

CBEC may refer to their U.O. Note No.V-566/5/2001-Pt.II-Cus/04 dated 07.01.2010 on the subject cited above.

2. Commission has observed that the IO's report and as

the views of the DA are appropriate as the inquiry establishes the active involvement of the CO in leaving his station unauthorisedly for abetting the export fraud which was unraveled by DRI.

3. Commission, hence, in agreement with DA, advises for acceptance of IO's Report and imposition of suitable major penalty upon Shri R.K. Singh, then Inspector (now Supdt.).

4. Department's files are returned herewith. Receipt of Commission's advice/Department's files may be acknowledged. Action taken may be intimated."

From the above office menmorandum, we find that CVC has not discharged its role in accordance with law. As a matter of fact, CVC seems to have been influenced by the opinion of the disciplinary authority and has endorsed its opinion without any application of mind, and vice versa, the disciplinary authority being influenced by the opinion of CVC imposed the penalty. In the entire process, the principles of natural justice have been sacrificed by both the authorities.

21. The applicant has also challenged the competence of the Commissioner, Central Excise to issue the charge memorandum. It is stated that the Commissioner was not competent to issue the charge-sheet. Reliance is placed upon order dated 16.01.2003 issued by the Ministry of Finance, Department of Revenue, CBEC, New Delhi, whereby the Chief Commissioner, Central Excise/Customs, Lucknow was declared as the cadre controlling authority. Copy of this letter is placed on record as Annexure-1 with OA No.723/2010 in OA No.75/2010. Aforesaid letter reads as under:

"Sub: Declaration of Chief Commissioner of Central Excise/Customs as Cadre Controlling Authorities upto Group 'B' level staff.

Sir

I am directed to say that the question of declaring the Chief Commissioner of Central Excise/Customs as cadre controlling authority in respect of staff upto Group 'B' level had been under consideration of the Central Board of Excise and Customs (hereinafter referred to as the Board) for some time. It has now been decided by the Board that all the powers that are presently being exercised by the respective Chief Commissioners as the cadre controlling authority should henceforth be exercised by their respective Chief Commissioners. However there would be no merger or bifurcation of the existing cadres i.e. the functions of each cadre controlling authority shall be exercised separately and independently by the chief Commissioner. This in effect would imply that the independent entity of each cadre shall remain intact and unchanged.

2. As the cadre controlling authority, the Chief Commissioners' mandate of responsibility should also extend to:

(a) All establishment matters including recruitment, promotion and confirmation upto the level of Group B staff;

(b) Holding of Departmental Promotion Committee meetings;

(c) Monitoring the implementation of the Board's instructions with regard to transfers and equitable distribution of manpower and material resources between Commissioners/Zones; and

(d) Adequate representation of employees belonging to the SC/ST and OBC categories in the cadre under his control.

3. It is also clarified that in the formations comprising both Commissioners and Chief Commissioners, it would be the Chief Commissioner who would allocate and post staff to various formations including Commissioners'/Chief Commissioners' office.

4. It has also been decided to declare the Chief Commissioners as Head of the Department in order to enable them to carry out their responsibilities."

22. From the perusal of the aforesaid letter, we find that the Chief Commissioner was declared as the cadre controlling authority for purposes of activities mentioned therein. Insofar as the disciplinary proceedings are concerned, Part-II of the Schedule appended to the CCS (CCA) Rules, 1965 prescribes the description of service, appointing authority and the competent authority to impose penalties. Part-II of the Schedule deals with the Central Civil Services Group 'B'. Entry 12 of the aforesaid Schedule reads as under:

Serial No.	Description of service	Appointing Authority	Authority competent to impose penalties and penalties which it may impose (with reference to item numbers in Rule 11	
			Authority	Penalties
(1)	(2)	(3)	(4)	(5)
12.	Central Excise Service, Group 'B'- (including Deputy Headquarters Assistant to the Collector) and District Opium Officers, Group "B'	Collector of Central Excise/land Customs; Narcotics Commissioner	Collector of Central Excuse/Land Customs Director of Inspection; Director of Revenue Intelligence; Narcotics Commissioner. In respect of (i) a member of the Service Serving in (Statistics and Intelligence Branch Central Excise) : Deputy collector (Statistics and Intelligence Branch). (ii) any other member of the Service: Assitant6 Collector of Central Excise, Group "A' All	All (i) to (iv) (i)

From this Schedule, it is evident that the Collector of Central Excise (Commissioner) is the competent disciplinary authority to impose all penalties prescribed under rule 11. The Schedule is statutory in nature. Letter dated 16.01.2003 has not amended the Schedule and thus may be for administrative purposes, but not for purposes of imposition of penalty. Otherwise also this communication does not in any manner deals with the powers of the Chief Commissioner to impose the penalty in disciplinary proceedings. Thus statutory rule would prevail and the

Commissioner was and continues to be the competent authority for imposing penalty upon the applicant. The contention of the applicant is thus rejected.

23. The only relief claimed in OA No.316/2007 is challenge to the charge-sheet on the ground that the same has been issued by an incompetent authority. In view of the above, there is no merit in this OA, which is liable to be dismissed. Ordered accordingly.

24. As far as OA No. 75/2010 is concerned, we have already recorded our opinion that the procedure adopted by the disciplinary authority is in contravention to sub-rules (2)and (3) (a) of rule 15 of the CCS(CCA)Rules, 1965, as also violative of principles of natural justice. The impugned penalty order is thus liable to be set aside on this count. We order accordingly. notwithstanding the setting aside of the impugned penalty order, the matter is remitted back to the disciplinary authority to pass a fresh order after taking into consideration the reply of the applicant to the inquiry report, without taking into consideration the second stage advice of CVC."

7. Aggrieved by the order dated 01.09.2017, the present writ petition has been filed by the petitioners.

8. Sri R.C. Saxena learned counsel for applicant-respondent No. 1 has raised preliminary objection on the issue of maintainability of writ petition through affidavit. The relevant portion of the affidavit is quoted below:-

*"**(i) The present writ petition is barred by the doctrine of Estoppel**:- The present writ petition is liable to be dismissed for the reason that after serving the certified copy of Judgement and order dated 1.9.2017 passed by Learned Tribunal in O.A. No.75/2010 along with representation dated 23.9.2017, the Disciplinary Authority, Commissioner, CGST & Central Excise Lucknow in terms and in compliance of Judgement and order dated 1.9.2017 of the Learned Tribunal issued the letter dated 12.10.20 17 requiring the deponent to submit the representation against the inquiry report dated 29.7.2009 within a period of 15 days for taking decision after considering the representation, if submitted by the deponent and thereafter the deponent in compliance of letter dated 12.10.2017 submitted representation dated 24.10.2017 and further representation dated 29.6.2018 to the Disciplinary authority for taking decision but no decision has yet been taken by the disciplinary authority in terms of judgement and order dated 1.9.2017. From the above it is absolutely clear that the Petitioners accepted the judgement of the Learned Tribunal dated 1.9.2017 and also implemented the impugned judgement and order dated 1.9.2017 by issuing letter dated 12.10.2017. Thus, from the own actions of the Petitioners/Respondents that they had no intention to challenge the impugned judgement and order of the learned tribunal as the letter dated 12.10.2017 issued by themselves for implementing the judgement and order dated 1.9.2017 of the learned tribunal they are barred & stopped by the Doctrine of Estoppel as such the present writ petition is liable to be dismissed on this ground alone. The true electrostat copy of the letter dated 12.10.2017 excluding the copy of inquiry report and the representations dated 24.10.2017 & 29.6.2018 submitted by the deponent are filed here with as Annexure*

No.-CA-1, CA-2 & CA-3 to this counter affidavit.

(ii) Writ Petition is liable to be dismissed for concealment of material facts/documents:- *The petitioners/respondents have cunningly and most dishonestly have concealed the most material facts/documents in the writ petition that for the purpose of compliance of judgement and order of Learned Tribunal dated 1.9.2017 the letter dated 12.10.2017 contained in Annexure No. CA-1 was already issued to the deponent requiring the deponent to submit his representation for taking appropriate decision by the disciplinary authority which was submitted by the deponent on 24.10.2017 & 29.6.2018 contained in Annexure No.-CA-2 & CA-3 and the disciplinary authority despite the above has yet not taken any decision. In view of the above, since the petitioners/respondents have not approached this Hon'ble Court with clean hands and are guilty of concealment of material facts and documents, the writ is liable to be dismissed for the said reasons.*

(iii) Moving of two Applications seeking for extension of time to comply with the judgement and order before the Learned Tribunal in 0.A. No.75/2010, debars the petitioners/respondents to challenge the said impugned judgement and order dated 1.9.2017 before this Hon'ble Court:- *It is the well settled legal position that either the respondents may comply with the directions of the Hon'ble Court within the time specified or if the compliance is not possible for any reason within the specified period, the only course open to the Respondents is that they should moved the concerned court for the purpose of extension of further time for compliance of the said directions. In the present case also since the Petitioners/respondents could not take decision within a specified time of 3 months, they approached and filed two applications for further extension of time before the Learned Tribunal in OA No.75/2010 for complying with judgement and order dated 1.9.2017. Moving of above two applications for further extension of time itself finds mention in para 29 and 31 of the writ petition. Therefore, on one hand when above applications of the petitioners/respondents seeking for extension of time for compliance of iudgement and order dated 1.9.2017 are still pending with the learned tribunal in the aforesaid O.A. No.75/2010, they are under legal obligation to comply with the judgement and order dated 1.9.2017 and they can not permitted to challenge the same judgement and order dated 1.9.2017 for compliance of which they have sought for extension of time before Learned Tribunal. In this regard the deponent refers and rely upon the decision of Hon'ble Supreme court in the case of M.L. Sachdev vs Union of India & another reported in 1991 SCC(L&S) 606, Para 7 in which the Hon'ble Apex Court has held that once it was found that before the extended date the direction was not being complied with, it was the obligation of the respondent-contemnor to approach the court for further extension of time or to receive such direction as the court in its discretion thought it appropriate to make. Thus, it is absolutely clear that the very purpose of moving application for extension of further time is to aimed at to comply with the judgement and order and its direction and not for challenging the iudgement and order before higher court in the garb of said application for extension of time as such the present writ*

is barred by principles of Estoppel and constructive resjudicata.

*(***iv) The present writ petition is liable to be dismissed on the ground of delay and laches:-** *The Hon'ble Tribunal passed the judgement and order dated 1.9.2017 contained in Annexure No. 1 to the writ petition considering the entire facts and grounds raised on behalf of petitioner and the respondents and decided all the issues involved into the matter, setting aside the impugned punishment order of compulsory retirement and remitted back the matter to the disciplinary authority for passing a fresh order within a period of three months. The petitioner/respondents within a period of about one month partially complied with the judgement and order dated 1.9.2017 by issuing letter dated 12.10.2017 contained in Annexure No.-CA-1 and when remaining compliance about taking of final decision could not be possible within the specified period of 3 months, they approached the learned Tribunal for extension of time by means of two applications. From the moving of these applications for extension of time for complying with the directions of Learned Tribunal, the petitioners/respondents can not get rid off from the 3 months limitation for filing the writ petition. The reason is that seeking of time for compliance of directions is all together contrary to the question of limitation for filing of writ petition. It is wonder that the petitioners/ respondents have not even mentioned any facts and grounds for condoning the period beyond three months in any part of the entire writ petition. It appears that the petitioners/respondents misleading the Hon'ble court and not disclosing that the period of limitation for challenging the judgement and order dated 1.9.2017 had already expired as on 1.12.2017 and further expiry of one year, filed the above writ petition which was liable to have been dismissed on the ground of delay and laches. It is not disputed that even if any writ petition suffers from the delay and laches, the Hon'ble Court has power to condone the delay for sufficient reasons to be pleaded and brought on record but the delay in question has to be explained with reasons so that the concerned Hon'ble court may be able to pass appropriate order but in the present case the relevant facts and reason about Condonation of delay have not been pleaded at all instead several letters of departmental correspondents of different subsequent dates have been referred in the writ petition which are irrelevant as regards the question of limitation for filing of writ petition against the judgement and order dated 1.9.2017. In view of the above, the present writ petition is liable to be dismissed on the ground of limitation also."*

9. Learned counsel for petitioners, in rebuttal, so far as the matter in regard to delay in filing the writ petition, submits that after passing of the judgment by Tribunal dated 01.09.2017 the steps were taken as stated in paragraph Nos. 29 to 34 of the writ petition, so keeping in view the said facts as well as the judgment passed by Hon'ble the Apex Court int eh case of ***Smt. Sudama Devi Vs. Commissioner and others, 1983 (2) SCC 1 and in the case of State of Rajasthan & others Vs. Bal Kishan Mathur (dead) Through Legal Representatives and others, 2014 (1) SCC 592***, delay in filing the writ petition may be condoned.

10. Sri K.D. Nag, learned counsel for petitioners-Union of India while

opposing the other objections raised by learned counsel for respondent as well as on merit of judgment passed by the Tribunal submits as under:-

"1. That it is admitted fact that there were very serious allegations against Ravindra Kumar Singh (OP-1 in instant WP), including those relating to extending assistance to the offenders by misusing is official position and attempting to get released the detained export consignments of offenders, against the interest of the Customs department. Hence Disciplinary proceedings were conducted against the OP-1 in accordance with law wherein full opportunity was provided to him. The Charge Sheet was issued on 29.09.2003, whereas after providing full opportunity, the punishment order of compulsory Retirement of R. K. Singh (OP-1) was passed by the disciplinary authority on 30.07.2010. (refer Para-12 of WP).

2. That it is also admitted fact that a Memorandum of Charges dated 29.09.2003 was served to R. K. Singh (OP-1), to which he submitted his reply dated 08.10.2003. The gravity and seriousness of Charges is evident as the Article of Charges have been quoted in the final Judgment and Order dated 01.09.2017, impugned in the writ petition (refer Para-3 of WP).

3. That it is also admitted fact that the enquiry officer proceeded with the enquiry proceedings in accordance of law. After giving full opportunity and after observing all norms of natural Justice, the inquiry was concluded on 04.06.2009. At that stage R. K. Singh submitted detailed Statement of Defense dated 21.07.2009 and after considering the statement of defense of R. K. Singh (OP-1 in instant WP), the inquiry officer submitted Inquiry Report dated 29.07.2009 to the disciplinary authority (refer Para-5 of WP).

4. That it is also admitted that vide office order dated 05.02.2010 (i.e. Show Cause Notice- before awarding punishment) the (i) copy of the Inquiry Report dated 29.07.2009 and (ii) copy of IInd stage advice memo dated 22.01.2010 of CVC was serve to R. K. Singh (OP- 1 in WP) for his reply /representation in the matter of action proposed against him. The fact of serving the copy of the Inquiry Report dated 29.07.2009 and copy of IInd stage advice memo dated 22.01.2010 of CVC has been acknowledged by the Tribunal in the end of paragraph 5 of the impugned judgment dated 01.09.2017 (Ann. - 1 to wp). As such all norms of opportunity of representation, fair play and natural justice were observed at that stage also. As such no prejudice caused to R. K. Singh (refer Para-7 of WP).

5. That OP-1 (R. K. Singh) submitted his representation dated 12.03.2010 in response to the office order dated 05.02.2010 (i.e. Show Cause Notice before awarding punishment) (refer Para-9 of WP).

6. That after considering the entire material relating to disciplinary proceeding including the representation dated 12.03.2010 of OP-1 (R. K. Singh) in response to the office order dated 05.02.2010 (i.e. Show Cause Notice - before awarding punishment), the punishment order dated 30.07.2010 for 'compulsory retirement' of R. K.Singh (OP-1 in instant WP) was passed by the disciplinary authority (refer Para-12 of WP).

7. That it is pertinent to mention that the Disciplinary Proceedings in question against the opposite party commenced on 29.09.2003, with the issuance of Memorandum of Charges dated

29.09.2003 (Charge Sheet) and got concluded on 30.07.2010 by issuance punishment order dated 30.07.2010 for compulsory retirement of R. K. Singh in a span of seven year duration. In the prolong detailed Disciplinary Proceedings, all possible opportunities of representation /reply hearing in his defense were provided to the opposite party and all opportunities were fully availed by the opposite party.

8. That during the course of Disciplinary Proceedings, opposite party (R.K. Singh) filed two original applications i.e. OA No. 316 / 2007 and OA No.75 /2010, in the Central Administrative Tribunal, Lucknow Bench, Lucknow, but he did not plead as to what and factual prejudice was caused to him actual and factual prejudice was caused to him and in what manner during inquiry proceedings through which he was compulsorily retired.

9. That the Tribunal has acknowledge that along with the copy of Inquiry Report, the advice of the commission (CVC) was also send to the R. K. Singh for his

comments - before passing punishment order. As such it cannot be said that there is failure of opportunity of hearing to the Government Servant, and in fact the final decision of imposition of penalties was taken only after considering the reply dated 12.03.20100 of R. K. Singh in response to the office order dated 05.02.2010 (i.e. Show Cause Notice - before awarding punishment) of disciplinary authority (refer Para-25 of WP).

10. That for allowing the OA No.75 / 2010 vide impugned judgment dated 01.09.2017, the Learned Tribunal relied on the legal principle laid down by the Hon'ble Supreme Court of India on the issue of 'Non Supply of Report of Inquiry Officer' in the matter of Managing Director, ECIL, Hyderabad Vs. B. Karunakar - (1993) 4 SCC 727.

11. That in paragraph 30 (v) of the judgment in - Managing Director, ECIL, Hyderabad Vs. B. Karunakar, reported at (1993) 4 SCC 727, Hon'ble Supreme Court of India observed -

"30 (v) ..... Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to

permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an - unnatural expansion of natural justice which in itself is antithetical of justice.

In the instant matter in hand of R. K. Singh, a Show Cause Notice-before awarding punishment (i.e. order dated 05.02.2010) was issued to R. K. Singh and along with that the (i) copy of the Inquiry Report dated 29.07.2009 and (ii) copy of IInd stage advice memo dated 22.01.2010 of CVC was serve to R. K. Singh (OP-1 in WP) for his reply /representation in the matter of action proposed against him. The fact of the serving the copy of the Inquiry Report dated 29.07.2009 and copy of IInd stage advice memo dated 22.01.2010 of CVC has been acknowledged by the Tribunal in the end of paragraph 5 of the impugned judgment dated 01.09.2017 (Ann.-1 to WP).

The Learned Tribunal failed to record the appropriate findings as to what actual and factual prejudice was caused to

R. K. Singh and in what manner. Thus the impugned judgment dated 01.09.2017 (Ann. 1 to WP) is in sheer violation to the principle laid down in Managing Director, ECIL, Hyderabad Vs. B. Karunakar (1993) 4 SCC 727 itself.

12. That in support of contention of the writ petition, the petitioner is further relying on the judgment given in the matter of S. K. Singh Vs. Central Bank of India & others (1996) 6 SCC 415 (copy attached), wherein the Hon'ble Supreme Court of India held - since the dismissed employee failed to explain, as to what prejudice was caused to him on account of non-supply of the Charge Sheet, the 'dismissal order' was rightly not interfered with by the Hon'ble Single Judge and also rightly not interfered by the Division Bench of High Court. Lastly Hon'ble Apex Court also dismissed the SLP filed by the dismissed employee.

13. That in support of contention of the writ petition, the petitioner is further relying on the paragraphs 21, 22, 23, 24, 25, 36 & 44 of the judgment given in the matter of - Haryana Financial Corporation & another Vs. Kailash Chandra Ahuja - (2008) 9 SCC 31 (copy attached).

14. That in support of contention of the writ petition, the petitioner is further relying on the paragraphs 7, 8, 9 & 10 of the judgment given in the matter of - Uttarakhand Transport Corporation & another Vs. Sukhver Singh - (2018) 1 SCC 231 (copy attached).

15. That in preliminary objection dated 25.03.2019, the counsel for OP-1 has opposed the writ petition on the ground of 'Estoppel' as the departmental authorities invited objections of OP-1 in furtherance of judgment dated 01.09.2017 (Ann. 1 to WP), impugned in instant writ petition. Hence departmental authorities are stopped to challenge the judgment dated 01.09.2017 passed by the Central Administrative Tribunal.

In reply it most respectfully submit that parties (particularly the departmental authorities) before the Central Administrative Tribunal, in the OA have every 'legal right' rather 'legal duty' to challenge the judgment of the Tribunal and seek judicial review at next higher forum i.e. the Hon'ble High Court. It is most respectfully submitted that 'legal right' or 'legal duty' cannot be blocked on the ground of 'Estoppel'.

It is further submitted that none of the legal right of the OP-1 are getting affected by judicial review /judicial scrutiny by the Hon'ble High Court of the judgment dated 01.09.2017 passed by the Central Administrative Tribunal.

16. That in the 'Counter Affidavit' dated 18.04.2019, the OP-1 has referred the Judgment of Hon'ble Apex Court delivered in the matter of S. P. Chengalvaraya Naidu Vs. Jagannath - 1994 AIR 853.

In this connection it is submitted the judgment of Apex Court delivered in the matter of S. P. Chengalvaraya Naidu Vs. Jagannath relates to the property dispute, where some manipulation were made in the property related document by one party and preliminary decree was obtain at the back of aggrieved party.

In the instant writ petition, unwanted interference by the Central Administrative Tribunal in the departmental disciplinary proceedings is to be examined by the Hon'ble High Court."

11. In order to consider the matter in respect to condonation of delay, we feel appropriate to go through the law as laid down by Hon'ble the Apex Court in the case of Smt. Sudama Devi Vs. Commissioner and others, 1983 (2) SCC

1 and in the case of State of Rajasthan & others Vs. Bal Kishan Mathur (dead) Through Legal Representatives and others, 2014 (1) SCC 592, wherein it has been held as under:-

" It is correct that condonation of delay cannot be a matter of course; it is also correct that in seeking such condonation the State cannot claim any preferential or special treatment. However, in situation where there has been no gross negligence or deliberate inaction or lack of bonafides this Court has always taken a broad and liberal view so as to advance substantial justice instead of terminating a proceeding on a technical ground like limitation. Unless the explanation furnished for the delay is wholly unacceptable or if no explanation whatsoever is offered or if the delay is inordinate and third party rights had become embedded during the interregnum the Courts should lean in favour of condonation. Our observations in Postmaster General v. Living Media India Ltd. : (2012) 3 SCC 563 and Amalendu Kumar Bera v. State of West Bengal : (2013) 4 SCC 52 do not strike any discordant note and have to be understood in the context of facts of the respective cases.

Postmaster General v. Living Media India Ltd. (supra)

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

Amalendu Kumar Bera v. State of West Bengal (supra)

10. ... True it is, that courts should always take liberal approach in the matter of condonation of delay, particularly when the Appellant is the State but in a case where there are serious laches and negligence on the part of the State in challenging the decree passed in the suit and affirmed in appeal, the State cannot be allowed to wait to file objection Under Section 47 till the decree-holder puts the decree in execution....

Merely because the Respondent is the State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in the absence of "sufficient cause" delay shall not be condoned."

12. Thus, in view of the abvoesaid law as laid down by Hon'ble the Apex Court we in the interest of justice thinks

that delay in filing the writ petition may be condoned and is hereby condoned.

13. So far the other preliminary objections, as raised by Sri R.C. Saxena, learned counsel for applicant-respondent No. 1, as stated hereinabove in regard to maintainability of the writ petition, except in regard to condonation of delay in regard to which we have already condoned.

14. From the material on record, the position which emerged out is that rather admitted facts that after passing of the judgment and order dated 01.09.2017 by the Tribunal in O.A. No. 75/2010, whereby the Tribunal remitted the matter back to the disciplinary authority to pass a fresh order after taking into consideration the reply of the applicant/R.K. Singh to the inquiry report, without taking into consideration the second stage advice of CVC. Thereafter, the competent authority/Diciplinary Authority has issued a letter dated 12.10.2017 written by the Commissioner/Disciplinary Authority, CGST & Central Excise, Lucknow, which on reproduction reads as under:-

"OFFICE OF THE COMMISSIONER
CENTRAL GOODS AND SERVICE TAX & CETNRAL EXCISE
7-A, ASHOK MARG, LUCKNOW
Phone/Fax No. 0522-2233049/2233134
NO-II(10)13-Vig/LKO/RKS/17/144
DATE:12.10.2017
To
Shri Ravindra Kumar singh
Superntendent (Retired)
S/o Shir Lalit Mohan singh
F-190, Indralok, Krishna nagar,
Kanpur Road,
Lucknow - 226023

Subject: Disciplinary case against Shri Ravindra Kumar Singh, Inspector [now Superintendent (Retired)] under rule 14 of the CCS (CCA) Rules, 1965-forwarding of Inquiry report Reg.

******

With reference to the Memorandum C.No.-05/Vig/Lko/2001/Pt/411 dated 29.9.2003 issued by Commissioner, Central Excise, Lucknow and in compliance of the order dated 01.09.2017 passed by Hon'ble CAT, Lucknow in O.A. NO. 75/2010 filed by Shri Ravindra Kumar Singh, Superintendent (Retired), please find enclosed herewith a copy of Inquiry report dated 29.07.2009.

In this regard, if you with to make any representation or submission against the said Inquiry report dated 29.07.2009, you may do so in writing the Disciplinary Authority i.e. the Commissioner, CGST & Central Excise, Lucknow within 15 days of receipt of this letter The disciplinary Authority will take decision after considering the representation/ submission, if any, submitted by you.

Encl: As above

(V. Valte)
Commissioner (Disciplinary Authority)
CGST & Central Excise :: Lucknow

15. In response to the abovesaid letter, applicant-respondent No. 1/R.K. Singh submitted his reply/submission on merit before the Disciplinary Authority, which are annexed as C.A.2 and C.A.-3 along with the affidavit filed in support of the preliminary objection taken by the applicant-respondent No. 1,. Further, petitioners, respondents in O.A., have not

considered and disposed of the same as per the direction given by the Tribunal.

16. Further, as per the admitted fact, thereafter petitioners, respondents in the O.A., have moved two applications for extension of the time before the Tribunal which are pending for consideration.

17. The said facts relates to letter dated 12.10.2017 have been deliberately concealed by the petitioner while filing the present writ petition before this Court.

18. Taking into consideration the aforesaid facts as well as the fact that when a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. (See ***The Ramjas Foundation & Ors. Vs. Union of India & Ors., AIR 1993 SC 852; K. P. Srinivas Vs. R. M. Premchand & Ors., (1994) 6 SCC 620).***

Thus, who seeks equity must do equity. The legal maxim "Jure Naturae Aequum Est Neminem cum Alterius Dectrimento Et Injuria Fieri Locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another.

In the case of Nooruddin vs. (Dr.) K. L. Anand, (1995) 1 SCC 242, the Supreme Court observed as under:

".....Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice."

Similarly, in the case of ***Ramniklal N. Bhutta & Anr. vs. State of Maharashtra & Ors., AIR 1997 SC 1236***, the Apex Court observed as under :-

"The power under Article 226 is discretionary. It will be exercised only in furtherance of justice and not merely on the making out of a legal point..... the interest of justice and public interest coalesce. They are very often one and the same. .....The Courts have to weight the public interest vis-a-vis the private interest while exercising the power under Article 226....indeed any of their discretionary powers.

19. In the case of ***M/s. Tilok Chand Motichand & Ors. Vs. H. B. Munshi & Anr., AIR 1970 SC 898; State of Haryana vs. Karnal Distillery, AIR 1977 SC 781; and Sabia Khan & Ors. Vs. State of U.P. & Ors., AIR 1999 SC 2284***, the Apex Court held that filing totally misconceived petition amounts to abuse of process of the Court and such a litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose, amounts to abuse of the process of the Court.

20. In the case of ***Agriculture & Process Food Products Vs. Oswal Agro Furane & Ors., AIR 1996 SC 1947***, the Apex Court had taken a serious objection in a case filed by suppressing the material facts and held that if a petitioner is guilty of suppression of very important fact his case cannot be considered on merits. Thus a litigant is bound to make "full and true disclosure of facts". While deciding the said case, the Supreme Court had placed reliance upon the judgment in King vs.

General Commissioner, (1917) 1 KB 486, wherein it was observed as under :-

"Where an ex parte application has been made to the Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent abuse of its process, to refuse to proceed any further with the examination of its merits....."

21. In the case of ***Abdul Rahman vs. Prasony Bai & Anr., AIR 2003 SC 718*** and ***S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors., (2004) 7 SCC 166,*** the Supreme Court held that whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would be led any fact on the merit of the case.

22. In the case of ***S.P. Chengalvaraya naidu Vs. Jagannath, 1994 AIR 853,*** Hon'ble the Apex Court held as under (relevant portion):-

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants- defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

23. As well as the fact that applicant-respondent No. 1/R.K. Singh had retired from the service during the pendency of the O.A. before the Tribunal after attaining the age of superannuation on 31.02.2016. The said fact was neither brought on record by the petitioner nor respondents before the Tribunal.

24. So in view of the abovesaid facts and taking into consideration the fact that once the petitioners have acted and complied the direction issued by the Tribunal vide judgment and order dated 01.09.2017 passed in O.A. No. 75/2010, we are of the considered opinion that the reliefs as claimed by the petitioner for quashing of the judgment and order dated 01.09.2017 passed by Tribunal, cannot be granted.

25. Further, taking into consideration the admitted position

between the parties that as per the direction given by the Tribunal after quashing of the order dated 30.07.2010 by which the penalty has been imposed upon applicant-respondent No. 1, the petitioners had proceeded to issue a letter dated 12.10.2017, to which applicant-respondent No. 1 has already submitted his reply, the competent authority/disciplinary authority is directed to decide the same within a further period of eight weeks from the date of receiving a certified copy of the order in accordance with law which governs the field and while doing so, the finding which is given by the Tribunal while quashing the order dated 30.07.2010 in O.A. No. 75/2010 by which it has set aside the penalty imposed upon the respondent No. 1 shall not be binding rather will not be an impediment in the way of the Punishing Authority.

26. In the result, writ petition is disposed of with the above observations.

27. No order as to costs.

(2019)10ILR A 2136

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.10.2019

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Service Bench No. 28018 of 2019

State of U.P. & Anr. ...Petitioners
Versus
Rajesh Kumar Singh & Anr. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Government Servants Conduct Rules, 1956; Rule 3 - defines misconduct - manner which is inconsistent with due and faithful discharge of his duty in service amounts to misconduct - monthly details for payment of entertainment tax which were kept in different files can be an act of negligence but not of misconduct

The Court observes that for an act to qualify "misconduct" what is of primary importance is to ascertain as to whether such an act of omission or negligence would result in irreparable damage or damage caused by such an act would be so heavy that the degree of culpability would be very heavy. (Para 8 & 10)

Writ Petition dismissed (E-10)

Cases Cited:-

1. U.O.I. & ors Vs J.Ahmad AIR (1979) Supreme Court 1022

2. Sri Kishan Vs St of U.P. & ors Writ-A No. 26115 of 2004

3. Badev Singh Gandhi Vs St of Punjab & ors AIR (2002) SC 1124

4. Noratannal Chouraria Vs M.R. Murli & anr (2004) 5 SCC 689

5. State of Punjab & ors Vs Ram Singh Ex-Constable (1992) 4 SCC 54

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard learned State counsel representing the petitioner.

2. This petition filed under Article 226 of the Constitution of India

challenges the order dated 07.03.2019 passed by U.P. State Public Service Tribunal, Lucknow whereby the claim petition no.1343 of 2017 filed by respondent no.1 challenging the order of punishment of censure and the appellate order, has been allowed and the punishment of censure has been set-aside.

3. Submission of learned counsel for the petitioner is that finding given by the Tribunal vide impugned judgment and order dated 07.03.2019 to the effect that in absence of any mens rea the charge against respondent no.1, as alleged, would not amount to misconduct, is erroneous in view of the law laid down by Hon'ble Supreme Court in the case of ***Union of India and others vs. J.Ahmad, reported in AIR (1979) Supreme Court 1022.***

4. A show cause notice was issued to respondent no.1 under Rule 10 (2) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules, 1999'), which provides the procedure for award of minor punishment. According to said show cause notice, the petitioner was required to furnish his reply in respect of irregularities said to have been committed by him which are mentioned in said show cause notice dated 23.10.2015. The alleged irregularity attributed to the respondent no.1 was that as per requirement of Rule 10 (2) of U.P. Cable Television Network (Exhibition), Rules 1997, monthly details are required to be presented/furnished in Form-5, however, in the concerned file Form-5 was available only in relation to the months of November, 2014, December, 2014 and January, 2015 and that Form-5 in relation to earlier months were not available. The respondent no.1 submitted his reply to the said show cause notice vide his letter dated 04.12.2015 and stated that at the time of inspection of the relevant file, all Forms-5 pertaining to the cable operator were available in separate Dak files, however, on account of urgency at the time of inspection only available Forms-5 were inserted in the file, but the cable operator has been making payment of entertainment tax every month in time. Along with the reply, respondent no.1 also annexed copies of all Forms-5 pertaining to the cable operator concerned, of the earlier months from the date respondent no.1 had taken charge of the area concerned. The said reply dated 04.12.2015 is on record which contains Formd-5 pertaining to earlier months from February, 2014 till December, 2014. The Commissioner, Entertainment Tax, U.P. however, passed an order on 19/21.01.2016 and found that respondent no.1 had not kept Forms-5 of every month relating to cable operator concerned though he was required to keep the same and accordingly awarded the respondent no.1 punishment of censure. Respondent no.1 challenged the said order dated 19/21.01.2016 by filing statutory appeal under the provision of Rules, 1999, which too was dismissed by the State Government vide its order dated 28.03.2017.

5. Challenging the aforesaid two orders i.e. the order of punishment dated 19/21.01.2016 and the order passed by the appellate authority, dated 28.03.2017, respondent no.1 preferred claim petition before U.P. State Public Service Tribunal, which has been allowed vide impugned judgment and order dated 07.03.2019. Learned Tribunal while passing the impugned judgment has considered the reply submitted by respondent no.1 to the show cause notice and has concluded that

issue at hand was only to the effect that respondent no.1 had not kept all Forms-5 of the cable operator in the file; rather they were kept in separate files and accordingly at the time of inspection, total number of Forms-5 found were less than the actual number of Forms-5 which were to be maintained and kept by respondent no.1. The Tribunal has given a finding that the relevant document, namely, Forms-5 were not kept in the file concerned, however, they were kept elsewhere, hence the same, at the most, may amount to negligence and it will not amount to any misconduct for the reason that by keeping Forms-5 respondent no.1 was not going to be benefited in any manner.

6. So far as the employees of the State Government are concerned, 'misconduct' has not been defined anywhere, however, for the purposes of regulating the conduct of its employees, the State Government has made Rules under the proviso appended to Article 309 of Constitution of India which are known as U.P. Government Servants Conduct Rules, 1956 (hereinafter referred to as "Conduct Rules"). Rule 3 of the said Rules clearly mandates that every government servant shall at all times maintain absolute integrity and devotion to duty. It further provides that every government servant shall at all times conduct himself in accordance with specific or implied orders of government regulating their behaviour and conduct which may be in force.

7. The Conduct Rules thus provide a code of conduct for government employees, however what is primary is that every government servant has to maintain absolute integrity and devotion to duty and further that he has to conduct himself in accordance with specific or implied orders of government regulating to their behaviour and conduct.

8. What flows from Rule 3 of Conduct Rules is that if a government servant conducts himself in a manner which is inconsistent with due and faithful discharge of his duty in service, the same will amount to misconduct. However, every act of omission would not constitute misconduct for the purposes of drawing disciplinary proceedings as has been held by Hon'ble Supreme Court in the case of J. Ahmad (supra). An act of omission which runs contrary to the expected conduct of an employee would certainly constitute misconduct, however some other act of omission or negligence in performance of duty and a lapse in performance of duty or error of judgment may amount to negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high.
(emphasis supplied)

9. These observations have been made in the case of J. Ahmad (supra), relevant extract of which is mentioned herein below:-

"A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P. H. Kalyani v. Air France, Calcutta (5), wherein it was found that the two mistakes committed by the employee

while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high."

10. Thus, for an act of omission to qualify 'misconduct', what is of primary importance is as to whether such act of omission or negligence would result in irreparable damage or damage caused by such an act would be so heavy that the degree of culpability would be very high. It is also clear that negligence or mistake may not ipso facto constitute misconduct when its consequences are serious.

11. This Court in a judgment rendered on 16.08.2018 in the case of ***Sri Kishan vs. State of U.P. and others, Writ-A No.26115 of 2004*** after reviewing the entire law relating to misconduct vis-a-vis negligence including the judgment in the cases of ***Baldev Singh Gandhi vs. State of Punjab and others, AIR 2002 SC 1124, Noratannal Chouraria vs. M.R. Murli & another, reported in 2004 (5) SCC 689 and State of Punjab and others vs. Ram Singh Ex-Constable, (1992) 4 SCC 54 and also J.Ahmad (supra)*** has held as under:-

"12. The allegations at the best may show that the petitioner is not very alert or careful but in absence of anything further, mere carelessness or lack of seriousness of an employee or failure to show better efficiency, upto desired level, ipso facto would not amount to 'misconduct' warranting punishment as held in J. Ahmed (supra) that Lack of efficiency or failure to attain highest standards in discharge of duties attached to public office would not constitute misconduct, unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high, which is not the case in hand".

12. If the misconduct as alleged against respondent no.1 is examined on the touch stone of what has been laid down by Hon'ble Supreme Court in the case of J.Ahmad (supra) and other judgments referred to hereinabove, what we find is that respondent no.1 was alleged to have not kept certain documents in the file concerned. It is not the charge against respondent no.1 that he did not maintain the said documents being its custodian. It is also not the charge against respondent no.1 that documents (Forms-5) pertaining to cable operator were not kept at all.

13. To the contrary, it is apparent from the reply submitted by respondent no. 1 to the charge sheet is that though all Forms-5 pertaining to the cable operator were not available in the file, however,

they were kept in different files. It is also not the charge against respondent no.1 that he had failed to realize the amount of entertainment tax payable by the cable operators. Accordingly, at the most respondent no.1 can be said to have conducted himself negligently but there being no serious consequence of keeping Forms-5 at separate place, such act of respondent no.1 cannot, in our considered opinion, be construed as misconduct.

14. In view of the aforesaid, we do not find any illegality or irregularity in the impugned order dated 07.03.2019 passed by U.P State Public Service Tribunal which warrants any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

15. The writ petition, thus, lacks merit and is hereby dismissed.

16. There will be no order as to costs.

(2019)10ILR A 2140

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.10.2019

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Service Bench No. 6880 of 2019

State of U.P. & Ors. ...Petitioners
Versus
U.P. State Public Services Tribunal, Lucknow & Anr. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
C.S.C., Ganesh Kumar Gupta, Manish Kumar

A. Service Law - U.P. Police Officer of Subordinate Rank (Punishment and Appeal) Rule, 1991; Section 14 (1) - honorable acquittal in criminal case will exonerate the petitioner from departmental proceedings - squarely covered by S. Bhaskar Reddy case

" An acquittal based on benefit of doubt would not stand on par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. The long standing view on this subject was settled by this Court in *R.P. Kapur Vs. Union of India*, whereby it was held that a departmental proceeding can proceed even though a person is acquitted when the acquittal is other than honorable" (Para 34)

The expressions "honorable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honorably acquitted. (Para 43)

B. Constitution of India - Article 14 - doctrine of equality applies on the delinquents - no discrimination while imposing punishment

Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. (Para 53)

Writ petition dismissed (E-10)

Precedent followed: -

1. S. Bhaskar Reddy & anr Vs Superintendent of Police & anr (2015) 2 SCC 365

Cases referred: -

1. G.M. Tank Vs St of Guj & ors (2006) 5 SCC 446

2. Shashi Bhushan Prasad Vs Inspector General Central Industrial Security Force & ors (2019) SCC Online SC 952

3. Joginder Singh Vs Union Territory Of Chandigarh & ors (2015) 2 SCC 377

4. U.O.I. Vs Sardar Bahadur (1972) SCC 618

5. Depot Manager, A.P. SRTC Vs Mohd. Yusuf Miya (1997) 2 SCC 699

6. Suresh Pathrella Vs Oriental Bank of Commerce (2006) 10 SCC 572

7. West Bokaro Colliery (TISCO Ltd.) Vs Ram Pravesh Singh (2008) 3 SCC 729

8. Mazdoor Sangh Vs Usha Breco Ltd. (2008) 5 SCC 554

9. Samar Bahadur Singh Vs St of U.P. (2011) 9 SCC 94

10. Karnataka SRTC Vs M.G. Vittal Rao (2012) 1 SCC 442

11. Inspector General of Police Vs S. Samuthiram (2013) 1 SCC 598

12. SBI Vs Narendra Kumar Pandey (2013) 2 SCC 740

13. Commr. Of Police Vs Meher Singh (2013) 7 SCC 685

14. SBI Vs R. Periyasamy (2015) 3 SCC 101

15. St of W. B. & ors Vs Sankar Ghosh (2014) 3 SCC 610

16. Indian Overseas Bank, Annasalai and another Vs P. Ganesan & ors (2008) 1 SCC 650

17. Ajit Kmar Nag Vs Indian Oil Corporation Ltd. (2005) 7 SCC 764

18. Nelson Motis Vs Union of India (1994) 4 SCC 711

19. NOIDA Entrepreneurs Assn. Vs NOIDA (2007) 10 SCC 385

20. State (NCT of Delhi) Vs Ajay Kumar Tyagi (2012) 9 SCC 685

21. R.K. Solanki Vs Central Bank of India (2018) Lab IC 1652

22. Bank of India Vs Degala Suryanarayana (1999) 5 SCC 762

23. Lalit Popli Vs Canara Bank (2003) 3 SCC 583

24. M.V. Bijlani Vs Union of india (2006) 5 SCC 88

25. Sukh Ram Vs St of U.P. & ors (2018) 4 ESC 1772

26. Director General of Police & ors Vs G. Dasayan (1998) 2 SCC 407

27. Anand Regional Coop. Oil Seedgrowers' Union Ltd. Vs Shailesh Kumar Harshadbhai Shah (2006) 6 SCC 548

28. Rajendra Yadav Vs St of M.P. & ors (2013) 3 SCC 73

29. Lucknow Kshetriya Gramin Bank & anr Vs Rajendra Singh (2013) 12 SCC 372

(Delivered by Hon'ble Anil Kumar, J.)

1. Heard Sri Manjeev Shukla, learned counsel for the petitioners/State and Sri Manish Kumar, Senior Advocate assisted by Sri Ganesh Kumar Gupta, learned counsel for the claimant-respondent no.2/ Sushil Kumar Mishra.

2. By means of present writ petition, petitioners have prayed for quashing of the impugned judgment and order dated 4.7.2018 passed by U.P. State Public

Service Tribunal, Indira Bhawan,Lucknow(herein after referred as the "Tribunal') in Claim Petition No.1035 of 2014 (Sushil Kumar Mishra Vs. State of U.P. and others).

3. Facts, in brief, as submitted by learned counsel for the petitioners are that on 2.11.2011 a Truck having registration no. RJ-14 UB3210 was intercepted by the police of the police-station Chakeri, District Kanpur Nagar .It was found that in the said truck cows and bullocks were being carried for slaughtering. When the police interrogated the driver of the truck, namely, Ram Kumar son of Prem Singh and other persons present in the truck , they stated that claimant/respondent no.2 by putting his motorcycle was facilitating the smooth movement of the truck so that the cattle present in the truck may be taken to Bihar for slaughtering.

4. In view of the said fact, an F.I.R. was lodged on the same day i.e. on 2.11.2011 in case crime no. 1247 of 2011 at police-station Chakeri District Kanpur under section 11 of the Animal Cruelty Act and 3/5 and 8 of Cow Slaughter Act.

5. After investigation, the Investigating officer has submitted charge-sheet before the court concerned. Accordingly , a case no. 1A of 2012 (State Vs. Sushil Kumar Mishra) and case no.1354A of 2012 (State Vs. Gyanandra Bahadur Singh and Sunil Kumar Shukla) as case crime no.1247 of 2011 under Sectin 3/8,5Ka/34 Cow Slaughter Act and section 11/34 of Animal Cruelty Act, Police Station Chakeri District Kanpur Nagar was registered. By means of order dated 28.3.2017, Additional Chief Metropolitan Magistrate, Court no.3 Kanpur Nagar acquitted the claimant-respondent no.2 and other persons from the charges levelled against them.

6. In the meantime, under rule 14(1) of U.P. Police Officer of Subordinate Rank (Punishment and Appeal) Rule ,1991 (herein after referred as the "Rules,1991')a departmental enquiry was initiated against the claimant-respondent no.2 and a charge-sheet dated 21.02.2012 was issued to the claimant-respondent no.2, to which he submitted a reply on 3.3.2012.Thereafter enquiry officer conducted disciplinary proceeding in the matter in question and submit his report dated 27.9.2012 to the punishing authority. On 29.9.2012 D.I.G./ S.S.P.,Kanpur Nagar/punishing authority issued a show cause notice to the claimant-respondent no.2 alongwith enquriy report, to which he submitted his reply. By order dated 23.5.2013, punishing authority/ S.S.P. Kanpur Nagar dismissed the claimant- respondent. no.2 from service.

7. Aggrieved by the order dated 23.5.2013, claimant-respondent no.2 filed an appeal before Deputy Inspector General of Police, Kanpur Zone, Kanpur Nagar, the same was dismissed vide order dated 30.6.2013.

8. Against the orders dated 23.5.2013 and 30.6.2013, claimant-respondent no.2 filed revision, the same was also dismissed by Inspector General of Police, Kanpur Zone, Kanpur by order dated 24.1.2014.

9. The claimant-respondent no.2 filed a claim petition no.1035 of 2014 challenging the punishment order dated 23.5.2013, appellate order dated 30.6.2013 and revisional order dated

24.1.2014 before the Tribunal . By order dated 4.7.2018 the Tribunal allowed the claim petition of the claimant-respondent no.2 and directed to reinstate the claimant-respondent no.2 in service and further directed that so far as the matter in respect to back wages for the period from dismissal in service to the period of reinstatement in service is concerned, the competent authority shall pass a speaking order within three months from the date of receipt of the certified copy of the order.

10. Sri Manjeev Shukla learned counsel for the petitioners while challenging the impugned judgment and order dated 4.7.2018 passed by the Tribunal in Claim Petition No.1035 of 2014 (Sushil Kumar Mishra Vs. State of U.P. and others) submits that the same is erroneous and unsustainable in the eye of law as the Tribunal has allowed the claim petition only on the ground that claimant/respondent no.2 has been acquitted in the criminal trial therefore he could not have been punished in the disciplinary proceedings in relation to the same charges, matter, the view taken by the Tribunal is contrary to the law laid down by Hon'ble Supreme Court in its various judgments.

11. He submits that Hon'ble the Supreme Court in its catena of judgments has categorically held that a criminal trial and disciplinary proceedings are carried out for entirely different purpose and the standard of proof is also different in both the proceedings therefore, merely because acquittal order has been passed in the criminal trial result of the disciplinary proceedings against a Government Servant will not stand affected.

12. He also submits that the Apex Court in catena of judgemtns has categorically held that in a criminal trial on the basis of evidence produced by the prosecuting agency the case has to be proved beyond reasonable doubt whereas in disciplinary proceedings evidence relied upon has to be tested on preponderance of probabilities therefore, even if the Government Servant has been acquitted in criminal trial , the said acquittal will not affect the result of the disciplinary proceedings.

13. He further submits that from a bare persual of the inquiry report submitted by the inquiry officer in the present matter it is patently manifest that a detailed inquiry has been conducted in the matter in which statement of witness have recorded in presence of the claimant-respondent no.2 and he has also been afforded opportunity to cross examine the prosecution witnesses in the inquiry and thereafter inquiry officer has concluded that the charges leveled against the claimant-respondent no.2 are proved as such merely because in relation to the same matter claimant-respondent no.2 has been acquitted in criminal trial, the aforesaid disciplinary inquiry cannot stand vitiated.

14. It is also submitted by learned counsel for the petitioners that in the disciplinary inquiry it has been found proved that the conduct of claimant-respondent no.2 in getting the Truck No. RJ-14 UB-3210 passed through area is not proper and has ultimately tarnished the image of the disciplined force.

15. In rebuttal, Sri Manish Kumar, learned counsel for claimant-respondent no.2 submits that on the same incident, same set of facts, circumstances and evidence the crime case no.1247/2011

was registered in which the claimant-respondent no.2 has been honorably acquitted. The dismissal of the claimant-respondent no.2 on the pretext that charge-sheet has been filed against him in the criminal case is unsustainable as mere filing of the charge-sheet by the police would not amount to conviction of the claimant- respondent no.2 . In the instant case, the claimant-respondent no.2 has been honorably acquitted by the trial court in the criminal case vide judgment dated 28.3.2017.

16. He further submits that it is a settled law that where a criminal case in departmental proceedings are based on similar facts and evidences and the employees had been acquitted in the criminal case, the dismissal would be unsustainable. In this regard, he has placed reliance on the following judgments:-

1. S. Bhaskar Reddy and another Vs. Superintendent of Police and another, (2015) 2 SCC 365

2. G.M.Tank Vs. State of Gujrat and others (2006) 5 SCC 446

3. Shashi Bhushan Prasad Vs. Inspector General Central Industrial Security Force and others (2019) SCC online SC 952

4. Joginder Singh Vs. Union Territory of Chandigarh and others (2015) 2 SCC 377.

17. Learned counsel for the claimant-respondent no.2 submits that in the instant case, the two other persons named alongwith the opposite party no.2 in the F.I.R. namely Constable Gyanendra Bahadur Singh and Constable Sunil Kumar Shukla, against whom also the charge-sheet was filed by the police in the criminal case, have been awarded only a censure entry while in the case of the claimant-respondent no.2, the order of dismissal has been passed which is not only disproportionate to the charges levelled against the claimant-respondent no.2 but also discriminatory and in violation of Article 14 of the Constitution of India.

18. He also submits that once it is not disputed by the petitioners that the order of dismissal passed against the claimant-respondent no.2 is on the basis of same criminal case, same set of facts, documents and evidence and when the claimant-respondent no.2 (alongwith Constable Gyanendra Bahadur Singh and Constable Sunil Kumar Shukla) has been acquitted honourably on 28.3.2017, the punishment of dismissal is arbitrary and the judgment dated 4.7.2018 passed by the U.P. State Public Services Tribunal being a reasoned and speaking order and in accordance with law settled in the judgments of the Hon'ble the Apex Court, is full justified and there is no infirmity in the same. Hence, the writ petition is liable to be dismissed with cost.

19. We have heard learned counsel for the parties and gone through the record.

20. The undisputed facts of the present case are that an incident took place on 2.11.2011 and an F.I.R. was lodged on the same day i.e. on 2.11.2011 as case crime no. 1247 of 2011 at police-station Chakeri, District-Kanpur under section 11 of the Animal Cruelty Act and section 3/5 and 8 of Cow Slaughter Act. After investigation, the Investigating officer submitted the charge-sheet before the court concerned. Thereafter a case no.

1A of 2012 (State Vs. Sushil Kumar Mishra) and case no.1354A of 2012 (State Vs. Gyanandra Bahadur Singh and Sunil Kumar Shukla) as case crime no.1247 of 2011 under Section 3/8,5Ka/34 Cow Slaughter Act and section section 11/34 of Animal Cruelty Act, Police Station Chakeri, District-Kanpur Nagar was registered. By means of order dated 28.3.2017, Additional Chief Metropolitan Magistrate, Court no.3, Kanpur Nagar acquitted the claimant-respondent no.2 and other persons from the charges levelled against them. The court concerned while acquitting the claimant-respondent no.2 and other co-accused persons has given the following findings:-

"प्रश्नगत मामले में अभियोजन द्वारा किसी जानवर का वध किया जाना या चोटहिल होना या मृत्यु होने का कथन नहीं किया गया है | कथित ट्रक थाना चकेरीए जनपद कानपुर नगर में सीज किया गया है जो बिहार राज्य की सीमा से बहुत ही दूर है | ऐसे में मात्र अभियुक्त के पुलिस के समक्ष दिये गये बयान के आधार पर परिवहन की बात साबित नहीं होती है |अभियोजन द्वारा जो साक्षी प्रस्तुत किये गये है, उनमे से किसी भी साक्षी ने ट्रक में लदे पशुओं से अभियुक्तगण उपरोक्त द्वारा निर्दयता पूर्वक करने का कथन नहीं किया गया है | जिससे धारा -11 पशुक्रूरता अधिनियम उपरोक्त अभियुक्तगण के विरुद्ध साबित नहीं होता है |

उपरोक्त किये गये सम्यक विश्लेषण के उपरान्त न्यायालय इस मत पर पहुँचती है कि अभियुक्तगण सुशील कुमार मिश्रा ज्ञानेन्द्र बहादुर सिह व सुनील शुक्ला के विरुद्ध अभियोजन धारा 3/8 सपठित धारा -34, 5 क गो वध निवारण अधिनियम व धारा .11 पशु क्रूरता निवारण अधिनियम का आरोप युक्तियुक्त संदेह से परे साबित करने में असफल रहा है। अभियुक्तगण सुशील कुमार मिश्रा , ज्ञानेंद्र बहादुर सिंह व् सुनील शुक्ला को धारा 3/8 सपठित धारा .34,5 क गो वध निवारण अधिनियम व धारा -11 पशु क्रूरता निवारण अधिनियम के अन्तर्गत दोषमुक्त किये जाने योग्य है।"

21. Further in the present case, In the meantime a departmental proceedings against the claimant-respondent no.2 under rule 14(1) of U.P. Police Officer of Subordinate Rank (Punishment and Appeal) Rule ,1991 (herein after referred as the "Rules,1991') and a charge-sheet was issued on 21.2.2012 to the claimant-respondent no.2, to which he submitted a reply on 3.3.2012 denying the charges leveled against him. Thereafter enquiry officer conducted the disciplinary proceedings and submitted his report dated 27.9.2012 to the punishing authority. On 29.9.2012 D.I.G./ S.S.P. Kanpur Nagar/ punishing authority issued a show cause notice to the claimant-respondent no.2 alongwith enquriy report, to which he submitted his reply. By order dated 23.5.2013, punishing authority/ S.S.P. Kanpur Nagar, dismissed the claimant-respondent no.2 from service. Thereafter claimant-respondent no.2 filed an appeal before Deputy Inspector General of Police, Kanpur Zone, Kanpur Nagar, the same was dismissed vide order dated 30.6.2013. Aggrieved by the said order, claimant-respondent has filed revision under the Rules,1991 , the same was also dismissed by Inspector Generl of Police, Kanpur Zone, Kanpur by order dated 24.1.2014.

22. The core question is to be considered under what circumstances acquittal in criminal case will absolve/exonerate the petitioner from

departmental punishment. In the present case, as noticed, the punishment imposed on the petitioners is not based on the conclusion of the criminal case. It is based on the findings recorded in the departmental inquiry which is based on the depositions of witnesses in the departmental inquiry. The standard of proof required in the departmental inquiry and in the criminal case are different. It is profitable to refer to certain judgments of Supreme Court on this aspect.

23. In **Union of India Vs. Sardar Bahadur, (1972) SCC 618**, the Hon'ble Supreme Court has held as under:

"15. A finding cannot be characterized as perverse or unsupported by any relevant materials if it is a reasonable inference from proved facts. Now what are the proved facts: Nand Kumar as representative of Ram Sarup Mam Chand and Mam Chand and Company of Calcutta filed five applications for licences to set-up steel re-rolling mills on 14th June, 1956. On 25th June, 1956, a cheque drawn in favour of P.S. Sundaram was given to the respondent by Nand Kumar for Rs. 2500; the cheque was endorsed and the amount credited in the account of the respondent. When the respondent borrowed the amount in question from Nand Kumar, he was not working in the Industries Act Section. Nand Kumar knew that the respondent was working in the Steel & Cement Section of the Ministry and the applications for the grant of licences for setting up the steel plant re-rolling mills would go to that section. Even if the applications were to be dealt with at the initial stage by the Industries Act Section the respondent at least was expected to know that in due course the section in which he was working had to deal with the same. This is borne out by the fact that in July 1956 copies of the applications were actually sent to the Steel & Cement Section where the respondent was working. If he, therefore, borrowed money from Nand Kumar a few days earlier it seems rather clear that he placed himself under pecuniary obligation to a person who was likely to have official dealings with him. The words likely to have official dealings take within their ambit the possibility of future dealings between the officer concerned and the person from whom he borrowed money. A disciplinary proceeding is not a criminal trial. The standard proof required is that of preponderance of probability and not proof beyond reasonable doubt. If the inference that Nand Kumar was a person likely to have official dealings with the respondent was one which a reasonable person would draw from the proved facts of the case, the High Court cannot sit as a court of appeal over a decision based on it. Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court (See : State of Andhra Pradesh v. S. Sree Rama Rao, AIR 1963 SC 1723) No doubt there was no separate finding on the question whether Nand Kumar was a person likely to have official dealings with the respondent by the Inquiring Officer or the President. But we think that such a finding was implied

when they said that Charge No. 3 has been proved. The only question was whether the proved facts of the case would warrant such an inference. Tested in the light of the standard of proof necessary to enter a finding of this nature, we are satisfied that on the material facts proved the inference and the implied finding that Nand Kumar was a person likely to have official dealings with the respondent were reasonable."

24. In ***Depot Manager, A.P. SRTC Vs. Mohd. Yousuf Miya, (1997) 2 SCC 699***, the Apex Court expressed its view as under:

"8. We are in respectful agreement with the above view. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public (sic duty), as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. The enquiry in the departmental proceedings relates to the conduct of the delinquent officer and proof in that behalf is not as high as in an offence in criminal charge. It is seen that invariably the departmental enquiry has to be conducted expeditiously so as to effectuate efficiency in public administration and the criminal trial will take its own course. The nature of evidence in criminal trial is entirely different from the departmental proceedings. In the former, prosecution is to prove its case beyond reasonable doubt on the touchstone of human conduct. The standard of proof in the departmental proceedings is not the same as of the criminal trial. The evidence also is different from the standard point of the Evidence Act. The evidence required in the departmental enquiry is not regulated by the Evidence Act."

25. In the case of **Suresh Pathrella Vs. Oriental Bank of Commerce, (2006) 10 SCC 572**, the Apex Court held as under:

"11. In our view, the findings recorded by the learned Single Judge are fallacious. This Court has taken the view consistently that acquittal in a criminal case would be no bar for drawing up a disciplinary proceeding against the delinquent officer. It is well-settled principle of law that the yardstick and standard of proof in a criminal case is different from the disciplinary proceeding. While the standard of proof in a criminal case is a proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities."

26. In **West Bokaro Colliery (TISCO Ltd.) Vs. Ram Pravesh Singh, (2008) 3 SCC 729**, the Apex Court held as under:

"20. The Tribunal has set aside the report of the enquiry officer and the order of dismissal passed by the punishing authority by observing that the charges against the respondent were not proved beyond reasonable doubt. It has repeatedly been held by this Court that the acquittal in a criminal case would not operate as a bar for drawing up of a disciplinary proceeding against a delinquent. It is well-settled principle of law that yardstick and standard of proof in a criminal case is different from the one in disciplinary proceedings. While the standard of proof in a criminal case is proof beyond all reasonable doubt, the standard of proof in a departmental proceeding is preponderance of probabilities."

27. In ***Mazdoor Sangh Vs. Usha Breco Ltd., (2008) 5 SCC 554,*** the Apex Court laid down:

"33. Before a departmental proceeding, the standard of proof is not that the misconduct must be proved beyond all reasonable doubt but the standard of proof is as to whether the test of preponderance of probability has been met. The approach of the Labour Court appeared to be that the standard of proof on the management was very high. When both the parties had adduced evidence, the Labour Court should have borne in mind that the onus of proof loses all its significance for all practical purpose."

28. In ***Samar Bahadur Singh Vs. State of U.P., (2011) 9 SCC 94,*** the Apex Court categorically held:

"7. Acquittal in the criminal case shall have no bearing or relevance to the facts of the departmental proceedings as the standard of proof in both the cases are totally different. In a criminal case, the prosecution has to prove the criminal case beyond all reasonable doubt whereas in a departmental proceedings, the department has to prove only preponderance of probabilities. In the present case, we find that the department has been able to prove the case on the standard of preponderance of probabilities. Therefore, the submissions of the counsel appearing for the appellant are found to be without any merit".

29. In the case of ***Karnataka SRTC Vs. M.G. Vittal Rao, (2012) 1 SCC 442***, Supreme Court has held as under:

"11.The question of considering reinstatement after decision of acquittal or discharge by a competent criminal court arises only and only if the dismissal from services was based on conviction by the criminal court in view of the provisions of Article 311(2)(b) [sic Article 311(2) second proviso (a)] of the

Constitution of India, or analogous provisions in the statutory rules applicable in a case. In a case where enquiry has been held independently of the criminal proceedings, acquittal in a criminal court is of no help. The law is otherwise. Even if a person stood acquitted by a criminal court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry it is the preponderance of probabilities that constitutes the test to be applied."

30. The Apex Court in the case of ***Inspector General of Police Vs. S. Samuthiram, (2013) 1 SCC 598*** emphasised:

"6. As we have already indicated, in the absence of any provision in the service rules for reinstatement, if an employee is honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile, etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile."

31. In ***SBI Vs. Narendra Kumar Pandey, (2013) 2 SCC 740***, the Apex Court held as under:

"23. The inquiring authority has examined each and every charge levelled against the charged officer and the documents produced by the presenting officer and came to the conclusion that most of the charges were proved. In a departmental enquiry, the disciplinary authority is expected to prove the charges on preponderance of probability and not on proof beyond reasonable doubt. Reference may be made to the judgments of this Court in Union of India v. Sardar Bahadur and R.S. Saini v. State of Punjab. The documents produced by the Bank, which were not controverted by the charged officer, support all the allegations and charges levelled against the charged officer. In a case, where the charged officer had failed to inspect the documents in respect of the allegations raised by the Bank and not controverted, it is always open to the inquiring authority to accept the same".

32. In ***Commr. of Police Vs. Mehar Singh, (2013) 7 SCC 685***, the Apex Court held as under:

"24. We find no substance in the contention that by cancelling the respondents candidature, the Screening Committee has overreached the judgments of the criminal court. We are

aware that the question of correlation between a criminal case and a departmental enquiry does not directly arise here, but, support can be drawn from the principles laid down by this Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur v. Union of India this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable."

33. In ***SBI Vs. R. Periyasamy, (2015) 3 SCC 101***, the Apex Court held as under:-

"11. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India v. Sardar Bahadur, this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in SBI v. Ramesh Dinkar Punde. More recently, in SBI v. Narendra Kumar Pandey, this Court observed that a disciplinary authority is expected to prove the charges levelled against a bank officer on the preponderance of probabilities and not on proof beyond reasonable doubt."

34. In the case of **S. Bhaskar Reddy** (supra) after placing earlier judgment rendered by Hon'ble the Apex Court in the case of **SBI Vs. R. Periyasamy, (2015) 3 SCC 101, Hon'ble the Apex Court** held as under:-

"An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merits after a full-fledged trial, where there is no indication of the witnesses being won over. The long-standing view on this subject was settled by this Court in R.P. Kapur Vs. Union of India, whereby it was held that a departmental proceeding can proceed even though a person is acquitted when the acquittal is other than honourable."

35. The judgment of Captain M. Paul Anthony and G.M. Tank (supra) were again considered by the Supreme Court in ***Divisional Controller, Karnataka State Road Transport Corporation Vs. M.G. Vittal Rao, (2012) 1 SCC 442.*** In para-24, the Apex Court considered the judgment of Captain M. Paul Anthony(supra), and opined that this judgment is not of universal application. The judgment of G.M. Tank (supra) was considered in para-23 of the judgment. After considering this judgment and after taking note of the basic judgment of R.P. Kapoor (supra), the Apex Court held that the departmental inquiry and criminal case can run simultaneously despite the

fact that the same are founded upon the same factual matrix. It was held that facts, charges and nature of evidence, etc. involved in an individual case would determine as to whether decision of acquittal would have any bearing on the findings recorded in the departmental inquiry. This view is followed by the Supreme Court in ***State of West Bengal and others Vs. Sankar Ghosh- (2014) 3 SCC 610***. In this case also, the Apex Court explained the judgment of Captain M. Paul Anthony and G.M. Tank (supra). In para, 16, 17 and 18 of this judgment, the Apex Court held that the proof required in the departmental inquiry is different than the proof required in a criminal case. In ***Indian Overseas Bank, Annasalai and another Vs. P. Ganesan and others- (2008) 1 SCC 650***, the Apex Court reiterated the same principle. In ***Ajit Kumar Nag Vs. Indian Oil Corporation Ltd., (2005) 7 SCC 764***, it was held as under:-

"....The two proceedings criminal and departmental are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with service Rules.....

36. In ***Nelson Motis Vs. Union of India, (1994) 4 SCC 711***, the Apex Court held as under:

"5. So far the first point is concerned, namely whether the disciplinary proceedings could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding. Besides, the Tribunal has pointed out that the acts which led to the initiation of the departmental disciplinary proceeding were not exactly the same which were the subject matter of the criminal case."

37. In ***NOIDA Entrepreneurs Assn. Vs. NOIDA, (2007) 10 SCC 385***, Supreme Court has held as under:

"16. The standard of proof required in departmental proceedings is not the same as required to prove a criminal charge and even if there is an acquittal in the criminal proceedings the same does not bar departmental proceedings. That being so, the order of the State Government deciding not to continue the departmental proceedings is clearly untenable and is quashed. The departmental proceedings shall continue."

38. In the case of **State (NCT of Delhi) Vs. Ajay Kumar Tyagi, (2012) 9 SCC 685,** the Apex Court has held as under:

"25. We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result in the quashing of the criminal prosecution. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may

be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further, they are not in the same hierarchy."

39. Hon'be the High Court of *Madhya Pradesh in the case of R.K. Solanki vs. Central Bank of India, 2018 Lab IC 1652* has held as under :-

9. The scope of departmental inquiry and criminal cases have been considered by the Apex Court in number of cases. The said issue is no longer res integra. In B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749 the Supreme Court has held as under:

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

40. In ***Bank of India Vs. Degala Suryanarayana, (1999) 5 SCC 762***, it is held by the Apex Court as under:

"11. Strict rules of evidence are not applicable to departmental enquiry proceedings. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings. The court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of mala fides or perversity i.e. where there is no

evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that finding. The court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained. In Union of India v. H.C. Goel the Constitution Bench has held:

The High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence legally the impugned conclusion follows or not."

41. In ***Lalit Popli Vs. Canara Bank, (2003) 3 SCC 583***, Supreme Court has held as under:

"16. It is fairly well settled that the approach and objective in criminal proceedings and the disciplinary proceedings are altogether distinct and different. In the disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him, whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial are conceptually different. (See State of Rajasthan v. B.K. Meena.) In case of disciplinary enquiry the technical rules of evidence have no application. The doctrine of proof beyond doubt has no application. Preponderance of probabilities and some material on record are necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

17. While exercising jurisdiction under Article 226 of the Constitution the High Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. Judicial review is not akin to adjudication of the case on merits as an appellate authority.

18. In B.C. Chaturvedi v. Union of India the scope of judicial review was indicated by stating that review by the court is of decision-making process and where the findings of the disciplinary authority are based on some evidence, the court or the tribunal cannot reappreciate the evidence and substitute its own finding."

42. In ***M.V. Bijlani Vs. Union of India, (2006) 5 SCC 88***, Supreme Court opined as under:

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a

preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

43. In the case of ***S. Bhaskar Reddy and another Vs. Superintendent of Police and another (2015) 2 SCC 365*** has held as under:-

"21.It is an undisputed fact that the charges in the criminal case and the Disciplinary proceedings conducted against the appellants by the first respondent are similar. The appellants have faced the criminal trial before the Sessions Judge, Chittoor on the charge of murder and other offences of IPC and SC/ST (POA) Act. Our attention was drawn to the said judgment which is produced at Exh. P-7, to evidence the fact that the charges in both the proceedings of the criminal case and the Disciplinary proceeding are similar. From perusal of the charge sheet issued in the disciplinary proceedings and the enquiry report submitted by the Enquiry Officer and the judgment in the criminal case, it is clear that they are almost similar and one and the same. In the criminal trial, the appellants have been acquitted honourably for want of evidence on record. The trial judge hascategorically recorded the finding of fact on proper appreciation and evaluation of evidence on record and held that the charges framed in the criminal case are not proved against the appellants and therefore they have been honourably acquitted for the offences punishable under 3 (1) (x) of SC/ST (POA) Act and under Sections 307 and 302 read with Section 34 of the IPC. The law declared by this Court with regard to honourable acquittal of an accused for criminal offences means that they are acquitted for want of evidence to prove the charges.

The meaning of the expression "honourable acquittal" was discussed by this Court in detail in the case of Deputy Inspector General of Police & Anr. v. S. Samuthiram, (2013) 1 SCC 598, the relevant para from the said case reads as under :-

"24. The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."

After examining the principles laid down in the above said case, the same was reiterated by this Court in a recent

decision in the case of Joginder Singh v. Union Territory of Chandigarh & Ors.(2015) 2 SCC 377.

Further, in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. & Anr. (supra) this Court has held as under:-

"34. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, "the raid conducted at the appellant's residence and recovery of incriminating articles there from". The findings recorded by the enquiry officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by police officers and panch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by the enquiry officer and the enquiry officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex parte departmental proceedings to stand.

35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

Further, in the case of G.M. Tank v. State of Gujarat and Ors.(supra) this Court held as under:-

"20.....Likewise, the criminal proceedings were initiated against the appellant for the alleged charges punishable under the provisions of the PC Act on the same set of facts and evidence. It was submitted that the departmental proceedings and the criminal case are based on identical and similar (verbatim) set of facts and evidence. The appellant has been honourably acquitted by the competent court on the same set of facts, evidence and witness and, therefore, the dismissal order based on the same set of facts and evidence on the departmental side is liable to be set aside in the interest of justice.

30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law.....It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the

appellant's residence, recovery of articles therefrom. The Investigating Officer Mr V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony case will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

44. Hon'ble the Apex Court in the case of ***Shashi Bhushan Prasad Vs. Inspector General Central Industrial Security Force and others, AIR 2019 SC 3586*** after taking into consideration the various judgments on the point in issue has held as under:-

"The scope of departmental enquiry and judicial proceedings and the effect of acquittal by a criminal Court has been examined by a three Judge Bench of this Court in Depot Manager A.P. State Road Transport Corporation Vs. Mohd. Yousuf Miya and Others, 1997 (2) SCC 699. The relevant para is as under:-

"The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public (sic duty), as distinguished from mere private rights punishable under

criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Evidence Act. Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. The enquiry in the departmental proceedings relates to the conduct of the delinquent officer and proof in that behalf is not as high as in an offence in criminal charge. It is seen that invariably the departmental enquiry has to be conducted expeditiously so as to effectuate efficiency in public administration and the criminal trial will take its own course. The nature of evidence in criminal trial is entirely different from the departmental proceedings. In the former, prosecution is to prove its case beyond reasonable doubt on the touchstone of human conduct. The standard of proof in the departmental proceedings is not the same as of the criminal trial. The evidence also is different from the standard point of the Evidence Act. The evidence required in the departmental enquiry is not regulated by the Evidence Act. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances. In this case, we have seen that the charge is failure to anticipate the accident and prevention thereof. It has nothing to do with the culpability of the offence under Sections 304A and 338, IPC. Under these circumstances, the High Court was not right in staying the proceedings."

18. The exposition has been further affirmed by a three Judge Bench of this Court in Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Limited, Haldia and Others ,2005 (7) SCC 764, this Court held as under: -

"As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused

"beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability". Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."

45. A Division Bench of this Court in the case of ***Sukh Ram Vs. State of U.P. and others, 2018 (4) ESC 1772*** after taking into consideration the various judgments on the point in issue has held as under:-

"(19) The principles discussed above can be summed up and summarized as follows:

19.1. When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities;

19.2. The Courts cannot assume the function of disciplinary/departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority;

19.3. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the Court;

19.4. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The Court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the Doctrine of Equality when it is found that the concerned employee and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable.

46. From the bare perusal of the charge-sheet dated 21.02.2012 and contents of F.I.R. as well as judgment of Trial court it transpires/ apparent that charge(s) in the departmental proceedings are nothing but allegations made in the F.I.R. dated 02.11.2011, in relation to which charge-sheet was filed in the court and untimately claimant-respondent no.2 was acquitted vide judgment dated 28.03.2017 by the trial court. It further appears that the witnesses mentioned in the charge-sheet to prove the charge in the departmental proceedings are Sri Jai

Narain Singh, Sri Jai Shanker Prasad , Sri Jagdish Prasad, Sri Hemant Singh and Sri Ram Adhar Gautam and before trial court, out the same , Sri Jai Shanker Prasad, Sri Jagdish Prasad , Sri Hemant Sinigh and Sri Ram Adhar Gautam were produced as prosecution witnesses. The claimant-respondent no.2 was asked to submit his reply on the charges similar to the allegation made in criminal proceedings in disciplinary proceedings under Rule 14(1) of Rules 1991.

47. Further in criminal case after filing of the report in relation to F.I.R. the case(s) were registered against the claimant-respondent no.2 and other co-accused person in which by means of judgment and order dated 28.3.2017, the trial court court had Honorable acquitted the claimant-respondent no.2 and other co-accused after considering the evidence and statement of prosecution witnesses name above.

48. From the aforesaid, we are of the view that the case of the claimant-respondent no.3 is squarely covered under the judgment of Hon'ble Apex Court pased in the case of S. Bhaskar Reddy (supra)

49. Taking into consideration the said fact as well as the findings given by the Tribunal while allowing the claim petition quoted below, we do not find any illegality or infirmity on the part of the Tribunal thereby allowing the claim petition on the point in issue.

"इस तरह उपरोक्त विवेचना के आधार पर यह स्पष्ट हो जाता है कि याची के विरुद्ध पशु तस्करों द्वारा पशुओं को ट्रक द्वारा वध किये जाने हेतु ले जाने पर उसके द्वारा उक्त ट्रक को पास कराने सम्बन्धी आरोप लगाकर कार्यवाही की गयी जिसमें याची व अन्य दो आरक्षियों के विरुद्ध आपराधिक मामला दर्ज किया परन्तु उक्त आपराधिक मामले में न्यायालय द्वारा साक्षियों के बयानों को गलत मानते हुए उन्हें दोष मुक्त कर दिया गया है | याची के दोष मुक्त होने के बाद यह स्पष्ट हो जाता है कि उसके विरुद्ध की गयी एफ आई आर व पुलिस के कथन सही नहीं है | अतः हमारे विचार से उन्हीं आरोपों एवं साक्ष्यों के आधार पर जिसमे याची को न्यायालय द्वारा आपराधिक मामले में दोष मुक्त किया जा चुका है, उसके विरुद्ध अनुशासनिक कार्यवाही में उसे दण्डित किया जाना किसी भी प्रकार से विधिक नहीं कहा जा सकता |"

50. In the present case alongwith claimant-respondent no.2, two other co-accused, namely, Gyanandra Bahadur Singh and Sunil Kumar Shukla were also named in the F.I.R. in respect to incident which took place on 2.11.2011 on the basis of which a case was registered against them and a criminal proceedings were initiated in the trial court and vide judgment and order dated 28.3.2017 the Additional Chief Metropolitan Magistrate- III, Kanpur Nagar had acquitted the claimant-respondent no.2 and other co-accused persons from the charges levelled against them.

51. Further, departmental proceedings were initiated against the said persons alongwith the claimant-respondent no.2 in respect of the same incident and the said two persons were awarded censure entry while in the case of claimant-respondent no.2 the order of dismissal has been passed. In this regard, the Tribunal has given the following findings:-

"याची के विद्वान अधिवक्ता द्वारा यह भी तर्क दिया गया है कि आरक्षी सुनील कुमार

शुक्ला व आरक्षी ज्ञानेंद्र बहादुर सिंह को उसी अपराधिक मामले में अभियुक्त होने के बावजूद उन्हें केवल परिनिन्दा प्रविष्टि के दण्ड से दण्डित किया गया। याची द्वारा आरक्षी सुनील कुमार शुक्ला के विरुद्ध पारित परिनिन्दा प्रविष्टि के आदेश की छायाप्रति दाखिल की गयी है। याची के विद्वान् अधिवक्ता द्वारा दिये गये उपरोक्त तर्क पर हमारे द्वारा विचारण किया गया। चूँकि यह स्वीकृत तथ्य है कि एक ही मामले में तीनो आरक्षी संलिप्त थे तथा अन्य दो आरक्षियों को परिनिन्दा प्रविष्टि का दण्ड प्रदान कर छोड़ दिया गया जबकि याची को सेवा से पदच्युत किये जाने का दण्ड प्रदान किया गया है जो हमारे विचार से समानता के सिद्धान्त के विपरीत है।"

52. The said findings given by the Tribunal is perfectly valid rather in accordance with Article 14 of the Constitution of India as well as the doctrine of equality.

53. The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.

54. In this regard, Hon'ble the Apex court in the case of ***Director General of Police and others Vs. G. Dasayan (1998) 2 SCC 407***, wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India.

55. In ***Anand Regional Coop. Oil Seedsgrowers' Union Ltd. Vs. Shaileshkumar Harshadbhai Shah, 2006 (6) SCC 548***, Ho'nble the Supreme Court held that the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit.

56. Hon'ble the Apex Court in the case of ***Rajendra Yadav Vs. State of Madhya Pradesh & Others 2013 (3) SCC 73*** paragraph nos. 9 to 12 as ruled as under:-

"(9) The Doctrine of Equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co- delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The Disciplinary Authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences.

(10) The principle stated above is seen applied in few judgments of this Court. The earliest one is Director General of Police and others Vs. G. Dasayan (1998) 2 SCC 407, wherein one Dasayan, a Police Constable, along with two other constables and one Head Constable were charged for the same acts of misconduct. The Disciplinary Authority exonerated two other constables, but imposed the punishment of dismissal from service on Dasayan and that of compulsory retirement on Head Constable. This Court, in order to meet the ends of justice, substituted the order of compulsory retirement in place of the order of dismissal from service on Dasayan, applying the principle of parity in punishment among co-delinquents. This Court held that it may, otherwise, violate Article 14 of the Constitution of India.

(11) In Shaileshkumar Harshadbhai Shah case (supra), the workman was dismissed from service for proved misconduct. However, few other workmen, against whom there were identical allegations, were allowed to avail of the benefit of voluntary retirement scheme. In such circumstances, this Court directed that the workman also be treated on the same footing and be given the benefit of voluntary retirement from service from the month on which the others were given the benefit.

(12) We are of the view the principle laid down in the above mentioned judgments also would apply to the facts of the present case. We have already indicated that the action of the Disciplinary Authority imposing a comparatively lighter punishment to the co-delinquent Arjun Pathak and at the same time, harsher punishment to the Appellant cannot be permitted in law, since they were all involved in the same incident. Consequently, we are inclined to allow the appeal by setting aside the punishment of dismissal from service imposed on the Appellant and order that he be reinstated in service forthwith. Appellant is, therefore, to be re-instated from the date on which Arjun Pathak was re-instated and be given all consequent benefits as was given to Arjun Pathak. Ordered accordingly. However, there will be no order as to costs."

57. The issue came up before the Apex Court in another case ***Lucknow Kshetriya Gramin Bank & Another Vs. Rajendra Singh 2013 (12) SCC 372***. Paragraph nos. 9 to 20 of the aforesaid judgement which are relevant for the issue in hand are extracted herein under:-

"(9) Mr. Mehta referred to the judgment of this Court in Obettee (P) Ltd. V. Mohad Shafiq Khan (2005) 8 SCC 46 wherein identical features, as prevailing in this case, were held as distinctive features and different and higher

punishment was held to be justified in the following manner:

"8. On consideration of the rival stands one thing becomes clear that Chunnu and Vakil stood on a different footing so far as the Respondent workman is concerned. He had, unlike the other two, continued to justify his action. That was clearly a distinctive feature which the High Court unfortunately failed to properly appreciate. The employer accepted to choose the unqualified apology given and regrets expressed by Chunnu and Vakil. It cannot be said that the employer had discriminated so far as the Respondent workman is concerned because as noted above he had tried to justify his action for which departmental proceedings were initiated. It is not that Chunnu and Vakil were totally exonerated. On the contrary, a letter of warning dated 11.4.1984 was issued to them.

9. IN Union of India Vs. Parma Nanda the Administrative Tribunal had modified the punishment on the ground that two other persons were let off with minor punishment. This Court held that when all the persons did not stand on the same footing, the same yardstick cannot be applied. Similar is the position in the present case. Therefore, the High Court's order is clearly unsustainable and is set aside."

(10) Per contra Mr. Vishwanathan, learned Sr. Counsel and Mr. Rajeev Singh, the learned counsel appearing for the respondent in these appeals argued that the circumstances of the two sets of cases were almost identical and therefore in the facts of this case, the directions of the High Court were perfectly in order. They pointed out that the other three employees had also denied the charges in the first instance, in their replies to the charge sheets served upon them. For some curious reasons the Appellant-Bank did not hold any common enquiry even when the charges leveled in all six charge-sheets were identical. Instead the Bank first picked up only the Respondents herein, and held the enquiry against them. It is only after in the enquiry the charges were established against the Respondents and the punishment of dismissal was imposed on them, that the enquiry against the other three employees was commenced. That at this stage, knowing the fate of their cases, those three employees accepted the charges and tendered unconditional apologies.

(11) The learned Counsel argued that the Bank had given definite advantage to those three employees by deferring their enquiries enabling them to make up their mind after knowing the result in the case of the Respondents. They, thus, argued that it cannot be said that those three employees had accepted the charges at the outset. Their submission was that in such circumstances imposition of different and higher-penalty on the Respondents herein would clearly amount to invidious discrimination, as held by this Court in Rajendra yadav V. State of M.P. In that case two employees were served with charge sheets who were involved in the same incident. A person who had more serious role was inflicted a comparatively lighter punishment than the Appellant in the said case. This was held to be violative of the doctrine of Equality Principles enshrined under Article 14 of the Constitution of India. The discussion which ensued, while taking this view, reads as under:

"8. We have gone through the inquiry report placed before us in respect of the Appellant as well as Constable

Arjun Pathak. The inquiry clearly reveals the role of Arjun Pathak. It was Arjun Pathak who had demanded and received the money, though the tacit approval of the Appellant was proved in the inquiry. The charge leveled against Arjun Pathak was more serious than the one charged against the Appellant. Both the Appellants and other two persons as well as Arjun Pathak were involved in the same incident. After having found that Arjun Pathak had a more serious role and, in fact, It was he who had demanded and received the money, he was inflicted comparatively a lighter punishment. At the same time, the Appellant who had played a passive role was inflicted with a more serious punishment of dismissal from service which, in our view, cannot be sustained."

58. Further a Division Bench of this Court in the case of ***Sukh Ram Vs. State of U.P. and others, 2018(4) ESC 1772*** held in para 20 as under:-

"20. It is made clear that such a comparison is permissible only when the other employee(s) who is given lighter punishment was a co-delinquent. Such a comparison is not permissible by citing the cases of other employees, as precedents, in all together different departmental enquiries."

59. For the foregoing reasons, we are of the considered opinion that there is no illegality or infirmity in the impugned jdugment passed by Tribunal.

60. The writ petition lacks merit and is dismissed.

(2019)10ILR A 2163

APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 21.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 5449 of 2018
with
Criminal Appeal No. 5696 of 2018
with
Criminal Appeal No. 5811 of 2018

Smt. Sheela Devi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Muktesh Kumar Singh, Sri Ramkripal Yadav, Sri Rajesh Yadav, Sri V.K. Srivastava.

Counsel for the Opposite Party:
A.G.A.

A. Indian Penal Code, 1860 - Section 306 / 34 - Appeal against conviction - A conviction on mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of accused that led a person to commit suicide is not sustainable under section 306 IPC. (Para 24)

Grievance of dowry demand and consequential harassment shall not be general in nature and there should be some specific incident and should have provocative capability to drive the deceased to such distressed state, mental and physical that she could elect to end her life. Here the test of "person of common prudence" must also be applied. (Para 24)

Failure to provide an opportunity to accused of cross-examination of a prosecution witness vitiates trail and it tantamounts to condemning him unheard. (Para 29)

Criminal Appeal allowed (E-2)

List of cases cited: -

1. Ghulam Mustafa Vs St. of U.K AIR 2015 SC 3101.

2. Gurucharan Vs St. of Panj. AIR 2017 SC 74.

3. Nachhatter Singh Vs St. of Panj. (2011) II Cri. LJ 2292 (SC).

4. Mangat Ram Vs St. of Har. AIR 2014 SC 1782.

5. Dwarka Das Vs St. of J&K 1979 Cri LJ 550 (J&K).

6. Kartar Singh Vs St. of Panj. (1994) 3 SCC 569.

7. Mohd. Hussain Vs St. (Gov. of NCT of Delhi) (2012) 2 SCC 584.

8. Sunil Mehta Vs St. of Guj. (2013) 9 SCC 209.

9. Anil Sharma Vs St. of Jharkhand (2004) 5 SCC 679.

(Delivered by Hon'ble Pradeep Kumar Srivastava, J.)

1. These criminal appeals have been preferred against the judgment and order dated 07.09.2018, passed by learned District & Sessions Judge, Chandauli, in Sessions Trial No. 178 of 2012 (State vs. Rakesh Yadav), arising out of Case Crime No. 44 of 2009, under Section 306/34 IPC, Police Station Baluwa, District Chandauli, whereby the appellants Rakesh Yadav, Akhand Yadav and Sheela Devi have been convicted and sentenced under Sections 306/34 IPC for ten years rigorous imprisonment and Rs. 50,000/- fine each and in default six months additional imprisonment each. It has further been directed that period already passed in jail shall be adjusted against the sentence.

2. Brief facts of the case is that the daughter of the complainant Bindu was married to Rakesh Yadav, who was living in the joint family of Dashrath Yadav and Munni Lal. About three years and eight months ago, a partition took place between them and they started living separately. At the time of partition, Munni Lal had taken a loan of Rs. 1,00,000/- from Dashrath Yadav. Therefore, accused Munni Lal (Father-in-law), Rakesh Yadav (Husband), Akhand Yadav (Jeth) and Sheela Devi (Jethani) started pressurizing and beating deceased Bindu to bring Rs. 1,00,000/- from her parents for payment of aforesaid loan. On 22.02.2009, on the occasion of Shivratri, when the complainant went to meet his daughter Bindu with Siya Ram Yadav, his daughter asked him to arrange Rs. 1,00,000/-, if he wants to see her alive. She told that her in-laws will kill her as Dashrath Yadav is regularly pressurizing for payment of money. She also said that if the complainant will not arrange Rs. 1,00,000/-, she will commit suicide with her children. They tried to console her and came back. On 25.02.2009, the complainant got information from her another daughter Inda Devi that Bindu has been beaten and forcibly expelled from the house and whether she reached to him or not. On 26.02.2009, when the informant was going to Kailawar for searching her daughter Bindu and her children, in Chandauli, he was informed by some persons that the dead bodies of a woman and two children are lying on the railway track. When he reached there, he found that his daughter and her two children had committed suicide after coming under a train. A report was given to Police Station Balua about the incident on 26.02.2009 naming all the accused persons and a case was registered against them for offence under Section 306/34 IPC. His daughter was aged about 35 years and her daughter was aged about 14

years and her son was aged about 12 years.

3. The inquest report was prepared and the dead bodies were sent for post-mortem in the district hospital where the post-mortem was conducted. After completing the investigation, charge sheet was submitted against the accused persons namely Munni Lal. Rakesh Yadav, Akhand Yadav and Sheela Devi. The case was committed for trial and charge was framed against all the accused persons for evidence under Section 306 IPC.

4. The prosecution examined Chowki Incharge, Kailawar Sri Moti Lal as PW-1, Ramvriksh Yadav as PW-2, Siyaram Yadav as PW-3, Inda Devi as PW-4, retired SI Chandrakanti as PW-5 and Dr. Ravindra Nath Singh as PW-6. They have proved the written report as Exhibit Ka-1, site map as Exhibit Ka-2, Charge sheets as Exhibits Ka-3 and Ka-4, post-mortem reports as Exhibits Ka-5 to Ka-7, chik first information report as Exhibit Ka-8, G.D. Report as Exhibit Ka-9, Inquest reports as Exhibits Ka-10 to Ka-12 and the papers for sending the three dead bodies for post-mortem as Exhibits Ka-13 to Ka-26.

5. Accused Munni Lal died during trial, hence the case against him was abated. The statements of remaining accused persons have been recorded under Section 313 Cr.P.C., who admitted the marriage but denied the prosecution story. They stated it to be false that they expelled the deceased persons from the house after beating them. The fact is that she along with her children had gone to her parents on the occasion of Maha Shivratri and while coming back from there, she and her children got injured in accident by train near Majhwar Railway Station and died on spot. The death of all deceased took place out of accident by train but the complainant has filed a false case against them. The accused persons have examined in defence DW-1 Dharmraj Yadav and DW-2 Indrapal Singh Yadav.

6. After hearing counsel for both the parties and perusing the evidence on record, the learned sessions judge by the impugned judgment convicted and sentenced the accused persons.

7. Feeling aggrieved by the impugned judgment, criminal appeals have been filed on the ground that the judgment is against the evidence on record and is against law. The conviction is wholly illegal and is liable to be set aside. The offence under Section 306/34 IPC was not established against the appellants. The statements of the witnesses are contradictory and against FIR version as well as site map. No independent witness has been examined and the witnesses examined, have turned hostile. Clearly the accident took place by train and there was no role of the convicted appellants, therefore, the impugned judgment is liable to be set aside and the accused persons are entitled for acquittal.

8. Heard learned counsel for the parties and perused the record.

9. PW-1 Moti Lal Yadav has been examined to prove that the accused Munni Lal has died and it has no relevance with the prosecution case and during trial the case against the accused Munni Lal has been abated by the learned court below.

10. PW-2 Ramvriksh Yadav (complainant) has stated that Bindu was married to accused Rakesh Yadav. Her father-in-law and his brother had joint family. A few years ago from the date of incident, due to partition in the family, they started living separately. Munni Lal had taken a loan of Rs. 1,00,000/- from Dashrath Yadav and for the payment of the said loan, the accused persons were demanding Rs. 1,00,000/- and treating Bindu with cruelty and they used to beat her. On 22.02.2009, when he went to meet Bindu, she told him everything and said that the accused persons are pressurizing and harassing her for bringing Rs. 1,00,000/- and if this continues, she will commit suicide. On 26.02.2009, when he came to Chandauli, somebody told him that dead bodies of a woman and two children are lying on the railway track. He went there and recognized that it was the body of his daughter and her two children. She committed suicide with her children because of dowry harassment by coming under the train. He lodged the first information report about the incident.

11. PW-3 Siyaram Yadav has stated that Bindu was married to Rakesh Yadav and after three or four years, she went to her in-laws family after "*Gaona*". Subsequently, a partition took place between Munni Lal and Dashrath Yadav. Munni Lal has taken a loan of Rs. 1,00,000/- from Dashrath Yadav after partition and the in-laws of Bindu were demanding Rs. 1,00,000/- for payment of loan and harassing her. On 25.02.2009, Indu, the real sister of the deceased informed on telephone that Bindu has been forced to leave the matrimonial house after she has been beaten by her in-laws and when he and complainant went to search her, she was found dead with her children on the railway track. Bindu committed suicide due to dowry harassment.

12. PW-4 is Inda Devi, real sister of the deceased Bindu has stated that her sister was married with Rakesh Yadav. The accused persons were harassing her and the deceased had informed her on 25.02.2009 at 07:00 PM by telephone that her in-laws used to beat her. She informed her father for the same and on the next day, the dead bodies of Bindu and her two children were found on the railway track. She committed suicide because of harassment by the accused persons.

13. PW-5 is SI Chandrakanti has investigated the case and has stated that he recorded statements of the witnesses, prepared the site plan of the place of occurrence Exhibit Ka-2, and filed charge sheet which is Exhibit Ka-3. She also recorded the statements of other accused persons and the witnesses of inquest. She filed charge sheet also against accused persons which is Exhibit Ka-4. She has also proved other police papers.

14. PW-6 is Dr. Ravindra Nath Singh who conducted the post-mortem of all the three dead bodies. He has stated that on 26.02.2009, he was deputed at District Hospital, Chandauli and he conducted postmortem of the three dead bodies. On the body of deceased Preeti following ante-mortem injuries were found :-

1. Lacerated wound on the left side of face.

2. Abrasion 4x3 cm on the front of both knees.

3. Lacerated wound 6x3 cm above 5 cm from the right hand wrist.

4. Lacerated wound 10x4 cm on the scalp, 8 cm above the left ear with swelling around left eye.

Internal Examination

The fronto-peraital bone of scalp was found broken, brain and brain membranes were lacerated, both kidneys, pleura, peritoneum and both lungs were found pale. According to Doctor, death occurred due to shock and brain hemorrhage as a result of ante-mortem head injuries caused in accident within 12 to 24 hours. He has proved postmortem report as Ext. Ka-5.

15. On the same day postmortem of the dead body of Bindu alias Indu was conducted by the witness and following injuries were found :-

1. Cranial conty was open was open and empty, frontal bone was lacerated, both eye ball was absent.

2. Lacerated wound 5x3 cm in size on face.

3. Lacerated wound 2x2 cm on right ear.

4&5. On the right side of chest two contusions of 10x4 and 9x5 cm were found.

6. Contusion 5x2 cm on right cheek.

7. Loosening of upper teeth.

8. Contusion in the area of 60x20 cm on right side of back, on stomach, right side of hip, on the back side of right thigh, all connected with each other.

9. Contusion 10x4 cm on the right thigh and the bone was broken.

10. Contusion 10x4 cm on left hand.

11 to 14. Multiple contusion and abrasion on body, mandible fractured, femur fractured.

Internal Examination

Frontal bone of scalp and skull found crushed and fractured. Both eye ball found absent. Contusion found on the right side of abdomen in the area of about 10x4 cm. Brain and brain membranes, base of skull were fractured, both kidneys, pleura, peritoneum and both lungs were found pale. According to Doctor, death occurred due to shock and brain hemorrhage as a result of anti mortem head injuries caused in accident within 12 to 24 hours. He has proved postmortem report as Ext. Ka-6.

16. On the same day, postmortem of dead body of Ravi was conducted and following injuries were found :-

1. Whole of the skull including mandible amputated and missing.

2.Whole of neck lacerated and crushed.

3. Upper limb amputated through shoulder.

4. Lower limb amputated through 10 cm below the knee joint.

5. Lacerated wound found on the right leg 15x10 cm 5 cm below knee, fracture was found.

6. Laceration on waist 10x3 cm on the left side.

7. Multiple small contusion and abrasion on whole body.

Internal examination

Scalp and skull, membranes, brain and base of skull was damaged as per injury mentioned above. Both kidneys, pleura, peritoneum, pancreas, spleen and both lungs were found pale. According to Doctor, death occurred due to instantaneous anti mortem injuries at neck, vessels and spinal cord caused in accident within 12 to 24 hours. He has proved postmortem report as Ext. Ka-7.

17. PW-6 Dr Ravindra Nath Singh who conducted postmortem has stated that the postmortem of the three dead bodies was done by him in between 3.40 PM to 5 PM and the bodies were brought by GRP, Mughalsarai. Deceased Bindu Devi was aged about 35 years, Preeti of 14 years and Ravi was about 12 years old. Rigor Mortise was present in all the three dead bodies which was indicative of fact that death must have occurred more than 12 hours before and all the injuries found on the dead bodies must have come in a train accident simultaneously and in one go. Semi digested food was found which indicates that they must have taken meals 2 ½ to 3 hours prior to death.

18. From the reading of the postmortem report, nature of injuries found on the dead bodies and statement of doctor, it is clear that all the three sustained injuries and died due to injuries which must have been caused by a running train, may be accident or otherwise. This is further supported by the inquest reports of dead bodies Ext. Ka-10, Ka-11 and Ka-12, prepared on 26.2.2009 from 9.20 AM to 12.30 PM before five witnesses and all the witnesses and the officer who prepared inquest report were of the view that the deceased persons must have died being hit by train.

19. The prosecution version is that deceased Bindu was being harassed and treated with cruelty by accused persons as they were demanding one lac rupees for repayment of loan taken by her father in law and on the date of incident she was expelled from her matrimonial house after beating by accused persons along with children and provoked by same she committed suicide with her two children. On the other hand, the defence has put a case of denial and has put forward a case of accident alleging that Bindu and her children had gone to her parents on Shivratri festival and while coming back they got trapped as crossing gate was closed and the accident took place by a train resulting in their unfortunate death. It has been also argued that the deceased with her husband and children were living separately from other accused and the family was leading a good and happy family life. Therefore, the issue which was to be determined was whether it was a case of accident or the deceased persons committed suicide and if they committed suicide, whether it has been proved by prosecution that the accused persons provoked and abetted them to commit suicide.

20. Section 306 incorporates the offence of abetment of suicide and the main ingredients of the offence is the suicidal death and abetment thereof. The suicide is an intentional killing of oneself. Section113-A of the Evidence Act provides presumption as to abetment of suicide by a married woman as below :-

*"**Abetment of suicide by a married woman:** When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.*

***Explanation-** For the purpose of this section, "cruelty" shall have the*

same meaning as in section 498-A of the Indian Penal Code (45 of 1860)."

21. Explanation to section 498-A IPC defines cruelty caused on wife by husband or his relatives as follows :-

"(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

22. It is pertinent to mention that at the time of death Bindu was aged about 35 years and her daughter was about 14 years in age and son was of 12 years in age. Thus, Bindu must have died nearly 15 years of her marriage and as such no presumption will be available under section 113-A of the Evidence Act and the prosecution is required to establish the facts constituting abetment in addition to the fact of commission of suicide by three deceased persons.

23. In ***Ghulam Mustafa vs State of Uttarakhand, AIR 2015 SC 3101,*** the Court held that a casual remark or something said in a routine way or in usual conversation should not be construed or misunderstood to mean 'abetment.' A conviction on mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of accused that led a person to commit suicide is not sustainable under section 306 IPC. Again, in ***Gurucharan vs State of Punjab, AIR 2017 SC 74,*** it has been held that to constitute the offence under section 306 IPC, there should be a live link between abetment and suicide and the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. So far as the grievance of dowry demand and consequential harassment is concerned, it should not be general in nature and there should be some specific incident and should have provocative capability to drive the deceased to such distressed state, mental and physical that she could elect to end her life.

24. In ***Nachhatter Singh vs State of Punjab, (2011) II Cri. LJ 2292 (SC),*** the court remarked that in case of abetment of suicide by married woman, the cruelty and harassment meted out must be of nature to drive a person of common prudence to commit suicide. Every quarrel between husband and wife which results in suicide cannot be taken to abetment by husband. For abetment, standard of reasonable or practical woman as compared to headstrong and over sensitive one is to be applied. In ***Mangat Ram vs State of Haryana, AIR 2014 SC 1782,*** it was laid down that a woman can commit suicide for various reasons, such as, depression, financial difficulties, disappointment in love, tired of domestic worries, acute or chronic ailments and so on and need not be due to abetment. Therefore, reasoning that no prudent woman will commit suicide unless abetted by someone is perverse and not sustainable under law. In ***Ghulam Mustafa vs State of Uttarakhand, AIR 2015 SC 3101,*** the Court held that a casual remark or something said in a

routine way or in usual conversation should not be construed or misunderstood to mean 'abetment.' A conviction on mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of accused that led a person to commit suicide is not sustainable under section 306 IPC. Again, in ***Gurucharan vs State of Punjab, AIR 2017 SC 74,*** it has been held that to constitute the offence under section 306 IPC, there should be a live link between abetment and suicide and the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. So far as the grievance of dowry demand and consequential harassment is concerned, ***it should not be general in nature and there should be some specific incident and should have provocative capability to drive the deceased to such distressed state, mental and physical that she could elect to end her life.***

25. Though, ***Gurucharan vs State of Punjab (supra)*** was a case based on dowry harassment, the last four lines mentioned in bold letters are still relevant and they require specific incident, and not general allegations, having ***provocative capability to drive the deceased to such distressed state, mental and physical that she could elect to end her life.*** Routine behaviour, remark or quarrel by husband in matrimonial life in a drunken state cannot be taken to be sufficient to the extent to constitute abetment unless something extra-ordinary, more than normal wear and tear of married life, is shown on or just before the date of incident. The burden of proving close link, in proximity of time between abetment and suicide, heavily lies on prosecution and the prosecution has utterly failed in discharging this burden.

26. Now coming to the facts of this case. Three fact witnesses have been examined by the prosecution. PW-2 is the father and informant and from his statement in examination-in-chief, it appears that he has stated that when he went to his daughter Bindu on 22.2.2009, she told about cruelty and harassment by accused persons on account of demand of one lac rupees for repayment of debt and she was so disturb that she wanted to commit suicide. He also stated that he got a report scribed and lodged FIR. When he was put to cross-examination, he disowned his FIR and said that he did not lodge any such FIR nor he signed over it and he does not know who wrote the same and who delivered it to police. He has also stated that her married life was happy and there was no complaint from either side.

27. There is one more aspect in relation to PW-2 which has not been considered by the learned trial court. From the perusal of the statement of PW-2 it appears that his cross-examination was not completed and the same was continued on 29.9.2016 and the case was fixed for remaining cross-examination on 4.11.2016, 7.11.2016, 7.12.2016, 2.2.2017, 18.3.2017, 15.5.2017, 29.6.2017, 17.8.2017, 28.9.2017, 15.11.2017, 28.11.2017, 12.12.2017 and 3.1.2018, but the prosecution did not produce PW-2 for cross-examination during trial, although, other prosecution witnesses were examined. This resulted in the denial of the valuable right of the accused to cross-examine the witness. It has been nowhere mentioned in the order-sheet that the witness was not produced as he was not traceable or had died. It has also not been shown that the opportunity of cross-examination was closed by the court by a specific order to that effect. Moreover, he has himself disowned the

FIR and statement of such witness cannot become basis for conviction and if at all such statement could be used, the same may be for the support of other evidence.

28. The main object of cross-examination is to find out the truth and detect falsity in the testimony of a witness. According to ***Powell (Law of Evidence, 10th Edition, 463)*** the objects of cross-examination are to impeach the accuracy, credibility, general value of the evidence given in-chief, to shift the facts already stated by the witness, to detect and expose discrepancies, or to elicit the suppressed facts which will support the case of the cross-examining party. ***Phipson (On Evidence, 15th Ed., 2000, para 11-17)*** has remarked that '***the object of cross-examination is two fold- to weaken, qualify, or destroy the case of the opponent; and to establish the party's own case by means of his opponent witness.'***

29. In ***Dwarka Das vs State of J&K, 1979 Cri LJ 550 (J&K),*** it has been observed that the right of cross-examination is referable not only to section 138 of the Evidence Act but is one of the principles of natural justice that evidence may not be read against a party until the same has not been subjected to cross-examination, or at least an opportunity has not been given for cross-examination. Section 138 impliedly lays down that the statement of a witness would be read as evidence against a party only when it had been tested on the anvil of cross-examination or opportunity was afforded for the purpose. The testimony of a witness is not a legal evidence unless subjected to cross-examination. In ***Kartar Singh vs State of Punjab, (1994) 3 SCC 569*** and ***Mohd. Hussain vs State (Government of NCT of Delhi) (2012) 2 SCC 584,*** it has been held that the right of cross-examination is included in the right of accused in a criminal case, to confront the witness against him not only on facts but also to discredit the witness by showing that his testimony in-chief was untrue and biased. Failure to provide an opportunity to accused of cross-examination of prosecution witness vitiates the trial. In ***Sunil Mehta vs State of Gujarat, (2013) 9 SCC 209,*** it has been further held that in a criminal case, using the testimony of a witness at the trial without giving the accused the opportunity of cross-examination, is tantamount to condemning him unheard.

30. The purpose of the above discussion is to indicate that the evidence of PW-2 cannot form basis for conviction as he was not produced for cross-examination and a very little cross-examination (ten to fifteen lines) which was conducted by the defence, that too demolished the credibility of the witness as he denied that any written report was given and FIR was lodged by him and that he did not know who signed over the same. Moreover, he stated about the good matrimonial life of deceased. It is also pertinent to mention that the witness was not declared hostile. After that little cross-examination, he did not turn up nor he was further produced for cross-examination.

31. PW-3 Siyaram is brother of PW-2 and he claims to be present with him when they visited to the in-laws of the deceased. But the fact that he also accompanied the informant does not find mention in the statement of PW-2. PW-3 has stated in his cross-examination that Bindu used to come to her parents and

used to return to her husband after staying a day or two. He has also stated that in his knowledge there was no dispute of any kind between two sides. Very importantly, he has stated that he cannot say whether Bindu and two sons died out of train accident or they committed suicide. He has stated that for the first and last time he went to in-laws of Bindu on 22.2.2009 and nothing was demanded by her in-laws, their stay there was very cordial and Bindu and her children raised no complaints. He says that both the children were born in her laws house and all the arrangements were made by in-laws and they were given usual education by them and daughter was studying in class 9th and son was studying in 7thclass. Thus, the statement of this witness does not prove the prosecution version on the point of demand, cruelty and harassment or abetment and he is not sure whether the deceased persons committed suicide.

32. PW-4 Inda, sister of deceased, has stated that the deceased informed her on phone on 25.2.2009 that the accused persons are treating her with cruelty and have committed maar-peet and she will not live there. She informed the same to her father. PW-2 has said nothing about this information in his statement. In the cross-examination, PW-3 Siyaram has said it, but he has been contradicted on this point with reference to his statement recorded by IO in which he has not stated that fact. Then, the information, if any, was given to the father of deceased and not to PW-3. It is also pertinent to mention that the witness has admitted that the deceased and she, both do not have any mobile phone nor prior to incident, they ever talked to each other and there was mobile connectivity between them. Therefore, it is doubtful that the deceased talked to her or she further informed to her father. She has further stated that the deceased and her husband were living separately from other accused her brother in law and his wife and as such, it is highly doubtful how they abetted the deceased.

33. PW-4 Inda has further stated about good and happy married life of deceased as after marriage she used to happily come to her parents whenever she liked and there was no restriction on her. Her two children were studying and they were happy and healthy. The deceased never made any complaints about her husband and in-laws. She has stated that to go to the parents and on coming back to in laws, one has to step over the railway track and after crossing the railway track, another means of travel is to be taken for both sides. She has further stated that there was no complaint to deceased before the accident. She has admitted that because of death of deceased and her children, her father and family became emotional and angry.

34. The statement of PW-5 IO Ms Chandrkranti is very relevant who has stated that during investigation, she found that Munnilal and Dashrath were separated a long back and there was no dues of one lac rupees and this fact was found to be wrong in investigation. She has stated that the deceased persons died out of train accident while crossing the railway track at railway crossing situated at Chandouli-Sakaldiha road in the west of Majhwar railway station. She has also stated that there was no evidence of cruelty and harassment by accused persons for any demand of one lac rupees. She has also stated that witness Siyaram

(PW-3) never stated to her about Inda Devi informing him on phone that Bindu has been expelled by accused persons after beating her. Proving Ext. Ka-25, the witness has stated that about the accident GRP Moghulsarai was having prior information and the dead bodies were removed from railway track and were kept near the railway track in front of Police Chowky, Chandouli and from there the dead bodies were taken in possession and proceeding of inquest was conducted. Pw-5 has also stated that none of the witnesses examined by her stated that the deceased persons committed suicide by jumping over the track. She has also stated that it came to her knowledge during investigation that the deceased and her children had gone to her parents 2 to 4 days before prior to accident. It is notable that it has been specific case of defence that the deceased and her children had gone to her parents on the occasion of Maha Shivratri and while returning when trying to cross railway track at the railway crossing they were hit by train and died in accident. The statement of IO supports the defence version and it cannot be ignored nor it can be said that the IO has given false statement for which she had no reason. The learned trial court appears to have adopted a very casual approach in rejecting the statement of IO. If her statement was suffering from infirmity, the benefit in such circumstances should have been given to the accused persons.

35. The two witnesses who have been examined by the defence DW-1 Dharmraj Yadav and DW-2 Indrpal Singh Yadav have stated that the deceased and her children had gone to her parents on Maha Shivratri and while coming back they sustained injuries by train accident when they were crossing the railway track. They have also stated that married life of the deceased was good and cruelty and harassment on her was never heard. Both these witnesses come in relation of Bindu from her maternal side and they have stated that accused Akhand and Sheela got separated and Bindu and her husband used to live with Munnilal. The children of deceased were studying in the Junior High School, Mathela and the deceased had full liberty to go to her parents whenever she wished. There was no complaint of any harassment. When all the three died in accident, her father lodged case out of anger and emotions. A similar statement has been given by PW-4 Inda Devi.

36. In ***Anil Sharma Vs. State of Jharkhand, (2004) 5 SCC 679,*** it has been held that an accused can examine himself u/s 315 CrPC as a defence witness and equal treatment should be given to the evidence of prosecution and defence. Standard and parameter for evaluation of evidence is the same whether it is a prosecution witness or defence witness. Unfortunately, the learned trial court has applied different yardstick for evaluation of defence witness and has discarded their testimony on the ground that they have good relations with accused persons and have been brought by accused side to give evidence. If this was a good ground for rejecting their testimony, the prosecution witnesses are closely related with complainant as he is father of the deceased and PW-3 and PW-4 are his brother and daughter. Moreover, the defence witnesses are also relatives of the complainant and as such their testimony assumes greater weight, more so when the prosecution witnesses also have stated in such way that there appears to be greater

possibility of deceased dying out of accident.

37. There is one more perspective on the basis of which a conclusion of death by accident finds support. The age of the daughter at the time of incident was about 14 years. PW-1 has stated that the daughter was born after 6-7 years of marriage. PW-2 has stated that after 3-4 years of marriage, her GAUNA (a matrimonial ceremony when the girl for the first time goes to her in-laws) took place. DW-1 and DW-2 have also stated that both were married 20-25 years before. In every case the marriage must have taken place 20 years ago. Therefore, it is not a case of suicide by a young bride. After 20 years of marriage where the matrimonial life of deceased was good and happy as two children were born to her, and she had enough freedom and could go to her parents alone and come back, a freedom which is not much seen in village life, more particularly when prosecution has alleged harassment. When the life of deceased was enough settled, it does not suit to reasoning that she could have been in any way abetted to commit suicide. There is no allegation that the children were also put to cruelty or they were also beaten before the incident. They were studying and were leading happy and healthy life. In such case there was no occasion for them to commit suicide. They were aged about 14 and 12 years and in their age, children attain sufficient understanding and it cannot be reasonably believed that they could get prepared to commit suicide merely on saying of their mother. On the contrary, they could check their mother from committing suicide. This is also indicative of an unfortunate accident in which they all lost their lives.

38. There is no principle of law that wherever wife commits suicide, the husband will bear the responsibility and will be held liable. Where marriage of both has passed about 15-20 years, two children were born and both studying in school in a usual way and the family is leading happy life, general allegation of harassment cannot be sufficient to hold the accused persons guilty for the offence of abetment of suicide. It has not been stated by the prosecution witnesses that any demand was made by the accused persons before them or from them. No witness has been examined to show cruelty and harassment with the deceased before the incident or abetment in proximity of time for committing suicide. Postmortem report shows that semi-digested food was found and that indicates that deceased have taken meals and it also falsifies that she was not given food on account of cruelty for pressurizing the demand. The trial court is required to look into all the circumstances of the case and to attract the offence under section 306 IPC, the alleged cruelty, instigation or encouragement by accused should not only be proved by prosecution but also be of such nature which leaves no option to the deceased except to commit suicide. From the evidence on record and attending circumstances as well as postmortem report of dead bodies, a possibility of deceased loosing life due to accident appears to be more probable in comparison to their committing suicide. There is no evidence led by prosecution that there was abetment of such grave nature which was likely to drive them to commit suicide in group. The witnesses of prosecution also do not disclose any serious fact creating a panic situation for all to commit suicide. The prosecution evidence if considered in totality, makes

out a case of accident rather than a suicide.

39. On the basis of above discussion, I find that the conviction and sentence recorded by the learned trial court suffers from perversity and the impugned judgment is not sustainable under law.

40. Therefore, all the three appeals are **allowed** and the impugned judgment and order dated 07.09.2018, passed by learned District & Sessions Judge, Chandauli, in Sessions Trial No. 178 of 2012 (State vs. Rakesh Yadav), arising out of Case Crime No. 44 of 2009, under Section 306/34 IPC, Police Station Baluwa, District Chandauli, whereby the appellants have been convicted and sentenced under Sections 306/34 IPC is set aside and **appellants Rakesh Yadav, Akhand Yadav and Sheela Devi are consequently acquitted.**

41. Appellants **Rakesh Yadav, Akhand Yadav and Sheela Devi be set at liberty forthwith.**

42. Office is directed to transmit back the lower court record along with a copy of this judgment for information and necessary compliance.

(2019)10ILR A 2175

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.07.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE DINESH KUMAR SINGH-I, J.

Criminal (Capital) Appeal No. 205 of 2018
connected with
Capital Cases No. 206 of 2018
connected with
Capital Cases No. 207 of 2018

Sarfaraz Ali & Anr. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Nazrul Islam Jafri, Sri Dileep Kumar, Sri Sadaful Islam Jafri, Sri V.P. Srivastava, Sri V.M. Zaidi.

Counsel for the Opposite Party:
G.A., Sri Ajay Kumar Pandey, Sri Sudhir Kumar Agarwal, Sri Satish Trivedi.

A. Section 302 read with Section 149 I.P.C. — Appeal against conviction.

Death penalty can be awarded only rarest of rare cases when collective conscious of the community is shocked it will be expected the holders of the judicial power center to inflict death penalty in respect of person their opinion as per regards the desirability or otherwise retaining death penalty. In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one. (Para 131)

In this case the offence of murder is not a gruesome manner that it would not require imposition of death penalty. Therefore, it adequate that ends of justice would be met if the punishment under Section 302/149 IPC is reduced to that of life imprisonment. (Para 133)

Appeal partly allowed (E-2)

Case Law Referred: -

1. Farooq @ Karattaa Farooq & ors Vs St. Of Kerala (2002) 4 SCC 697.

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

1. Heard Sri V.P. Srivastava, learned Sr. Advocate & Sri V.M. Zaidi, learned Sr. Advocate assisted by Sri Dileep

Kumar and Sri N.I. Jafri, learned counsel for the appellants, Sri Satish Trivedi, learned Sr. Advocate assisted by Sri Ajay Kumar Pandey, Sri Sudhir Kumar Agarwal, learned counsel for the complainant and Sri S.K. Pal, learned Government Advocate assisted by Sri J.P. Tripathi, learned A.G.A. for the State.

2. This Criminal (Capital) Appeal No. 205 of 2018 (reference no. 8 of 2018) has been preferred against the judgment and order dated 20.11.2018 preferred by accused appellants, Sarfaraz Ali, Md. Sahid, Sadiq and Rashid against the judgement and order dated 20.11.2018 passed in S.T. No. 957 of 2010 and in connected S.T. No. 9 of 2011.

3. Criminal Appeal No. 206 of 2018 has been preferred by accused, Arshad against the same judgement passed in S.T. No.9 of 2011.

4. Criminal Appeal No. 207 of 2018 has been preferred by accused appellants, Farukh and Mumtaj against the same judgment in S.T. No. 9 of 2011.

5. In the said combined judgement of S.T. No. 957 of 2010 and S.T. No. 9 of 2011, the trial court has convicted the appellants Sarfaraz Ali, Md. Sahid, Sadiq, Arshad, Rashid, Farukh and Mumtaj under Section 302 read with Section 149 I.P.C. and sentenced with death penalty directing them to be hanged till death and fine of Rs. 1,000/- each and in default of payment of fine, one year additional R.I.; under Section 148 I.P.C., all of them have been sentenced with three years R.I. and fine of Rs. 1,000/- and in default of payment of fine, six months additional S.I. each; under Section 452 I.P.C., all of them have been sentenced with three years' R.I. and fine of Rs. 1,000/- and in default of payment of fine, six months S.I. each; under Section 307 I.P.C. read with Section 149 I.P.C., they have been awarded life imprisonment. Accused appellants, Sarfaraz Ali and Md. Sahid have been further convicted and sentenced with three years R.I. and find of Rs. 1,000/- under Section 25 of Arms Act in S.T. No. 958 of 2010 and S.T. No. 959 of 2010 respectively in the same judgment.

6. The trial court has passed combined judgment in S.T. No. 957 of 2010 along with S.T. No. 9 of 2011, S.T. No. 958 of 2010 and S.T. No. 959 of 2010 on 20.11.2018.

7. Since all the appeals mentioned above arise out of the same common judgment, in the interest of justice, all the three appeals are being disposed of jointly by us.

8. The prosecution case as disclosed in the F.I.R. is that the brothers of informant i.e. Naseem and Khalil (P.W.3) had had a quarrel about seven to eight days prior to the present occurrence with Sadiq S/o Iqbal of the same village which was got settled due to intervention of the villagers but Sadiq had given a threat that he would see them. Due to the said animosity on 27.2.2010 at about 2:00 p.m., Sadiq (A-1), his brother, Sahid (A-2) and others of his family i.e. Arshad (A-3) S/o farzullah, Rashid (A-4) S/o Isfaq, Sarfaraz (A-5) S/o Shaukat, Farukh (A-6) S/o Islam, Mumtaj (A-7) S/o Ismail, all residents of village, Harsauli came there, out of whom, Sadiq was armed with country-made gun and rest of them were armed with country-made pistols, at the house of informant and Sadiq abusingly

uttered 'sale naseem tujhe dekhna hai' and entered into the informant's house and started making fire with an intention to kill in which his brother, Naseem, Khalil, Raiyyan and his nephew, Sakir received fire arm injury. Informant was also fired upon but he saved his life by fleeing from there and concealing himself. These accused believing that all the brothers of the informant and his nephew had died, went away from there. This occurrence was witnessed by Ilias S/o Yaqoob R/o Makhyali who was informant's guest and ladies of the house i.e. Vakeela, Shabnam and Nerbun. The informant had taken brother, Naseem to government hospital, Muzaffarnagar where he was declared dead while the other brother, Khalil was fighting for his life. The medical examination was also conducted of injured, Raiyyan and Sakir. Due to this indiscriminate firing made by the accused, terror had gripped the village and the villagers had closed their doors and children and ladies were running here and there. No one could summon up courage to stop the accused from assaulting and, thereafter, the assailants fled away firing.

9. P.W.4, Constable Sahab Singh has stated in examination-in-chief that on the said written report, Exhibit Ka-1 being given at P.S., Shahpur on 25.02.2010 at 16:30 hours (4:30 p.m.), a Case Crime No. 163 of 2010 under Sections 147, 148, 149, 452, 307, 302 I.P.C. and under Section 7 of Criminal Law Amendment Act was registered against accused No.1, Sadiq, accused no.2, Sahid S/o Iqbal, accused no.3, Arshad S/o Farqula, accused no.4, Rashid S/o Ishfaq, accused no.5, Sarfaraz S/o Shaukat, accused no. 6, Farukh S/o Islam, accused no. 7, Mumtaj S/o Ismail all residents of village, Harsauli, P.S. Shahpur, District Muzaffarnagar by Constable Sahab Singh (P.W.4) who prepared chik F.I.R., Exhibit Ka-2 and made entry of this case in G.D., Exhibit Ka-3 at report no. 33 at 16:30 hours on 25.02.2010.

10. Sahab Singh (P.W.4) was provided recovery memo by the then S.H.O., Pramod Panwar, P.W.8 on 27.02.2010 of one country-made pistol of 12 bore, one country-made pistol of 315 bore, two cartridges of 12 bore and one cartridge of 315 bore which were recovered from accused, Sarfaraz Ali and Md. Sahid respectively and on the basis of the same, he registered Crime No. 165 of 2010 under Section 25/27 of Arms Act against accused, Sarfaraz and Crime No. 166 of 2010 under Section 25 Arms Act against accused Sahid. The chik F.I.R. of this case was prepared by him which is Exhibit Ka-4 and the same is paper no. 4 in file of S.T. No. 958 of 2010 (State Vs. Sarfaraz). The photo-copy of the concerned chik report is available on the file of S.T. No. 959 of 2010, State Vs. Sahid as paper no. 4 which is exactly the same as Exhibit Ka-4, which is being certified by him and marked as Exhibit Ka-5. On the basis of Exhibit Ka-4, he made entry in G.D. at report no. 23 at 15:10 hours, carbon copy of which is available in the file of S.T. No. 958 of 2010 which is paper no. 9/2 which was prepared by him in his hand-writing in same process. The said carbon-copy is proved by him by original G.D. and it is marked as Exhibit Ka-6. The photo-copy of the concerned G.D. is filed in file of S.T. No. 959 of 2010 which is paper no. 8/2, which this witness has certified to be the exact carbon-copy of original G.D. and has been marked as Exhibit Ka-7.

11. P.W.8, Inspector Pramod Panwar has stated in examination-in-chief that the investigation of this case was assigned to him on 25.2.2010. On the said

date, he had written parcha no. 1 in which after copying the chik F.I.R. and G.D., recorded the statements of Constable Sahab Singh and Md. Irfan S/o Shamshuddin. He inspected the place of incident and prepared the site-plan, recovered one empty cartridge of 12 bore, one empty cartridge of 315 bore and took plain and blood stained soil and prepared its recovery memo. The site-plan is Exhibit Ka-19. The recovery memo of plain and blood stained soil was paper no. 8/1 in the file which was got prepared by S.I., Sri Bagesh Kumar Sharma at the spot at his dictation which was signed by P.W.8 and S.I. Bagesh Kumar himself and had already been marked as Exhibit Ka-12. Similarly paper no. 8/2, Fard in respect of recovery of one empty cartridge of 12 bore and one empty cartridge of 315 bore connected with Crime No. 163 of 2010 were prepared at the scene of occurrence at his dictation by S.I., Bagesh Kumar Sharma which is already marked as Exhibit Ka-14. One sealed bundle was presented in court pertaining to Crime No. 163 of 2010 which was opened with the permission of Court and out of it, one live cartridge of 12 bore was taken out from one panni which had mark on it as L.G.1 etc. dated 21.07.2010. On the bundle which was a white cloth, was marked as material exhibit-1 and the white panni was marked as Material Exhibit-2; live cartridge of 12 bore was marked as material Exhibit-3 and three other empty cartridges of 12 bore were marked as T-1, T-2 and were material Exhibits 4 and 5 respectively. There was another empty cartridge of 12 bore which was marked as E.C.-1 and it was marked as material Exhibit-6. From out of the white panni, one live cartridge of 315 bore bearing on it L.C.2 was taken out and was marked as material Exhibit-7. Further from the said panni, three blank cartridges of 315 bore were taken out which had mark on it as T.C.-3 and T.C.-4 etc. which were marked as material exhibits 8 and 9 respectively. The third empty cartridge of 315 bore was having written on it E.C.-2 and was marked as material Exhibit-10. From the white panni, one envelope of grey color was taken out on which pallets, P-1 was written, the envelope was marked as material Exhibit-1 and from out of the said envelope, one pudia of white paper was taken out which contained one small Pellet and date 21.07.2010 was written thereon; this paper was marked as material Exhibit-12 and the Pellet taken out of it was marked as material Exhibit-13. One grey colored envelope, on which white paper was pasted and deceased Naseem S/o Shamshuddin and others was written on it and one Pellet, which was sent after being sealed, was taken out and seal was also taken out and were marked as material Exhibits 14 and 15.

12. On 26.02.2010, he received post-mortem report of deceased, Naseem which was recorded in C.D. on 27.2.2010. On getting information from informer, accused Sarfaraz and Md. Sahid were arrested from their houses. From Sarfaraz, one country-made gun of 12 bore and one live cartridge of 12 bore were recovered and from Sahid, one country-made pistol of 315 bore and one live cartridge of 315 bore were recovered. The said articles were sealed on the spot and its fard was dictated by him to S.I. Anek Singh and was signed by companion police officials and accused Sarfaraz and Md. Sahid and one copy of it was given to each accused. The original fard is kept on file of Sarfaraz under Section 25/27 of Arms Act, P.S. Shahpur which is paper no. 5 and it was stated by this witness that the

same was prepared at the time when country-made pistol and gun were recovered from both the accused, Sarfaraz and Sahid and the same is marked as Exhibit Ka-20. Further this witness has stated that out of it, one sealed bundle bearing material Exhibit-1, one country-made pistol and one 315 bore pistol were taken out which were marked as material Exhibits 14 and 15 respectively. Both were found in running condition. The statement of the accused were taken. On 28.2.2010, statement of injured, Raiyyan, Shaqib, witness Ilias, Smt. Vakeela, Smt. Shabnam, Smt. Jaitun were recorded who stated themselves to be eye-witnesses of the occurrence and supported the prosecution version as mentioned in F.I.R. On 17.03.2010, warrant under Section 82 Cr.P.C. was obtained against accused, Farukh, Arshad, Mumtaj, Rashid and Sadiq from court which were executed on 24.3.2010. The original inquest report and post-mortem were copied in C.D. in which it was recorded that Naseem had died by bullet injury as per doctor's version. The statement of witness of inquest report were also recorded which included Yaseen and Naseebuddin, Shabbir, Mehar Hasan, Subhrati. On 13.4.2010, he sent the case property, for being tested to F.S.L., Agra through Constable Surendra. On 21.4.2010, he recorded statement of witnesses, Tahir and Shaukeen who were witnesses of recovery of two country made pistols and also of recovery of plain and blood stained soil. On 11.5.2010, after getting sufficient evidence against accused, Sarfaraz and Sahid, charge-sheet was submitted which is Exhibit Ka-21. On 11.5.2010, accused, Rashid and Arshad surrendered before the court of C.J.M. On 18.10.2010, the statements of these two accused were recorded in jail with the permission of court. On 28.5.2010, the bail application was heard of accused, Sadiq, Mumtaj and Farukh in compliance with High Court's order and on 10.6.2010, their bail applications were rejected and they were sent to jail. On 14.6.2010, their statements were taken in jail. On 21.6.2010, all the three aforesaid accused were taken on Police Custody Remand (P.C.R.). On 6.7.2010, charge-sheet was submitted against accused, Sadiq, Arshad, Rashid, Farukh and Mumtaj which is Exhibit Ka-23.

13. Further this witness has stated that other sealed bundle was opened before court on which Vidhi Vigyan Prayogshala was written relating to Crime No. 163 of 2010 and out of it, one pant of black color, one banyan white, one cloth of brown color and two sealed bundles were taken out and were marked as material Exhibits 16, 17, 18 and 19 and this witness stated that these were the same clothes which deceased, Naseem was wearing at the time of occurrence. The two containers were wrapped in cloth which was marked as Material Exhibits 20 and 21. From out of the said container, cement, mitti and tickli were marked as material Exhibit-22 while from other containers, blood stained soil and ordinary soil was taken out and the bundle was marked as material Exhibit-23 and container was marked as material Exhibit-24. The blood stained soil was marked as material Exhibit-25. From out of the bundle, material Exhibit-1, the country-made pistol of 315 bore and live cartridge of 12 bore, which were recovered from accused, Sarfaraz Ali and Md. Sahid, were taken out regarding which, the accused had stated that by the said weapons, both of them had made fire upon the deceased, Naseem and others on 25.2.2010.

14. On the basis of evidence gathered by the prosecution, charge under section 148, 452, 302 read with 149 and 307 read with 149 IPC has been framed against the accused-appellants Sarfraz and Sahid on 20.5.20111. A separate charge has been framed under section 148, 452, 302/149 and 307/149 IPC against accused-appellants Sadiq, Arshad, Rashid and Farukh Mumtaj on the same day. On the same day two separate charges were framed under section 25 Arms Act; one against the accused Sarfraz and other against accused Sahid, to all the above charges, the above-named accused pleaded not guilty and claimed to be tried.

15. In order to prove its case, Mohd. Irfan as PW1, Raiyyan as PW2, Khalil Ahmad as PW3, Sahab Singh as PW4, S.I. Bagesh Kumar Sharma as PW5, Dr. Pradeep Kumar Mittal as PW6, Dr. Radheyshaym Verma as PW7, Inspector Promod Panwar as PW8 and Dy. Inspector Baljor Singh as PW9 have been examined.

16. The prosecution evidence was closed and the statement of the accused were recorded under section 313 Cr.P.C, in which the entire evidence gathered against them has been stated to be false and have taken the plea that they have been falsely implicated due to the enmity. In addition, the accused Sarfraz has stated that in respect of the occurrence, which happened with him, his father Shaukat had lodged a case crime no. 163A of 20110 under sections 307, 504, 506 IPC, in which charge-sheet has been submitted against Khalil, Raiyyan and Shakir and the case is pending in this very court. He had used force against the complainant side only in self defence and has filed the copy of the FIR of the said case, which is Exhibit Kha-1. The accused-appellant Sahid has initially stated that he has been implicated in the case only because of being of the same family. The same defence has been taken by the other co-accused Sadiq. The co-accused Arshad has additionally stated that on 24.2.2010 the daughter of his brother-in-law Smt. Shakeela, who was married in village Kalyanpur, had died and after hearing the said news, he along with his brother Musarraf had gone there on 25.2.2010 from their village Harsauli and had reached in village Kalyanpur at 8.00 A.M. and remained there till 3.00 P.M. Mohammad Farukh has additionally stated that he has medical store in the village and on the date of the incident, he had gone somewhere and was not available at medical store. Subsequently, he came to know that an occurrence had happened near the said medical store with Sarfraz son of Shakeel regarding which, case crime 163A of 2010 was registered under section 307, 504, 506 IPC, in which charge-sheet has been submitted against Khalil, Raiyyan and Shakir, because of this enmity, he has been falsely implicated. Accused Mumtaj and Rashid both have additionally stated that because of them being of the same family, they have been falsely implicated. In defence, from the side of the accused, Dr. Radhey Shyam Verma as DW1, Haqiqat as DW2, S.I. Bagesh Kumar Sharma as DW3 and Dr. Sukrampal Singh as DW4, have been examined.

17. On the basis of the above evidence, the trial court after having considered the same and in the light of the arguments made from both the sides, has convicted the accused-appellants and sentenced them as mentioned above. Now we have to see in the light of the

argument made in this appeal as to whether the said judgment needs to be interfered with or should it remain as such.

18. In order to prove its case, from the side of prosecution, in support of the prosecution version as mentioned in the FIR, the informant Mohd. Irfan has stated as PW1, in examination in chief, that the occurrence took place on 25.2.2010 at 2.00 P.M. About 7-8 days prior to this occurrence, while playing volley ball, a quarrel had taken place between him and his brothers Naseem and Khalil on the one side and the accused Sadiq on the other, in which maar-peet had also taken place but after the intervention of some respected persons of the village, the matter was compromised between the parties, but the accused Sadiq had given a threat to his brothers that he would see them. On 25.02.2010 when PW1 was present at his house with his brothers namely, Naseem, Khalil, nephew Shakir, his mother Wakeela, Bhabi Jaiboon, Bhabi Shabnam and Ilyas and he and his brother, after coming from the field, were taking off fodder to be placed in the machine, then all of a sudden, at about 2.00 P.M. accused Sadiq armed with country made gun and others namely, Sahid, Arshad, Rashid, Sarfraz, Mumtaj and Farukh, all armed with country made pistol entered into his house and started abusing and uttered "Maro Salo Ko" and then all of them started making fire from their respective weapons upon the complainant side. In this assault, his brother Naseem, he himself, Khalil, Raiyyan and his nephew Shakir received fire arm injuries while he himself fled from there and concealed himself to save his life. The ladies of his house raised alarm and after hearing the sound of pistol and guns, a lot of people had assembled there coming from different lanes and thereafter the accused left the scene of occurrence giving threat. Thereafter, with the aid of his relative and family members, he brought his injured brothers to police chawki first by a vehicle and one police personnel had taken the injured person to the District Hospital, where Naseem was declared dead by the doctors as soon as he was seen. His other brothers namely, Khalil, Raiyyan and nephew Shakir were got admitted for being medically examined, thereafter, he had written report of this case in the hospital taking the same he had gone to police station Shahpur, where he got the case registered. He had identified Exhibit Ka-1 to be the same report, which he had given at the police station.

19. After drawing the attention to the above statement of this witness, learned counsel for the appellants had argued that the FIR was ante-timed because medical examination of the injured persons was conducted between 15-15 hours-15-30 hours, while the FIR had been registered on the same day at 16.30 hours, which would show that medical examinations of the injured, were already conducted before lodging the FIR.

20. In cross examination, this witness has stated that the name of his father is Shamsuddin, who is alive. He had three wives and from the first wife there was no child born. From the second wife, Iqbal was born and from the third wife, PW1, Raiyyan, Imran, Naseem, Saleem and Khalil were born. He cannot tell as to how much land is possessed by Shahmsuddin. Iqbal, who is son of Shamsuddin, was living separate while rest of the accused were also living

separate. From among the children of his mother, Naseem, Khalil and Saleem were living at one place while others namely Iqbal, Raiyyan, Ifran and Imran were living in a house at a distnace leaving in between one house. All the brothers named above, were married.

21. He has further stated that one case under section 307, 504, 506 IPC is also pending in the same court, in which the present case is pending and the complainant of the said case is Shaukat son of Alauddin. The injured in the said case was accused Sharfraz son of Shaukat. The son of Sharfraz was also caused injuries in the said case, in the said case, after investigation, the police had submitted charge sheet. He has also stated that the accused of the said case were his real brothers namely, Naseem, Khalil and Raiyyan and one more injured in that case was his nephew Shakir son of Raiyyan. He has further stated that in the present case, his real brother Naseem has been murdered while Raiyyan, Khalil and Shakir have received injuries but of his own, he has further stated that the above-named case under section 307 IPC was a false one as no such occurrence has taken place.

22. It has also been stated by this witness that all the accused shown in this case, they all are descendant of Kallu and Jagira and that the father of Kalu and Jagira was Hatham. It is right to say that there is distance of one kms. between the residential places of the families of Kallu and Jagira and his (PW1) families. Further, he has stated that all his brothers do agricultural work but he does not know as to how much land they possessed and the said agricultural land is common, however, their food is cooked separately but they lived together. The ancestors of accused namely Kallu and Jagira were real brothers of the ancestors of PW1.

23. He has no knowledge as to who were playing the volley ball in the field and what were their names. His brothers Naseem and Khalil had not told him the name of those persons, who were playing there because he had not asked for the same. He had come to know about the quarrel on the same day in the evening but he had not made any written report nor oral at the police Chauki in that regard. Rashid son of Raja Din had met him in the evening of the incident, who had accompanied him to the hospital. He had met him in the Government Hospital, Muzaffar Nagar. At that time, there were many people of the village including Intijar son of Islam Uddin, his uncle's son Subrati and many others. Imran and Iqbal sons of Shamsuddin had also reached the hospital and with them one police personnel had accompanied them from Chawki. All the injured were in the same vehicle, which was Maruti 800 and all the injured namely, Khalil, Raiyyan and Shakir were sitting while Naseem was made to lie on his lap. Soon after 5-7 minutes of the occurrence, lot of blood was coming out from the wounds, which had made all their clothes wet. Among injured, only Naseem was unconscious while rest injured were conscious and were talking. It has further been stated that by the time they reached Muzaffar Nagar, they had felt that the Naseem was still breathing but when they reached the hospital at 3.15 PM, there Naseem was declared dead and two persons had taken away the dead body of Naseem. Other three injured namely Khalil, Raiyyan and Shakir were medically examined in front of him.

24. On the date of incident, Farukh was present at the said medical store where medicines are sold. The said medical store is situated in the house of Meharban son of Isab Uddin and adjoining to this medical store to the south of it, is a lane and thereafter is situated abadi and thereafter one or two lanes and then is situated the main road. From the house of accused, the medical store of Farukh was situated about 600 meters away and there was no other medical store in that vicinity.

25. The main door of his house is towards east, which had a shutter, which remained closed in the night. His house is constructed in the area of about 600 to 700 sq.yards in which he lives and his cattles are also kept there. On 25.2.2010 there were 5, 7 and 10 buffalos tied in that house. Inspection of the place of occurrence was made by the Investigating Officer in his presence, although he does not recollect its date and time. Perhaps, the Inspector was Bagish Sharma, whom he had shown the place of incident, where cartridges were lying and his brother Naseem was lying. The places where Pellet embedded in the walls, were also shown and the place from where the accused had run away, after having made fire was also shown. The Investigating Officer had not got the photography done of the said place, where Pellet hits wall. After verandah, there is one gallery and on both sides of it, there are rooms. The ladies of his house live in curtains and thereafter of his own he has stated that he has three storyed residential house. On the third floor of which, ladies live. On the date of incident as well as prior to that, there was a door installed in the gallery of his house, which used to remain open during the day but the same remains, closed in the night. After the said gallery, lies a Sahan, in which cattle are tied. In the said veranda, there is no residential room and due to shed, cattle are tied in the said veranda and there is no other kind of construction. For going upto the third floor, there is only one passage, which goes through stairs. On the third floor, there were six rooms, out of which four had exit towards north side while rest had exit towards west and east sides. There was no curtain in those rooms but there were doors in them. He had not shown those rooms to the Investigating Officer. In the stair case, which leads upto the third floor from the ground floor, there is no door at the ground floor. There is one room constructed at the third floor, which remains vacant and the same is used only when guests come. In his house, after the gallery, there is a Sahan in which cattle are tied, which place is 'Kachcha'. Gallery is cemented and Varanda is also cemented. After veranda, there is Sahan and upon that 'kharanja' is laid. For looking after the cattle, he has not engaged any servant. Near the stair case, one fodder cutting machine, which is run by electricity, is also installed, which is used sometimes for the said purposes. All these places were shown to the Investigating Officer at the time of inspection.

26. This witness has further stated that after the gallery, varandah is about 11 ft. wide and after the said veranda, there is a gallery, which is about 11 ft. long and about 9 to 10 ft. wide. Just after the gallery, there is a kachcha floor and about 3-4 ft. to the west of it, there is kharanja. All the four persons namely, Khalil, Raiyyan, Shakair and Naseem had come from the field of Sugarcane. They had come in a buggi, which was parked

outside the varanda and all the above four persons were emptying the buggi. The Investigating Officer was shown the said place. On the said day, no altercation/conversion had happened with the accused. He has further stated that after the incident of volley ball, compromise had taken place. There was no social relationship between his family and the family of the accused. The accused were living about seven meters away near Harsauli road. The agricultural lands of the informant and the accused were adjoining to each other. None of the seven accused had met him since the date of incident. He cannot tell as to from which direction the accused had entered the Gher, because at that time, they were taking off the 'Gole' for the purposes of cutting the fodder. They were cutting the said fodder in the machine, which was installed beneath the stair case and the said machine was being run by hand by Khalil and Raiyyan.

27. Further, this witness has stated that he does not know exactly about Shakir as to where he was and what was he doing. When he had come after taking water, the accused had started the incident and as soon as they came and started abusing then Naseem, after having seen them, ran towards the stair case. With abusing, simultaneously all the accused reached near the fodder cutting machine armed with pistol while Sadiq had gun, which was a licensed one. He had no licensed weapon in his house. He has knowledge about the bore of the country made pistol. Soon after coming, the accused started making fires but he could not see whether they were making fires after taking aim or not. He has seen the country made pistol of the accused by which about 14-15 fires were made and soon after firing, the complainant side started fleeing but accused chased them. The place where the fodder machine was being used, the injured Naseem, Khalil, Raiyyan and Shakir had received fire arm injuries, which were caused to them while they were fleeing. Raiyyan, Khailil and Shakir had scaled northern side wall and had jumped over the other side of the wall to save their lives but he cannot tell whether the accused had chased them or not. He had not alleged this fact in the report that Khalil, Raiyyan and Shakir had run towards north after scaling the wall. The Investigating Officer has recorded his statement and to him he had told that after getting injured by fire, the above three persons had fled from there after jumping over the northern, wall which might have been 4-5 ft. high. At the time when this occurrence happened, he (PW1) was standing there and thereafter has stated of his own that he was in the stair case where there were small wall. He cannot tell as to whether he had told the Investigating Officer about the same nor had he mentioned the same in his report. When the fires were being made, he did not see as to which injured had received fire arm injury at which place because he was running away from there to save his live and after fleeing, the injured Naseem had straightway reached the third floor of the house. All the seven accused had not gone to the third floor making fires, rather none of them had gone there. He has further stated that the fire had hit the third floor and then again stated that possibly did not get hit. He was put a question as to whether all the seven accused had reached the third floor making fires, to which he responded that Sadiq, Sahid, Rashid and Sharfraz were going by the stair- case to the third floor but none of them could reach. The fire was made from the stair case.

28. Further, this witness has stated that Naseem had received fire arm injury on the third floor when he had turned

around to see but he could not see as whose shot had hit Naseem. He had told the Investigating Officer that injury was caused on the third floor. He does not known as to whether the blood was lying or not at the place where machine was installed or at the stair case, which led to third floor. Subsequently, he had seen blood lying at the third floor but had not seen any blood lying near fodder cutting machine. All the accused had made fires but cannot tell as to what was the distance between the injured and the accused when the fire was made. The accused had halted for about 5-7 minutes while the fire was being made and two empty cartridges were found. The empty cartridges were found near the machine but he had not seen them himself. The said empty cartridges were of the gun. When the Investigating Officer had come, Naseem had received gun shot injury on the upper portion of his chest while Khalil had received injury on his face and hand as well as on chest. Shakir had received fire arm injury on his forehead while Raiyyan had received injuries on the finger of his left hand. Khalil had received fire arm injury on his hand and chest as well as on his face. Khalil, Raiyyan and Shakir were got admitted in Muzaffar Nagar hospital from where Shakir and Raiyyan were discharged while Khalil was admitted. Khalil was referred after 5-7 days to some other hospital. He had remained in the hospital for about 5 days. Khalil, Raiyyan and Shakir, whether they were operated or not after having received arm injury, he does not know although all the three had been X-rayed but he does not know its outcome. He has further stated that Exhibit Ka-1 was written by him in the hospital at 3.30 p.m. on the date of incident.

29. This witness has further stated that Ilias S/o Yakoob R/o Makhiali was real brother-in-law (sala) of his deceased brother Naseem and further stated on his own that the wife of deceased, Naseem i.e. Shabnam started living with Rashid S/o Raiyyan after the death of Naseem meaning thereby that she had contracted marriage with him. He was also real nephew of deceased, Naseem.

30. He had not given information of this occurrence to any of his relatives. The occurrence had happened at about 2 p.m. but he did not make any mention of it to anyone nor did he divulge the names of the accused, although he went on to say that everyone had seen the occurrence and he had lodged the report as well by name.

31. He has further stated that indiscriminate firing was made by the accused, no fire arm injury was caused to any of the animals which were tied there in the 'gher'. The marks of bullets had been caused in the walls particularly in northern wall where 5 to 7 bullets had hit. Such marks were shown by him to the I.O. but he does not recollect whether empty bullets were lying there or not. He had saved his life by concealing himself in room at the second floor and had closed the doors. There was no lady in the said room as the ladies used to live in the rooms on the second floor. The doors of the rooms were not closed. On the second floor there were six rooms constructed out of which two were towards east and rest were towards south. The accused had only made fires upon him although he did not utter any word except that Naseem was abused by them. The neighbours had closed the doors of their houses and none of them had come to the spot at the time of occurrence and had reached only after the occurrence. Further he has stated that in respect of Sarfaraz having received injuries, he was told after he had lodged

the report, by S.O. but he does not recollect the exact time when it was told. The case in respect of Sarfaraz having received injuries was also being contested in the same court in which his real brothers Khalil, Raiyyan and his nephew, Shakir had got themselves bailed out. He has no knowledge whether any medical board was constituted for medical examination of Sarfaraz nor does he has knowledge whether Sarfaraz had received any treatment at Meerut Medical College after having received fire arm injuries.

32. He has further stated that on the stair-case railing has been installed after raising wall of bricks and the said railing begins from the side where machine was installed. The stair-case was three feet wide. When the accused reached on the third floor, they were continuously firing while chasing Naseem (deceased). Accused ascended stair-case while making fires. Naseem did not receive any injury till he reached the third floor and whatever injuries were received by him were caused to him only when he reached the third floor. Some accused had stayed back near the machine but he cannot say whether they were making fires or not. In his memory, no empty cartridge was found on the third floor. How the Naseem was found lying i.e. whether with face down or face up etc., he cannot tell. Accused were continuously making fire upon Naseem so that no one could come near them. When the accused had left, his mother, brothers and various other persons had taken Naseem to the ground floor in injured condition where he was made to lie on a cot. Naseem was not speaking anything; his clothes were smeared with blood. When Naseem was lying on the cot, the remaining injured, Khalil, Raiyyan and Shakir were also brought there by the villagers after lifting them. All the three had jumped over the wall and were lying in the other house, the said house was to the north of the house in which machine was installed and between them, there was house of Jabbar. The house in which they were lying also belonged to them (informant side). In house of Jabbar, these injured were lying there, blood was also found spread there. He had shown blood lying on the third floor and also in the other house as well as on the clothes, to the I.O. but the clothes were not taken into possession by him (I.O.).

33. He has further stated that he had told I.O. that he had a heated argument with accused Sadiq followed by abusing and 'marpeet' but if the same has not been recorded, he could not tell its reason. He had also told I.O. that his brother after having returned from the field was taking off the fodder and was placing it on the machine but if the same was not recorded, he cannot tell its reason. He had also told I.O. that ladies of the house raised alarm and after hearing the sound of fires, lot of people had assembled there, whereafter the accused fled from there making fires but why the same was not recorded by the I.O. in his statement, he cannot tell its reason. He had also told I.O. that he had taken his injured brothers in a vehicle and had gone first to the police chauki in the village and from there one police personnel had accompanied them to the hospital but if the same has not been recorded, he cannot tell its reason. He cannot tell as to for how long, he stayed at P.S., Shahpur after reaching there but stated that he might have stayed there for about half an hour. He does not remember whether police had already arrived in the village before he reached there. When he

returned home, he did not find any of the injured i.e. Khalil, Raiyyan and Shakir in the village and he does not remember as to whether any of these injured had returned to the village by the evening. When the dead body of his brother, Naseem came there at that time, Raiyyan and Shakir were present there. For the post-mortem of Naseem, he had gone. He was not present at the time when his panchayatnama was filled up nor did he see any Inspector or any police personnel filling up panchayatnama. He had reached the post-mortem house next day in the morning at about 8:00 a.m. and had found the dead body there but does not recollect whether any I.O. / police personnel was present there or not. He has denied not to have seen the occurrence and that he was making false statement due to the injured and deceased being his family members. He has also denied that after having consulted the police personnel, he had lodged the F.I.R. on the next day of the occurrence. He has also denied the suggestion that about ten days prior to this occurrence, quarrel had happened between the son of Shaukat i.e. Sarfaraz and his brother, Naseem (deceased) in respect of weighing of sugar-cane. He has also denied the suggestion that on 25.02.2010 at about 2:00 p.m., Sarfaraz (accused) had gone to take medicine from medical-store of Farukh and at that time, Naseem, Khalil, Raiyyan and Shakir (complainant side) were having lathi, katta and gun in their hands and by showing fear of these weapons, Sarfaraz was tried to be dragged by them in their house and that in the lane which was adjacent to their house, Sarfaraz was caused injuries by lathis by Khalil, Raiyyan and Naseem who were having guns, had caught hold of Sarfaraz and then Shakir told his companions that he should be shot and at this instigation, Shakir made fire upon Sarfaraz with an intention to kill by the katta which he was having in his hand. It is also wrong to say that as soon as Naseem was about to make fire, Sarfaraz snatched the gun from the hands of Naseem, whereafter all the said four persons (complainant side) chased Sarfaraz then Sarfaraz made fire from the said gun in order to defend himself which was snatched by him and somehow could save his life and returned home. He has denied the knowledge that Sarfaraz was medically examined in Meerut Medical College. It is also wrong to say that the real incident is the case which was lodged by Shaukat against the complainant side.

34. For appreciation of evidence of P.W.1 and other-witnesses, it will be essential to read and evaluate the same in the light of site-plan which is Exhibit Ka-19. In this site-plan, by arrow is shown the passage from where the accused came armed with guns. By 'A' is shown the place where the accused are stated to have made indiscriminate firing. By another arrow with zero at the tail end of it is shown the passage by which the injured are stated to have fled to defend themselves, by 'X' is shown the place where deceased received fire arm injury, which is the third floor of the house of the complainant side and he is shown to have received the said injury when he looked back upon the accused while running; by 'D' and 'E' are shown the places from where one empty cartridge of 12 bore and one empty cartridge of 315 bore were recovered. By 'B' is shown the place where plain-soil and by 'C' is shown the place from where blood stained soil was taken into possession. By 'F' is shown the ground floor of the house of complainant side and by 'B-1' is shown the second floor and above, of the complainant side.

35. This witness has proved the motive of the occurrence by stating that about 7 to 8 days ago prior to the occurrence that took place on 25.02.2010, the quarrel had happened between the deceased, Naseem and Khalil of the complainant side with accused Sadiq while playing volleyball in which both the sides had indulged in abusing each other and a little marpeet had also taken place but the matter was got compromised by the respectable persons of the village but at that time accused, Sadiq had given threat to deceased and his brother, Khalil that he would see them and in, pursuance to this motive, the occurrence was given effect to from the accused side on 25.02.2010 when P.W.1 and his brother after having come from their field were taking off fodder from the vehicle and were placing the same on fodder machine. Then, all of sudden, the accused named above came there armed with country made pistol and started abusing them exhorting 'maro salo ko' which was followed by indiscriminate firing made by them. In this assault, his brother, Naseem (deceased) and other brothers i.e. Khalil, Raiyyan and Shakir also received fire arm injuries while P.W.1 himself saved his life by concealing himself somehow. This witness has made clear in cross-examination that Naseem immediately ran towards the stair-case to save his life and rest of the three injured had jumped over the wall which was to the north of the said stair-case and had landed in the place where there was house of Jabbar after getting injured and it is apparent that this witness has proved his presence on the place of incident and according to him, by the side of the said stair-case, there was fodder cutting machine where the deceased and his brothers (injured persons) were involved in cutting of fodder when this occurrence took place and the deceased fled towards the third floor of the house and he was followed by the accused persons who was continuously making fire upon him and fire was also made by them from the stair-case and ultimately the deceased got seriously injured at place shown by 'X' in the site-plan which is third floor of the house of the complainant. This witness has denied the cross version of the accused that on the said date i.e. 25.02.2010 at about 2:30 p.m., Sarfaraz (accused) had gone to take medicines from the medical-store of Farukh where Naseem (deceased) and three injured (Khalil, Raiyyan and Shakir) who were armed with lathis, country made pistol and gun tried to drag Sarfaraz into their house which was located adjacent to the said lane where the said shop was located and it was in self-defence that Sarfaraz had made fire upon the deceased by the gun which was snatched by him from Naseem when he was about to make fire upon him and also denied that Khalil, Raiyyan and Shakir had made any fire upon Sarfaraz with an intention to kill.

36. During argument, the main emphasis was placed by the learned counsel for the appellants upon the fact that the occurrence did take place but not in the manner as has been stated by the prosecution rather it took place as stated by the defence side and in-fact the injury caused to the deceased were caused in self defence by the accused side and that cross case was registered against the complainant side in which they have been also held guilty under Section 307 I.P.C. We would give opinion in respect of the fact as to whether the version set-up by the defence is a cross-case or not after having evaluated the entire evidence as to

whether if there were cross-cases, as to which side was aggressor or whether it was a free fight.

37. P.W.2 who is also an injured eye-witness of the occurrence i.e. Raiyyan has stated in examination-in-chief that about three years ago when he was playing volleyball in the field of kabristan, a quarrel took place at about 4:00 to 5:00 p.m. between Sadiq (A-2) on the one hand and Khalil (P.W.3) & Naseem (deceased) on the other which was got compromised by the villagers but despite that Sadiq had given threat to Naseem that he would see him and three days thereafter when he along with others were coming home after taking fodder and the same was being taken off of the 'buggie' near the fodder cutting machine, right then Sadiq, Arshad, Sahid, Sarfaraz, Farukh, Rashid and Mumtaj came there and told 'sale naseem' and, thereafter started making indiscriminate firing in which Raiyyan, Shakir and Khalil got injured. This occurrence took place at about 1:45 p.m. Sadiq was having gun while others were having pistols. All these accused were of his village who knew him from before and they were all recognized by him in the Court. Soon after receiving injury, P.W.2 fled to save his life after jumping over the wall while his brother, Naseem (deceased) ascended the stair-case but accused pursued him and made fires upon him from the stair case. His brother, Irfan was also fired upon. Naseem was left in dead condition by the accused and fled from there. On the spot, P.W.2, Khalil, Shakir, Vakeela, Jainub, Shabnab and one other relative, Ilias were present who have seen the occurrence. About two minute thereafter, Irfan came near P.W.2 and stated that Naseem was in serious condition and should be taken to the hospital so that his life could be saved. Thereafter, all of them took Naseem and on way one constable was found at police chauki, Harsauli, he (police personnel) also sat in the said vehicle and as soon as they reached the hospital, Naseem was declared dead while P.W.2 Khalil and Shakir were medically examined in district hospital in Muzaffar Nagar. Khalil was admitted because of serious condition and the F.I.R. of this case was lodged by his brother, Irfan.

38. In cross-examination, this witness has stated that it is right to say that the father of accused Sarfaraz i.e. Shaukat has lodged a case against P.W.2, Khalil, Naseem and Shakir under Sections 307, 504 and 506 I.P.C. at P.S., Shahpur but he cannot tell whether the said occurrence is of the same time and date which has been stated to be the date and time of the present occurrence but the police of Shahpur has filed charge-sheet in that case which is pending in this Court. The injured in that case is Sarfaraz.

39. Further this witness has given the same genealogy of Shamshuddin which has been narrated by P.W.1 and has also stated about the wife of Naseem having married the son of Raiyyan as was stated by P.W.1, hence the same is not being repeated.

40. As regards to the manner of occurrence, he has stated that the occurrence of firing had closed at 2:00 p.m. and soon after the occurrence, police had come there after 5 to 7 minutes. Irfan (P.W.1) had given full details of the said occurrence to S.O. Shahpur. He (P.W.2) was not in conscious condition when the police had come as he has suffered injury

in his hand, thereafter, said that he was fully conscious. Lot of villagers had assembled there. When the police arrived, at that time, Naseem was lying at the third floor of his house in injured condition but, thereafter, stated that police had not arrived by then and had not gone to the third floor. He further stated that all the injured had gone in Maruti Car and had reached the government hospital by 2:30 p.m., at that time one constable of Shahpur was accompanying them. As regards the motive, he also referred to the earlier occurrence and stated that 3-4 days after the earlier occurrence in which quarrel had happened in the field of Kabristan, the present occurrence was given effect to by the accused. Prior to this occurrence and subsequent to the compromise between the parties, no other dispute had arisen between them nor any meeting took place between two sides in village. No written report was got lodged in respect of the quarrel which had happened during playing volleyball. This witness has also narrated about his mother being third wife of his father, therefore, the genealogical aspect mentioned in the statement of P.W.1 is not being repeated here.

41. As regards the location of medical-store where incident of cross-case is said to have taken place. This witness has stated that the medical-store which is near the house of deceased, Naseem belongs to Kale S/o Shaukat but he does not recollect the direction in which it is located from the house of Naseem. His house is located in the lane which is going adjacent to the said medical-store which is located in the house of Meherban.

42. Further he has stated that his relatives, Rashid, Shaukeen, Saiyad and Ilias had come to the place of incident soon after receiving news but he cannot tell the exact time of their arrival as he had come to Muzaffar Nagar. None of his relatives had gone to Muzaffar Nagar with him. They had gone to Muzaffar Nagar by his maruti car in which five men i.e. Irfan, P.W.2 himself, Khalil, deceased (Naseem), Intezar had gone which was driven by him (P.W.2).

43. The vehicle was parked at the same place where the incident of firing had started and soon after the occurrence i.e. within 15 to 50 minutes thereafter, they had started from the said place. One constable was also taken along from the check-post who was provided to accompany them by S.O. Pramod Kumar.

44. The dead body was not taken down from the roof. The dead body was brought down by him, Irfan and Khalil by lifting the same which was of Naseem. About two to three constables had come at about 3 ¼ p.m. but only one constable had accompanied them to the hospital. S.O. had taken full information from village, Harsauli about the occurrence, whom everything was told by him and Imran which was noted by him in his diary at about 3:15 p.m. At the time of medical examination, the S.O. was present in the hospital.

45. He does not remember as to in whose (S.O.) presence, the panchayatnama was filled up. He had accompanied the dead body of Naseem from the government hospital on the next day. Along with him was Irfan and his son Shakir also. Khalil was got admitted. He does not know as to whether S.S.P. had spoken anything to Sheher Kotwal regarding lodging of the report. He along with others had gone to the post mortem

house in the night after crossing the bridge and there was no police personnel. He, Irfan and Shakir were present there.

46. He has further stated that all the 7 accused were armed who had made fires. Sadiq was having a gun but does not recollect whether it was single barrel or double barrel gun while rest of the accused were having small arms but cannot tell their bores. All the accused had come in their 'Gher' from the passage which went north-south. The gallery of the said 'Gher' is about 8 feet wide and after this gallery, there is some vacant space left for tying the animals, the area of the said place is around 300 yards. There is one stair-case to go up-stairs in the said house which is located in southern direction in the gallery. In this boundary, the stair-case is built for going to second floor and third floor of the house. In this very 'Gher', the fodder cutting machine is installed adjacent to the stair-case but between the said machine which is electricity operated and the gallery, this fodder machine is installed at a distance of 15 paces from the said stair-case by the side of gallery. The floor of the said 'Gher' is 'kutcha' while gallery is having 'kharanja' and just prior to the gallery towards road side is varandah which also has a 'kharanja' which means that it has bricks spread. The buggie on which they had brought the fodder was parked on the main road adjacent to the 'kharanja'. About 10 minutes had passed since they had brought the fodder in buggie when the occurrence happened and they were in process of taking off the fodder which was to be cut through fodder cutting machine. In that very 'gher' cattle were also tied on the other side. By the side of stair-case, there was a wall about 5 to 6 feet high. He had not seen accused entering into the 'gher' as he was busy in cutting of grass which was cut for about 5 minutes. All that accused had come at that very place where fodder machine was cutting the fodder. The accused had abused Naseem saying that 'Naseem bahar nikal'. Naseem did not respond and then firing began. All the accused had not surrounded them rather they were on the one side from where they had made fire. He told that at the time when fire was made, there was a distance of about 20 paces between them but he cannot tell as to for how many minutes the firing continued but it was indiscriminate firing being made continuously during which time many persons of 'moholla' had come but their names, he cannot reveal. At the place where fodder was being cut, nobody had got injured nor had he felt any blood spread over there although stampede had followed the firing. He does not recollect as to on which particular part of the body, injured had received injuries but Naseem had received injuries on the upper portion of the body while he, P.W.2 had jumped over the wall. There was one room at the third floor of the house which has doors on all sides. There was none in the said room at that time. He had not gone to the third floor but he had gone there only to call Irfan. At that time Naseem was lying dead over there. He and Irfan had brought Naseem down, who was having lot of fire arm injuries on his fore-head, chest and neck. Lot of blood was also lying there. Shakir had received injury on his fore-head while P.W.2 had received injury on his left hand and fingers on the rear portion and not on any other part of the body. No Pellet was extracted from the said injury. He further stated that he had received bullet injury which was taken out by doctor and his hand was bandaged but

he does not know whether the said bullet was sealed by the doctor or not. Naseem had received many injuries of bullet. Although he did not have any injury of pallets on his body, rather had received many bullet injuries. Khalil and Shakir had not received any Pellet injuries but had received many bullet injuries. Khalil was also medically examined in front of him and the said bullets were taken out by the doctor during medical examination but he does not recollect whether they were sealed or not. He did not pay attention as to whether there were any blank cartridges lying. Khalil had become unconscious on the spot who was picked up and was taken in a vehicle. He does not recollect whether Khalil had received injuries in his chest. He does not know where the ladies of the house were present at that time. Whatever fodder was being cut, was lying there, he had told about the said fodder cutting machine to the I.O. but does not recollect whether he had shown that the same was operable by electricity. He had shown the said machine also to him. If all these facts have not been recorded by him, he cannot tell its reason. At that time, there were 5-7 cattle also tied there when firing was made. The fire was being made inside and outside of the house. By inside, he meant store where the firing had begun which belonged to Kale Khan in which direction the said store of Kale Khan was located from his house, he does not know nor does he know whether accused had come from the side of adda towards their house. The place from where they had started making fire, the commotion had started. When he came out after hearing the said commotion, the accused continued to make fires for about 4 to 5 minutes inside the 'gher'. They were coming from the side of store making fires, at that time the marks of fire were made in the house of Umar, which was located in front of the primary school as well as in his own house. He did not see any cattle receiving any injury although he had not seen marks of fires on the wall.

47. He does not recollect as to for how many days Khalil and Shakir remained hospitalized for how many days because he had absconded after the occurrence because Sarfaraz' father Shaukat had lodged a report to the effect that he was fired upon by P.W.2 and his companions. In the case in which Sarfaraz was stated to have received injuries, F.I.R was lodged at the police station in which he had got himself bailed out and the said case is still proceeding in the same court. The other case which was proceeding against him, in that, Afroz, Musharraf and Gaiyur are witnesses. The real brother of Gaiyur i.e. Mumtaj is an accused in this case. The name of real grand father of Sarfaraz is Allaudin @ Bhura who has sons namely Ali Mohammad, Fatehdeen, Zameer Hasan in complaint of the cross case of Shaukat whose son is accused Sarfaraz.

48. It is right to say that all the accused live separate and also do agricultural work separately. He had told I.O. that in the field of Kabristan, a quarrel had taken place while playing volleyball between Sadiq, Khalil and Naseem at about 4:00 p.m. which was got compromised, although dispite that Sadiq had given Naseem a threat to see and three days thereafter, this occurrence took place in the manner which has been stated above by him. He has denied that he had not seen the occurrence and was making false statement.

49. This witness has also proved the occurrence as stated by the prosecution

that on 25.02.2010 at about 2:00 p.m. by all the seven accused named above who are stated by him to be armed with fire arm weapons. It is also proved by that the firing had started near the place where fodder machine was installed and at that time the work of cutting fodder was going on which was being done by deceased and as well as by the three injured named above have stated to have received injuries to jump over the wall situated to the north of the stair-case which led to the third floor of the house of the complainant side, where the deceased, Naseem had tried to flee to save himself but the accused had pursued him in that direction and had made several fires upon him from the stair case and finally, he received injuries by which he lay in badly injured condition on the third floor from where he was brought down by the P.W.1, P.W.2 and other companions for being taken to the hospital. Lot of argument was made in respect of there being no possibility of the deceased having received injury in the manner as it is being stated to have been received because according to the prosecution witnesses, the deceased was fleeing towards the third floor and he was being chased by the accused and continuous fires were being made upon him. But there is discrepancy in the statement of P.W.1 and P.W.2 with respect to the fire having been made at the deceased on third floor, because it has come in evidence of P.W.1 that fire was made from the stair-case and the accused had not gone up to the third floor while P.W.2 at one place had stated that the accused had chased the deceased and had made fire upon him at the third floor as well. With respect to blood being found at the place 'X' which is shown in the site-plan at the third floor, no evidence appears to have been gathered by the I.O. to have found blood there which has been shown to have been collected by him from place 'C' where he had found the blood smeared soil which is on the verandah from where blood smeared soil was collected by him. By citing this, it was argued that the place of occurrence was not proved by the prosecution and in no way, the injuries could have been caused to the deceased at the third floor from the place shown by the I.O. i.e. 'A' from where the indiscriminate firing is stated to be made upon the deceased as well as injured persons. We are of the view that the presence of P.W.2 cannot be disbelieved on account of the said discrepancy pointed out from the side of defense because in such kind of occurrence where large number of accused are involved in making fires upon the complainant side, it would be very difficult for the injured as well as other witnesses, who are present on the spot, to have witnessed as to who out of the accused was in particular making fire upon whom and the injury to the injured as well as to the deceased was caused by which accused. It is quite apparent from the statement of P.W.2 as well as P.W.1 both that when this occurrence happened, they tried to save their live by running from the place where they were cutting fodder which was on the ground floor in the 'gher' and three out of them who had received injuries saved themselves after crossing boundary to land up in the place of Jabbar while the deceased tried to save himself by going up stairs on the third floor but in badly injured condition in the said firing, he lost his life before he could reach the hospital, therefore, place of occurrence would be treated to have extended from the place where the fodder machine was installed and the incident started up to the place where dead body of the deceased, Naseem was found.

50. The third injured eye-witness is Khalil who has been examined as P.W.3 and in the examination-in-chief, he stated the same facts which have been mentioned by P.W.1 and P.W.2 and this witnesses in examination-in-chief has subsequently stated that accused had followed, Naseem through stair-case up to the third floor and there, Naseem was fired upon and that after the occurrence, the accused fled from there. During this occurrence, his brother, Irfan was in the house and had seen the accused and after fleeing from there, he had saved his life. He has clearly stated that in the firing made, he, Raiyyan and his nephew, Shakir had got injuries and all the three including himself had crossed over the boundary to save their life.

51. In cross-examination, this witness has admitted that on the date of incident, accused, Sarfaraz S/o Shaukat had received fire arm injuries regarding which his father, Shaukat had lodged F.I.R. against the deceased, Naseem, P.W.3 himself, his brother, Raiyyan and nephew Shakir in which charge-sheet was submitted and they had got themselves bailed out.

52. He has further stated in cross-examination that on the date of incident, Farukh medical store was located five to seven houses away from his house but he does not recollect whether on the date of incident the said medical store was open or closed. Farukh is not related to the accused. After the school, the first house next to the medical store is that of Farukh, exit of which is towards the house of P.W.3 and his entire family lives in that house. There was no enmity between complainant side and Farukh.

53. This witness has also reiterated in cross-examination the same facts as narrated by P.W.1 and P.W.2 with respect to a quarrel having taken place between the deceased, his brother and the accused, Sadiq while playing volleyball and has also corroborated the version that the compromise had been effected between the parties. In the said marpeet, some internal injuries were suffered by the complainant side but no medical examination was got done nor any report was lodged, therefore, this witness has also proved the motive of enmity between two sides because of earlier happening, although he has failed to narrate the exact time when the said incident happened. The statement with respect to genealogy of the complainant side is also the same as that of P.W.1. In respect of the occurrence, he has stated that he regained consciousness 2 to 3 days after the occurrence and for all this while he remained in district hospital Muzaffar Nagar although he was not operated by the doctors. An X-Ray was conducted 2-3 days after the occurrence but he had got one Pellet extracted on his own at his house. He has suffered injury on the right side of face, on right side of chest and on the right side of right shoulder and arm which were pretty grievous but cannot tell their sizes and about 6 to 7 days after the occurrence, he was referred to Meerut Medical College but no parcha was made there because he was told that he would get alright and he did not take any treatment there.

54. Further he stated that he had been picked up by his brother Irfan but does not know about others. He has crossed over the boundary and had jumped into the house of his brother, Iqbal to conceal himself. He does not know whether besides him, in the house, any person had jumped or not but all the

injured had run in the same direction. He has further stated that all the brothers do agricultural work together and distribute equally the produce of it. On the date of incident who all had gone to the fields, he does not recollect but has stated that they had gone for cutting the sugar-cane at about 7 to 8:00 a.m. and had returned home about 10:00 p.m. in their 'gher' and were resting. All the brothers were living separate in their respective houses but they were all located in one 'gher' and it is the same 'gher' in which the incident happened, he cannot tell its area in bighas or yards. In the said 'gher' there are 13 residential rooms constructed: there is no room on the ground floor except one kotha in which articles were kept for running water. The said house is three storeyed. On the first floor there are 6 rooms which are constructed on the rear side of sehan. The main door of the two rooms opens towards kharanja while doors of the rest of 4 rooms are towards north. On the second floor also, there are 6 rooms exactly like that of the first floor but on the third floor there is a room, its one door opens towards kharanja and one towards the north. The said room at the third story is at the centre of the house. All the three brothers were residing in the said house which included Naseem, Saleem and P.W.3. All the three are married and their wives also live in that house. He lives along with family on the second floor but none lives on the first floor nor anyone lives on the third floor. On the third floor, there is no residential room and only guests etc. are accommodated. This witness has also stated that deceased, Naseem's wife Shabnam had married Rashid after his death.

55. This witness has further stated that 'Gher' is surrounded by boundary wall and to the north of it is located, gher of Jabbar and by the side of it towards north goes a stair-case up to the third storey which is about 1 ½ feed wide without any railing. There is wall of bricks by the help of which one can go up to the third floor. There is some kattcha place left in his 'gher' for the purpose of tying the cattle which is about 15 yard wide in length and is located towards north the house of Jaffar. In their house, there is only one fodder cutting machine but for running the same, there was no electricity motor but had only affixed on it a handle for cutting the fodder, which machine is lying towards north in the 'gher' near the stair-case. He had brought the fodder near the said fodder cutting machine which was about 50 kgs. and for cutting this fodder, all the brothers were not there rather only he, Raiyyan and Naseem were busy in cutting the fodder. About half of the fodder had been cut and at that time, his brother, Irfan was present there but was not cutting fodder, he does not do normally the agricultural work and does so only when it is felt necessary. At that time there were 5 to 7 cattle tied at the said place.

56. The main door of his house is towards the east i.e. towards the side of Kharanja and there a gallery in the said 'Gher' which is about 8 to 9 feet wide. As soon as he heard the abusive language in gallery, he left the work and came to the gallery where accused were present having openly wielding country made pistol and guns in their hands. At the time when for the first time, he saw them, there was no fire being made in the gallery and when they (P.W.3) and his brothers came in front of the said gallery, the accused started making fires upon them by their respective weapons indiscriminately and about 200-250 fires were made but he cannot tell exactly. The said fire was

made for about 1 ½ minute. All the accused were having waist belt having cartridges. In front of the gallery, P.W.3, Naseem and Raiyyan were present. Shakir was working in the gallery somewhere else. They and the accused were sitting face to face. There must have been distance of about 25 to 30 feet between them. All of them (complainant side) had received injuries there only but had not fall down rather had fled from there towards north and saved their life after crossing the boundary. Within two to four minutes after this occurrence, his brother, Irfan reached there where he (P.W.3) was concealing himself behind the wall and at that time, he had not seen Irfan having received any injury, he had come along and had picked up and taken him to the 'gher'. At that time, Naseem was already placed in the car which was parked outside the Gher. At that very time, he was also placed in the said car and Irfan immediately proceeded. He regained consciousness next day after having been treated. At that time, Shakir S/o Shabbir, his Mamu was there but he did not tell anything about the occurrence or the injured or deceased persons. Irfan had met him next day in the evening in hospital but did not give him any information with regard to the fact that against him also, a case had been filed nor had he told him anything about the accused, Sarfaraz having received any injury.

57. After the occurrence, Irfan met him next day in the evening about 5:00 p.m.-6:00 p.m. and at that time P.W.3 was admitted in Government Hospital, Muzaffar Nagar. Prior to him meeting his brother, Irfan, P.W.3 was not operated or x-rayed in the district hospital Muzaffar Nagar. He remained hospitalized for 6 to 7 days and was x-rayed once or twice. His brother, Raiyyan had taken him from Muzaffar Nagar to Meerut for treatment but he does not know why he was taken to Meerut. He was having relief but he was taken for ensuring whether he had any pallets or bullet in his body but he was not got admitted there. He had received injuries on his hand and chest. In his t-shirt, the marks were there of bullet having crossed. He does not recollect whether the marks of bullets were there on the walls of the 'gher'. He does not recollect that cattle were tied in the side but stated that at the time of occurrence, the cattle were not tied there. Lot of blood of his brother, Naseem had spread there. Later on, he said that he does not recollect as to whose blood was lying there.

58. He has admitted that a cross-case of the present case was pending in this Court against him, his brother, nephew Raiyyan and Shakir in which cross examination was going on. Further he has stated that he does not know as to what allegations were made in the said case by Shaukat against him. He has denied that he was making false statement on the basis of concoction.

59. He had given statement to the I.O. that at that time he was inside the house and that they were cutting fodder for their cattle and that he, Raiyyan and Shakir had crossed over the boundary to save themselves. Further he had given statement to the I.O. that Naseem had fled towards third story of his house to save himself by the stair-case where the accused had caused him bullet injuries and that on the second and third floor, women of the house live and that he was admitted in District Hospital for his treatment but if the same facts were not recorded, he cannot tell its reason.

60. The statement of this witness is trust worthy and believable to the extent that he was also present at the time of occurrence although he has exaggerated a little bit by saying that he had become unconscious and regained consciousness only after two to three days after the occurrence. This kind of exaggeration is found often in the statements of injured witnesses to show the nature of seriousness of their injury but that can be over-looked. He is one of the witnesses who had received injuries in this occurrence and saved himself by crossing the wall with other co-injured. Although we do not find that it would be possible for him to have seen the deceased, Naseem being fired upon by the accused persons on the third floor as he had crossed over the boundary and he was brought back by P.W.1 and others for being treated subsequently but he is definitely a witness of the occurrence that the accused had come in the 'gher' of the complainant side in order to make deadly assault upon them and kill them and in this process, this witness had crossed over the boundary to save himself while the deceased, Naseem received fatal injuries who was found in badly injured condition on the place 'X' shown on the third floor of the complainant's house from where he was taken to hospital and was later on proclaimed dead.

61. PW 4, Constable Sahab Singh has stated in cross-examination that the original GD dated 25/02/2010 is in front of him, according to which, prior to the said case, on 25/02/2010 Naksha Najri was prepared by a Constable, Yash Vir Singh, who was posted with him and with whose signature and writing he was conversant. The said Naksha Najri was prepared in the presence of SHO Promod Panwar at 6:15 AM on 25/02/2010, and at serial number 6 of the said Naksha Naukari the Ravanagi of SI Bagesh Kumar Sharma is shown on 23/02/2010. Prior to the registration of present case, crime number 162 of 2010 under section 60 of Excise Act at 10:45 AM is entered. The posting of constable 639 Ram Mehar Singh is shown at PS Shahpur, Chauki Harsoli. He does not know whether at the said police Chauki Harsoli, GD is run or not.

62. The entry of the present case is made at report no. 33 and in the same GD the Ravanagi of SHO Promod Panwar along with force and panchayatnama and other papers is also made. On the original GD, signature is available of SO Promod Panwar. No entry has been made in the said GD of dispatching SR (special report). The name of the person who carried the said special report is not recorded in the said GD nor is there any entry made of the said person who had returned. All this was being stated by him after having perused the GD dated 25/02/2010. There is no mention made of return of police force and its members which was dispatched vide report number 33 dated 25/02/2010 in the said GD. After the Ravanagi of the SO from the police station his subordinate is made In- charge of police station. In the GD the name of the said Incharge subordinate officer has not been indicated.

63. As per GD dated 25/02/2010 entry in respect of the accused was made by him at 24.00 hours. It is right to say that on 25/02/2010, the GD was forwarded by Promod Panwar on 26/02/2010 and not by the officer in charge in his absence. On his own this witness has stated that the GD was

forwarded on 26/02/2010 and at that time SHO Promod Panwar was not present on the police station. No entry has been made in GD of the return of constable 639, Ram Mehar Singh on 25/02/2010 after getting the injured Naseem, Khalil, Raiyyan and Shakir having been admitted for medical examination. The original chick report was sent to Circle Officer's office on 26/02/2010, but there was no documentary proof in front of him of the same.

64. He has further stated that at the time of registration of the case SHO Promod Panwar was not present on the police station. No order was passed by the SO to register the case. It is wrong to say that the chick report and other papers were prepared anti-timed pertaining to crime no. 163 of 2010.

65. After preparing the chick report of case under sections 25/27 of Arms Act, the case property was deposited in Malkhana. At the police station there is maintained Malkhana register, in which date of entry is always entered and description is made of the case therein. The case property is sent to sadar Malkhana after conclusion of the trial, however during the trial the same is kept at the police station.

66. The chick of crime no. 160 3A/2010, under sections 307, 504, 506 IPC vs Naseem and others was prepared by him on the basis of written report given by the informant, Shaukat and on that basis the case was registered on 10/3/2010 at 6:30 PM by him, the original chick report was available on the summoned file of the Sessions Trial No. 74 of 2011, State vs Khalil and others under sections 307, 504 and 506 IPC, PS Shahpur. The said chick report was prepared by him, the photocopy of which after comparing with the original was filed as Exhibit Kha - 1.

67. This witness is a formal witness who has simply stated that he had prepared the chick F.I.R. of the present case, nothing in the cross-examination has emerged which would persuade us to believe that the F.I.R. was anti-timed in this case. The lapses which he has admitted to be there with respect to several entries not being made regarding return of the person who had taken special report, would only be taken to be a procedural error committed by the investigating officer but that would not reduce the statement of this witness to be doubtful as regards lodging the F.I.R. at appropriate time as has been mentioned in the chick FIR.

68. SI Bogesh Kumar Sharma has stated as PW 5 that on 25/02/2010 he was posted at PS Shahpur and on that day he had registered a case crime no. 163/2010 under sections 147, 148, 149, 452, 307, 302 IPC and 7 Criminal Law Amendment Act on a written report of informant Irfan son of Shamshuddin resident of Harsoli. The panchayatnama of the deceased Naseem son of Shamshuddin was filled up at District hospital, Muzaffarnagar by him on 25/02/2010 at 17.10 to 18.50 hours. In the said panchayatnama, he had made Ishtafaq, Yaseen, Jamiluddin, Manzoor Hasan, Shubrati as panchas. In panchayatnama the description of the dead body was made including that of the clothes that he was wearing. In the estimation of the panchas, the cause of death was the injuries received on the body of the person of the deceased and because of that, opinion was expressed for

conducting post-mortem report to identify the cause of death. The dead body was sealed and was handed over to constable Ramveer and constable Vijendra Singh for taking the same for post-mortem. This witness has proved panchayatnama of the deceased as Exhibit Ka - 8 which has been signed by him and his companions. He has also proved photo Nash, Exhibit Ka 8, Chitthi RI, Exhibit Ka 10, Chitthi CMO, Exhibit Ka 11, challan Nash, Exhibit Ka 12, fard in respect of taking plain floor and bloodstained pieces of floor and clothes which is Exhibit Ka 13, which was prepared at the instance of In-charge police station Shri Vinod Kumar. Fard was also prepared of taking into possession 1 empty cartridge of 12 bore and 1 empty cartridge of 315 bore pertaining to crime no. 163 of 2010, which was prepared at the instruction of In-charge PS Promod Panwar in his handwriting, which is Exhibit Ka-14.

69. In cross-examination this witness has stated that he had received information of this case through first information report. He has no knowledge whether the information of this case was got received at the police station prior to him coming to know about it. The case was registered at the PS in his absence. At the time when he received this information that the case had been registered, at that time he was posted at Chauki Harsoli. The said police Chauki was located in the same village where the occurrence took place at a distance of about 1 ½ Km. from the police station. The said village is connected with the road which goes to Shahpur Budhana. There were two routes to go to the said village. There was R.T. set at Harsoli police Chauki. No CD is maintained at the said Chauki because the said Chauki was not reporting Chauki. From police force which had come from PS Shahpur, he had come to know that some occurrence had happened in the village.

70. He has further stated that he had received information about the occurrence at 4:30 PM. The village in which occurrence took place was about 2 - 2 ½ km away from the main road, because of that he did not go straight to the place of incident, rather went to the village first, thereafter straightaway went to the Government hospital, Muzaffarnagar. He was with Promod Panwar, who was also present at the time of panchayatnama as the same was performed in his presence and under his instruction. He admitted this to be right that the signature of SHO is not available on any above challani document such as panchayatnama, Chitthi RI, Chitthi CMO, challan Nash and photo Nash etc.. There was a lot of crowd in the hospital which led to the problem of maintaining law and order, because of which the SHO became involved in maintaining peace.

71. He has denied to have given wrong statement with respect to presence of the SHO and that the SHO Promod Panwar was not present on the spot. The panchayatnama was prepared till 6.50 for about 1 hour and 40 minutes, during which the injuries sustained by the deceased were also noticed and mentioned and also the opinion of panchas was recorded. The panchayatnama was filled up in the hospital and at 6.50 p.m. on 25/02/2010 the dead body was handed over to the constables. From the District hospital, the Police Line, Muzaffarnagar was about 1 km away and the police at the most could have taken about half an hour in reaching

there. The challan Nash was prepared by him, at the back of which there is entry made in respect of depositing of the papers vide report no. 57 time 23.40 hours on 25/02/2010, which bears the signature of the then RI.

72. At the time of filling up panchayatnama, he had chick report with him which he had read. In the said chick report the time of occurrence is mentioned as 2 PM on 25/02/2010 and no place is mentioned where the death took place of the deceased. It is right to say that on challan Nash, the time of death was recorded as 2.50 p.m. it is also right to say that the witnesses which were shown in panchayatnama were not mentioned as witnesses in the first information report and it was also right to say that he was not an investigating officer in this case. He on his own has stated that on the basis of information obtained by him, he had mentioned the time of death to be 2.50 p.m. He does not remember as to whether he had given statement to the IO that he did not have knowledge about the entry of time of death made in challan Nash. It is right to say that on paper no. 6/1, signature is there of RI bearing seal of District hospital, Muzaffarnagar, in which beneath p.m. number 166, Time 8.40 a.m. has been indicated along with date 26/02/2010. According to the available papers, such as Challan Nash post-mortem is endorsed to have been conducted on 26/02/2010 at 11 AM, after having obtained the papers at 10.50 a.m..

73. After filling up panchayatnama he and SHO Saheb along with force had gone to village Harsoli but at what time he reached there he does not recollect but it had become dark by then. The reports which are prepared by him i.e. Exhibit Ka - 13 and Exhibit Ka - 14, were prepared on the spot, but no mention is made therein of the source of light.

74. In the F.I.R. it is mentioned as to in whose house this occurrence had taken place, but in Exhibit Ka 13 and Exhibit Ka 14, it was not specifically indicated as to in whose house or at which particular place, the plain floor as well as bloodstained floor was taken into possession and similarly in Exhibit Ka - 14 also no such specific place was indicated, except that place of incident and the case crime no. was mentioned. The occurrence regarding which he has made description belongs to case crime no. 160 of 2010. This place of occurrence is located in the house of deceased Naseem and informant Irfan in village Harsoli at P.S. Shahpur. The witness was shown the site plan, to which he stated that the same was prepared by him, which was a copy prepared by him of the site plan prepared by SHO Saheb. The said site plan bore signature of Promod Panwar and the place of incident was inspected by I.O. Promod Panwar.

75. The house of the informant was three storeyed. The floor was broken of the house which was situated in gallery, where blood of the injured was lying.

76. The empty cartridge of 12 bore and empty cartridge of 315 bore were found lying near the staircase and whatever articles were taken in possession by the police, the fard was prepared with regard to that which was signed by SHO, this witness as well as witness Tahir and Shaukeen Hassan and their entry was made in the same night at the police station. The higher authorities of police had already left the place of incident

before this witness reaching there. He has denied the suggestion of having done ante-dated and anti-timed proceedings and that he did not make any such recovery.

77. This witness is also a formal witness who had simply proved the challani documents such as panchayatnama, photo Nash, challan Nash, Chitthi RI, Chitthi CMO and fard recovery of cartridges etc. apart from panchayatnama, therefore his testimony does not appear to suffer from any infirmity nor any infirmity has been pointed out in his statement.

78. Dr. Pradeep Mittal has been examined as PW 6 who has stated in examination in chief that on 25/02/2010 he had examined the injured Khalil at 3:15 PM who was brought by constable 634, Ram Mehar Singh of PS Shahpur and had found following injuries on his person:

1 - lacerated wound 0.75 cm, x 0.25 cm, x depth not probed on right side of face, 2 cm, away from right angle of mouth, fresh bleeding present, kept under observation advised x-ray face.

2 - 2 lacerated wounds 0.75 cm, x 0.25 cm, second one 0.3 cm x 0.3 cm depth not probed, 4 cm apart each other present on front of left shoulder, 2 cm above left clavicle, bleeding present from the wound, kept under observation, advised x-ray chest AP view.

3 - 2 lacerated wound 0.75 cm x 0.25 cm, second one 0.3 cm x 0.3 cm depth not probed, present on front of left upper arm, 10 cm above left elbow, 8 cm apart each other, bleeding present from wounds, kept under observation, x-ray advised left upper arm.

4 - lacerated wound 0.7 cm x 0.3 cm depth not probed, right side of chest 2.5 cm away right nipple at 3 o'clock position, depth not probed bleeding present from wound, kept under observation and x-ray advised of chest AP view.

5 - lacerated wound 0.75 cm x 0.3 cm, depth not probed, on outer aspect of the left side, 15 cm above left knee, kept under observation advised x-ray left thigh.

79. All the injuries' duration was fresh and for finding out the nature of injuries, the patient was referred to surgeon. This witness has proved the injury report Exhibit Ka 15 of this injured.

80. On the same day on 25/02/2010 at 3. 25 PM he medically examined injured Shakir who was also brought by the same constable and found on his person following injuries:

1 - lacerated wound 0.7 cm x 0.3 cm, right side of head, 9 cm above right eye, depth not probed, bleeding present, kept under observation, x-ray advised of skull.

81. He has proved the injury memo of this injured as Exhibit Ka 16.

82. On the same day he examined medically the injured Raiyyan at 3.35 PM who was brought by the same constable and found following injuries on his person:

1 - lacerated wound 0.7 cm x 0.3 cm x depth not probed medial aspect

of left-hand, 2 cm above base of left little finger, bleeding present, kept under observation advised x-ray left hand.

2 - lacerated wound 0.3 cm x 0.3 cm x depth not probed on entire aspect of the left forearm, 2 cm above the left wrist joint, bleeding present, kept under observation, x-ray advised of left forearm.

83. All the injuries' duration was found fresh and for knowing the nature of the injury the patient was referred to orthopedic surgeon. This witness has proved the medical report of this injured as Exhibit Ka 17.

84. In cross-examination this witness has stated that it was right to say that in the hospital, for medical examination, three registers were being maintained. Medico legal register, voluntary register, medico-legal police register and accidental case register. The injuries of the three injured would have been also noted in MLPC register. It is right to say that no serial number has been indicated in the District hospital's register of the injury memos Exhibit Ka 15 to Ka 17. It is also not indicated as to by which medical officer, they were forwarded for medical examination. It is also right to say that on all the three medical reports there was no crime no. Or case number indicated. On all the three medical reports it was not indicated as to what was general condition of these injured, however it is stated by him that if general condition happens to be poor, in such a situation the patient is admitted in the hospital for the purposes of treatment but in the present case it was not so. It is also right to say that the condition shown of all the three injured was almost similar but he cannot tell as to whether the pellets of 12 bore would disperse, if yes how much. It is also right to say that in all the injuries of these injured persons depth was not probed and there was no blackening present. He has not indicated as to by which weapon the said injuries could have been caused to the said injured persons. All the three injured were given reference lips and were also referred to the surgeon, but at no stage any one came to him to find out his opinion as to whether the said injuries were simple or grievous. He would not give any opinion in respect of injuries unless sought for. He has denied the suggestion that because of the police having told so, he had recorded the said injuries, although it was right to say that he had not given any treatment to the injured.

85. Dr. Radheshyam Verma has been examined as PW 7 who has stated that on 26/02/2010 at about 11 AM he had conducted post-mortem of the deceased Naseem son of Shamshuddin, whose dead body was brought by 2 constables and was identified by them namely Ravir Singh and Brijendra Singh Rathi. He found following ante-mortem injuries on the person of the deceased:

1 - Pellet induced injuries, size 1.0 cm x 1.0 cm x muscle deep on the front of the right side of forehead, it is 4.0 cm above from the right side of eyebrow, margins were inverted and blackening present.

2 - Pellet induced injuries size 1.0 cm x 1.0 cm x muscle deep. It is 5.0 cm below from left-side ear.

3 - Pellet induced injuries size 1.0 cm x 1.0 cm x depth not probed,

present on the neck. It is 6.0 cm below from the angle of the left side mandible.

4 - Pellet induced injury size 1.0 cm x 1.0 cm x muscle deep present just above from the left side clavicle. One Pellet has been recovered, which was sealed.

5 - Pellet induced injuries size 1.75 cm x 1.5 cm, x chest cavity deep on left side chest, near nipple, margins are clear inverted, blackening present and margins are regular.

6 - Wound of exit size 2.5 cm x 1.75 cm x chest cavity deep present on left side chest wall was rated as just below from the left and scapular border. Its margins are outwards and irregular.

86. It was noted in the margin that maximum pellets had injured tissues and had returned back from the same path like injury number 1, 2 and 3.

87. On internal examination after opening skull, the brain was found yellow and it was found lacerated also. The 5th, 6th, 8th and 9th ribs of the chest were found broken. The left lung was lacerated and in left-side pleural cavity, 1.5 litres of blood was found. Heart was lacerated. Cause of death was shock and haemorrhage as a result of fire arm weapon induced injuries. This witness has proved the post-mortem report Exhibit Ka - 18 and has opined that the deceased might have died on 25/02/2010 at about 2 PM by fire arm injuries.

88. It has been stated in cross-examination by this witness that by the said injury instant death was possible. He had not given any opinion in respect of injury no. 4. With regard to injury no. 1, 2 and 3 he had indicated that the pellets had entered and had returned by the same route and came out of the body. Injury no. 1 and 5 had blackening. He has stated that he could not tell as to whether the said blackening could have been caused by making fire from distance of 3 feet or less. It is right to say that trajectory of injury no. 5 to 6 was from above to downwards. He has denied that he did not take proper precautions in conducting the post-mortem.

89. From a perusal of the statement of this witness it is apparent that he had conducted the post-mortem of the deceased and has found the deceased to have died because of fire arm injuries, 2 out of which are found to have been caused from close range as blackening was found. It is also a case of the prosecution that the accused had opened fire upon the deceased as well as on injured by which deceased died and injured also received injuries and the time of the said injuries to have been caused to the deceased is also found to be the same which has been stated in the F.I.R. as the time of this occurrence. Therefore we find that the testimony of this witness is corroborating the eye-witnesses' account noted above. The argument was made on the side of the appellants that the trajectory of the injury number 5 and 6 was found from above to downward and hence it does not match the statement of the eye-witnesses. We are not inclined to accept this argument because when indiscriminate firing is made, it is difficult for the witnesses to notice as to how and from which angle the injuries were caused. Moreover in this case the occurrence has been admitted by the accused side, the only defence taken by

the accused side is that the said injury to the deceased was caused in self-defence and the accused was also caused firearm injury for which cross case was registered against the complainant side.

90. Now we would deal with the statement of the Investigating Officer Pramod Panwar (P.W.8) who has stated in cross-examination that it was right to say that till registration of this case on 25/02/2010 at PS Shahpur at 4:30 PM he did not have any kind of information about happening of this occurrence. He has admitted that at Shahpur and Chauki Harsoli there was wireless set and in respect of serious occurrences information used to be exchanged. He does not remember as to whether at Chauki Harsoli, SI Baljor Singh was in charge or not although police remains there round-the-clock. The concerned In-charge had not given any information on CUG mobile of any serious occurrence. Further he stated that after registration of the case in GD at report no. 33 time 11.30 hours, his Ravanagi was done with SI Bagesh Kumar Sharma apart from other police team by Government jeep, however Ravanagi of SI Baljor Singh does not find place in GD. After his Ravanagi he did not stop at Chauki Harsoli to take any police personnel along nor did he find out anything about the occurrence. According to the informant Irfan, police was available at Chauki Harsoli. It is wrong that he had sent the injured for treatment to District hospital. If it is written in his statement that prior to registration of F.I.R. he was present in District hospital, the same is wrong. The informant had met him at the police station for the first time after lodging the F.I.R. but he does not remember whether the written report was given to him or to Head Morrier, by him, but there was no order of his for registration of the case. It was wrong to say that at the time when written report was given at the police station he was not present there and because of that reason only there was no order on the said written report of his to the effect that case be registered. In Naksha Nokari whatever police happens to be there at the police Chauki, the description of their presence and details are noted in the GD. It had come to his knowledge during investigation that the injured were medically examined on the basis of Majrubi Chitthi which was given by constable Ram Mehar Singh. And this witness was asked as to from where the Majrubi Chitthi was issued, he stated that the same was issued from the police station. After having seen Exhibit Ka 15 , Exhibit Ka 16, Exhibit Ka 17 of the three injured namely Shakir, Raiyyan and Khalil he stated that their medical examinations were conducted at District hospital between 3.15 p.m. to 3.35 PM and all the three medical reports were provided to him by constable Ram Mehar Singh. During investigation, after his Ravanagi and return from the District hospital, these three injury memos were provided to him by the said constable and at the same time entry was made of these documents in GD no. 37 at 4 PM at PS Kotwali Nagar. After registration of the first information report he had instructed SI Bagesh Sharma to prepare panchayatnama at his instruction. It was right to say that at none of the pages of the said panchayatnama, there was his signature and on his own he stated that he was busy in other work. In Exhibit Ka 8, panchayatnama there is direction available for taking along constable Raghuveer Singh of Chauki Harsoli and constable Brijendra Rathi and SI Baljor

Singh along with available force to reach village Harsoli. According to panchayatnama the proceedings were held between 5.00 p.m. to 6.50 p.m. at Sadar hospital, Muzaffarnagar and on challan lash, Exhibit Ka 12, vide report no. 57 time 23.40 hours on 25/02/2010 is endorsed as the time of dead body reaching police line Muzaffarnagar. From the District hospital, police line was situated about 2 kilometres away. He has denied the suggestion that on 25/02/2010 till 23.40 hours, the F.I.R. had not been written at the police station. It was right to say that proceedings of panchayatnama were in last leg, right then they had proceeded for the place of incident. He, on his own, stated that SI Bagesh Sharma had come to the place of incident after concluding the proceedings and till then this witness had not done any written work. Whatever written work was done was done only after coming of SI Bagesh Sharma. After reaching the place of accident, first of all he made inspection of the place of incident and SI Bagesh Sharma prepared the site plan which is Exhibit Ka 19. The bloodstained and ordinary floor which were taken in possession, were the places outside the gate of the house of informant in varandah shown by "C' and "B', apart from that there is no other place shown from where anything was lifted. From this place, from where blood smeared floor was taken into possession, no empty cartridge was recovered. In site plan, from places shown by "D' and "E", blank cartridges of 12 bore and 315 bore respectively were recovered. The said witness had stated under 161 Cr. P.C. about fire to have been made by seven accused and has also written the same in written report that all of them had made indiscriminate firing in his house but during investigation only 2 cartridges mentioned above were recovered. Irfan had not shown him any marks of pallets on the walls of their residential house nor were they shown by informant to him, otherwise he would have shown them in the site plan. He was also not shown the fodder cutting machine near the staircase or sacks full of fodder otherwise he would have indicated them. He does not remember whether to the west of the place shown by "C' there was any iron gate or not. It was told by informant that the accused had made firing from the place shown by "A'. By "X' is shown the place where deceased had received the shot. By "B1' is shown the room on the third storey. It is right to say that the places which are shown by other letters than "B' and "C', no blood was found. In the fard relating to recovery of empty cartridges, got prepared by him by Bagesh Sharma, the word place of incident is written and not specifically Makan Dalan and on his own he stated that in the first information report the place of incident has been indicated. In both the fard i.e. of collecting the empty cartridges as well as of taking blood smeared soil, no specific time has been disclosed because he did not consider it necessary but he denied that he had not prepared those fard on 25/02/2010. He has further stated that on 26/02/2010 at 6:30 AM he had deposited three bundles after returning to the police station along with the sample seal. It is right to say that the said articles were deposited in Malkhana of police station and the description of the said articles was made in the Malkhana register of the PS. It is also right to say that on the fard of blood smeared and ordinary soil no other witness had put his signatures. It is also stated by him that when the case property becomes in excess, then only the articles

are deposited in Sadar Malkhana. He had arrested accused Sarfaraz and Sahid on 27/02/2010 at 1:20 PM and according to Exhibit Ka 7 the accused was got sent along with Majrubi Chitthi for medical examination to PHC Shahpur with the help of constable Aslam and constable Samarpal. During investigation he was sent to hospital in Shahpur, but no medical report was submitted of accused Sarfaraz at PHC Shahpur. He had not incorporated the said document in investigation under sections 302 IPC, rather the investigating officer of cases under sections 25 of Arms Act, S I Baljor Singh pertaining to crime no. 165 of 2010 was given a copy of the same, while the original of which was in ST No. 958/10, State vs Sarfaraz and the Doctor of PHC Shahpur had advised x-ray of the chest as well as right-hand of the injured Sarfaraz. On 27/02/2010, at the time of arrest of accused by him, the statement of Sarfaraz was recorded under sections 161 Cr. P.C. in which he had stated that on the date of incident, prior to the present incident Naseem, Khalil and his brothers had done Marpit in which he had got badly injured and also had stated that firing was done from both the sides and almost of the same type statement was also made by accused Sahid also, but in consonance with the U.P. Police Rules, no detailed investigation was done in respect of the statements by made by the accused. He has knowledge that the cross case of the present case relates to crime no. 163A/10, under sections 307/504/506 IPC, which was investigated by SI Bagesh Kumar Sharma and the case diary relating to that was perused by him and in the said case the said IO had submitted charge sheet against the informant of the present case and others. It is further stated by him that he had received the x-ray report of Raiyyan and Shakir which were entered in Parcha number 7 dated 11/03/2010 and in that it was mentioned that there was no bony injury found. The statements of witnesses named in F.I.R. namely, Ilyas Shabnam and Zubain could not be recorded on 25/02/2010 because of being busy in official work. He has denied that he had not recorded statement of these witnesses because by then F.I.R. had not been registered. It was right to say that during investigation he did not obtain supplementary medical report of the injured Raiyyan, Shakir and Khalil because there was no seriousness in the x-ray report. At the time when Irfan had lodged report, thereafter he had not apprised him that Sarfaraz had also received injuries.

91. The cause of occurrence has been shown to be quarrel which happened one week prior to the occurrence on account of playing volleyball, but in this regard he had not recorded the statement of independent witnesses, although in this regard the witnesses had made statements to him. The witness Irfan had not told him that he and his brother, after having returned from the field, were taking off fodder from the buggi to be placed on fodder machine nor had he given this statement that when women of the house raised alarm and sound of country made pistol were heard, due to fear people had assembled. This witness had also not stated to him that after putting his injured brother in the vehicle, first of all he came to the police Chauki of the village and from there he took along a police constable and then they went to the hospital. Witness Raiyyan had not stated to him that fodder machine was being run with hand, leaving which they fled and the fodder was left lying there. This

witness had not told him that at the time of occurrence they were cutting fodder. This witness has further stated that he could not find any such evidence during investigation that injured Raiyyan Khalil and Shakir had remained admitted for the treatment. He has denied that he did not make independent investigation and entire investigation was done by him sitting at the police station and filed charge sheet.

92. This witness is a formal witness but his statement is of enormous importance as he has conducted the investigation in this case. There are few noteworthy points which need to be taken into consideration particularly the statement made by this witness that he did not find blood at any other place except at the places shown by "B' and "C' which meant that he did not find any blood at the place shown by "X' where the deceased was found lying in injured condition on the third storey of the house of the informant, which is a little intriguing for us because the above-mentioned eye-witnesses particularly PW 1 and PW 2 have clearly stated that the deceased had run to the third floor of his house to save his life who was pursued by the accused and was being fired upon continuously, therefore in such a situation there was likelihood of the blood being found on the said place shown by "X' at the third floor. But we find that this appears to be lacuna on the part of the investigating officer not to have collected blood from there, the benefit of which cannot be allowed to go to the accused. There are few other statements also made by this witness such as him not having found any mark of fire made on the walls of the gher, even though it is a prosecution case that there firing was made by the accused persons, it was argued that had there been made such kind of firing, certainly such kind of marks would have been found and also the cattle which were tied there would also have received injuries and therefore being found nothing of the sort there would create doubt in the mind of prudent person about the prosecution version being true. We are not much impressed by the said argument because it was not necessary that such marks would have been found on the walls because that would depend upon the intensity of the fire and also in evidence it has come that cattle were tied on one side, and it could be possible that on the said side fires may not have been made. This witness has also stated that the injured on the side of the complainant namely, Raiyyan Khalil and Shakir had not received serious injuries because of which he had not collected supplementary medical examination report of the injured persons, but that would not mean that the said injured had not received injuries in this occurrence. The Doctor has proved that these injured had received injuries and since lacerated wound is found, it could not be ruled out that they would have been caused by the fire arm. There appears to be lapse on the part of investigating officer in not making serious investigation as per his own admission and the case of accused Sarfaraz having been fired upon by Naseem, Khalil and his brothers on the pretext that it was not permissible under the U.P. Police Rules although he has admitted that he had full knowledge that there was a cross case being crime no. 163A/10 registered at the same PS which was being investigated by S I Bagesh Kumar Sharma, who had filed charge sheet against the complainant side in this case and the same was perused by this witness. It would be appropriate for this witness, who has investigated the present

case to have investigated the said matter as well to reach the right conclusion as to who was the aggressor or whether both the sides were involved in free fight in which injuries were suffered on both the sides. Be that as it may, we have to form an opinion on the basis of evidence which has been placed before us. We find that whatever discrepancies have been noticed in the statement made by this witness in respect of the statements which were given before him by PW 1, 2 and 3 who are eye-witnesses, do not appear to relate to the material aspect of the case and such contradictions of the prosecution may be overlooked keeping in view the fact that in a matter of assault like the present one when large number of the accused were assaulting the deceased and the other injured by fire arms, it could be possible certainly omissions/commissions could be there which should be taken to be natural. Therefore the testimony of this witness is found to be in favour of the prosecution and does not appear to suffer from any serious lacuna.

93. S.I. Baljor Singh has been examined as P.W. 9 who has stated that on 27/02/2010 he was posted as SI at PS Shahpur and on that day he was assigned the investigation of case crime no. 165 of 2010 under sections 25/27 State vs Sarfaraz and also of crime no. 166/2010 under sections 25/27 vs Sahid. On 27/02/2010 he had copied chick F.I.R., GD and had taken statement of the constable clerk Sahab Singh, statement of accused Sarfaraz and Sahid in Parcha 1 and also took a statement of SI Anil Singh and constable 34 Jitendra Singh. On 3/3/2010 he took the statement of informant SHO Promod Panwar, constable 388 Samaryab and at the instance of S.I., Anek Singh made the spot inspection and prepared site plan. The original site plan was kept on the file of ST No. 958/2010 which is paper no. 8 in his handwriting and the same has been exhibited as Exhibit Ka 23 and a carbon copy of the same is placed on the file of ST no. 959/2010 which is paper no. 7 and which is marked Exhibit Ka 24. On 04/03/2010, he filed charge sheet no. 40/2010 in crime no. 165 of 2010 which is paper no. 3 and is marked Exhibit Ka 25. In crime no. 166 of 2010 pertaining to sections 25/27 of the Arms Act State vs Sahid, he filed charge sheet no. 41/2010 which is paper no. 3 and is marked Exhibit Ka 26. Against those accused persons he proceeded, sanction was obtained from the District Magistrate on 18/03/2010 by him which is paper no. 6 and the same is marked Exhibit Ka 27. Against accused Sahid prosecution sanction was obtained on 18/03/2010, which is paper no. 6 on the file and the same is marked Exhibit Ka 20. One SCD Parcha was also prepared by him on 24/03/2010.

94. In cross-examination this witness has stated that in both the cases mentioned above charge sheet was submitted by him on 04/03/2010 and in both the cases prosecution sanction was received by him on 18/03/2010. The medical examination of accused Sarfaraz was got done at PHC Shahpur through police. The reference slip of the said injured accused Sarfaraz in original was available on file, which along with his medical report were obtained by him during investigation and were annexed in case diary. A carbon copy of the said medical report was provided by him in the murder case to the investigating officer by him and not the original. The entry of these papers was made in GD of the

police station. He was Sub Inspector under the SHO. In this matter the arrest was made by the SHO, recovery was also made by SHO. For prosecution sanction he himself had taken the weapons to the District Magistrate which was opened by him and was shown to the District Magistrate after making fire and both the bundles were opened and thereafter resealed by him with the seal of the District Magistrate. He had collected the weapons from the Malkhana of the police station. He has denied that he did not make investigation in accordance with law and simply because he was subordinate to the SHO he had completed investigation sitting at the police station and submitted charge sheet. He has further stated that he does not recollect whether at the time of taking the weapons from the police station, entry was made in the Malkhana register or not. He clarified that at the police station there is a Malkhana register but it does not bear number of the article deposited and the identification of the case property is made by crime number.

95. This witness is a formal witness of the cases against two accused named above, namely, Sarfaraz and Sahid from whom firearm weapons where recovered and this witness had made investigation in the cases against them under sections 25/27 of Arms Act and submitted charge-sheet after taking proper sanction from the District Magistrate.

96. From the side of defence doctor Radheshyam Verma has been examined as DW 1 who was posted at T B hospital, Muzaffarnagar. He has stated that on 26/02/2010 he was deployed on emergency duty. On the said date one patient by the name Sarfaraz Ali son of Shaukat Ali aged about 23 years resident of village Harsoli had come to him at about 9.25 AM and was medically examined in emergency and following injury was found on his person:

(i) Pellet induced injuries over right side chest and trauma over posterior chest wall.

97. Further this witness has stated that he had referred the patient to be admitted in Medical College, Meerut and for conducting medico-legal examination of the injuries. The original reference slip is in the file of ST No. 724/2011 State vs Khalil and others under sections 307/504/506 IPC PS Shahpur, photo copy of which is filed which is marked Exhibit Kha - 2.

98. This witness has been cross-examined and has stated that he did not conduct any medical examination of the said patient nor did he conduct an x-ray nor any x-ray was shown to him during his examination. He had simply referred the patient to medical college Meerut, although he denied that he had mentioned "bullet induced injuries' at the instance of the accused. By whom the same has been written, he does not know. He cannot tell as to whether in the clothes which the said patient was wearing there was any whole. In the reference slip he has not disclosed that any treatment was given to him. In the said reference slip the only reference of the name of Sarfaraz is made and not of any of his relatives. He denied that because of pressure upon him he had mentioned in the slip bullet induced injuries and also stated it to be wrong that Sarfaraz did not have any injury on head. He stated it to be right that he had not seen any other injury nor does he

remember as to whether the patient had come himself for being referred or was brought by someone.

99. Hakikat has been examined as DW 2, who has stated in examination- in-chief that he knows Sarfaraz of his village who is son of Shaukat and he also knows Khalil, Nadeem, Raiyyan son of Shamshuddin and Shakir son of Raiyyan and Naseem who has died. The occurrence took place about 7 ¼ years ago on 25/02/2010 at about 2:30 PM. His house was in front of the medical store of Farukh which was located in the house of Mahadev. On the said day at about 2:30 PM Sarfaraz had come to take medicines, right then Naseem, Khalil, Raiyyan and Shakir came there with Lathis, country made pistol and gun at the said medical store and tried to drag Sarfaraz inside their house. He had seen that there was a lane by the side of the house of Naseem and others , where Sarfaraz was caused injuries by lathis by Khalil and Raiyyan. Khalil, Raiyyan and Naseem had caught hold of Sarfaraz, Naseem was armed at that time by a gun. All of them told Shakir "Mar sale ko goli" and at this instigation Shakir made fire upon Sarfaraz with an intention to kill and as soon as Naseem was disposed to make fire upon Sarfaraz, looking his life in danger, he snatched the said gun from the hand of Naseem somehow and started fleeing. Behind him these people also chased him with an intention to kill, then Sarfaraz in order to save his own life made fire from the said snatched gun and fled in injured condition from there. Subsequently he came to know that Naseem had died. This occurrence was seen by him and apart from him by Gaiyur, Musharraf, Ifroz and other Mohalla persons.

100. In cross-examination this witness has stated that he had not given the statement he made today in writing to any higher police officer and it was also stated by him to his counsel and to none else. He came to know yesterday only when police had lifted him. He could not tell as to in which direction is the opening of the house of accused as he does not know the directions. The distance of the house of accused from his own house would be about half km. but in which direction he could not tell. His house is situated in different Mohalla than the houses in which accused are located and in between, there are about 50 houses. Between his house and the house of Farukh there is one road. The store of the Farukh opens on the road, which restore was being run for about 5 to 6 years. It was told by the villagers that after the occurrence Sarfaraz had been referred to Meerut. After getting injured, where Sarfaraz had gone, he did not know. After getting injuries in head Sarfaraz had fallen in the lane outside. He kept lying there for about half second and thereafter got up and fled and thereafter stated that when he got up, then the fire was made at him, which hit his chest from a distance of about half feet, by which he fell down and none lifted him. After half second of getting hit he again got up and snatched the gun of Naseem but he cannot tell whether it (gun) had single barrel or double barrel. By the said gun no fire was made upon Sarfaraz. After snatching the said gun, Sarfaraz fled towards his house. He did not run after him, rather kept standing there only. After having run 15 - 16 paces Sarfaraz made fire upon accused to save his life, he made just one fire. He was looking all this from the place of occurrence. He does not know whether the fire made by Sarfaraz hit anyone or not. After making fire Sarfaraz ran towards his house along with the gun but he does not know what he did with the said gun. He does not know whether

Sarfaraz had gone to his home or not. He had seen him only up to the medical store and thereafter he had gone home. What happened thereafter of Sarfaraz he cannot tell as to where he had gone? He had not gone to his house next day or even thereafter because he did not know as to where he was. Sarfaraz was of his clan but he cannot tell as to what was his relation with him. Sarfaraz used to do farming. When the occurrence happened Farukh was not at the medical store. He had not seen him prior to or even after the occurrence but he further stated that it was not so that there was no medical store of Farukh. The name of father of Farukh was Islamu.. Farukh has medical store even today which is being run by Kala son of Shaukat. The said Kala is not related to Farukh. It is wrong to say that there was no medical store of Kala. Farukh had gone to jail after the occurrence but how many days after the occurrence, he does not know. Farukh was son of the brother of Sarfaraz. Naseem son of Shamshuddin was murdered on the same day, of which he was narrating the occurrence. The brother of Naseem namely Khalil had also received firearm injury or not, he cannot tell. He also could not tell whether Raiyyan and Shakeb had received fire arm injuries. It was right to say that Sadik, Sajid, Arshad, Rashid, Sarfaraz, Farukh and Mumtaj were in jail but why, he could not tell. About one hour after the occurrence police had arrived. He had not met them. After having seen the police he had closed himself in his house. About the occurrence he had told the villagers only. Prior to narrating it in the court he did not tell about it to the police. He does not know as to for how long police stayed there. He was at his home and thereafter did not see police personnel. He denied that he had not seen any such occurrence and the house which he was stating to be his, was not his house and that he was making false statement only because of being of the family of Sarfaraz.

101. The statement of this witness does not appear to be trustworthy and confidence inspiring because he has stated himself to be present on the place of incident when firing was being made from the side of the complainant upon Sarfaraz and the description that he has given that Sarfaraz had fallen after getting hit and thereafter again got up, and ran for certain distance and again he was shot at and thereafter fell down but again got up and this time he snatched the gun from the hands of Naseem when he was about to make fire upon him and thereafter he fled towards his house in injured condition and while he was being chased by the accused with an intention to kill him, Sarfaraz made fire upon the complainant side but he cannot tell as to who got hurt by that. Had he been there certainly he would have seen as to who had got the injury by the fire made by Sarfaraz. He appears to have made the said statement only with a view to defending the accused Sarfaraz by cooking up a story so as to enable him have right of private defence and in excise of the same to prove that he had made fire upon the complainant side which might have hit the deceased Naseem although he did not specifically said so.

102. S.I. Bagesh Kumar Sharma has been examined as D.W. 3 who has stated that on 10/03/2010 he was posted on the post of S I at P.S. Shahpur and on that day after registration of the case crime no. 163 of 2010 under sections 307, 504, 506 IPC against accused Naseem, Khalil, Raiyyan son of Shamshuddin and Shakir son of

Raiyyan, residents of Harsoli, the investigation was assigned to him. On the said day he copied the chick F.I.R., GD and took statement of the F.I.R. writer and thereafter on 11/03/2010 he took the statement of the informant in Parcha no. 2 and also of witness Afroz son of Jabbar, resident of Harsoli, Musharraf son of farzullah and Gafoor son of his Ismail, residents of Harsoli and also received injury memos of injured Sarfaraz and inspected the place of occurrence and prepared the site plan which is paper no. 9 and is marked as Exhibit Kha - 3. On 15/03/2010 in Parcha no. 3 effort was made to arrest the accused who could not be found. In Parcha no. 6 dated 23/03/2010, the statement of Sarfaraz was recorded after permission from court as he was detained in prison. In CD 7 dated 04/04/2010 raid was made to arrest the accused but could not be found. In CD 8 dated 14/4/2010 again raid was made but accused could not be found hence report was submitted for obtaining NBW. In CD 9 dated 15/04/2010 the effort was made to arrest the accused persons by obtaining NBW but they could not be found. In CD 10 dated 21/04/2010 and CD 11 dated 11/05/2010 raid was conducted but accused could not be found. In CD 12 dated 23/05/2010 a report was submitted for issuing warrant under sections 82 and 83 of the Criminal Procedure Code. In CD 13 dated 26/05/2010, NBW was issued against the accused. In CD 14 dated 27/05/2014 raid was made for executing NBW but could not be executed. In CD 15 dated 28/05/2010, warrant under sections 82 Cr.P.C. were obtained for service but accused could not be found. In CD 16 dated 13/06/2010 raid was conducted but accused could not be found. In CD 18 dated 29/06/2010 a report was submitted for obtaining warrant under sections 83 Cr. P.C. In CD 19 dated 02/07/2010 warrant were obtained against accused under sections 83 Cr. P.C.. In CD 20 dated 18/07/2010, medical report of injured Sarfaraz were received. The accused were released on interim bail from High Court. Charge-sheet no. 118/2010 was submitted after having found sufficient evidence against accused Khalil, Raiyyan and Shakir, which is paper number 3 and is marked as Exhibit Kha - 4. The summoned file of ST no. 724 of 2011 State vs Khalil and Sarfaraz was in front of him, in which site plan and the said charge sheet were placed and these two documents were marked as Exhibit Kha - 3 and Kha - 4.

103. This witness in cross-examination has stated that he has not shown the medical store of Farukh in the site plan. He cannot tell the distance and the direction of medical store of Farukh from the place of incident. He does not know whether Farukh was an accused in cross case. He did not find out as to where Farukh was. He had inspected the place of incident at the instance of the informant. Informant is not an eye-witness of this case. He had not gone to the place of incident taking along any eye-witness. Sarfaraz is an accused in cross case, who had stated that he had snatched the gun and thereafter had made fire in defence. He did not enquire from Sarfaraz as to where the said gun was nor did he ask about it from any other witness. He did not enquire about it even from Farukh. He did not find out anything about the deceased and injured of the cross case. He cannot tell the distance of lane from the place of occurrence shown by "X' nor could he tell the width of the said lane. He did not find any such evidence on the place of incident which would reflect that

the occurrence happened because he had gone to the place of incident many days after the occurrence. He had not gone to the house of Naseem on the date of incident.. He had not taken his statement or of any person of kolhu in respect the occurrence. He had not recorded statement of any eye-witness whose houses were near the place of incident. He had not gone to the hospital to record the statement of any employee in respect of the injuries caused. The clothes of Sarfaraz were not taken into possession nor did he make any queries about the same from him. He had gone to the house of the informant but did not make any endorsement regarding it. No damage was noticed in the house of informant. Sarfaraz had not stated to him that when he had gone to the store of Farukh he was present there. Rather he had given statement that Raiyyan, Khalil and Naseem had caught hold of him and Shakeel had made fire from the country made pistol which he was carrying in his hand. Shaukat had stated to him that he had gone to lodge report at PS Shahpur but the same was not lodged. He had also stated that Naseem told Shakir "mar sale ko goli'. This witness had not told that all the four accused had made fire upon his son Sarfaraz rather had told that Sarfaraz had made fire. He has denied to have submitted charge- sheet on the basis of false investigation.

104. From the statement of this witness it is apparent that he was very lax in conducting the investigation in respect of vital aspects of the matter. He has admitted not to have recorded the statements of independent witness who were living in the vicinity nor did he record any statement of any employee of the hospital with respect to the injuries having been caused to Sarfaraz. Shaukat, he stated, had not told him that all the four accused had made fire upon Sarfaraz rather had stated that it was Sarfaraz who made fire upon them. He also did not find out anything about the injuries caused to the deceased and the injured of the cross cases, which ought to have been done by him for fair investigation.

105. Dr. Mukund Pal Singh has been examined as DW 4, who has stated to have medically examined Sarfaraz on 26/02/2010 at 12.50 p.m., who was brought by Md. Hashim son of Suleman, resident of Sher Nagar, Nai Mandi District Muzaffarnagar, who was referred from Muzaffarnagar hospital to Meerut and found following injuries on his person:

1 - Lacerated wound 3 cm × 0.5 cm, × the scalp deep on left side of skull 10 cm above left ear, blood clot present, kept under observation and x-ray advised.

2 - Pellet induced lacerated wound on his right side of front of chest 10 cm × 8 cm, area above left nipple, lacerated wound about 8 in number, average size 0.2 cm into 0.2 cm hole in shape, blackening present, around the wound, bleeding on touch, kept under observation and advised x-ray.

3 - Contusion 10 cm × 2 cm on the right side of front of abdomen below right subcostral, red in colour.

4 - Contusion multiple in number on lower part of abdomen in an area of 8 cm × 6 cm, average size 3 cm into 2 cm, 5 cm below umblicus.

106. He has opined that injury no. 1, 3 and 4 could have been caused by blunt object while injury number 2 could have been caused by a firearm. X-ray was advised keeping the injury no. 1 and 2

under observation. The nature of the injury no. 3 and 4 were found to be simple and were received within one day. The patient was referred from District hospital Muzaffarnagar, regarding which police was informed. According to him, injury no. 2 was possible to have been caused on 25/02/2010 at 2.30 p.m. by fire arm and all these injuries were received within 24 hours of the medical examination. He has proved the said medical report which is marked as Exhibit Kha - 5. He had conducted medical examination at the reference slip of District hospital Muzaffarnagar.

107. In cross examination this witness has stated that the injured Sarfaraz was not admitted although he had come there at about 12.50 p.m.. He could not tell as to for how long they stayed in the hospital. He was brought in fully conscious condition. He did not find any abnormality in his general condition nor did he enquire from him as to where did he get those injuries. He also did not enquire anything about FIR being lodged in respect of the said occurrence in which he received these injuries however he had informed about it to the Medical College police on phone but he does not know whether police had arrived or not. He also does not recollect whether x-ray was conducted of the injured and whether the same was placed before him for preparing supplementary report or not. He does not recollect whether the injured had undergone any operation or not. The injury no. 2 was lacerated wound, but he could not tell as to from how much distance a fire would be required to be made for causing such kind of wound. He could not tell whether any pellet was taken out of injury no. 2 after operation. He further stated that when contusion is caused, its colour would be red and would remain so between 12 to 24 hours. Injury number 3 and 4 could have been received by him 5 to 10 minutes prior to conducting of the medical examination. Injury no. 1 was a lacerated wound and the blood clots within 6 hours. He could not tell the duration of injury no. 2. Injury no. 3 and 4 could have been manufactured. He has denied to have prepared the false medical exemption report in collusion with the accused. He could not tell about the nature of the injury no. 2. He could not tell whether the injury was dangerous to life or not. He could not tell the depth of the pellets. The pellets were not in front of him today. He had not stitched any injury of the injured.

108. This witness is a formal witness, who has stated to have medically examined the injured Sarfaraz upon being referred from District hospital Muzaffarnagar on a reference slip. He has clearly admitted that the said patient was not admitted and that he was not in a position to disclose the nature of the injuries as to whether they were dangerous to life or not because no x-ray report was presented before him for supplementary report to be prepared. He has gone to the extent of saying that injury no. 3 and 4 could have been manufactured. He has also noticed that the injured was not in a critical condition, rather was fully conscious. Therefore from his statement the said injured does not appear to have suffered any serious kind of injuries.

109. From the side of the learned counsel for the appellants it has been argued that in the present case one died while three are stated to have become injured on the side of prosecution in this

occurrence and elaborated that the deceased was Naseem while the injured were Khalil (PW 3), Raiyyan and Shakir. While on the side of defence, accused Sarfaraz had received injuries caused from the side of prosecution, but no explanation was given thereof. The place of occurrence has also been changed. In fact the occurrence had started at the medicine store which was about 600 - 700 metres away from the house of the informant and the prosecution has shifted place of occurrence by showing it that accused side had assaulted the complainant side by fire arms inside the gher of the complainant side and further shifted the place of occurrence by stating that the accused had made fire upon the deceased Naseem from the staircase. There was no motive for giving effect to this occurrence, however attention was drawn to the last Para of page 48 of the paper book in which it was mentioned that the effort was made by the prosecution to create motive that few days prior to this occurrence a quarrel had taken place between brothers of PW 1 Irfan namely, Naseem and Khalil with the accused side, was not any serious kind of quarrel which would create motive to commit the present occurrence and that is why PW 1 failed to disclose the names even of those persons who were playing the volleyball on the said date. Much emphasis was laid on the right of self-defence because it was argued that accused Sarfaraz opened fire upon deceased Naseem as Naseem along with the other three namely, Khalil, Raiyyan and Shakir had assaulted Sarfaraz with Lathi Danda, country made pistol and gun at the medicine shop and when Naseem was about to make fire on Sarfaraz, he (Sarfaraz) had snatched gun from the hand of the Naseem and ran towards his house to save his life and had made fire upon the complainant side in defence. It was also emphasized that the injuries caused to the accused Sarfaraz were not explained by the prosecution side which clearly indicates concealment of origin of the occurrence. Attention has also been drawn to the fact that Majrubi Chitthi were given to the injured prior to lodging of the F.I.R. which shows that the F.I.R. was anti-timed. No x-ray was conducted of the injured although PW 6 had examined all the three injured. Hence it was evident that the injuries sustained by them could not be serious. Attention was drawn to the statement of PW 6, Dr. Pradeep Mittal who had stated that for knowing the nature of injuries he had referred the injured persons to the surgeon and attention was also drawn to page 139 and 140 of the paper book in which this witness has admitted that there was no reference of crime no. on the three injury reports. The medical examination of all the three injured was conducted between 3:15 PM to 3:35 PM while the F.I.R. was lodged at 4:30 PM. Attention was also drawn to the statement of PW 1 at page 43 and 44, wherein this witness has admitted that cross case of the present case under sections 307, 504, 506 IPC was going on in the court, complainant of which was Shaukat, father of the injured Sarfaraz, in which charge sheet was submitted against real brothers of PW 1 namely, Naseem (deceased) , Khalil, Raiyyan and Shakir. Attention was also drawn to the statement of PW 1 at page 67 in which he has stated that Sarfaraz had received the injury, was apprised to him by SO after he (PW 1) lodged report. This witness also had admitted that in the said case his brothers named above had got themselves bailed out. The attention was also drawn to page 72 of the paper

book in which PW 1 has denied the suggestion that on 25/02/2010 at 2:30 PM Sarfaraz had gone to take medicine from the medical store of Farukh and at that time Naseem, Khalil, Raiyyan and Shakir having Lathi, country made pistol and gun, tried to drag Sarfaraz into their house and that in the lane by the side of the house of the complainant, Sarfaraz was caused injuries by Lathi by Khalil and Raiyyan and both the them along with Naseem, who was armed with gun, had caught hold of Sarfaraz and then Shakir had exhorted "mar sale ko goli' and at this Shakir made fire on Sarfaraz with an intention to kill him by country made pistol and when Naseem was about to make fire on him by the gun in his hand Sarfaraz snatched the same from his hand and thereafter all the four above named complainant side chased him, then Sarfaraz opened fire upon them in order to defend himself and somehow returned home to save his life. The attention was also drawn to the statement of PW 2 Raiyyan at page 75 of the paper book in which he admitted that the case under sections 307, 504 and 506 IPC was got registered by father of Sarfaraz against the complainant side. The attention was also drawn to the statement of PW 3 Khalil at page 99 of the paper book in which this witness has also admitted the case having been registered against the complainant side by Shaukat. It was argued that the place and time of incident of both the occurrences are one and the same. On behalf of the accused Arshad it was also argued that improvement has been made in respect of place of occurrence by the prosecution side, which shows that the occurrence happened in some other manner than in the manner as has been stated in the F.I.R. No role was assigned to him hence he cannot be treated to be a member of unlawful assembly. He had no motive of committing offence, hence his conviction with the aid of sections 149 IPC was bad in law. Nothing was recovered from his possession. It was also argued on behalf of the appellants that no blood was found on the staircase nor any pellets were found there , which would indicate that the occurrence did not take place there. The incident took place at the medicine shop of Farukh where Sarfaraz had already received firearm injury and then he had snatched the gun and when he fled to save his life, the complainant side had chased him. On 27 /02/2010 recovery of paunia , a small gun has been shown from him . In order to conceal the genesis of the incident, the injuries caused to the accused Sarfaraz have been concealed. No blood was found on the third floor/storey of the house which also shows that no incident took place there. In fact the occurrence took place in the manner as was mentioned in Exhibit Kha - 1 and not as mentioned in Exhibit Ka – 1.

110. From the side of prosecution it was vehemently argued that the cross case has been concocted by the father of the accused i.e. Shaukat . It is very unnatural that the injured Sarfaraz was taken to Sasural of Shaukat in Sher Nagar and thereafter he was shown in District hospital Muzaffarnagar , from where he was referred to Meerut for medical examination. No defence was taken in the statement under sections 313 Cr. P.C. that the accused Sarfaraz had made fire in defence. It clearly proved beyond reasonable doubt by the prosecution side that it were the accused who had come prepared with common object of the unlawful assembly formed by them to make assault upon the deceased and the other injured persons in order to kill them

and with that object in mind they had opened fire upon them by which deceased had died and three other injured had received injuries. The appeal therefore deserves to be dismissed.

111. After having heard the arguments of both the sides and having perused the entire evidence on record we find that according to prosecution version, about 7-8 days prior to the present occurrence, a dispute had occurred between informant's brothers i.e. Naseem (deceased) and Khalil (PW-3) on the one hand and accused Sadiq on the other, while they were playing volleyball, which was settled between them by intervention of some villagers but accused Sadiq had given a threat to them to see. In pursuance of the said threat on 25.2.2010 at about 2:00 pm, accused Sadiq, his brother Sahid and other family members namely Arshad, Rashid, Sarfaraz, Farukh and Mumtaj came at the house of informant armed with country made pistols and guns and Sadiq abused Naseem "Sale Naseem Tujhe Dekhna hai" and then all of them entered the house of informant and started making fire with an intention to kill, in which PW-1's brother Naseem, Khalil, Raiyyan and his nephew Shakir received fire arm injuries. The informant fled from there in order to save his life, while the accused taking the brothers of the deceased and his nephew dead, had also fled from there. The informant had taken the injured persons to the Muzaffar Nagar District Hospital, where his brother Naseem was declared dead, while Khalil was fighting for his life.

112. On the other hand, the version of the defence is that ten days ago prior to the present occurrence, the son of Shaukat namely, accused Sarfaraz had a quarrel with Naseem (deceased) S/o Shamshuddin in respect of weighing of buggi of sugarcane at Kolhu and the same was got settled by few persons present there. At that time Naseem had given threat to Sarfaraz that he would see him but ignoring that threat, his son Sarfaraz had gone on 25.2.2010, at about 2:30 pm, at the medical store of Farukh to bring medicine for his father Shaukat, right then, Naseem (deceased), Khalil (injured), Raiyyan (injured) S/o Shamshuddin and Shakir (injured) S/o Raiyyan, came there at the said medical store armed with Lathi, country made pistols and guns in their hands and forcibly tried to drag Sarfaraz to their house and Sarfaraz was assaulted by Khalil and Raiyyan by Lathi in the lane adjacent to their house and Raiyyan, Khalil and Naseem, who were having guns, had caught hold of Sarfaraz and then Shakir had told "Mar Sale Ko Goli", at this exhortation, Shakir made fire upon Sarfaraz by country made pistol in his hand with an intention to kill and as soon as Naseem was about to make fire upon Sarfaraz, Sarfaraz sensing that he might be killed, snatched gun from the hand of the Naseem and thereafter all the four above persons had chased Sarfaraz, who in order to save his life, made fire and somehow saved his life and came home. It is further the case of the defence that the family of complainant side was big and they all reached the house of accused due to which the accused had closed his door and windows and in the night after concealing themselves, had gone to Shernagar (Sasural of Shaukat) and from there accused- Sarfaraz was taken to Muzaffarnagar District hospital but from there he was referred to Meerut for medical examination because of serious injuries. Shaukat had given an application dated 2.3.2010 addressing to

D.I.G., Saharanpur, whereon after the order having been passed, a cross-case was registered as Crime No. 163A of 2010, under Sections 307, 504 and 506 IPC against complainant side, which included Naseem (deceased), Khalil, Raiyyan and Shakir on 10.3.2010 at 18:30 pm.

113. It could be most pertinent to mention here that from the side of accused, F.I.R. has been lodged against the complainant side showing the occurrence to have taken place on 25.2.2010 at 2:30 pm in which deceased Naseem along with other injured namely Khalil, Raiyyan and Shakir have been made accused, while from the side of prosecution, the occurrence is shown to have taken place on 25.2.2010 at 2:00 pm, which raises a question as to how incident could have been done by Naseem (deceased) at 2:30 pm when he is stated to have died, by prosecution side, in occurrence, which took place at 2:00 pm, this question does not appear to have been dealt with by the trial court on the basis of evidence adduced from both the sides. It is also apparent from the judgment of the trial court that it has taken the occurrence of Crime No. 163A of 2010 to be not a cross case of the occurrence of Crime No. 163 of 2010 and has treated them to be two separate incidents having been committed at two different point of time and has awarded punishment to both the sides.

114. In order to prove the prosecution case, which has been mentioned above, the informant Irfan (PW-1) has supported the said version in examination-in-chief by saying that on the date of occurrence i.e. 2.5.2010, he along with his brother was taking off fodder from the buggi after having returned from the field to be placed on the fodder machine to be cut, right then at about 2:00 pm, all of a sudden accused Sadiq armed with country made pistol and accused Sahid, Arshad, Rashid, Sarfaraz, Mumtaj and Farooq armed with country made pistols entered his house saying "Maro salon ko" and at this, they all opened fire from the respective weapons in their hands, in which his brother Naseem, he himself, Khalil, Raiyyan and his nephew Shakir had received fire arm injuries. He saved his life by concealing himself. The women of the house had raised alarm and also after hearing the sounds of fires, people had assembled there but the accused fled from there, giving him threats and, thereafter, he with the help of other family members had taken his injured brother to hospital taking along with him a constable from the police Chauki of the village but doctor pronounced Naseem dead, while other injured brothers were got admitted for treatment. The F.I.R. has been promptly lodged because occurrence took place at 2:00 pm while on the same day the F.I.R. has been lodged at 2:30 pm, though the distance of the village Harsauli, where the occurrence took place from the P.S. was 7 kms. This witness has been cross-examined at length. He has stated in cross-examination that by 3:15 pm, he had reached Government Hospital Muzaffar Nagar and soon, thereafter, the doctor declared Naseem dead. The accused had started the occurrence soon after coming there. One accused, started abusing seeing him Naseem ran towards the staircase. All were armed with country made pistols except Sadiq, who was armed with gun. Soon after coming there, accused started firing upon them, about 14-15 fires were made. As soon as fire

started, the complainant side fled from there. The place where fodder was being cut, Naseem, Khalil, Raiyyan and Shakir had received injuries and they, thereafter, fled from there. Raiyyan, Khalil and Shakir had jumped towards the northern wall to save their life, while Naseem fled towards the third floor of his house, who was chased by the accused. He had received fire arm injury when he had turned around to see the accused. The I.O. has shown the place where Naseem was lying in injured condition by "X' on the third floor of the complainant's house in site plan, which is Ext. Ka.-19.

115. It is apparent from the statement of this witness that initially the firing took place near the fodder machine, where deceased Naseem along with his other brothers was busy in cutting the fodder and when the assault was made by the accused side, three of injured, who are named above, crossed over the northern boundary to save their life, while the deceased Naseem ascended the third floor of the house but he was pursued by the accused and fire was made upon him even from the staircase and ultimately he lay in deeply injured condition at place "X' from where he was taken down after the accused had fled from there. Similarly PW-2, Raiyyan, who is also an injured witness, has supported the version of prosecution stated above, whose statement has been mentioned above in detail. The third injured namely, Khalil, has also supported the prosecution version as narrated above.

116. All these three injured witnesses have been cross-examined at length except Irfan but nothing such has been elicited in cross-examination, which would make their presence doubtful on the place of occurrence particularly because of them being injured witnesses. The injuries received by them have been proved by PW-6, Dr. Pradeep Mittal, who found injured Khalil to have suffered five injuries, all were lacerated wounds, although he has stated that to know the nature of said injuries, he had referred the patient to surgeon. The injuries caused to Khalil were suffered on face, left shoulder, left hand, left chest and right thigh. Similarly, the other injured Shakir had received one lacerated wound on his head. The third injured Raiyyan had received two lacerated wounds, one on little finger and the other on left hand. These injured were also referred to surgeon for knowing the nature of injuries. It is true that these three injured were examined by Dr. between 3:15 pm to 3:35 pm, although F.I.R. was lodged at 4:30 pm, which establishes that injuries were examined by the Dr. before lodging the F.I.R. It can be well understood that if somebody has assaulted by fire arm weapons, the primary aim of all the injured and his family members would be to get themselves medically examined first rather than rush to the police station to lodge F.I.R., therefore, we find that nothing adverse should be inferred in the present case merely because the injuries were got examined by Doctor prior to lodging the F.I.R. simply on that count it cannot be said that the F.I.R. was ante-timed and no benefit should be allowed to go to the accused because of this reason.

117. As regards, the deceased Naseem, his post mortem was conducted by R.S. Verma (PW-7) on 26.2.2010 at 11:00 am and had found six ante mortem wounds on his person. Injury no. 1 was on his forehead, injury no. 2 was on his face, injury no. 3 was on his neck, injury no. 4

was on his clavicle and injury no. 5 was on his chest, while injury no. 6 was also on chest. All these injuries were fire arm injuries, which according to the doctor were possible to have been caused on 25.2.2010 at 2:00 pm by which the deceased would have died. Therefore, it is well established by the testimonies of PW-6 and PW-7 that all the injuries sustained by the three injured named above as well as one deceased were fire arm injuries and the assailants/accused were also established by the prosecution side to have been armed with country made pistol and gun by which they are stated to have fired upon them, therefore, the ocular testimony is corroborated by the medical examination reports in the present case.

118. As regards the motive of giving effect to this occurrence, it is mentioned by all the three witnesses of fact i.e. PW-1, PW-2 and PW-3 that about 7-8 days prior to this occurrence, a dispute had arisen between the deceased Naseem and Khalil on the one hand and accused Sadiq on the other while playing volleyball, which was resolved by the villagers at that time but the accused Sadiq had given threat to the deceased that he would see him and it was in pursuance to this threat that the present occurrence was given effect to. The said animosity which has been proved by all the three witnesses is found to be sufficient by us for giving effect to the present occurrence by the accused.

119. As regards the place of occurrence, regarding which it was argued by the learned counsel for the appellants that it has been shifted because according to the defence, the occurrence had started at the shop of medicine belonging to Farukh, which was adjacent to the lane, where accused Sarfaraz had gone to purchase medicine for his father and it was there that the three injured mentioned above as well as deceased had gone there, who all had tried to drag the accused Sarfaraz towards their house and in the process one fire was also made by one of the injured witnesses, while two others including the said injured witness had caught hold of Sarfaraz and Shakir had made fire upon Sarfaraz with an intention to kill him and, thereafter, when Naseem (deceased) tried to also make fire upon him, his gun was snatched by Sarfaraz in order to save himself and fled towards his house and while he was being chased, he made fire upon the complainant side. It is further argued by the learned counsel for the appellants that the accused are stated to have entered the 'Gher' of the complainant side where they are stated to have made fire upon the deceased and the injured persons indiscriminately but neither any marks of bullets were found on the walls of the 'Gher' nor any cattle, which are stated to be tied there, received any injuries, which shows that the said occurrence did not happen, rather the occurrence happened in some other manner. It was also argued that place of occurrence is shifted by showing the incident to have happened inside the 'Gher' near the fodder cutting machine and, thereafter, when the injured fled from there in order to save their life crossing the wall, the accused chased the deceased Naseem, who headed towards the third floor of his house and he was stated to have been fired upon from the staircase. In this regard there were inconsistent statements of PW-1 to PW-3 as some of them have stated that the accused had followed the deceased right up to third floor and shot him there, while others

have stated that the fire was made upon the deceased only from the staircase, such kind of discrepancies would make case of prosecution doubtful. We are not inclined to accept this argument of learned counsel for the appellants because in a situation like the one in the present case in which as many as seven accused are stated to have made indiscriminate firing in prosecution of common object of the unlawful assembly formed by them in order to eliminate the deceased and kill other injured persons, it would be difficult for the witnesses, even if they are injured witnesses, who have seen the occurrence, to divulge distinctly as to which of accused had made fire and from where. It has come in evidence beyond any doubt that all the seven accused, who have been named in the F.I.R., had entered in the 'Gher' of the complainant side in order to eliminate the deceased and caused injuries to the injured persons in prosecution of common object of unlawful assembly formed by them.

120. In this regard, it would be pertinent to mention here that the place of occurrence would extend from the place, where initially firing was made near the fodder cutting machine and, thereafter, right up to the place where deceased Naseem was found lying in injured condition at place shown by "X' at the third floor, therefore, from the evidence on record, we do not find that there was such kind of shifting of place of incident, which would make the prosecution case to be doubtful.

121. Now we would dealt with aspect of the defence case which has been stated above.

122. From the side of defence, four witnesses have been examined to prove their defence. From among the eye-witnesses, Hakikat has been examined as DW-1, whose testimony has already been mentioned above by us and we find that he has tried to prove the defence version in examination-in-chief that he was witness of the occurrence of 25.2.2010 at 2:30 pm, which happened at the medical store of Farrukh, where he was present when accused Sarfaraz had come to take medicine for his father and it was then that Naseem (deceased) Khalil, Raiyyan and Shakir had come there armed with Lathi, country made pistol and gun and had tried to drag Sarfaraz into their house and Shakir was beaten by them in the lane adjacent to the house of the complainant, who was caught hold up by Khalil, Raiyyan and Naseem. Shakir had exhorted that 'Mar Sale Ko Goli', at which Shakir had fired upon Sarfaraz by his country made pistol and as soon as Naseem was about to make fire, Sarfaraz sensing threat to his life, had snatched the gun from his hand and fled towards house in order to save himself, they were pursued by the complainant side and in order to save his life, Sarfaraj made fire upon the complainant side by the said snatched gun. Later on he came to know that Naseem had died. The said occurrence was seen by Gayoor, Musarraf, Imroz and none of these witnesses have been examined in defence from the side of accused. In cross-examination, made by the complainant side, the testimony of this witness was found to be not confidence inspiring because he had admitted that he failed to know as to where Sarfaraz had gone after having got injured. The narration made by him of the said injured-accused because having fallen and again getting up and then again getting hit by bullet and then again getting up and finally making fire

upon the complainant side in order to save himself, does not sound natural. He has further stated that he continued to stay there and witnessed this incident and could not tell as to whom shot hit, which was made by Sarfaraz. Had he been present on the spot. He certainly would have seen the person, who was hit by the shot made by Sarfaraj, therefore the testimony of this witness is not trustworthy and it appears that because of being close to the accused side, he had made false statement.

123. As regards, DW-2, who is Dr. R.S. Verma, it may be mentioned that he had simply referred the accused Sarfaraz on 26.2.2010 at 9:25 pm, when he was brought in emergency in District Hospital, Muzaffarnagar to the medical college Meerut, and he failed to give explanation as to who had recorded the injury in respect of the said patient, which mentioned Pellet induced injuries over right side chest and trauma over posterior chest wall. He has simply proved Ext. Kha-2, which is reference slip. He has also admitted in cross-examination that no X-ray was shown to him at the time of medical inspection made of the said patient. From the statement of this witness, we do not find that he found the accused to be in serious condition.

124. DW-3, S.I. Bagesh Kumar Sharma, he had conducted the investigation of the alleged cross-case, in which he submitted charge sheet. He in cross-examination, has stated that Shaukat had not told him that Naseem told Shakir 'Mar Sale Ko Goli'. This witness had also not stated to him that all the four accused (complainant side) made fire upon Sarfaraz, rather it was told by him that Sarfaraz had made fire.

125. This witness has stated that he did not record the statement of any persons/eye-witnesses living in vicinity in respect of correctness of the present occurrence, which happened with Sarfaraz. He has also stated that the informant of the cross-case was not eye-witness and he has not taken any eye-witness to the place of incident for making site plan. It appears from the statement of this witness that he did not make serious effort to come to the truth of the occurrence nor does it appear that he evaluated this fact as to how it was possible that according to prosecution side, the occurrence took place at 2:00 pm in which Naseem had died, while the same deceased had been made accused along with three other injured persons in a cross-case in respect of the occurrence, which is stated to have occurred at 2:30 pm on the same day as a dead person could not be believed to have participated in the said occurrence, which falsifies the whole defence version.

126. Dr. Mukund Pal Singh has been examined as DW-4, who has proved four injuries on the person of accused Sarfaraz. Injury no. 1 is incised lacerated wound on the left side of the head, injury no. 2 is incised lacerated wound on left side of chest and injury no. 3 is contusion on abdomen in right side and injury no. 4 is contusion on abdomen covering large area and has proved his injury memo, which is Ext. Kha-5. In cross-examination, this witness has clearly stated that the said injured-accused was not admitted in hospital. He was fully in conscious condition, no abnormality was found in his general condition. From his statement, it can fairly be gathered that the said injured was not having any serious kind of injuries and this witness has gone to the

extent to state that injury no. 3 and injury no. 4 could have been manufactured.

127. On the basis of defence witnesses, we are of the view that the defence version does not appear to be trustworthy and the same needs to be discarded, while the prosecution has been able to prove its case to the hilt on the basis of sound proof of evidence which has been discussed above and, therefore, these appeals deserve to be dismissed with respect to all the accused having been held guilty by the trial court in crime no. 163 of 2010, under Section 148, 307 read with 149, 302 read with 149, 452 IPC and 7 Criminal Law Amendment Act, and is accordingly, dismissed.

128. Since all the accused were armed with deadly weapons, the offence under Section 147 does not stand proved because none of the accused was armed with ordinary weapons. Therefore, the accused mentioned-above stand acquitted of offence under section 147 IPC.

129. We further are of the view that on the basis of evidence of PW-4, Constable Sahab Singh, and PW-5, S.I. Bogesh Kumar Sharma, PW-8 S.I. Pramod Kumar and P.W. 9, S.I. Balzor Singh, it is also evident that on 27.2.2010 at about 1:20 pm, from the possession of the accused Sarfaraz and Sahid one 12 bore gun and one cartridge of 12 bore and one country made pistol of 315 bore and one live cartridge of 315 bore were recovered for which they did not possess any valid license and, therefore, the trial court has also held them guilty under Section 25 of Arms Act rightly. Therefore, appeals of the accused persons for being held guilty under Section 25 of Arms Act also stand dismissed.

130. Now it would be pertinent for us to express our opinion as to whether the punishment awarded by the trial court is on the higher side as they have been awarded punishment under Section 302 read with 149 IPC for being hang till death.

131. As regards reduction of the sentence from death penalty to life imprisonment, we would like to rely upon the law laid-down by Supreme Court in **Farooq @ Karattaa Farooq & Ors vs. State Of Kerala (2002) 4 SCC 697** in which in paragraph no. 8 following is held:

"Next question which is to be considered is as to whether the High Court was justified in upholding the death penalty imposed against appellant Farooq and appellant Sathar. Reference in this connection may be made to the Constitution Bench decision of this Court in the case ofBachan Singh v. State of Punjab, AIR 1980 SC 898, as well as, following the same, three Judge Bench decision of this Court inMachhi Singh & Ors. v. State of Punjab1983 (3) SCC 470, wherein various circumstances have been enumerated and it was laid down that if the case squarely falls within its ambit, only in that eventuality, death penalty can be awarded. It was observed that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise retaining death penalty, such a penalty can be inflicted. In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one. Therefore, we are clearly

of the opinion that in the fitness of things, extreme penalty of death was not called for and the same is fit to be commuted to life imprisonment."

132. It is apparent from the above position of law that death penalty should be awarded only in circumstances as enumerated in the above-mentioned cases and only in that eventuality when collective conscience of the community is so shocked that it will expect the court to inflict death penalty irrespective of their personal opinion as desirability. In the present case, we find that facts were not such as would shock our conscience to that extent that we would feel compelled to award death penalty because the murder in the present case is not committed in such gruesome manner that it will require imposition of death penalty.

133. In this regard, in our opinion, this is not one of such cases in which the offence of murder is committed in such gruesome manner that it would require imposition of death penalty. The accused are stated to have made fires upon the deceased and also on other three injured persons by which they have received injuries. Therefore, we find it adequate that ends of justice would be met if the punishment under Section 302/149 IPC is reduced to that of life imprisonment and a fine of Rs. 10,000/- and in default of payment of fine, two months simple imprisonment. Rest of the punishments which have been awarded under the above mentioned sections do not require any interference and they are upheld.

134. Accused are in jail.

135. The Criminal (Capital) Appeal No.205 of 2015 stands partly allowed and the reference for confirmation stands rejected.

136. The Criminal Appeal Nos. 206 of 2018 and Criminal Appeal No.207 of 2018 stand dismissed.

137. Let a copy of this judgment be transmitted to the court below along with original record of lower court for necessary information and compliance forthwith

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(2019)10ILR A 2224

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.10.2019

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 541 of 1998
along with
Criminal Appeal No. 542 of 1998
along with
Criminal Appeal No. 564 of 1998
along with
Criminal Appeal No. 1839 of 2004

Ram Shanker & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Anand Mohan, Begum Sabiha Kamal, Sri Mohd. Shahid Akhtar.

Counsel for the Respondent:
Govt. Advocate.

A. Section 149, 299, 300, 302 & 304 Part- 1 and Part-2 I.P.C. Distinguish between motive intention and knowledge.

Relative witness: -

Relationship with deceased is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. The testimony of the PW-1 and PW-6 cannot be discarded only on the basis of their relationship with the deceased.

The trial Court is able to seprate grain from the chaff, the reliable and acceptable part of the evidence can be accepted and the untruthful part of the evidence may be rejected and on the basis of truthful evidence some accused may be convicted and others may be acquitted.

Distinguish between motive intention and knowledge: -

There is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall Under Section 304 Part II. **The facts and circumstances of the present case of grave and sudden provocation and hence the Accused is entitled to the benefit of Section 300 Exception 4 of the Indian Penal Code."**

It is a case of culpable homicide not amounting to murder inasmuch as the incident happened on account of sudden fight between the friends who had gathered for a drink party arranged. There was no pre-mediation and the act done by the Appellant was in the heat of passion without the Appellant taking any undue advantage or acted in a cruel manner.

Over all discussion, it is apparent that the act of appellant is covered under Section 304 Part-I of the I.P.C. instead of Section 300 punishable under Section 302 of the I.P.C. and, therefore, appellant is liable to be convicted under Section 304 Part-I of I.P.C. and not under Section 302 I.P.C.

Appeal partly allowed (E-2)

Case Law Referred: -

1. Gangabhavani Vs Rayapati Venkat Reddy & ors., MANU/SC/0897/2013

2. St. of Rajasthan Vs Smt. Kalki & anr. MANU/SC/0254/U.P.

3. Sachchey Lal Tiwari Vs St. of U.P. MANU/SC/0865/2004 AIR 2004 SC 5039,

4. Bhagaloo Lodh & ors. Vs St. of U.P. reported in MANU/SC/0700/2011

5. M.C. Ali & anr. Vs St. of Kerala MANU/SC/0247/2010 AIR 2010 SC 1639

6. Myladimmal Surendran & ors. Vs St. of Kerala MANU/SC/0670/2010 AIR 2010 SC 3281

7. Shyam Vs St. of M.P. MANU/SC/7112/2007 (2009) 16 SCC 531

8. Prithi Vs St. of Haryana ANU/SC/0532/2010 :(2010) 8 SCC 536

9. Surendra Pal & ors. Vs St. of U.P. & anr. MANU/SC/0713/2010 (2010) 9 SCC 399

10. Himanshu @ Chintu Vs St. (NCT of Delhi) MANU/SC/0006/2011:(2011) 2 SCC 36)

11. Mahendran & ors. Vs St. of Tamil Nadu & ors. Reported in MANU/SC/0257/2019

12. Chanakya Dhibar (Dead) Vs St. of W. B. & ors., MANU/SC/1096/2003

13. Lalji Vs St. of U.P. MANU/SC/0283/1989

14. Roy Fernandes Vs St. of Goa & ors. Reported in MANU/SC/0072/2012

15. Kuldip Yadav & ors. Vs St. of Bihar, MANU/SC/0390/2011

16. Manjit Singh Vs The St. of Punjab, MANU/SC/1195/2019

17. Lallu Manjhi Vs St. of Jharkhand, AIR 2003 SC 854

18. AIR 2003 SUPREME COURT 3617, Sucha singh v/s St. of Punjab

19. Masalti & ors. Vs St. of U.P. MANU/SC/0074/1964, St. of Punjab Vs Jagir Singh (AIR 1973 SC 2407)

20. Lehna Vs St. of Haryana (2002 (3) SCC 76)

21. AIR 2013 SUPREME COURT 3150, Raj Kumar Singh @s Raju alias Batya Vs St. of Rajasthan

22. Budhi Singh Vs St. of H.P. reported in MANU/SC/1126/2012

23. Arjun & ors. Vs St. of Chhattisgarh reported in MANU/SC/0153/2017

24. Arumugam Vs State, Represented by Inspector of Police, Tamil Nadu MANU/SC/8108/2008: (2008) 15 SCC 590

25. Surinder Kumar Vs Union Territory, Chandigarh MANU/SC/0589/1989 (1989) 2 SCC 217

26. Ghapoo Yadav & ors. Vs St. of M.P. (2003) 3 SCC 528, MANU/SC/0124/2003

27. Sukhbir Singh Vs St. of Haryana (2002) MANU / SC/0116/2002, (2002) 3 SCC 327

28. Alister Anthony Pareira Vs St. of Maharashtra (2012) 2 SCC 648, MANU/SC/0015/2012

29. Singapagu Anjaiah Vs St. of A.P. (2010) 9 SCC 799, MANU/SC/0451/2010

30. Basdev Vs The State of PEPSU AIR 1956 SC 488

31. Pulicherla Nagaraju @ Nagaraja Reddy Vs St. of A.P. (2006) 11 SCC 444, MANU/SC/8419/2006

32. Surain Singh Vs St. of Punjab reported in MANU/SC/0399/2017 (2017) 5 SCC 796

33. Atul Thakur Vs St. of H.P. & ors., MANU/ SC/0018/2018, AIR 2018 SC 570.

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

1. Heard Shri Mohd. Shahid Akhtar, Advocate for the appellant in Criminal Appeal Nos. 542 of 1998, 564 of 1998, 541 of 1998 and as Amicus Curiae for appellant, Kalloo in Criminal Appeal No. 1839 of 2004 as well as Shri Chandra Shekhar Pandey, learned A.G.A. for the State.

These Criminal Appeal Nos. 542 of 1998, 564 of 1998, 541 of 1998, 1839 of 2004 have been filed by above appellants against the judgment and order dated 29.09.1998 passed by learned Additional Sessions Judge XIth, Lucknow in Sessions Trial No. 316 of 1996 "State vs. Siya Ram and others", arising out of Case Crime No. 86 of 1995, under Sections 147, 148, 149 and 302 I.P.C., Police Station Itaunja, District Lucknow, whereby all the appellants were convicted under Section 147, 148, 149 and 302 I.P.C. and sentenced for life imprisonment.

2. The prosecution case as borne out of the record of the Subordinate Court is that a written report was presented by Sri Rafique Khan son of Sri Husaini Khan resident of Village Ludhauli, Police Station Itaunja, District Lucknow to S.H.O. Police Station Itaunja, on 22.05.1995 at about 9:45 pm. alleging that the younger brother of the applicant namely Zaheer Khan is running a shop of Electric appliances at Manpur Chauraha. One Munna son of Ram Shanker Pasi is employed in his shop as a servant. On 22.05.1995 at about 8:30 pm., he (Rafique) and Zaheer went to the residence of Munna with regard to some work pertaining to installation of decorative lights and when Zaheer called Munna from the main gate of the house, Siya Ram Lodhi son of Munni Lal, Karan

Singh son of Bhagwan Bux Singh, Harish Chandra son of Hem Raj, Santosh Singh son of Sheetla Bux Singh, Arjun Singh son of Bhagwan Bux Singh, Khem Chandra son of Munna, Ram Shanker son of Putti Lal and Kallu son of unknown emerged out from the house and dragged his brother namely Zaheer inside the house and started assaulting him by "Kicks and Fists'. His brother fell down and Siya Ram took out a knife from his pocket and stabbed Zaheer below his chest with an intention to kill him. His brother (Zaheer)after receiving grievous injuries died at the spot, inside the house of Ram Shanker. On hearing alarm, Mohd. Shamim son of Maqsood Khan and Krishna Kumar Mishra son of Lal Bihari Mishra of the same village Ludhauli arrived on the spot and witnessed the incident in the light of torch and 'Dhibri' , which was lighting inside the house. The other villagers of the village also arrived on the spot and witnessed the incident. The dead body of his brother is lying inside the house of Ram Shanker.

3. On the basis of the aforesaid written application (Exhibit-ka-1), Chik FIR (Exhibit-ka-2) was prepared and a case was registered at Case Crime No. 86 of 1995 on 22.05.1995 at 9:45 pm, under Sections 147, 148, 149 and 302 I.P.C.. A corresponding G.D. entry (Exhibit-ka-3), was also made in the General Diary as Serial No. 86 of 1995 at 9:45 pm. on 22.05.1995 and investigation of the F.I.R. was entrusted to S.H.O. Shri M.M. Khan. The Investigating Officer visited the place of incident and prepared Inquest Report (Exhibit-ka-5) and other necessary papers for the purpose of postmortem of the dead body i.e. 'Photo Lash' (Exhibit-ka-7), Sample Seal (Exhibit-ka-6), letter to C.M.O, (Exhibit-ka-9), Form No.13 (Exhibit-ka-8). The Investigating Officer also prepared the Site Plan (Exhibit-ka-10) and collected the blood stained and simple soil from the place of occurrence and also prepared a Recovery-memo (Exhibit-ka-11). The dead body of deceased Zaheer was thereafter sent for postmortem.

4. P.W.-4/Doctor Nalini Kant Tripathi conducted the postmortem on the body of the deceased Zaheer on 23.05.1995 at 11:30 am and prepared a postmortem report (Exhibit-ka-4). He found the age of the deceased as about 32 years, a person of average built body. Rigor mortis was present all over the body. The postmortem staining was present on the back, Eyes were closed and mouth was half open.

The Doctor found following ante mortem injuries on the dead body of the deceased:-

Injury No.1/Stab wound of 5 cm. x 2 cm. x abdominal cavity deep present on point of abdomen 6 cm. above from umbilicus, margins are sharp and clear cut and well defined. On opening ecchymosis present beneath injury, small intestine cut through and through at one place place. Small intestine and abdomen omentum is coming out of wound. Direction is oblique forward to move downward.

Injury No.2/Stab wound of 4 cm. x 2 cm. x Abdomen cavity deep present on right side lower base 7 cm. behind mid line and 10 cm. above from post superior Iliac spine. Margins are sharp clear cut and well defined. Direction is obliquely forwarded upward

from right to left. On opening ecchymosis present underneath injury. Stomach cut through and through at one place about 01 liter of fluid and clotted blood with food material present in abdominal cavity.

On internal examination, 90 ml. liquid food matter was found in the Stomach, digested food and gases were found in small intestine and faecal matter and gases were found in big intestine. Galbladder was empty. The cause of death was determined as death occurred due to shock and haemorrhage, as a result of, Anti-mortem stab wounds .

The Investigation Officer, during the course of investigation also sent the blood stained soil and other articles, recovered form the spot, for chemical examination and the report of the chemical analyst (Exhibit-ka-12) is available on record, which states that human blood has been found on all these articles. The Investigating Officer after completing the investigation filed a charge-sheet against all the named accused persons under Section 147, 148, 149 and 302 I.P.C.

5. The case being triable by the Court of Sessions was committed to the Sessions Court and charges under Section 147, 149/302 I.P.C. were framed against Karan Singh son of Bhagwan Bux Singh, Harish Chandra son of Hem Raj, Santosh Singh son of Sheetla Singh, Arjun Singh son of Bhagwan Bux Sing, Khem Chandra son of Munna, Ram Shanker son of Putti Lal, while charges under Section 148 and 149/302 of I.P.C. was framed against accused-appellant, Siya Ram. The appellants denied the charges and claimed trial.

6. The prosecution in order to bring home the charges framed against appellants/accused persons relied on following documentary evidence:-

1. Application FIR, Exhibit-ka-1

2. Chick FIR, Exhibit-ka-2

3. G.D. Entry of FIR, Exhibit-ka-3

4. Postmortem report, Exhibit-ka-4

5. Inquest Report, Exhibit-ka-5

6. Seal Sample, Exhibit-ka-6

7. Photo Lash, Exhibit-ka-7

8. Form-13, Exhibit-ka-8

9. Letter to C.M.O, Exhibit-ka-9

10. Site Plan, Exhibit-ka-10

11. Seizure Memo of Simple & blood stained Soil, Exhibit-ka-11

12. Chemical Analyst Report, Exhibit-ka-12

13. Charge-sheet, Exhibit-ka-13

Apart from the above mentioned documentary evidence, the prosecution also testified following witnesses :-

P.W.-1/Rafique Khan
(Informant/Eye witness)

P.W.-2/Mohd. Shamim
(Eye witness)

P.W.-3/Constable Vishnu Narayan Shukla,
(Scribe of the Chick FIR and G.D.)

P.W.-4/Doctor Nalini Kant Tripathi, the
(Doctor, who conducted postmortem)

P.W.-5/Shri M.M. Khan,
(Investigating Officer)

P.W.-6/Raees Khan @ Rahees,
(Scribe of the application of FIR)

7. After the completion of prosecution evidence, the statement of appellants was recorded under section 313 of the Code Of Criminal Procedure wherein they denied the occurrence as alleged by the prosecution and alleged false implication due to enmity. Appellant Siyaram also denied his presence at the spot and further stated that police has shielded the actual culprits. He claimed that deceased has been murdered as he was of bad character. Appellant Ram Shankar Stated that injured Zaheer entered his house to save his life. He went to the house of Rafique to call him and when he went to lodge the report the dead body of deceased remained in his care.

Appellants in their defence also produced D.W.-1 Loknaam, D.W.-2 Khemchandra, D.W.-3 Santram and D.W.-4 Krishna Kumar.

8. The Trial Court after appreciating and analyzing the evidence made available on record came to the conclusion that the prosecution has been able to prove its case beyond reasonable doubt against appellants Siya Ram, Karan Singh, Harishchandra, Ram Shanker and Kalloo, and vide impugned judgment and order convicted and sentenced the appellants in the manner described in the first paragraph of this judgment. Trial Court by the same judgment and order acquitted the accused persons Santosh Singh, Arjun Singh and Khemchandra of the charges under Sections 147, 148, 149/302 I.P.C. No appeal, till date, is stated to have been filed by the State against the Judgment and Order of acquittal, pertaining to Santosh Singh, Arjun Singh and Khemchandra.

Shri Mohd. Shahid Akhtar, learned counsel for the appellants while referring to the judgment of the Trial Court submits that the Court below has convicted the appellants only on the basis of *"surmises, assumptions and conjectures'*. The prosecution, according to him, failed in its duty to prove the charges against the appellants.

9. Learned counsel for appellant-accused further submits that as per the facts and circumstances of the present case, the case of other appellants is different from the case of appellant Siyaram and in absence of any unlawful assembly they could not be convicted for the Act of Siyaram.

Learned counsel for the appellants further submits that the Court below have acquitted 03 accused persons and convicted the appellants on the same set of evidence. No motive has been proved of the crime and the prosecution story is highly improbable.

He further submits that the evidence of 02 eye witnesses namely P.W.-1/Rafique and P.W.-2/Mohd. Shamim is not trustworthy in facts and circumstances of the case and also on the count that they are related to the deceased Zaheer and, therefore, their evidence is partisan and interested and could not be believed

He further submits that the story of the prosecution is highly improbable specially the fact that deceased Zaheer was dragged inside the house by all accused persons and the theory of prosecution that all accused persons caught hold of him and dragged the deceased for some distance is not believable in the facts and circumstances of the case, as no mark of injury or any sign has been found on the body of the deceased, which may suggest any scuffle. The Investigating Officer namely P.W.-5/M.M. Khan has also not found any sign of scuffle at the spot. Therefore, the story of the prosecution is full of lies.

He further submits that, in fact it is a blind murder. Deceased Zaheer has been murdered somewhere else by some unknown persons and to save himself, he came in the Courtyard of Ram Shanker and simply on the basis that his dead body has been found there, the appellants have been falsely roped in.

He further submits that P.W.-2/Mohd. Shamim is a chance witness and other independent witness/Krishna Kumar has not been produced by the prosecution and he testified himself as defence witness (D.W.-4) and in his statement has stated that P.W.-2/Mohd. Shamim was with him at the time of occurrence. Therefore, the presence of P.W.-2/Mohd. Shamim at the spot is highly doubtful and could not be believed in the facts and circumstances of the case.

It is further submitted by learned counsel for the appellants that the accused persons were not having any prior information of the arrival of the deceased and, therefore, in absence of any prior enmity, there was neither any opportunity nor occasion for the appellants to form any unlawful assembly. No member of the assembly except Siya Ram was having any arm with him and the fact that Siya Ram is possessing a knife, was not known to any other accused person either before or during the hot talks or during alleged scuffle of deceased with Siya Ram. Therefore, there was no unlawful assembly formed at any time of the alleged incident.

10. Per contra, Shri Chandra Shekhar Pandey, learned A.G.A. submits that the prosecution by reliable and acceptable evidence has proved the case of prosecution and in cases of direct evidence, the prosecution is not obliged to prove the motive and, therefore, the case is to be decided on the basis of direct evidence of eye witnesses.

He further submits that on the day of occurrence the deceased was dragged into the house by all accused persons and the unlawful assembly was formed at that point of time when deceased was dragged inside the house by all appellants and accused Siya Ram as a member of that Unlawful Assembly, in order to achieve its common object, stabbed deceased Zaheer in his Stomach and waist and caused his death. Therefore, each and every appellant is liable for the murder of Zaheer, being part and parcel of the Unlawful Assembly.Therefore, the Court below has not acted illegally in convicting the appellants and no interference is required in the Judgment and Order of the Trial Court and the appeal is liable to be dismissed.

11. Before proceeding further, it is expedient to have a brief survey of the evidence of the prosecution as well as

of the defence available on record, so that the evidence available on record may be appreciated in a better way in the backdrop of the arguments advanced on behalf of the appellants and State.

P.W.-1/Rafique Khan is the brother of the deceased Zaheer and was accompanying him at that point of time. He has stated that Munna was working with Zaheer and on the fateful day at 8:30 pm, when he along with Zaheer came to the house of Munna to take him (Munna) with them and gave a call to him from his main door, father of Munna i.e. Ram Shanker came out followed by Siya Ram, Kalloo, Harishchandra, Karan Singh and 03 other unknown persons and they caught hold of the deceased. Ram Shanker, Kallu, Harishchandra and Karan Singh caught hold of the deceased and Siya Ram took out a knife from his pocket and started stabbing the deceased below his chest. The incident was witnessed by him as well as by Shamim and Krishna Kumar, who were holding torches in their hand and a*''Dhibri'* was also lighted inside the house. He also narrated the motive of crime as some dispute about monetary transaction between Siya Ram and Zaheer. He acknowledges that the FIR was written by Raees on his dictation.

In cross-examination, he stated that Munna was working as an employee of Zaheer, so was Putanni. On the fateful night, they took a contract of decorative lighting near Shamsherganj and all material pertaining to that was already transported to the Site and as Munna did not come to the shop, they came to the house of Munna to call him. He further stated that responding to the call given by deceased- Zaheer, at first, Ram Shanker came out and thereafter other accused persons named by him in his chief-examination emerged and dragged Zaheer inside the house. They took his brother inside the house near the door of "Baretha' and at that time Siya Ram took out a knife and stabbed Zaheer. He did not go inside the house and raised an alarm. His brother used to come at the house of Munna as and when required. The dead body of Zaheer was lying near the door. He further stated that a women lived in the house of Munna and he did not know whether she was of loose character. He stated to have told "Daroga Ji' that she was of loose character and she was on talking terms with his brother Zaheer and his brother has been killed due to this.

P.W.-2/Mohd. Shamim is a witness, who though was not accompanying the deceased or P.W.-1/Rafiq Khan, but on the fateful day, he went to the shop of deceased, as he was in need of some money and when he did not find Zaheer at the shop and was informed by a neighbor Shopkeeper that Zaheer had gone to Munna's home, he came to Manpur. When he reached near the Railway line, he heard an alarm being raised by Rafique, which was coming from the house of Munna. He went near the main door of Munna and saw 5 to 6 persons catching hold of Zaheer, he recognized few of them as Siya Ram, Kalloo, Harishchandra and Ram Shanker but could not identify others. Siya Ram stabbed Zaheer with a knife, who fell down and he gave another blow and thereafter, accused persons fled away. He was having a torch and according to him, a "Dhibri' was also lighting inside the house. In nut shell, he stated that he went to the shop of Zaheer as he was in need of some money and after being informed that Zaheer had gone to the house of Munna, he came there and on the way he met

Krishna Kumar. When he reached the spot, he found Rafique raising an alarm that Zaheer was being dragged and he found all accused persons surrounding the deceased and therefore, he could not see who amongst the accused persons was holding which part of the body of Zaheeer. Siya Ram's face was in front of Zaheer and all other accused persons were scattered here and there. There was no source of light at the place, where Zaheer was being dragged and only a "Dhibri' was lighting at the door. He again stated that the main door of the house was open and he did not make any attempt to save his brother. He further stated that his brother was dragged for about 10 ft. and all accused persons were catching hold of him. He remained at the door till the incident was over and when the accused persons stopped assaulting the deceased, he returned to his home. He further stated that Krishna Kumar took his own way from Manpur Crossing. When he first heard the alarm raised by Rafique, he could not understand that Zaheer is being done to death or who are the persons committing the crime. Zaheer was injured below his chest and he had told at his home that the knife might have been used by only one person.

P.W.-3/Constable Vishnu Narayan Shukla has proved the Chick FIR, Exhibit-ka-2 and G.D., Exhibit-ka-3 to be in his own hand writing and signatures.

P.W.-4/Doctor Nalini Kant Tripathi has proved to have conducted the postmortem on the body of the deceased (Zaheer) on 23.05.1995 at about 11:30 am and also to have prepared the postmortem report, Exhibit-ka-4. The injuries noted by him on the person of the deceased Zaheer as well as other observations pertaining to internal and external examination have been elaborately dealt with in Para no. 4 of this Judgment.

P.W.-5/Shri M.M. Khan is the Investigating Officer of the crime, who proved preparation of Inquest Report as Exhibit-ka-5. He also stated to have prepared and proved necessary papers required for the postmortem of the deceased and have stated to have also prepared the Site Plan, Exhibit-ka-10 and Memo of collection of blood stained and simple soil as Exhibit-ka-11 and also to have submitted the Charge-sheet against the accused persons as Exhibit-ka-13.

In cross-examination, he stated that the body of the deceased was lying inside the house of Ram Shanker. There was a pool of blood around the body. He found one wound below the chest of deceased, which may be caused by any sharp aged weapon. According to him, he found no other visible injury marks on the body of the deceased and he also did not find any trail of blood from the main door of the house till the place, where the body was lying. He further stated in his cross-examination that he did not find any sign of "struggle' near the dead body. He admitted to have been told by witness Shamim that deceased was of a bad character and he along with accused persons were having illicit relationship with the same girl and reason of his murder was the bad character of the deceased. He further stated that if someone is standing at the right side of the main door of the house of Ram Shankar, where the dead body of the deceased was found, he could not see what is happening inside the house. While

referring to the Site Plan, this witness stated that from Point-B and C shown in the Map, one could not be able to see Point-A.

P.W.-6/Raees Khan @ Rahees is brother of deceased, who stated to have written the FIR on the dictation of P.W.-1/Rafique Khan and proved the same in his hand writing as Exhibit-ka-9. Admittedly, he came at the scene of occurrence after the incident was over, therefore, his testimony is not of much relevance so far as the commission of the crime is concerned.

Accused persons in their defence have also produced 04 witnesses:-

D.W.-1 Loknaam has been produced by the accused persons to prove the fact that the police arrested the Khemchandra at about 9-10 pm from his home.

D.W.-2 is Khemchandra, has also stated that he was arrested at about 9-10 pm. by the police from his home.

D.W.-3/Santram has stated that Siya Ram accused is known to him as they are residents of the same village. He is son of Ram Shanker Pasi. Munna is also the other son of Ram Shanker. He stated that deceased Zaheer was done to death and his dead body was lying in the house of Ram Shanker. Siya Ram also went to see the dead body along with him. He further stated that on the next day also, he saw Siya Ram in the village.

D.W.-4/Krishna Kumar is the witness about whom, P.W.-2/Mohd. Shamim has stated that he met him at Manpur Crossing and from there, he took his own way. This witness stated that Ram Shanker came to meet him about 10 days ago. He met with the Investigating Officer, however, his statement was not recorded by him. He went to the scene of crime. Before incident, he was at Manpur Crossing, where he met with Shamim (P.W.-2) who told him to accompany him to village Manpur. Thereafter, Shamim departed from there and he after taking beetle returned to his home. When he arrived at his house, a little thereafter there was alarm in the village that Shamim had been killed. He also went to the spot along with others and saw that the dead body of Zaheer was lying inside the house of Ram Shanker and there was a pool of blood. He went to the spot at about 8:00 pm. He was not having any watch with him. He stated that Ram Shanker was also there.

12. Having gone through the evidence made available on record, the case of the prosecution, as put forth in the shape of oral and documentary evidence before the Court below, is that, deceased Zaheer was running a shop of electrical goods at Village Manpur and he was also doing the work of electricity decoration. Munna, who is the son of accused-appellant/Ram Shanker Pasi was working in his shop as an employee and he used to install decorative lights as and when required. On the fateful night, deceased Zaheer came to the house of Munna with his younger brother Rafiq, as he had sent decorative material at a Site and as on that day Munna did not come to the shop, they came to the house of Munna for the purpose of sending him to the Site for installation of decorative lights. The story as unfolds further from the statement of witnesses is that at 8:30 pm, when

deceased Zaheer along with Rafique arrived at the house of Munna and called him (Munna) from the main door of his house, at first Ram Shanker emerged from inside the house and, thereafter, all other accused persons came and caught hold of Zaheer and dragged him inside the house of Ram Shanker, while others caught hold of the deceased from all around , Siya Ram took out a knife and stabbed Zaheer below his chest and all other assaulted him with fists and kicks.

13. The first submission of Ld. Counsel for the appellants is that PW1 Sri Rafique and P.W.-6 Raees Khan are the real brothers of deceased and they are interested witnesses. Trial Court by the same judgment and order has acquitted the accused persons Santosh Singh, Arjun Singh and Khemchandra of the charges under Sections 147, 148, 149/302 I.P.C. and on the same set of evidence convicted the appellants, which is not tenable in the facts and circumstances of the case.

So far as the submission of Ld. Counsel for the appellants pertaining to the two witnesses i.e. PW1 Sri Rafique and P.W.-6 Raees Khan, being relatives of the deceased is concerned, this issue is no more res inregra. Hon'ble Supreme Court in ***Gangabhavani vs. Rayapati Venkat Reddy and Ors. , MANU/SC/0897/2013*** has held as under :-

"11. It is a settled legal proposition that the evidence of closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.(Vide: Bhagaloo Lodh and Anr. v. State of U.P. MANU/SC/0700/2011 : AIR 2011 SC 2292; and Dhari and Ors. v. State of U.P. MANU/SC/0848/2012 : AIR 2013 SC 308).

12. In ***State of Rajasthan v. Smt. Kalki and Anr. MANU/SC/0254/1981 : AIR 1981 SC 1390,*** *this Court held:*

"5A. As mentioned above the High Court has declined to rely on the evidence of P.W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased".....For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested'. In the instant case P.W. 1 had no interest in protecting the real culprit, and falsely implicating the Respondents."(Emphasis added)(See also: Chakali Maddilety and Ors. v. State of A.P. MANU/SC/0609/2010 : AIR 2010 SC 3473).

13. In ***Sachchey Lal Tiwari v. State of U.P. MANU/SC/0865/2004 : AIR 2004 SC 5039,*** *while dealing with the case this Court held:*

"7....Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."

In ***Bhagaloo Lodh and Ors. vs. State of U.P. reported in MANU/SC/0700/2011,*** *It was held as under :-*

"14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. ***(Vide: M.C. Ali and Anr. v. State of Kerala MANU/SC/0247/2010 : AIR 2010 SC 1639; Myladimmal Surendran and Ors. v. State of Kerala MANU/SC/0670/2010 : AIR 2010 SC 3281; Shyam v. State of Madhya Pradesh MANU/SC/7112/2007 : (2009) 16 SCC 531; Prithi v. State of Haryana MANU/SC/0532/2010 : (2010) 8 SCC 536; Surendra Pal and Ors. v. State of U.P. and Anr. MANU/SC/0713/2010 : (2010) 9 SCC 399; and Himanshu @ Chintu v. State (NCT of Delhi) MANU/SC/0006/2011 : (2011) 2 SCC 36).***

In view of the law laid herein above, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses."

It is therefore settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with deceased is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person.

However, in such a case Court has to adopt a careful approach and analyse the evidence of such witness to find out whether he is a natural witness and whether in the facts and circumstances of the case his evidence is cogent and credible. Keeping in view the above factual and legal matrix, we do not find any substance in the sumissions of Ld. Counsel for appellants that the testimony of the PW-1 Sri Rafeeque and PW-6 Raees be discarded only on the basis of their relation with the deceased.How ever the same has to be appreciated with care and caution.

So far as second submission of the Ld. Counsel for appellants with regard to the fact that some accused persons have been acquitted and some have been convicted on the same set of evidence by the trial Court is concerned, it is permissible for any Criminal Court to sift the evidence produced by the prosecution and to seprate truth from falsehood and if in this exercise the trial Court is able to seprate grain from the chaff, the reliable and acceptable part of the evidence can be accepted and the untruthful part of the evidence may be rejected and on the basis of truthful evidence some accused may be convicted and others may be acquitted.

Hon'ble Supreme Court Of India in ***Mahendran and Ors. Vs. State of Tamil Nadu and Ors. Reported in MANU/SC/0257/2019*** in para 38 of the report held as under :-

"38. ..... The argument that the entire case set up is based on falsehood and thus not reliable for conviction of the Appellants, is not tenable. It is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in Gangadhar Behera's case, wherein the Court held as under:

15 . To the same effect is the decision in State of Punjab v. Jagir Singh MANU/SC/0193/1973 : (1974) 3 SCC 277 and Lehna v. State of Haryana, MANU/SC/0075/2002 : (2002) 3 SCC 76. Stress was laid by the Accused-Appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an Accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an Accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other Accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of Rule of law. It is merely a Rule of caution. All that it amounts to, is that in such cases

testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory Rule of evidence". (See Nisar Alli v. State of U.P. MANU/SC/0032/1957 : AIR 1957 SC 366) Merely because some of the Accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the Accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab MANU/SC/0122/1955 : AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound Rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. MANU/SC/0254/1972 : (1972) 3 SCC 751 and Ugar Ahir v. State of Bihar MANU/SC/0333/1964 : AIR 1965 SC 277.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. MANU/SC/0093/1952 : AIR 1954 SC 15 and Balaka Singh v. State of Punjab MANU/SC/0087/1975 : (1975) 4 SCC 511.) ....."

3 9 . Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed."

In view of above factual and legal background the trial Court, within permissible limits, could sift the evidence and act on the acceptable part of the testimony of prosecution witnesses with regard to some accused persons and can reject the same with regard to the other accused persons.

14. The next submission of Ld. Counsel for the appellants is to the effect that the deceased might have been injured somewhere by some unknown persons and to save his life, he fell down in the courtyard of Ram Shanker's house and due to the fact that body of the deceased has been found in the house of Ram

Shanker, he and other appellants have been falsely roped in.

Perusal of the record and evidence available thereon, in the background of the above argument would reveal that P.W.-1/Rafiq has stated in his statement that when Zaheer called Munna from his main gate, Ram Shanker and other accused persons emerged out and dragged deceased in the house and Siya Ram thereafter stabbed him in the Stomach.P.W.-2/Mohd. Shamim has also narrated the same story and deposed that the body of deceased was lying inside the house, after he was stabbed with a knife by Siya Ram. P.W.-5/Shri M.M. Khan, Investigating Officer of the crime has also found a pool of blood near the dead body and collected the blood stained and normal soil from there and prepared a memo, Exhibit-ka-11. Significantly, no trail of blood was found by him from the main door of Ram Shanker's house till the spot whereon body of deceased was lying. In Inquest, (Exhibit-ka-5) also it is stated that the body of deceased was lying inside the house of Ram Shanker Pasi, where there is a pool of blood around it. Importantly, D.W.-4/Krishna Kumar also in his statement stated that he visited the house of Ram Shanker Pasi on the same night, where the dead body of the deceased was lying and there was a lot of blood around it.

The above evidence available on record, clearly suggests and prove that the deceased Zaheer was done to death at the place where his body was found and the submission of Ld. Counsel for the appellants that deceased got himself injured somewhere else and just to take shelter, he came in the house of Ram Shanker Pasi, appears to be not correct in the facts and circumstances of the case.

15. Ld. Counsel for the appellants further submits that the appellants were not having any prior information about arrival of deceased at the house of Munna and their was no previous enmity of deceased with appellants, therefore there was neither any time nor occasion for the appellants to form any unlawful assembly and infact no unlawful assembly was ever formed by the appellants and the evidence of eye witnesses is not reliable. In the alternative it is also argued that even if the case of prosecution is taken on its face, the act of Siyaram may not travel beyond second part of Section 304 IPC. Moreover the motive in the instant case assumes importance and not proving of motive renders the case of prosecution as not believable and the Trial Court has materially erred in convicting the appellants with the aid of section 149 of IPC.

Hon'ble Supreme Court Of India in ***Chanakya Dhibar (Dead) Vs. State of West Bengal and Ors., MANU/SC/1096/2003*** while dwelling on the scope of section 149 IPC has held as under :-

"11. The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the

common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it, a common object may be formed by express agreement after mutual constitution, but that is by no means necessary. It may be formed at any stage by all or a few members or the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

12. 'Common object' is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behavior of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the cutset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

13. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that he offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikarange Gowda and Ors. v. State of Mysore, MANU/SC/0116/1956 : 1956CriLJ1365 ."

In ***Lalji v. State of U.P. MANU/SC/0283/1989 i****t was observed that:*

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.""

16. Hon'ble Supreme Court in ***Roy Fernandes vs State of Goa and Ors. Reported in MANU/SC/0072/2012 w***hile eloborating the scope of section 149 of the penal code has held as under :-

"19. In Gajanand and Ors. v. State of Uttar Pradesh MANU/SC/0173/1954 : AIR 1954 SC 695, this Court approved the following passage from the decision of the Patna High Court in Ram Charan Rai v. Emperor MANU/BH/0073/1945 : AIR 1946 Pat 242:

"Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

20. This Court then reiterated the legal position as under:

The question is whether such knowledge can be attributed to the Appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The Appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 Indian Penal Code. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the Appellants, much less that they would be used in order to cause death.

21. In Mizaji and Anr. v. State of U.P. MANU/SC/0040/1958 : AIR 1959 SC 572 this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of Indian Penal Code was, therefore, attracted and the conviction of the members of the assembly for murder legally justified. This Court analysed Section 149 in the following words:

6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a pre-concert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which

the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.

*22. In Shambhu Nath Singh and Ors. v. State of Bihar MANU/SC/0214/1959 : AIR 1960 SC 725, this Court held that members of an unlawful assembly may have a community of object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court Gangadhar Behera and Ors. v. State of Orissa MANU/SC/0875/2002 : 2002 (8) SCC 381 and Bishna Alias Bhiswadeb Mahato and Ors. v. State of West Bengal MANU/SC/1913/2005 : 200*5 (12) SCC 657 similarly explain and reiterate the legal position on the subject."

17. Hon'ble Supreme Court Of India in ***Kuldip Yadav and Ors. Vs. State of Bihar, MANU/SC/0390/2011*** while commenting on the scope of conviction with the aid of section 149 of penal Code has held as under :-

*"Para 25-.....**149. Every member of unlawful assembly guilty of offence committed in prosecution of common object**.-If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.*

26. The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only

the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established.

The above principles have been reiterated in Bhudeo Mandal and Ors. v. State of Bihar MANU/SC/0125/1981 : (1981) 2 SCC 755.

27. In Ranbir Yadav v. State of Bihar MANU/SC/0245/1995 : (1995) 4 SCC 392, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

*28. In Allauddin Mian and Ors. Sharif Mian and Anr. v. State of Bihar MANU/SC/0648/1988 : (1989) 3 SCC 5, this Court held: ...Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done i**s such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly.** Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC....*

29. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in

prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

30. In Rajendra Shantaram Todankar v. State of Maharashtra and Ors. MANU/SC/0002/2003 : (2003) 2 SCC 257 : 2003 SCC (Crl.) 506, this Court has once again explained Section 149 and held as under:

14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behavior of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 - either clause - is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act...." (Emphasis ours)

18. Hon'ble Supreme Court Of India in ***Manjit Singh Vs. The State of Punjab, MANU/SC/1195/2019*** held as under :-

"14.4. In the case of Subal Ghoral v state of West Bengal, MANU/SC/0296/2013 (supra), this Court, after a survey of leading cases, summed up the principles as follows:

52. The above judgments outline the scope of Section 149 Indian Penal Code. We need to sum up the principles so as to examine the present case in their light. Section 141 Indian Penal Code

defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 Indian Penal Code postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 Indian Penal Code provides for punishment for being a member of unlawful assembly. Section 149 Indian Penal Code provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of theperson falls within the ingredients of Section 149 Indian Penal Code, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 Indian Penal Code if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 Indian Penal Code. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the Accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to

conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a Rule of caution."

19. Therefore the evidence of the instant case is to be appreciated on the basis of principles highlighted in the above mentioned case reports.The facts of the case, as are canvassed by the prosecution eye witnesses PW-1 Rafique and PW-2 Shamim, who claimed to have seen the crime, are to the tune that when deceased at the fateful night arrived at the house of Munna, with his brother Rafique and called him, he was dragged in the house by the accused persons. Deceased was further dragged towards the inner side of the house to a place called "Baretha', and it was there, while he was being caught hold by other accused persons, Siya Ram stabbed him in the stomach. Perusal of First Information Report would also reveal that no motive of the crime has been attributed to the accused persons. However, it has come in the statement of P.W.-1 Rafique that there was some dispute between the deceased Zaheer and Siya Ram with regard to the payment of some money, but nothing has come either in the statement of this witness or other witnesses of the prosecution as to what was the transaction between the deceased and Siya Ram. No other prosecution witness has stated about this motive, therefore, this motive in the facts and circumstances of the case appears to be neither genuine nor has been proved by the prosecution. P.W.-1/Rafique Khan in his cross-examination has stated that a women lived in the house of Munna and she was on talking terms with his brother Zaheer. He further stated to have informed "Daroga Ji' (investigating officer) that this lady was of loose character and due to this, his brother has been killed. P.W.-5/M.M. Khan, Investigating Officer in his evidence has stated that deceased and accused persons were having illicit relationship with the same women, but neither he nor P.W.-1/Rafique has stated as to who was the women with whom deceased as well as accused persons were having illicit relationship. Therefore this Lady has also not been identified by the Investigating Officer as well as by P.W.-1/Rafique. Hence this motive is also not proved by prosecution.

20. Though, no motive of the crime was alleged in the FIR, however, in the statement before the Court, a motive pertaining to some dispute of money was attempted to be developed by P.W.-1/Rafique. However, during his cross-examination he developed another motive, when he stated that his brother has been killed as he was having terms with a lady living in the house of Munna, but no name and particulars of that lady was narrated by him. Therefore, in the facts and circumstances of the case, no motive has been proved by the prosecution which may be accepted in the facts and circumstances of the case, which might have prompted the accused persons to commit the crime.

It is true that in a case based on direct evidence, motive looses its significance, however, since here we are dealing with a case, where no prior enmity between the deceased Zaheer and accused persons has been proved and in the background of the fact that it is not a case where accused persons have gone somewhere by forming an unlawful

assembly rather Victim Zaheer himself came to the place of occurrence, which is the dwelling house of some of the accused persons, therefore, the motive in the peculiar facts and circumstances of the case, becomes important in the background that the accused persons have been convicted by the Trial Court with the aid of Section 149 of I.P.C. and it was not the case of prosecution that on the fateful day accused persons were having any prior information that deceased Zaheer was coming to the house of Munna. Per contra, the case of the prosecution is that, on the fateful day, as Munna did not go to the shop of Zaheer and as deceased had taken some assignment of decoration in a village and material of the same had already been dispatched, they came to Munna's house to take him to fix decorative lights at the site and when deceased Zaheer gave a call to Munna, accused persons dragged him inside the house and P.W.-1/Rafique remained outside at the main door as accused persons dragged the deceased inside for some distance and thereafter Siya Ram took out a knife from his pocket and stabbed Zaheer in Stomach and thereafter all accused persons fled away.

21. It has also come in the evidence that at the time of incident only a *''Dhibri'* was lighted at the *''Barotha'*. P.W/.-5/Investigating Officer Shri M.M. Khan in his evidence has stated that those standing at B and C points in the Map could not see anything happening at the Point-A. It is to be recalled that P.W.-2/Mohd. Shamim has stated that he along with DW-4 Krishna Kumar witnessed the crime while standing at Point-B and C. So keeping in view the fact that there was only a *''Dhibri'* lighting and though PW-1 Rafique was having torch with him, he could not have seen the minute details of incident happening at or beyond *''Barotha'*, as is evident from the Site Plan, Exhibit-ka-10. Both witnesses of fact P.W.-1/Rafique and P.W.-2/Mohd. Shamim have also admitted that they did not go inside the house beond the main door till accused persons fled away. Therefore both these witnesses may have an impression of involvement of all accused persons in the incident.

22. We now revert to the discussion that nobody amongst the accused persons was having any information that deceased and his brother Rafique was coming to take Munna with them and on being called, the accused persons, in the spur of the moment, dragged Zaheer inside and after dragging him for some distance, he was caught hold by accused persons and, thereafter, Siya Ram stabbed him in the Stomach. This part of the story of prosecution is highly improbable and not acceptable as when the accused persons were not having any prior information or knowledge about the arrival of deceased, there is no possibility that any unlawful assembly might be formed by accused persons before that time, either to cause murder or hurt to deceased Zaheer. Now, when there is no previous enmity proved between accused persons and the deceased, the unlawful assembly could not have been formed at the point when Zaheer gave a call to Munna from his main door. So the only probability or possibility of formation of an unlawful assembly may be at the time, when accused persons saw the deceased Zaheer. In this backdrop, statement of Investigating Officer P.W.-5/Shri M.M. Khan is significant, when he stated that he did not find any sign of Scuffle near the dead body. In the same line is the

statement of P.W.-4/Dr. Nalini Kant Tripathi, who conducted the postmortem on the body of the deceased and stated that there were only 02 incised wounds, one at Stomach and another at waist of the deceased. He categorically stated that apart from these 02 injuries, there was no other injury of any kind found on the body of the deceased. He specifically stated that there was no bruise, contusion or abrasion found on the body of the deceased. It is highly improbable, rather next to impossible that if deceased was being dragged for some distance by 7 or 8 persons and was having a scuffle, which is natural in the facts and circumstances of the case, he would not receive any kind of marks or injuries on his body during the dragging. Certainly he shall receive at least bruises, contusions or abrasions or, at least, some marks on his wrist or hands, when he was caught hold by 7 to 8 persons. Strangely, neither any injury nor any such mark has been found on the body of the deceased and absence of any such injury or mark, which may be the result of dragging and scuffling or even of catching hold coupled with the statement of P.W.-5/Shri M.M. Khan, Investigating Officer that he did not notice any sign of struggle near the body, belies the statement of prosecution eye witnesses, so far as their statement pertaining to the dragging of the deceased by 7 or 8 persons inside the house of Ram Shanker is concerned.

In ***Lallu Manjhi vs. State of Jharkhand, AIR 2003 SC 854,*** *Hon,ble Supreme Court has held in Para 10 that "The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely* ***(i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable, nor wholly unreliable.*** *In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness."*

In ***AIR 2003 SUPREME COURT 3617, Sucha singh v/s State of Punjab*** *Honble Apex Court after considering* ***Masalti and others vs. State of U.P. MANU/SC/0074/1964, State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76),*** *has opined as under:- "Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The*

maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence.' (See Nisar Ali v. State of Uttar Pradesh (AIR 1957 SC 366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurcharan Singh and another v. (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because18witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justicewould come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and another v. State of Madhya Pradesh, 1972 3 SCC 751) and Ugar Ahir and others v. State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and others v.state of punjab (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and another (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and others v. State of Bihar etc. (2002 (4) JT (SC) 186)."

23. Therefore the fact of dragging the deceased by appellants for some distance, in absence of any injury or mark on his body and at the spot, does not appear to be either probable or has been

proved by the evidence available on record. Now, when the dragging part of the story of the prosecution has not been found truthful and acceptable, there is nothing in the evidence produced by the prosecution, which may classify the assembly of the accused persons as Unlawful Assembly. In absence of any previous enmity and any prior information of the arrival of deceased at the house of Munna, the assembly of accused persons at the house of Ram Shanker could not be termed as Unlawful Assembly. Therefore, what transpires from the evidence available on record is, that when deceased Zaheer went inside the house of Ram Shanker, as he was a regular visitor of house of Munna, accused persons were inside the house and there was some scuffle of the deceased only with Siya Ram as a result of which he stabbed the deceased in his Stomach and by such assault, the deceased died at the spot. In this whole factual backdrop, there was no possibility of formation of any unlawful assembly by the accused appellants, with an object to murder Zaheer.

In ***AIR 2013 SUPREME COURT 3150, Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan,*** *Hon,ble Supreme Court has held that* ***Para 17*** *"Suspicion, however grave it may be, cannot take place of proof and there is a large difference between something that 'may be' proved and 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason, that the mental distance between 'may be' and 'must be' is quite large and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the Court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."*

Therefore, keeping in view the evidence on record, it is evident that there was no unlawful assembly formed by accused persons, as there was neither any motive nor sufficient time or prior information of the arrival of deceased nor it is proved that all accused persons dragged the deceased inside the house, as no injury of any kind has been found on the person of the deceased except two incised wounds stated to be inflicted by Siya Ram. Therefore, Simply by standing and witnessing a quarrel from howsoever close range, could not render the other appellants as being part and parcel of any unlawful assembly. In view of above discussion, it can not be believed that the

accused persons had formed any unlawful assembly or had acted in furtherance of any unlawful object or common intention.

24. The instant case can be viewed from another angle as there cannot be any doubt to the preposition that unlawful assembly could also be formed at the spur of the moment just before or during the occurrence. It has been held by *Catena of Decisions,* some of which have been quoted herein-before, that the formation of any unlawful assembly can be gathered by the behavior of the assembly prior, during or subsequent to the commission of the crime as well as the arms, which are being carried by the members of such Unlawful Assembly and also the manner of assault. As said earlier, It is also possible that any unlawful assembly may be formed at the spur of the moment, but for that purpose, in our considered opinion, there must be some prior enmity between the parties, so on the basis of that enmity without happening of anything special or without any communication between the members, the accused persons may form an assembly instantly, which may be unlawful, having an illegal object. But here we are dealing with a case, where no prior enmity has been proved and the motive, which has been suggested is neither acceptable nor proved in the facts and circumstances of the case. The admitted facts on record are that none of the appellants, except Siya Ram, was carrying any arm of any kind at the place of incidence. It is also established that only Siya Ram is possessing a knife or any other sharp edged weapon and this was not disclosed to any other appellant. Nothing has either been produced on record or stated by any eye witness as to what communication, if any ?, the members of the unlawful assembly were making with each other, during the time of alleged scuffle, whereby any inference of instant formation of unlawful assembly can be derived. Therefore there is no evidence available on record whereby the formation of any unlawful assembly, in the spur of the moment, may be inferred either before or during the alleged scuffle, as no sign of any scuffle has either been found on the spot or on the body of deceased and the part of the prosecution story pertaining to dragging of deceased by all accused persons inside the house of Ram Shanker has been held herein before, not believable. Hence there is nothing left on record which may prove the fact that the accused persons during the course of alleged scuffle were having any conversation with each other, which may suggest that any unlawful assembly was actually formed in the spur of moment and the proved facts suggest only one inference that whatever arguments or any scuffle occurred at that point of time the same occurred only between the deceased and the appellant Siya Ram and other appellants were only present there and that there was no unlawful assembly formed either before or during the occurrence.

In fact the prosecution is completely silent on the point as to whether any communication was made between Siyaram and other members of alleged unlawful assembly during alleged assault. None of the eye witnesses has stated anything allegedly done or said by the other accused persons during alleged scuffle. As said earlier, the theory of prosecution pertaining to the fact that the deceased was dragged by all accused persons in the house has not been found believable, in the facts and circumstances of the case, nothing thereafter is left on

record which may render the assembly of accused persons in the house of Ram Shanker, as unlawful. When formation of any unlawful assembly either at the beginning or during the course of occurrence is not proved, the appellants could not be convicted with the aid of Section 149 of the I.P.C. Hence, in this situation, the role of every individual accused/appellant is to be seen for the purpose of determining his culpability. The theory of prosecution that other accused persons except Siya Ram caught hold of the deceased is not truthful and it appears that the genesis of the incident has been suppressed by the prosecution and also that there is no overt assigned to the other accused persons (Except Siya Ram), therefore, all accused persons except Siya Ram appear to have committed no offence. Simply being present in the house of Ram Shanker could not be an offence, when formation of any unlawful assembly with any of the object classified under Section 141 of the I.P.C. has not been found proved. In these circumstances, the appellants i.e. Karan Singh, Harish Chandra, Ram Shanker and Kalloo are liable to be acquitted of the charges framed against them.

25. Ld. Counsel for the appellants has also submitted that even if the prosecution case is taken to be established with regard to appellant Siya Ram, his act will not travel beyond the ambit of section 304 part II and according to him the trial Court has acted illegally in convicting him under section 302 IPC.

Hon'ble Supreme Court in ***Budhi Singh Vs. State of H.P.*** reported in ***MANU/SC/1126/2012*** has held as under:-

"*21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable: homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.*

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment

to the matters involved in the second and third stages.

11. A Bench of this Court in the case of Thangaiya v. State of Tamil Nadu [MANU/SC/1046/2004 : (2005) 9 SCC 650] pointed out the distinction between the two sections and observed as under:

9. This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of Indian Penal Code culpable homicide is the genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, Indian Penal Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

Hon'ble Supreme Court Of India in ***Arjun and Ors. Vs State of Chhattisgarh*** reported in MANU/SC/0153/2017, wherein the appellants assaulted the deceased with katta, gandasa and stone and deceased fell down and sustained injuries on his head and his brain matter came out and he died on the way to the hospital has held as under :-

"20. To invoke this exception (4), the requirements that are to be fulfilled have been laid down by this Court in Surinder Kumar v. Union Territory of Chandigarh MANU/SC/0589/1989 : (1989) 2 SCC 217, it has been explained as under:
7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.....

21. Further in the case of ***Arumugam v. State, Represented by Inspector of Police, Tamil Nadu MANU/SC/8108/2008*** *: (2008) 15 SCC 590, in support of the proposition of law that under what circumstances exception (4) to Section 300 Indian Penal Code can be invoked if death is caused, it has been explained as under:*

18. The help of Exception 4 can be invoked if death is caused (a) without

premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 Indian Penal Code is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general Rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

23. When and if there is intent and knowledge, then the same would be a case of Section 304 Part I Indian Penal Code and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II Indian Penal Code. Injuries/incised wound caused on the head i.e. right parietal region and right temporal region and also occipital region, the injuries indicate that the Appellants had intention and knowledge to cause the injuries and thus it would be a case falling Under Section 304 Part I Indian Penal Code. The conviction of the Appellants Under Section 302 read with Section 34 Indian Penal Code is modified Under Section 304 Part I Indian Penal Code. As per the Jail Custody Certificates on record, the Appellants have served 9 years 3 months and 13 days as on 2nd March, 2016, which means as on date the Appellants have served 9 years 11 months. Taking into account the facts and circumstances in which the offence has been committed, for the modified conviction Under Section 304 Part I Indian Penal Code, the sentence is modified to that of the period already undergone."

In ***Surinder Kumar v. Union Territory, Chandigarh MANU/SC/0589/1989 (1989) 2 SCC 217,*** Hon'ble Supreme Court held that if on a sudden quarrel a person in the heat of the moment picks up a weapon which is handy and causes injuries out of which only one proves fatal, he would be entitled to the benefit of the Exception of section 300 IPC provided he has not acted cruelly. It was held that the number of wounds caused during the occurrence in such a situation was not the decisive factor. What was important was that the occurrence had taken place on account of a sudden and unpremeditated fight and the offender must have acted in a fit of anger. Dealing with the provision of Exception 4 to Section 300 this Court observed:

"..... To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue

advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."

In ***Ghapoo Yadav and Ors. v. State of M.P. (2003) 3 SCC 528, MANU/SC/0124/2003,*** *it is held as under :-*

"...The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight: (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300. IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4 It is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

In ***Sukhbir Singh v. State of Haryana (2002) MANU / SC/0116/2002, (2002) 3 SCC 327***, the appellant caused two Bhala blows on the vital part of the body of the deceased that was sufficient in the ordinary course of nature to cause death. The High Court held that the appellant had acted in a cruel and unusual manner in following words :-

"...All fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 IPC. After the injuries were inflicted and the injured had fallen down, the appellant is not shown to have inflicted any other injury upon his person when he was in a helpless position. It is proved that in the heat of passion upon a sudden quarrel followed by a fight, the accused who was armed with Bhala caused injuries at random and thus did not act in a cruel or unusual manner."

The question whether the act of the appellant will fall undder Section 304 Part I or Part II of the IPC, a distinction between these two parts of that provision was drawn in ***Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648, MANU/SC/0015/2012 i***n the following words:

"..... For punishment under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death...."

In ***Singapagu Anjaiah v. State of Andhra Pradesh (2010) 9 SCC 799, MANU/SC/0451/2010,*** *it was observed:*

"16. In our opinion, as nobody can enter into the mind of the accused, its intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused..."

In ***Basdev v. The State of PEPSU AIR 1956 SC 488,*** *drew a distinction between motive, intention and knowledge in the following words:*

"....Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things..."

Hon'ble Supreme Court in ***Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh (2006) 11 SCC 444, MANU/SC/8419/2006*** enumerated some of the circumstances relevant to find out whether there was any intention to cause death on the part of the accused :-

"...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre- meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden

quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention..."

In the case of ***Surain Singh Vs. State of Punjab reported in MANU/SC/0399/2017 (2017) 5 SCC 796,*** Hon'ble Supreme Court has reiterated the settled legal position about the purport of Exception 4 to Section 300 of IPC. In this case, the accused had repeatedly assaulted the deceased with a Kirpan and caused injuries resulting into death. After restating the legal position, the Court converted the offence to one under Section 304 Part-II instead of Section 302 IPC and observed as under:-

"15. The weapon used in the fight between the parties is 'Kirpan' which is used by 'Amritdhari Sikhs' as a spiritual tool. In the present case, the Kirpan used by the Appellant-accused was a small Kirpan. In order to find out whether the instrument or manner of retaliation was cruel and dangerous in its nature, it is clear from the deposition of the Doctor who conducted autopsy on the body of the deceased that stab wounds were present on the right side of the chest and of the back of abdomen which implies that in the spur of the moment, the Appellant-accused inflicted injuries using Kirpan though not on the vital organs of the body of the deceased but he stabbed the deceased which proved fatal. The injury intended by the Accused and actually inflicted by him is sufficient in the ordinary course of nature to cause death or not, must be determined in each case on the basis of the facts and circumstances. In the instant case, the injuries caused were the result of blow with a small Kirpan and it cannot be presumed that the Accused had intended to cause the inflicted injuries. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. It is clear from the materials on record that the incident was in a sudden fight and we are of the opinion that the Appellant-accused had not taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this Exception provided he has not acted cruelly.

16. Thus, if there is intent and knowledge then the same would be a case of Section 304 Part I and if it is only a case of knowledge and not intention to cause murder and bodily injury then the same would fall Under Section 304 Part II. We are inclined to the view that in the facts and circumstances of the present case, it

cannot be said that the Appellant-accused had any intention of causing the death of the deceased when he committed the act in question. The incident took place out of grave and sudden provocation and hence the Accused is entitled to the benefit of Section 300 Exception 4 of the Indian Penal Code."
(Emphasis Ours)

Hon'ble Supreme Court in ***Atul Thakur vs. State of H.P. & others, MANU/ SC/0018/2018, AIR 2018 SC 570***, while considering the applicability of Section 304 I.P.C., where deceased was assaulted with knife, held as under:-

"12. Taking overall view of the matter, the facts of the present case warrant invocation of Exception 4 to Section 300 of Indian Penal Code. For, it is a case of culpable homicide not amounting to murder inasmuch as the incident happened on account of sudden fight between the friends who had gathered for a drink party arranged at the behest of Hitesh Thakur. There was no pre-mediation and the act done by the Appellant was in the heat of passion without the Appellant taking any undue advantage or acted in a cruel manner. The number of wounds caused by the Appellant, it is a well established position, by itself cannot be a decisive factor. The High Court committed manifest error in being influenced by the said fact. What is relevant is that the occurrence was sudden and not premeditated and the offender acted in the heat of passion. The evidence supports the case of the Appellant in this behalf. The fact that the Appellant used weapon such as knife, is also not a decisive factor to attract Section 302 of Indian Penal Code. Neither the use of a knife in the commission of offence nor the factum of multiple injuries given by the Appellant would deny the Appellant of the benefit of Exception 4.

Therefore the role of appellant-Siya Ram, in commission of crime, is to be analyzed and appreciated in the background of above mentioned legal position.

26. Perusal of record would reveal that both eye witnesses of the crime i.e. P.W.-1/Rafique and P.W.-2/Mohd. Shamim have categorically stated in their statements that it was Siya Ram, who had stabbed deceased below his chest with a knife, which he was keeping in his pocket. The evidence of these witnesses of fact is believable and is reliable in the facts and circumstances of the case. P.W.-4/Dr. Nalini Kant Tripathi in his statement has corroborated the testimony of these eye witnesses by stating that at the time of postmortem, he found 02 incised wounds i.e. one at the stomach and the other at the waist of the deceased, of the dimension of 5 cm. x 2 cm. and 4 cm. x 2 cm., respectively. These 02 incised wounds correspond to the weapon of assault (knife) allegedly held by the appellant Siya Ram in his hand during the course of incident. P.W.-4 Doctor Nalini Kant Tripathi, further corroborated the testimony of P.W.-1/Rafique and P.W.-2/Mohd. Shamim with regard to the time of death of the deceased about which, he stated that the deceased might have died one day before the postmortem. He also stated that the knife used in the assault was having sharp edges on its both side.

Apart from the above mentioned 02 incised wounds, no other injury has been found on the body of the deceased as

well as no other signs of struggle have been noticed by the Doctor on the body of the deceased. He also did not find any contusion, bruise or even friction on any of the part of the deceased. P.W.-4 Doctor Nalini Kant Tripathi has also categorically ruled out that Injury No.2 could not be inflicted to the deceased from behind, if 6 to 7 persons had gripped the deceased from all around. Therefore, it is also established on record that the author of both these injuries found at the person of deceased, was Siya Ram and the same has been caused from the front of the deceased. This factual matrix also finds corroboration from the statement of P.W.-2/Mohd. Shamim at Page No. 2 of his statement, when he stated that only Siya Ram was in front of Zaheer (Deceased) and all other accused persons were standing here and there. Therefore, it is also proved beyond any doubt that fatal injuries to the deceased were actually inflicted by none other than the appellant Siya Ram in his individual capacity and not as a member of any unlawful assembly.

27. The motive suggested by P.W.-1/Rafique in his statement has not been proved and it transpires that either the prosecution has suppressed the actual motive or there was no motive at all. The only significant fact surfaced in the evidence of P.W.-1/Rafique and P.W.-5/Shri M.M. Khan, Investigating Officer of the crime is that there was some woman, who lived in the house of Munna with whom deceased was on talking terms and as per the Investigating Officer, deceased and accused persons were having illicit relationship with one and the same woman and this fact was informed to the Investigating Officer by P.W.-2/Mohd. Shamim. However, in contrast, P.W.-2/Mohd. Shamim in his cross-examination, on being categorically asked has stated that, he did not know whether deceased was of loose character and he did not have any talk with "Daroga Ji' (Investigating Officer) about any illicit relationship of deceased with any woman or regarding him being of loose character. So, in this factual backdrop, no motive or prior enmity of Siya Ram with the deceased has been proved.

28. As has been said earlier there was no prior information available to the accused persons, pertaining to the arrival of deceased Zaheer and it is also established by the acceptable and reliable part of the evidence of P.W.-1/Rafique and P.W.-2/Mohd. Shamim that the incident had happened without any pre-planning or pre-meditation, in the spur of the moment and only 02 blows of knife have been given by appellant Siya Ram in the Stomach and waist of the deceased, it is also established on record that appellant Siya Ram has not acted in any brutal or cruel
manner and actually no undue advantage has been taken by him in commission of the crime. Perusal of record further reveals that appellant Siya Ram was of 25 years old on 29.07.1998, when his statement under Section 313 of Cr.P.C. was recorded, therefore, he may be of the age of 45 or 46 years as of now. In the FIR, it is stated that Siya Ram gave a single blow below the chest of the deceased. In Inquest, Exhibit-ka-5, only one injury of knife has been found below the chest, though any question has not been put to the Doctor who conducted the postmortem and the knife, whereby injuries have been caused has not been recovered, the possibility of inflicting of these two injuries by a single blow of any

arm having a little longer blade with both sides sharp, could also be not ruled out. P.W.-1/Rafique has also stated that appellant Siya Ram started stabbing deceased below his chest. P.W.-1/Rafique in his cross-examination at Page No. 3 has stated that appellant, Siya Ram gave knife blows to the deceased causing him fall down. P.W.-2/Mohd. Shamim in his evidence has also stated that accused Siya Ram gave 02 blows.

29. Therefore, in peculiar facts and circumstance of the case as well as from the established facts, it is apparent that the act of appellant Siya Ram is covered under Section 304 Part-I of the I.P.C. instead of Section 300 punishable under Section 302 of the I.P.C. and, therefore, appellant Siya Ram is liable to be convicted under Section 304 Part-I of I.P.C. and not under Section 302 I.P.C.

30. In view of our aforesaid discussion, the appeal filed by the appellants namely **Karan Singh, Harish Chandra, Ram Shanker and Kalloo** is allowed. Appellants are acquitted of the charges levelled against them. From amongst the above appellants, appellant Kallo has been released on remission of sentence by State Government and other appellants are reported to be on bail, therefore, they need not to surrender in this case. Their bail bonds are cancelled and sureties are discharged. However, each of the appellant i.e. **Karan Singh, Harish Chandra, Ram Shanker and Kalloo** shall file a personal bond and two sureties each in the like amount to the satisfaction of the court concerned in compliance of the Provision as contained under Section 437-A of the Code of Criminal Procedure.

31. So far as appeal pertaining to appellant, Siya Ram is concerned, the same is **partly allowed.** The conviction of appellant Siya Ram is maintained, but in the facts and circumstances of the case as well as on the basis of established and proved facts, he is convicted under Section 304 Part-I of the I.P.C. instead of Section 302 I.P.C. and his sentence of imprisonment for life, as awarded by the Trial Court is modified to the sentence of 09 years' rigorous imprisonment along with fine of Rs. 20,000/- and in default of payment of fine to undergo further simple imprisonment of 03 months. Out of the amount of fine, Rs. 15,000/- shall be paid to the wife of the deceased (If she is alive), and in case she is dead, this amount shall be paid to his other legal heirs in equal proportion.

Shri Shahid Akhtar, Advocate was appointed as Amicus Curiae in Criminal Appeal No. 1839 of 2004 for appellant/Kalloo will get Rs. 10,000/- as honorarium.

Appellant Siyaram is reported to be on bail. He will surrender before the Trial Court within 15 days from today to serve the sentence as modified by this Court.

A copy of this judgment be sent to the Trial Court immediately for compliance and information.

(2019)10ILR A 2260

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2019

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Criminal Appeal No. 1005 of 2019

Dr. Vishnu Chandra Tripathi & Ors.
...Appellants

Versus

State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Sri Manoj Kumar Mishra, Sri Vinay Kumar

Counsel for Respondents:
Govt. Advocate, Sri Manoj Kumar Singh

A. Sections 323, 504, 506 IPC & 3(1) DA, Dha, SC/ST (Prevention of Atrocities), Act. - Appeal against conviction. Sections 200, 202, 203 and 204 I.P.C. discussed.

The proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

The Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Special Judge that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and inquiry report of investigation Under Section 202 of Code of Criminal Procedure, if any, the accused is answerable before the criminal court and there is sufficient ground for proceeding against the accused Under Section 204 of Code of Criminal Procedure, by issuing process for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction.

The summoning order passed by the special Court against law laid down therefore the same could not be allowed to stand.

Appeal allowed (E-2)

Case Law Referred: -

1. C.H.C.L. Employees Stock Option Trust Vs India Infalin Ltd. 2013(4) SCC 505

2. AIR 1998 S. C. 128, M/s. Pepsi Foods Ltd. & anr. Vs S.J.M. & ors.

3. AIR 2012 SUPREME COURT 1747, Bhushan Kumar & anr Vs St. (NCT of Delhi) & anr.

4. AIR 1976 SUPREME COURT 1947, Smt.

5. Nagawwa v/s Veeranna Shivalingappa Konjalgi & ors.

6. AIR 2015 SUPREME COURT 923, Sunil Bharti Mittal Vs Central Bureau of Investigation (Three Judges Bench)

7. AIR 2012 SUPREME COURT 1921, Nupur Talwar Vs Central Bureau of Investigation & anr.

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

1. Heard learned counsel for the appellants and learned AGA for the State as well as learned counsel for respondent no.2 and perused the record.

2. This Criminal Appeal under Section 14-A(1) SC/ST (P.A.) Act, 1989 has been filed against the order dated 29.3.2019 passed by Special Judge SC/ST Act (Prevention of Atrocities), Act, Bahraich in Criminal Case No. 46/2019 Bindra Pasi Vs. Dr. Vishnu Chandra Tripathi and others, by which the appellants have been summoned under Sections 323, 504, 506 IPC & 3(1) DA, Dha, SC/ST (Prevention of Atrocities), Act, relating to Police Station Kotwali Nagar, District Bahraich.

3. Brief facts giving rise to this appeal are, that a complaint case was filed

before Special Judge SC/ST Act, Bahraich by complainant, namely, Bindra Pasi against the appellants alleging that he belongs to a scheduled caste community and for the last many years, he is working as a house hold servant at the residence of Dr. Shiv Prasad Ojha. On 10.2.2019 at about 1,00 P.M. the appellants came to the residence of his Master Dr. Shiv Prasad Ojha. Two out of three persons were holding a briefcase in their hands and on being asked they narrated their names as Dr. Vishnu Chandra Tripathi, Principal Raj College, Jaunpur and Sudhakar Maurya- Accountant of the same College while the third person, namely, Sanjay Kumar Singh introduced himself as clerk in the same College.

4. It is further stated in the complaint that he told these persons that his master is not available at home, on this Dr. Vishnu Chandra Tripathi and Sudhakar Maurya asked his name and on being told they at once became angry and addressed him with his caste. On this he went inside the house and on the instruction of his master informed them that his master will not meet them. On this all these three persons physically assaulted him and also threatened him of his life. They also attempted to drag him towards their vehicle which was standing nearby.He made a noise on which other servants, namely, Shankar Dayal and Kuldeep etc. arrived and helped the complainant. He informed the Police Station Kotwali Nagar about the incident but no action was taken by the police, on which he made a complaint to the Superintendent of Police, Bahraich. He could not get his injuries examined due to his poorness.

5. The trial court after recording the statement of the complainant and his two witnesses, namely, Kuldeep and P.W.2 ? Vikas by impugned order summoned the appellants to face trial under Sections 323, 504, 506 and Section 3(1) Da, Dha of SC/ST Act and the same is the subject matter of this appeal, being challenged by the appellants.

6. Learned counsel for the appellants submits that the appellants are Principal, Accountant and Assistant Teacher of R.K.D. P.G. College, Jaunpur. Earler one Dr. Shiv Prasad Ojha (employer of the complainant) was the Principal of this College, who is a permanent resident of Brahmnipura, whohas retired as Principal of this College.

7. It is next submitted that the appellants no. 1, 2 and 3 are permanent resident of villages situated in Jaunpur district while Dr. Shiv Prasad Ojha, where complainant/ opposite party no.2 is working as domestic, is a resident of Bahraich.

8. It is next submitted that one Dr. Asha Ram made a complaint against Dr. Shiv Prasad Ojha on 4.4.2012 pertaining to some financial embezzlement allegedly made by him and a committee to inquire the matter was constituted, which submitted a reprot against Dr. Shiv Prasad Ojha on 21.6.2018, which was forwarded to Regional Higher Educational Officer/ Administrator, Varanasi Region. A First Information Report was also lodged by appellant no.1 agaisnt Dr. Shiv Prasad Ojha and one other co-accused (Annexure no.2) pertaining to the fact that Dr. Shiv Prasad Ojha is pressurizing the appellant no.1 to illegally provide him a 'Non-encumbrance Certificate' and when he refused to issue the same, on 6.2.2019 two persons came to his house and while showing pistol threatened him to issue the

'Non-encumbrance Certificate' to Dr. Shiv Prasad Ojha otherwise he will be shot dead. It is alleged that when Dr. Shiv Prasad Ojha came to know about the registration of the FIR on 6.2.2019, he through his servant filed instant complaint on 18.2.2019 with the false and fabricated allegations. It is further submitted that the instant complaint is nothing but the counter blast of the First Information Report lodged by the appellant no.1 against Dr. Shiv Prasad Ojha and the complaint has only been lodged because the appellant no.1 refused to issue an illegal 'Non-encumbrance Certificate' to Dr. Shiv Prasad Ojha, which he was requiring to use as his defence in a departmental proceeding instituted against him.

9. It is further submitted that the court below has materially erred in summoning the appellants as it was apparent on the face of the record that the complaint has been made with an ulterior motive. It was the duty of the trial court to see the alleged facts in the back ground of the probability. The facts alleged in the complaint are patently absurd and could not be believed by a normal prudent person and therefore the instant summoning order is nothing but abuse of process of law and therefore is not sustainable and is liable to be set aside.

10. Learned AGA, however, submits that at the stage of summoning deep evaluation of the evidence is not required and only a prima facie case is to be seen. Keeping this principle in view no illegality has been committed by the court below.

11. Learned counsel for the respondent no.2 submits that the appellants despite being informed that Shri Shiv Prasad Ojha does not want to meet them assaulted the complainant as also addressed him with castiest remarks and also dragged him towards their vehicle which was standing nearby.

12. It is further submitted that statement of the complainant has been amply corroborated by the statement of P.W.1 and P.W.2 and therefore there was sufficient material / evidence available with the subordinate court to pass order of summoning. Therefore, no illegality has been done committed by the trial court and no interference is required in the impugned order, therefore the appeal preferred by the appellants is liable to be dismissed.

13. At this juncture it is fruitful to have a look so far as the law pertaining to summoning of the accused persons in a complaint case is concerned and the perusal of the case law mentioned herein below would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course.

14. In **C.H.C.L.Employees Stock Option Trust VS. India Infalin Ltd. 2013(4) SCC 505** It was emphasized by the Honble Supreme Court that summoning of accused in a criminal case

is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

15. In **AIR 1998 S. C . 128 , M/s. Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others** held as under:-

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is primafacie committed by all or any of the accused."

16. In **AIR 2012 SUPREME COURT 1747,Bhushan Kumar and Anr v. State (NCT of Delhi) and Anr**" the Apex Court has held that *"10. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued."*

17. In **AIR 1976 SUPREME COURT 1947, Smt. Na*gawwa v/s Veeranna Shivalingappa Konjalgi & others,*** *It is held by The Apex Court that "It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceedings against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merit or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one."*

"4.It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited - limited only to the ascertainment of the truth or falsehood of

the allegations made in the complaint - (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

"It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a primafacie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 which culminates into an order under Section 204. Thus in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witness recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

18. In **AIR 2015 SUPREME COURT 923,Sunil Bharti Mittal v. Central Bureau of Investigation (Three Judges Bench)** Hon,ble Apex Court held as under:

"45. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This Section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him

(i.e., the complaint, examination of the complainant and his witnesses if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

46. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into Court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad-in-law if the reason given turns out to be ex facie incorrect."

19. In **AIR 2012 SUPREME COURT 1921,Nupur Talwar v. Central Bureau of Investigation and Anr** it is propounded by the Hon'ble Supreme Court that *"Moreover, this Court has held in Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and Ors. [(1976) 3 SCC 736 :(AIR 1976 SC 1947)] thatwhether the reasons given by the Magistrate issuing process under Section 202 or 204 Cr.P.C. were good or bad, sufficient or insufficient, cannot be examined by the High Court in the revision. All that the High Court, however, could do while exercising its powers of revision under Section 397 Cr.P.C when the order issuing process under Section 204 Cr.P.C. was under challenge was to examine whether there were materials before the Magistrate to take a view that there was sufficient ground for proceeding against the persons to whom the processes have been issued under Section 204 Cr.P.C ".*

20. Section 204 of the Code deals with the issue of process, if the Magistrate after taking cognizance of a case, upon consideration of the materials before him i.e., the complaint, examination of the complainant and his witnesses or report of inquiry, if any, thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused. It has to be reminded that a wide discretion has been given to the magistrate to grant or refuse the issuance of process and it must be judicially exercised. A person ought not to be dragged into Court to face criminal trial merely because a complaint has been filed and the same has been supported by two witnesses. No doubt the Magistrate is duty bound to issue process if a prima facie case has been made out and it cannot be refused merely because he thinks that it is unlikely to result in a conviction. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance as they amply suggest that an opinion is to be formed by the Magistrate only after due application of judicial mind that there are sufficient grounds for proceeding against the

accused(s) and formation of such an opinion is to be reflected in the order itself. The order is liable to be set aside if no reason is given therein while coming to such conclusion that there is prima facie case against accused or the reasons given turns out to be ex facie incorrect or the facts are highly improbable which could not be believed by a person of common prudence.

21. Coming back to the facts of the present case the allegations of addressing with castiest remark have been levelled by the complainant Bindra Pasi against the appellants, namely, Dr. Vishnu Chandra Tripathi, who was the Principal of R.K. College Jaunpur, Sudhakar Maurya, who was the Accountant of the College and Sanjay Kumar Singh, who at that point of time was the Head Clerk of the College. The allegations are also with regard to the fact that the complainant was physically assaulted. However, in the end of the complaint it has been mentioned that due to poverty he could not get himself medically examined. The allegations have also been levelled against all the appellants that the appellants also dragged the complainant towards their vehicles. It is apparent on record that the appellants are resident of Jaunpur and Bindra Pasi complainant who admittedly works as domestic help in the house of Dr. Shiv Prasad Ojha situated at Bahraich. It is highly improbable that these three persons will go to another district, namely, Shrawasti i.e. at the house of Dr. Shiv Prasad Ojha andwill do "marpit" and will drag complainant towards their vehicles without any intimidation given by the complainant. The story as put forth by the complainant in his complaint is highly improbable and unacceptable. Many documents have been placed on record by the appellants which shows that Dr. Shiv Prasad Ojha was earlier the Principal of R.K. College, Jaunpur and there he committed some financial illegalities and an enquiry was being conducted against him. It is also stated on behalf of the appellants that an FIR was also lodged by appellant no.1, namely, Dr. Vishnu Chandra Triapthi, Principal of the College against Dr. Shiv Prasad Ojha and others pertaining to threatening him in lieu of issuance of a non-encumbrance certificate, a copy of which has been provided on record, which was registered as Case Crime No.63 of 2019. By referring to the above mentioned documents and FIR it has been stated by the appellants that when Dr. Shiv Prasad Ojha failed to pressurize the appellants for issuance of a false non-encumbrance certificate, he manufactured this criminal case through his domestic help, namely, Bindra Pasi (complainant). However, the defence of the appellants (accused persons) could not be taken into consideration at this stage as the order of the Magistrate, whereby the appellants have been summoned is to be scrutinized on the basis of facts and evidence/ material which was available with the Magistrate, at the time of issuance of process.Even if the material which has been placed by the appellants before this Court is excluded from consideration the allegations of complaint and evidence of the prosecution witness recorded under Section 202 Cr.P.C. cannot be accepted being highly improbable.

22. Three persons (appellants) stated to have assaulted the complainant and injuries have also stated to have been received by himbuthis defence that due to poverty he could not get his injuries examined, could not be accepted. More-so

in the background of the fact that when the alleged assault took place, Dr. Shiv Prasad Ojha (his employers) was inside the house and even if there was some expenses expected to be incurred in medical examination the same might have been beared by Dr. Shiv Prasad Ojha. Secondly the motive of doing all these illegal activities as alleged by the complainant is missing. The pivot question is, that as to whyappellants went to the house of Dr. Shiv Prasad Ojha and for what purpose?, this has neither been alleged in the complaint nor has been stated in the evidence of the complainant or any of his witnesses. It is also significant the factum of Dr. Shiv Prasad Ojha was the Principal of a College where presently appellants are working in different - capacities has been deliberately concealed in the complaint and in totality of circumstances the allegations could not be believed by a prudent person.

23. It is to be remembered that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute any offence so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course, but as held by this Court in **Pepsi Foods Limited (supra**), to set in motion the process of criminal law against a person is a serious matter and it must reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is sufficient ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction of the ground for proceeding further would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, nolengthy formal order or a detailed order is required to be passed at that stage of 204 Cr.P.C. but the Code of Criminal Procedure requires a speaking order to be passed Under Section 203 of Code of Criminal Procedure when the complaint is being dismissed and that too the reasons need to be stated only briefly.

24. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Special Judge that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and inquiry report of investigation Under Section 202 of Code of Criminal Procedure, if any, the accused is answerable before the criminal court and there is sufficient ground for proceeding against the accused Under Section 204 of Code of Criminal Procedure, by issuing process for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Special Judge proceeds Under Sections 190/204 of Code of Criminal Procedure, the superior Court in Appeal is bound to invoke its power in order to prevent abuse of the power of the criminal court. To be

called to appear before criminal court as an accused is serious matter affecting one's dignity, self respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment.

25. Having gone through the order passed by the Special Judge, I am satisfied that there is no indication on the application of mind by the learned Special Judge while issuing process to the Appellants. The allegations made in the complaint were patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the appellants. The contention that the application of mind has to be inferred from the fact and circumstances of the case cannot be appreciated. Though no lengthy formal order is required at the stage of Section 204 Code of Criminal Procedure, there must be sufficient indication, in the summoning order, with regard to the application of mind by the trial court to the facts constituting commission of the offence and the statements recorded Under Section 200 and 202 of Code of Criminal Procedure so as to assess sufficiency to proceed against the offender. No doubt the veracity of the allegations is a question of evidence but here the question is not about veracity of the allegations only, but whether those who are being summoned to face trial, are answerable at all before the criminal court. There is no indication in that regard in the summoning order passed by the learned Special Judge. The summoning order dated 29.3.2019 passed by the special Court has been passed in utter disregard to the law laid down in the above mentioned cases and therefore the same could not be allowed to stand.

26. Resultantly the Appeal filed by the appellants suceeds and is **Allowed** and the order dated 29.3.2019 passed by the Special Judge SC/ST Act (Prevention of Atrocities), Act, Bahraich in Criminal Case No. 46 of 2019 is **set aside.**

(2019)10ILR A 2269

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2019

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Transfer Application (Criminal) No. 378 of 2019

Jalveer & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Kuldeep Singh Chahar

Counsel for the Opposite Parties:
G.A., Sri M.L. Jain

A. Code of Criminal Procedure, 1973 - Section 407-application-rejection-trial delayed, by getting it transferred – adjournment was sought-non-appearance of counsel and accused on the date given-issue of warrant against accused by court was the ground for transfer.

B. It has been specifically mentioned by the Trial Judge that newly engaged Senior Counsel for defence, has sought an adjournment of the case and given an assurance that he will argue the case on the only date requested by him. This date was given to him. On that particular date, none of the accused appeared nor the counsel appeared, which compelled the court for issuing warrants against the accused persons and this was made a

ground for Transfer Application, moved before the court of Sessions Judge, but nowhere it was mentioned in the said Transfer Application that there had been a direction by this Court for expeditious disposal of above Sessions Trial, that too, in a time bound frame. This has neither been mentioned before the court of Sessions Judge, Agra, nor before this Court, in this Transfer Application, which itself goes to show modus and intention of the accused-applicants, who have filed this Transfer Application, to get the trial delayed, by getting it transferred from the court where it is likely to be decided in near future. (Para 7, 8 ,10, 11 & 12)

Transfer Application (Crl.) rejected (E-6)

List of Cases Cited: -

1. St. of Bihar Vs Hemlal Sah 2014 Crl. L.J. 1767

2. St. of Mah. Vs Ramdas Shrinivas Nayak AIR 1982 SC 1249 at page 1251

(Per Lord Atinkson in Somasundaram Chetty Vs Subramanian Chetty AIR 1926 PC 136)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Transfer Application, under Section 407 of Criminal Procedure Code (Hereinafter, in short, referred to as "Cr.P.C."), has been filed by the accused-applicants, Jalveer and five others, against State of U.P. and Opposite party no.2, Geetam Singh, with a prayer for transferring Sessions Trial No. 643 of 2014 (State Vs. Jalveer and others), arising out of Case Crime No. 286/2014, under Sections 147, 148, 149, 302 and 506 of Indian Penal Code, Police Station-Fatehpur Sikri, District Agra, from the court of Additional Sessions Judge, Court no.9, Agra, with a contention that this first Criminal Miscellaneous Transfer Application is being filed before this Court and prior to it the same was filed before the court of Sessions Judge, Agra, which was rejected by the Sessions Judge, Agra.

2. A first information report was lodged at Police Station-Fatehpur Sikri on 30.5.2014, against these accused persons with an allegation of murder of Bhupendra by the accused-applicants, whereas in autopsy examination report, there was only injury at the chest, within blackening and tattooing, around it. Investigation resulted in submission of chargesheet against Jalveer and Sahab Singh, alongwith Ghamandi, as a proclaimed offender. After committal of the case, charges were framed against Jalveer and Sahab Singh, thenafter, an application, under Section 319 of Cr.P.C., dated 26.10.2015, with a prayer for summoning Dhirendra, Ravindra and Satendra, was moved. Sahab Singh, on 18.9.2014 and Jalveer, on 23.9.2014, were released on bail. Dhirendra, Ravindra and Satendra were also released on bail by this Court. Ghamandi is in Jail since 5.9.2015. Trial proceeded before the Additional Sessions Judge, Court No.9, Agra. It was scheduled on 4.5.219, when date 30.5.2019 was fixed and signature of accused were taken over blank papers. An oral statement for judgment, to be delivered on 30.5.2019, was narrated, whereas on 30.5.2019, only one hour was given for arguments in the case. The date was manipulated and written to be 15.5.2019, which was not in the knowledge of the accused persons, then 30.5.2019 was fixed, but warrant was issued against accused-applicants. Recall application was moved and date 4.7.2019 was fixed. Hence, neither opportunity for

argument was given nor it was heard, rather complainant-Opposite party no.2 was seen coming out of the chamber of the Presiding Judge. Transfer Application No.586 of 2019 was filed before the court of Sessions Judge, Agra, for transferring above case on which comment of the concerned presiding Judge was called for, who, in his comments expressed no objection over it, even then said Transfer Application was rejected, vide order dated 26.7.2019. Thus, this Transfer Application, with above prayer.

3. Learned counsel for the applicants argued that he has no objection in case file of Sessions Trial is being transferred to some other court, having competent jurisdiction, with grant of single date for argument over trial. Hence, a request for allowing this Transfer Application has been made.

4. Learned AGA, appearing for the State of U.P., has vehemently opposed this Transfer Application.

5. Sri M.L. Jain, learned counsel appearing for the victim, Smt. Nemwati, wife of the deceased, has argued that it is a case of murder, committed by the accused persons, in which there is a direction for time bound disposal of the trial, given in Crl. Misc. Bail Application No. 23065 of 2017, in the order dated 9.4.2018, but the accused persons are not permitting for disposal of this trial and with an ulterior motive, this Transfer Application, on baseless ground, has been moved.

6. Heard learned counsel for the parties and perused materials on record.

7. Perusal of the order, passed by the learned Sessions Judge, Agra, reveals that allegations levelled against the Presiding Judge, concerned, was that a manipulation in date was made, warrant was issued, complainant was seen coming out from the chamber of the Presiding Judge and there is a narration of complainant in evidence that he will get accused persons convicted.

8. Comment of the Presiding Judge, filed before the learned Sessions Judge, Agra, reveals that there had been a direction for time bound disposal of above Sessions Trial, in which Ghamandi is under trial and it was a date of argument, which was a part heard argument case. When none of the accused persons appeared, it resulted in issuance of bailable warrant against them and this was subsequently acted upon by enlarging them on bail on Personal Bond. Learned counsel for accused persons did not argue on the date fixed in the court, rather a new Vakalatnama of Haridutt Sharma, Advocate, was filed, with an assurance for getting the case argued on the next date. On this assurance, learned Trial Judge adjourned the case for argument to 30.5.2019, but no argument was advanced on that date too. Neither accused persons' counsel nor accused persons appeared, which compelled learned Trial judge to issue bailable warrant. So far as allegation of coming out of Opposite party no.2 from the chamber of the Presiding Judge is concerned, the same has been vehemently opposed by the Presiding Judge.

9. Learned Sessions Judge, found Transfer Application with no substance, hence rejected the same.

10. Alleged manipulation in the ordersheet is not being substantiated by

the counsel. It is undisputed that there was a direction for time bound disposal of the Sessions Trial of under trial accused and the court was endeavouring for getting same complied with and the Transfer Application was moved before the court of Sessions Judge, Agra, even in defiance of assurance given by learned counsel for defence, who was subsequently engaged on 4.5.2019, that he would argue the case on the next date fixed.

11. Apex Court in the case of **State of Bihar vs. Hemlal Sah, reported in 2014, Crl. L.J., 1767**, while referring a judgment of Apex Court, rendered in the case of **State of Maharashtra vs. Ramdas Shrinivas Nayak, reported in AIR 1982, SC, 1249,** at page 1251, has propounded that matters of judicial records are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena "Judgments cannot be treated as mere counters in the game of litigation." (**Per Lord Atinkson in Somasundaram Chetty Vs. Subramanian Chetty, AIR 1926, PC 136**), has propounded "We are bound to accept the statement of the Judges recorded in their judgments, as to what transpired in Court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit or other evidences. If the Judges say in their judgment that something was done, said or admitted before them, that has to be last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts, so stated, and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in the court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call attention of the very Judges, who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have record corrected. If no such step is taken, the matter must necessarily end there".

12. In present case, in the ordersheet, it has been specifically mentioned by the Trial Judge that Sri Hari Dutt Sharma, newly engaged Senior Counsel for defence, has sought an adjournment of the case and given an assurance that he will argue the case on the only date requested by him. This date was given to him. On that particular date, none of the accused appeared nor the counsel appeared, which compelled the court for issuing warrants against the accused persons and this was made a ground for Transfer Application, moved before the court of Sessions Judge, Agra, but nowhere it was mentioned in the said Transfer Application that there had been a direction by this Court for expeditious disposal of above Sessions Trial, that too, in a time bound frame. This has neither been mentioned before the court of Sessions Judge, Agra, nor before this Court, in this Transfer Application, which itself goes to show modus and intention of the accused-applicants, who have filed this Transfer Application, to get the trial delayed, by getting it transferred from the court where it is likely to be decided in near future.

13. Under all above facts and circumstances, there is no ground for transferring this Sessions Trial from the court of Additional Sessions Judge, Court No.9, Agra. Hence, this Transfer Application is being rejected, with a direction and advise to learned counsel,

who has filed this Transfer Application, to come to the Court with clean hands and to remain careful in future, while presenting any Transfer Application, with mentioning correct facts and circumstances before the Court.

14. In view of what has been discussed above, this Transfer Application, being devoid of merits, stands rejected.
